THE WORLD HERITAGE CONVENTION AND ITS IMPLEMENTATION IN AUSTRALIA

BY

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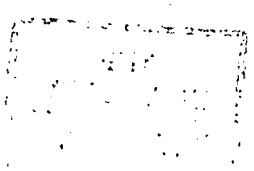


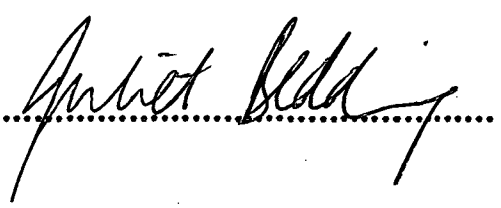
A dissertation submitted to the Faculty of Law, University of Tasmania in fulfilment of the requirements for the award of the degree of Doctor of Philosophy (Law).

Dedication

I dedicate this thesis to my parents,
Myrna and Robin Bedding,
in love and gratitude.

Declaration

This dissertation is the result of my original research and borrowed sources have been duly acknowledged in the text.



Acknowledgments

I am grateful to a number of people for their invaluable assistance in the process which has resulted in the production of this dissertation, and wish to acknowledge the same.

I owe a great debt of gratitude to my supervisors, Dr Martin Tsamenyi and Dr Sam Blay, of the Law Faculty, University of Tasmania. Any scholarship which this work can claim is a result of their criticisms, comments and suggestions. The fact that the thesis has been completed at all, and that the preparation of it has been such a stimulating process, is in large part due to their friendship and encouragement.

I acknowledge the support of the Trustees of the Lionel Murphy Foundation through a Lionel Murphy Australian Bicentennial Post-Graduate Scholarship for 1988 which enabled me to work on this dissertation full time during that year.

My thanks go to the secretarial and library staff at the University of Tasmania for their assistance, and particularly to Ms Lisa Parremore, who typed the first draft of the thesis.

I am eternally grateful to my colleagues in the Law Faculty, Mr Dave Brown and Mrs Mandi Haynes, for their patience and skill in educating a computer-illiterate in the marvels of word processing.

My thanks also go to the numerous officials at Unesco Headquarters, Paris and of the Commonwealth Department of Arts, Sport, Environment Tourism and Territories and Tasmanian Department of Lands, Parks and Heritage, who have at all times been helpful in their supply of information and documents.

A final "thank you" to my fiance, Christopher Behrens, for his love, support and understanding, and participation in many a fruitful discussion.

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Abstract

The thesis involves an examination of the *Convention for the Protection of the World Cultural and Natural Heritage* (hereinafter referred to as the *World Heritage Convention*) in its international context, and the implementation of the Convention in Australia. This examination begins with a consideration of the sources and development of international environmental law. It moves to consider specifically the concept of a world heritage as a basis for imputing environmental responsibility to States.

The international legal issues arising from the idea of a world heritage, particularly its relationship to concepts of sovereignty and development, are explored. The emergence of the world heritage concept is traced through a discussion of earlier international documents dealing with protection of unique aspects of the cultural and natural environment. Detailed analysis of the terms and operation of the *World Heritage Convention*, which embodies the concept as a matter of international law, enables a discussion of the effectiveness of the Convention as an instrument for achieving international cooperation on issues of environmental protection.

The implementation of the *World Heritage Convention* in Australia is set in context through an examination of the development of environmental consciousness in Australia, and the constitutional framework for environmental decision-making in this country. A detailed analysis of the legal and administrative framework for world heritage protection enables a discussion of the extent to which Australia has fulfilled its obligations under the *World Heritage Convention*.

Management of world heritage properties is considered in the context of international principles on the value of these sites, the role they play in sustainable development, and appropriate land-use policies, including multiple land-use. This discussion is extended into two case studies- of the Kakadu National Park and Great Barrier Reef world heritage sites. These case studies precipitate an analysis of the problems with implementation of the Convention in Australia. The Federal-State conflict is examined in its constitutional, political and economic contexts. The issue of the conflict between environment and development is also explored through the question of the status of private interests in world heritage properties. The final chapter looks at the future of the *World Heritage Convention* in Australia. It examines the prospects for cooperative federalism in the implementation of the Convention, the possibility of constitutional reform, and the potential for reducing

conflict by fully realising the tourism potential of world heritage sites.

The thesis emphasizes the international importance of the sites, and the obligations of the Australian Government, but sees these factors in the reality of the legal, political and economic situation of the country. The conclusion is that while some compromise at the stage of nomination is acceptable, properties included on the World Heritage List should not be subjected to activities which are likely to damage their world heritage qualities.

INTRODUCTION

The aims of this thesis are, first, to promote a greater understanding of the uniqueness and importance of the *Convention for the Protection of the World Cultural and Natural Heritage* (hereinafter referred to as the *World Heritage Convention*) as an instrument for achieving international cooperation on environmental matters. It is hoped in this way to strengthen government and public commitment to the aims and ideals of the Convention. The second aim of the thesis is to analyse Australia's implementation of the *World Heritage Convention* and to examine the reasons behind the controversies which have surrounded the implementation of the Convention in Australia.

The *World Heritage Convention* establishes permanent arrangements to ensure effective international cooperation in the identification and protection of what is defined as "the natural and cultural heritage of mankind". The Convention imposes obligations on States Parties both at the national level, with regard to the world heritage within their own territories, and, at the international level, respecting that which is situated in other States. The Convention is designed to complement, to aid, and to stimulate national efforts to protect the world heritage rather than to compete with or replace such efforts.[1]

Important as the institutional structure established by the *World Heritage Convention* is, it is the ethical rationale behind the Convention which provides a truly unique basis for the environmental responsibility of States into the twenty-first century.

The earliest international environmental law was based upon notions of State responsibility. Thus, where the activities of more than one State had the potential to affect aspects of the environment of another State, or natural resources shared by those States, such as fish or migratory birds, it was appropriate that those activities be regulated.[2] There was no ethic which comprehended an interest beyond national boundaries behind such international agreements. Such an ethic did, however, begin to emerge early in the twentieth century with regard to cultural sites. Perhaps this is because, more than natural sites, cultural elements of the environment can truly be

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1 Slatyer (1983), 140.

2 See, for example, the *Trail Smelter Arbitration (United States v Canada)* 3 *R.I.A.A.* 1905 where State responsibility for environmental degradation was based on damage to trees and crops in the United States from sulphur dioxide fumes emitted from a smelter in Canada.

regarded as "heritage" in the sense of having been built by the human hand and passed down through generations.

However, throughout the twentieth century there has been a gradual realisation of the importance of the preservation of genetic diversity for the survival of mankind, of the sense that cultural heritage must have some natural context in which to exist, and that the natural world has an intrinsic value of its own. The idea of a "heritage" began to be applied to the protection of aspects of the natural environment.

The problem of protection of unique natural and cultural sites does not fit neatly into one of the traditional categories of concern of international environmental law such as the prevention of transboundary pollution or the protection of migratory wildlife, interdependent ecosystems or shared waterways. Nor is the problem one which, like the protection of the ozone layer, action to avoid the "Greenhouse Effect", or even protection of the moveable cultural heritage, clearly requires global action. Certainly, international regulation to prevent States from destroying the heritage of other nations was necessary. Such regulation has its rationale in traditional concepts of State responsibility. One might ask, however, why the international community should be concerned with the steps which are taken by a State to protect its own heritage.

The answer to this question can be found in the world heritage trust concept, which recognizes an interest of present and future generations of mankind in certain areas. Once one adopts this concept and realises that many nations do not have the scientific and technical knowledge, the resources nor, often, the political will to enable national action for protection without assistance, it is clear that the problem of protecting these sites requires an international response.

The Common Heritage of Mankind (CHM) concept has been applied as a rationale for regulating activities in the global commons.[3] Its application is only partly explained by environmental motivations, with economic rationale prominent. The world heritage concept, on the other hand, applies within the exclusive territory of States, and has been motivated by a desire for environmental preservation.

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3 The concept provides that certain areas beyond the limits of present national jurisdiction have a special status as the common heritage of mankind and, as such, should be reserved exclusively for peaceful purposes and administered by an international agency in the name and for the benefit of all peoples and of present and future generations- see U.N. Doc. A/AC. 135/1, 29. See also the *Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction*, Res 2749 (XXV), 17 Dec 1970: the United Nations *Convention on the Law of the Sea*: the *Treaty on Principles Concerning the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies* (1967) 610 *UNTS*, 206. For comment see Bothe (1980), Brownlie (1981), Gorove (1971-2), Mahmoudi (1987) and Zuleta (1983).

In making concessions in relation to outer space and the ocean depths a State concedes little of its national sovereignty. An acceptance of the application of the world heritage concept, however, involves a recognition of an international interest to be protected within State boundaries, possibly at the expense of State sovereignty. Thus, the move towards recognition of the application of the heritage concept within the exclusive territory of States has been tentative and, in the only international instrument to adopt the concept, the *World Heritage Convention*, qualified by reference to State sovereignty.

To date, the notion of a world heritage has been applied in international law only in relation to certain types of natural and cultural sites which fulfil the requirement of exhibiting "outstanding universal value". There have been suggestions, however, that the concept could be used as a rationale for protecting other aspects of the environment, including the genetic base provided by species which ensures the preservation of biological diversity. It seems possible that in the future the concept will come to represent a qualification on State sovereignty which is applicable where the international community can justly claim an interest in some matter within the territory of a State.

One of the problems faced by the international community in recent years has been ensuring the participation of developing nations in the international environmental movement. This problem is linked to issues of sovereignty in the sense that the developing world has in the past indicated an unwillingness to concede elements of such sovereignty to the cause of international cooperation in environmental protection for fear that their development would be hindered thereby. Initially the problem was to convince the developing world of the relevance of the international environmental movement to their situation. Following general acceptance of this amongst the Less Developed Countries, the difficulty has been establishing international standards which are appropriate to the different levels of development which exist in the world so as to ensure truly international participation. This can be achieved in a variety of ways, including the prEscription of different standards for the developing nations, or in providing special schemes to assist or encourage the participation of such nations.

The development issue is crucial to the *World Heritage Convention*. The rationale for the Convention lies partially in the inability of developing nations to protect the heritage within their borders. Thus, special schemes of international assistance are established, while the Convention recognises that the particular economic situation of developing countries, as well as the need to make concessions to

State sovereignty, does not enable the prescription of uniform standards of protection for all world heritage sites.

The analysis of the implementation of the *World Heritage Convention* in the Australian domestic context provides a fascinating case study. Issues of sovereignty at the international level, are transposed at the domestic level in the rhetoric of regional politicians calling for a recognition of States' rights in the Federal constitutional context.[4] Issues of development at the international level are reflected in the calls of those adhering to the developmentalist ideology for concepts of sustainable development to be realised in the identification and management of these areas.

As a consequence, Australia, unique in its natural and cultural heritage because of the very isolation which has separated it from many of the environmental problems of the major European and North American nations, has played host to some of the most heated and internationally publicised controversies over environmental management that the world has known.[5]

The three Commonwealth Governments which have held power in Australia since the *World Heritage Convention* was negotiated have all expressed their commitment to its ideals. Australian participation in the implementation of the Convention has taken place at the international level, through representation on the World Heritage Committee, contribution to the World Heritage Fund and nomination of Australian properties for world heritage listing. At the national level there exists a comprehensive legislative and administrative framework for the realisation of the aims of the Convention. The question of appropriate principles for management of world heritage sites has generally been resolved satisfactorily. However, the implementation process has been fraught with difficulties.

The conflicts and controversies which have surrounded this process have had legal, political and economic bases. First, we have the factor of a federal system under which the Australian Federal Government, the international player, ratifies and accepts obligations under increasing numbers of international environmental conventions while having no direct power over land-use and environmental management. Second, there are political factors of parochialism and State loyalty which arise out of the complex Australian power system and the history of isolation which some States have experienced. Third, there is the fact that Australia has an

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4 This phenomena is discussed in detail in Chapter X.

5 See Chapter IV, which traces the controversy over the flooding of Lake Pedder in South-West Tasmania and later references to conflicts over the Great Barrier Reef, Fraser Island, the Franklin River and Kakadu National Park, all of which assumed international dimensions.

economy largely based on natural resource exploitation. This fact has led to the establishment of a very vocal developmentalist lobby. In most of the controversies surrounding the implementation of the *World Heritage Convention* all of these factors have been at play.

The initial battles of the Australian Federal Government against the intransigent conservative State Governments in Tasmania and Queensland have led to a new approach which emphasizes the Federal Government's obligations, but accepts the reality of the Australian legal, political and economic situation and, thus, the necessity for negotiation and compromise.

Cooperation in world heritage matters is crucial. The Federal legislative framework for world heritage protection in Australia enables the regulation of particular activities likely to damage world heritage values of properties. But only through cooperation with State Governments can ongoing joint management under State nature conservation legislation be achieved. Fortunately, cooperation through compromise has not as yet allowed widespread exploitative activities, such as mining developments, to take place in listed world heritage areas.

Characteristically Australian world heritage sites are huge, natural areas which often contain valuable mineral or other resources. The Australian economy is heavily reliant on the exploitation of natural resources. Thus, it will inevitably be necessary to compromise on nominations for the World Heritage List. Resolving the conflict between those who slavishly adhere to the conservationist ideology and those who would have development at any cost is one of the major challenges faced by Governments today. Their task will become easier as the developing environmental consciousness spreads and there is greater recognition that in some areas conservation and exploitative development simply are not compatible.

It is my fervent hope that conflict over identification and protection of world heritage sites will decline and that such sites will become a source of pride for the whole nation, as they are in other countries. Should this work contribute in any small way to this process, the aims of the thesis will have been realised.

PART 1

THE WORLD HERITAGE CONVENTION

CHAPTER I

THE EVOLUTION OF INTERNATIONAL ENVIRONMENTAL LAW

Introduction

The *World Heritage Convention* is a multilateral international agreement establishing obligations and arrangements for bringing about the protection of a very crucial part of the world environment, namely its unique cultural and natural sites. The Convention is a part of the intense development of international environmental law in the latter half of this century. In no other subject area has the body of international law grown so enormous in such a short period of time. This is a reflection of the fact that, 'perhaps never before in human history has public opinion been moulded so widely, in so uniform a manner and in so short a period of time'[1] over a given issue. The *World Heritage Convention* must be seen in this context. Only by tracing the sources and development and analysing the concerns of environmental law at the international level can we assess the significance of the Convention as an instrument for international cooperation on environmental issues.

Sources of International Environmental Law

The *Statute of the International Court of Justice* provides the starting point for any discussion on sources of international law. Article 38 of this instrument states that the Court, in deciding disputes submitted to it in accordance with international law, shall apply international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. The primary sources of international environmental law are both conventional and customary, however the vast bulk falls into the former category. During the twentieth century a large number of resolutions, declarations and recommendations have been passed by inter-governmental organisations on environmental issues. While these cannot form sources of law in themselves, the principles in them can become custom where there is sufficient repetition and conviction to establish State practice and *opinio juris.* [2]

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1 United Nations/World Commission for Environment and Development, 'Proposals for International Environmental Law Developments toward the Year 2000', (1986) 16/3 *Environmental Policy and Law*, 90, at 91.

2 Judge Tanaka in *South West Africa Cases* (1966) *International Court of Justice Reports*, 4, at 292.

Conventions as a Source of International Environmental Law

The major source of international environmental law is treaties.[3] Attempts to regulate the environment are of comparatively recent origin. Thus, a large body of customary law has not had time to develop. Further, in many cases, effective environmental solutions at the international level require the establishment of quite specific standards and principles of protection, which is most effectively done through bilateral and multilateral negotiation and agreement. Treaties enable the new principles, and sometimes radical changes, required to address international environmental problems to be introduced with the minimum of delay.[4]

The number of relevant conventions is continually increasing, and their scope is expanding. They serve many functions, including the establishment of uniform standards for the use and protection of aspects of the environment, the development of schemes to achieve international cooperation on environmental issues and the regulation of international aid to address problems of the environment.

Custom and International Environmental Law

Cases such as the *Trail Smelter* [5] and the *Corfu Channel* [6] provide illustration of the ways in which general established principles of customary international law can have effect in situations involving environmental degradation. The general principle expounded in these cases is that no State may use its territory in such a manner as to cause harm to the territory or interests of other States. This is a principle of customary international law with clear environmental implications. For example, in the *Trail Smelter Case* itself the United States of America claimed that a smelter in Canada was emitting sulphur dioxide fumes which were damaging trees and crops on the United States side of the border. The tribunal established by agreement between the parties[7] held that:

> under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and continuing evidence.[8]

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3 See the comprehensive collection of such conventions in Rusta and Simma (1975). Also see Kiss (1983).

4 Burhenne-Guilmin et al (1986), 197.

5 *Trail Smelter Arbitration (United States v Canada)* 3 *R.I.A.A.* 1905.

6 (1949) *I.C.J. Reports* 4.

7 See the *Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail*, *U.S.T.S.* no. 893.

8 3 *R.I.A.A.* 1905, at 1965.

On the basis of this principle the tribunal established a regime to govern the continued operation of the smelter. State responsibility has been a traditional justification for international regulation on environmental matters.

Resolutions, Declarations and Recommendations as Sources of Law

One of the ways in which principles relevant to the environment have been expounded at the international level is through resolutions and declarations of inter-governmental organisations, and particularly through the United Nations General Assembly. One cannot mention international environmental law, for instance, without referring to the United Nations Conference on the Human Environment (UNCHE), held in Stockholm in 1972 and attended by 113 delegations of member states of either the United Nations or its specialized agencies.[9] From this Conference, the aims and results of which will be discussed in detail subsequently, emanated the *Declaration of the United Nations Conference on the Human Environment.*[10] Other relevant declarations of the international community include the *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space* (1963),[11] the *Declaration of Principles Governing the Sea-bed and the Ocean Floor, And the Subsoil thereof Beyond the Limits of National Jurisdiction* (1970),[12] the Nairobi *Declaration on the State of the Worldwide Environment* (1982),[13] the *World Charter for Nature* (1982),[14] and the *Declaration of the Hague* (1989).[15]

The establishment of standards to solve particular environmental problems, whether among a certain regional group, or at a broader international level, is also appropriately done through recommendations of inter-governmental or non-governmental organisations. The standards thus established may be too specific in some cases to become the subject of binding obligations in treaties, but the documents can provide guidance to national Governments when formulating policy.[16]

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9 Notable absentees were delegates from the Soviet Union and the countries of Eastern Europe, with the exception of Yugoslavia and Romania.

10 (1972) 11 *I.L.M.* 1416.

11 General Assembly Resolution 1962(XVIII).

12 General Assembly Resolution 2749(XXV).

13 (1982) 21 *I.L.M.* 676.

14 (1983) 22 *I.L.M.* 456.

15 (1989) 19/2 *Environmental Policy and Law*, 78. The text of this Declaration was publicised simultaneously in major newspapers around the world by signatory nations- see the *Weekend Australian*, April 1-2, 1989.

16 See, for example the detailed provisions of the UNESCO *Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites* (for text see Ruster and Simma (1975), vol. XIV, 7275); the Unesco *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works* (for text see Rusta and Simma (1975), vol. XIV, 7289); and the *Recommendation for the Protection at National Level of the Cultural and Natural Heritage* (Unesco DOC. 17C/107-(1972) 11 I.L.M. 1367) . Note, however, that recent measures to protect the ozone layer, inspired by international concern, have adopted quite specific control measures in binding protocol form and in fairly strong

While resolutions, declarations and recommendations are not in themselves sources of law under Article 38 of the Statute of the I.C.J., they can form the basis of international custom as a recognised source of law. The question of the legal effect of declarations of international organisations or meetings of States has been explored through much academic comment.[17] Thirlway has described declarations as 'all formal statements of a legal nature and purporting to express legal rules binding on States, whether entitled resolutions, declarations or whatever, which are not embodied in a treaty-document to which States are invited to express their specific assent in the normal way.'[18] He suggests that resolutions of the General Assembly, and presumably of conferences convened by the General Assembly, at which the vast majority of United Nations members are represented, such as UNCHE, may serve four purposes relevant to the creation of international law. First, they may constitute State practice; second, they may originate practice; third, they may corroborate rules of international law; fourth, they may supply the *opinio juris sive necessitatis.*[19]

Just as the principles contained in treaties and declarations can become a part of general or special custom, so can recommendations of international or regional organisations. Generally speaking recommendations of international organizations do not create international obligations on Member States.[20] Recommendations of international organisations can have an impact on the evolution of international law and can 'indicate the paths which custom is following.'[21] Given evidence of State practice, and, crucially, *opinio juris*, they may indicate either general or special custom which binds a limited number of States.[22] This special custom may be regional or non-regional. In the latter case it may bind States sharing socio-economic or ideological interests.[23] Thus, for example, it is quite possible for custom to form among the member States of Unesco. Many of the recommendations on environmental issues contain quite specific details of appropriate national measures, and it seems unlikely that such will form into binding custom. Irrespective of whether they do so or

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language- see Montreal *Protocol on Substances that Deplete the Ozone Layer,* (1987) 26 *I.L.M* 1542.

17 See Castaneda (1969); Akehurst (1974-5); Johnson, D.H.N. (1955); Asamoah (1966); Higgins (1963).

18 Thirlway (1972), 62-63.

19 Ibid, 63-64. See also Judge Tanaka, *South West Africa Cases* (1966) *I.C.J. Reports,* 4, at 292: Akehurst (1974-5), 5-8: Bleicher (1969), 444-5.

20 See Castaneda (1969), 8-9 where he states: There is no doubt that the prevailing meaning [of the term recommendation] is that of "invitation"; hence recommendations are only the resolutions adopted with no intention of binding their addressees'.

21 *Ibid* at 21.

22 Recognized in the *Asylum Case* (1950)*ICJ Reports*, 276 and the *Right of Passage Case* (1969) *ICJ Reports* , 39.

23 See Villiger (1985), 33.

not, they provide useful indications of international and regional concerns on issues on environmental importance. Further, one cannot ignore the political and moral force of recommendations[24] nor the additional social sanction involved in the failure by a Member State to comply with a recommendation adopted by an international organization. Thus, the importance of environmental recommendations must be recognised; they may tend to have more effect on the conduct of states than their lack of juridical force would suggest.

So far as the UNCHE Declaration[25] is concerned, it seems clear that States did not intend to assume binding obligations under that document; it has been described simply as a 'statement of basic outlook and principles, broadly acceptable to all participating nations, designed to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.[26] As has been pointed out, the Principles are essentially statements of what "must be done" but are not of course intended to have any binding effect in themselves.[27] Thus, it would not be open to argue that simply by reason of the inclusion of Principle 7, 'States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea', States have assumed an obligation with regard to prevention of the pollution of the sea.[28]

The principles contained in the Declaration, however, have formed the basis of much national and international action on the environment. Some of the principles embodied in the Declaration were arguably already principles of customary international law. Principle 21, for example, which provides that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction', finds its basis in the notion of sovereignty embodied in the Charter of the United Nations and the principles of State

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24 Castaneda (1969), 11.

25 (1972) 11 *I.L.M.* 1416.

26 See United Nations Conference on the Human Environment (1972), 2.

27 Brown, E.D. (1973), 209.

28 However, this principle has been included in many subsequent treaties, including the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (London 1972), the International Maritime Consultative Organization's *Convention for the Prevention of Pollution from Ships* (1973) 12 *I.L.M.* 1319, the Helsinki *Convention on the Protection of the Marine Environment of the Baltic Sea Area,* the Paris *Convention for the Prevention of Marine Pollution from Land-Based Sources* and the United Nations *Convention on the Law of the Sea.*

responsibility which are a recognised part of international law. The combination of the two elements reaffirms the sovereign right of exploitation and regulates this in the light of the new environmental realities.[29] It extends the principle established in the *Trail Smelter Arbitration* to apply to areas beyond national jurisdiction, such as the High Seas and Antarctica.

It is arguable that many of the other principles embodied in the Declaration have or may eventually become a part of customary international law. The first principle, that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations', could now be regarded as part of general international law, given the vast number of international documents based upon this principle and the enormous amount of domestic legislation.[30]

Further, Principle 2 that 'the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate' and Principle 3, that 'the capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved' form the basis of the notion of sustainable development, as explained in the World Conservation Strategy[31] and the World Commission on Environment and Development's report *Our Common Future* (the Brundtland Report).[32] This principle has received widespread support from the international community and is one of the five general principles of the *World Charter for Nature*, adopted by the General Assembly on 28 October 1982.[33] In this Charter the General Assembly provides that, 'ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist'.

The Development of International Environmental Law

The development of international environmental law has been in response to the increasing realisation that a significant number of environmental issues transcend

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29 See Timagenis (1980), 94. On this point see Peters et al (1989).

30 This view is supported by Timagenis, at least so far as responsibility to protect the environment is concerned- *ibid* at 88.

31 IUCN, UNEP and World Wildlife Fund (1980).

32 World Commission on Environment and Development (1987).

33 (1983) 22 *I.L.M.* 456

national boundaries and that many of the environmental problems facing the world can most effectively, and in some cases only, be resolved through international regulation and cooperation.

Some issues that have arisen are inherently international because of their global ecological scope. Examples are the problems of marine and air pollution, acid rain, the "Greenhouse Effect" and protection of the ozone layer. Apart from these obviously international issues, there are others which have a real importance beyond national boundaries. Among such issues we would have to include the protection of floral and faunal species. Extinction of species through destruction of habitat or any other means results in a diminishing of the genetic pool, with consequences for scientific research which effect people from all nations.[34] Loss of unique cultural and natural sites will diminish the quality of life for both present and future generations.

Thus, international law has a role to play in proscribing standards for protection and providing for schemes of assistance. Further, the sharing of scientific data, analysis and experience between countries is essential in assessing environmental problems and appropriate reactions to them. As we shall see, international and regional organizations are now involved in a plethora of environmental activities. The organizations involved are inter-governmental and non-governmental, specifically established to deal with environmental issues, or with broader objectives. There are now bilateral and multilateral conventions and recommendations on a vast range of subjects relevant to the environment.[35]

The development of international environmental law can be seen in three stages which are marked by different characteristics which reflect changing international values and understanding of environmental issues.

The First Stage

International efforts to promote conservation of living resources date from before the beginning of the twentieth century.[36] The treaties negotiated during this

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34 See *World Charter for Nature* (1983) 22 *I.L.M.* 456.

35 Ruster and Simma (1975), have classified the concerns of international environmental law into the following subject areas: regulation of marine pollution; protection of fauna and flora on land; conservation of living resources of the sea; protection of fresh water resources; peaceful uses of atomic energy; protection of the cultural heritage; air and noise pollution; and prohibition of the use of chemical weapons, along with a miscellaneous category. We would certainly now have to include a new category of global atmospheric change, including protection of the ozone layer and regulation to reduce the "Greenhouse Effect" - two of the major concerns of international environmental law today.

36 See, for example, the Austria/Hungary-Italy *Declaration for the Protection of Birds Useful to Agriculture*, November 5 and 29, 1875, *Martens, Nouveau recueil general de traites et autres actes relatifs aux rapports de droit international deuxieme serie*, Vol. 4, 289. See also the

period exhibited three characteristics. First, they were concerned with the protection of living resources valuable to man,[37] and usually specifically with preventing the depletion of the fisheries resource.[38] The Conventions of this period also demonstrate a general lack of recognition that the environment might have some value beyond that of an economic resource. In the 1936 *International Agreement for the Regulation of Whaling*,[39] for example, signatories were motivated not by concern for the whales themselves nor for the part they play in the ecological structure of the oceans, but by the need to protect the economic value which the whales represented. Thus, the Preamble states that the signatories, 'desiring to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales have agreed' to the measures adopted in the Convention.

Second, the conventions were largely concerned with the direct killing of wildlife for sport and commerce and afford little or no protection from threats such as environmental degradation or loss or habitat; there was an absence of recognition of the importance of an ecological approach to environmental protection.[40]

A third characteristic of these early treaties was the unwillingness of sovereign states to adopt true obligations in relation to environmental protection in their own territories. Consequently, the language used in the agreements was nebulous; in the main they did not go beyond such cautious phrases as "explore the possibility of" and "give consideration to".[41] For example, under the *Convention Relative to the Preservation of Fauna and Flora in their Natural State* (1933),[42] the Contracting Parties

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International Phylloxera Convention, Berne, November 3, 1881 between Germany, Austria-Hungary, France, Portugal, Switzerland, *ibid,* vol. 8, 435.

37 There were numerous conventions signed in the first two decades with regard to fishing and common waterways (see note 33). On other issues see: the 1902 *Convention to Protect Birds Useful to Agriculture*, signed in Paris, *Reichsgesetzblatt* 1906, no. 2, 89; the 1911 *Treaty between the United States of America and Great Britain providing for the Preservation and Protection of Fur Seals*, signed at Washington in Malloy (ed) *Treaties, Conventions, International Acts, Protocols and Agreements Between the USA and Other Powers*, 1910-1923, Washington, 1910, Vol. III, 2629; Great Britain, Germany, Spain, Congo, France, Italy and Portugal: *Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa, which are useful to Mankind or Inoffensive*, London, May 19, 1900, *Martens, Nouveau recueil general de traites et autres actes relatifs aux rapports de droit international deuxieme serie*, vol. 30 at 430.

38 See *Agreement concluded between the delegates of the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, Regarding a Draft Convention for the Regulation of Fishing in the Adriatic*, signed at Brioni, September 14, (1921) 19 *LNTS*, 14/39; *Convention Between the Republic Regarding Fishing Regulations in the Gulf of Finland*, Helingfors, September 20, (1922) 19 *LNTS*, 143/151; *Convention Between Estonia and Latvia for the Protection of Fish and the Regulation of Fishing,* Rigu, October 28, (1925) 54 *LNTS* , 233; and other agreements cited in Ruster and Simma (1975), vol. VI, 2574-2669.

39 (1936) 190 *LNTS*, 80.

40 See Caldwell (1972), 58.

41 *Ibid.*

42 (1933) 172 *LNTS*, 242.

undertook to 'explore forthwith the possibility of establishing in their territories national parks and strict natural reserves as defined in the preceding Article.[43] Further, Article 4 of that Convention provided that the Contracting Governments 'will give consideration in respect of each of their territories to' a series of administrative measures. Another example of this sort of tendency is provided by the *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere* (1940).[44] By that Convention the Contracting Parties undertook to 'explore at once the possibility of establishing in their territories national parks, national reserves, nature monuments and strict wilderness reserves.[45]

There are a number of international values and perceptions which were prevalent during the first stage and which are reflected in the international environmental law developments during that stage. First, there was the view that the environment was to be seen in terms of its economic value to Mankind. Second, the perception was that the living resources of the world can be separated from the broader environment. Third, while there was a recognition of the importance of international regulation with regard to some narrow aspects of the environment this did not in general extend beyond migratory species and common waterways. Fourth, there was insufficient concern over environmental protection for States to accept stringent international obligations on the subject.

The Second Stage

The setting up of the United Nations and its specialised agencies in 1945 provides a convenient marking point for the beginning of the second stage of the development of international environmental law. At this time there was a clear expansion in all areas of international activity and environmental issues were among those which came to be dealt with in a significant way. This was partly the result of the international organization which followed the Second World War.

This stage exhibits three major characteristics so far as the development of international environmental law is concerned. The first is the degree of involvement of international governmental, non-governmental and regional organisations in the area;

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43 Article 3.1.

44 (1940) 161 *UNTS*, 194.

45 Article II. See also the *Convention between the United States of America and the United States of Mexico for the Protection of Migratory Birds and Game Mammals*, Mexico, Feb 7th, 1936, (1936) 178 *LNTS*, 310 which, in Article 1 provides that:

> In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated as migratory whatever may be their origin, which in their movements live temporarily in the United States of America and the United Mexican States, by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for the purposes of sport, food, commerce and industry.

the second is the change towards an ecological approach to the environment and a sense of the inherent value of the natural world; and the third is the enormous expansion in the number and type of environmental treaties and their subject matter. Each of these features will be discussed in turn.

International Organization

The first feature of the period is international and regional organisation to further environmental objectives. This is reflected in the mandates and activities of United Nations Organisations, the establishment of non-governmental organisations with environmental objectives, and the increasing involvement of regional organisations in studying environmental problems and in the establishment of appropriate standards for environment protection.

United Nations Specialised Agencies

While the United Nations Charter makes no specific reference to environmental issues, there is clear emphasis on international organization to achieve cooperation in resolving international problems of an economic, social, cultural, or humanitarian character.[46] Further, the mandates of a number of the United Nations specialised agencies have enabled them to deal with different environmental issues since their establishment. For example, the World Meteorological Organization (WMO) had and still has a clear mandate to investigate air pollution and weather patterns.[47] The World Health Organization (WHO) deals with the effects of environmental pollution on human health. The Intergovernmental Maritime Consultative Organization (IMCO) assesses marine pollution problems and appropriate responses. The International Civil Aviation Organization (ICAO) lays down standards for aircraft noise pollution.

While protection of the environment was not a central aim in the establishment of the United Nations Scientific, Educational and Cultural Organization (Unesco), the organisation has played an important role in international environmental matters. The preamble to the Constitution of Unesco refers to the need to diffuse culture and science among all of humanity to ensure peace in the world.[48] Unesco's primary purpose is stated to be `advancing, through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and

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46 See Articles 1.3 and 55 of the Charter of the United Nations.

47 This mandate can be ascertained from the *Convention of the World Meterological Organization*, signed at Washington on 11 October, 1947 which provides in Article 2 that the purposes of the Organization include facilitating 'worldwide cooperation in the establishment of networks of stations for the making of meterological observations or other geophysical observations related to meterology, to promote the establishment and maintenance of meterological centres charged with the provision of meterological services', 304 *UNTS*, 92.

48 Signed at London on 16th November 1945, (1945) 4 *UNTS*, 275.

the common welfare of mankind'.[49] By Article 1.2 the Organization is to assume, *inter alia*, the conservation and protection of the world's inheritance of books, works of art, and monuments of history and science and to recommend to the nations concerned the necessary international conventions. From its earliest years, Unesco has been involved in environmental activities, including research on natural resources and Arid Zone Research and Humid Tropics Research.[50]

During the 1950s and 1960s, as serious environmental problems became more evident, the various specialised agencies became increasingly involved in projects with an environmental flavour; in 1954 the Inter-governmental Maritime Consultative Organization (IMCO) adopted the *International Convention for the Prevention of Pollution of the Sea by Oil* and created a subcommittee to keep the subject of oil pollution under constant review; in 1963 the United Nations set up international commissions for the protection of the Moselle and the Rhine against pollution; in 1967 the World Meteorological Organization began the World Weather Watch.

Non-governmental Organizations

As part of this growing international organization of environmental law, the second phase is marked by the growth of non-governmental organisations concerned with the environment. These NGOs developed to fulfil a need for expertise and research within specialised areas in order to facilitate effective international action by inter-governmental organisations on environmental matters. The NGOs also operate as interest and lobby groups on the international scene. The most important NGOs active in the formulation of international environmental policy, and which perform important roles in the implementation of the *World Heritage Convention*, are described briefly below.

(i) IUCN

One of the more important non-governmental organizations, from the environmental point of view, established in this post-World War II period was the International Union for the Conservation of Nature and Natural Resources (IUCN). The IUCN was established in 1948 following a conference at Fontainebleau convened by Unesco and the Government of France. Its formation was part of the move away from seeing the natural environment simply as a source of natural resources in an economic sense.[51] The organization is not part of the United Nations system but works closely with the various organs and specialised agencies of the U.N. The preamble of

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49 See the preamble to the Constitution of UNESCO, *Ibid.*

50 Wilson (1971).

51 Caldwell (1972), 75.

the statutes of the IUCN recognizes the intrinsic value of nature and natural resources, referring to the inspiration of spiritual life of natural beauty and to the economic, social, educational and cultural importance of nature.[52]

The objects of the Union include: encouraging and facilitating cooperation between governments, national and international organizations and persons concerned with the conservation of nature and natural resources; promoting national and international action, scientific research and education in respect of the conservation of nature and natural resources; and preparing draft international agreements relating to the conservation of nature and natural resources and encouraging governments to adhere to agreements once concluded.[53] Membership of the IUCN is open to States and government agencies, national and international non-governmental organizations.[54] Its main policy organ is a General Assembly, which is assisted by a Council, Bureau, Commissions and a Director General. Much of the IUCN's work is done through its commissions, including the Survival Service Commission, through which the IUCN investigates the status and ecology of rare species of plants and animals, the Commission on Education, the Commission on Ecology, the International Commission on National Parks and the Environmental Policy, Law and Administration Commission.[55] As we shall see in Chapter III, the IUCN plays an important role in the scheme of international cooperation established under the *World Heritage Convention.*

(ii) The Rome Centre

Another significant environmental NGO established during this stage is the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Rome Centre), which also plays a role in providing information to, and advising, the World Heritage Committee. The Rome Centre was established pursuant to a resolution of the Ninth session of the General Conference of Unesco.[56] The functions of the Centre include: collecting, studying and circulating information concerned with scientific and technical problems of the preservation and restoration of cultural property; coordinating, stimulating and instituting research in this domain; and giving advice and recommendations on general or specific points concerned with the

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52 See *Revised Statutes of the International Union for the Conservation of Nature and Natural Resources, Geneva,* April 22, 1977 - *Proceedings of the 13th General Assembly of the International Union for the Conservation of Nature and Natural Resources,* Morges, 1977, 155.

53 Article 1, of the Statutes, *ibid.*

54 Article II.

55 Caldwell (1972), 77.

56 9C/Res. 4.53.

preservation and restoration of cultural property.[57] Membership of the Centre is open to all States members of Unesco, and associate membership to public or private institutions of a scientific or cultural nature.[58]

(iii) ICOMOS

In 1965 a third important non-governmental international organization, the International Centre for the Conservation of Monuments and Sites (ICOMOS), was established, again from an initiative of Unesco. ICOMOS acts as a link between the experts in all disciplines relating to monuments and sites and the bodies engaged in conservation work, largely through its national committees. ICOMOS also plays a very important role in advising the World Heritage Committee on issues within its areas of expertise which arise under the *World Heritage Convention.* [59]

Regional Organization

During this stage regional organisations also became involved in developing environmental standards. The Organization for Economic Co-operation and Development (OECD) was engaged in environmental studies which included the management of air and water resources, noise, pesticides and trans-frontier pollution.[60] Other developments in regional organizations in the 1960s included the creation by the North Atlantic Treaty Organization of a Committee on the Challenges of Modern Society with environmental problems as a major aspect of its mandate,[61] the adoption by the Organization for African Unity of the African *Convention for the Conservation of Natural Resources* ,[62] and the Council of Europe's involvement in environmental activities, including the setting up of the International Commission for the Protection of the River Rhine against Pollution, the *European Water Charter* and the *International Plant Protection Convention*..[63]

The Ecological Approach

Along with the growth in international organisations involved in environmental activities and with the expansion of already established organisations into the area of environmental research and regulation, the stage is also marked by a

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57 Article 1 of the *Statutes of the International Centre for the Study of the Preservation and Restoration of Cultural Property*, New Delhi, 1956 - *United States Treaties and Other International Agreements*, Vol. 22, Part I,19.

58 Articles 2 and 3.

59 See Chapter III.

60 Kay and Jacobson (1983), 90.

61 *Ibid.*

62 *USTS* 981.

63 Wilson (1971), 65.

change in attitude towards an ecological approach to the environment and a sense of the inherent value of the natural world. This is the second characteristic of the stage.

The trend towards the ecological approach became evident even before 1945. In two of the early conventions there was a discernable move towards recognition of the intrinsic value of aspects in the environment in contrast to recognizing purely their economic value, and of the importance of the protection of habitat. Thus, the Preamble to the *Convention Relative to the Preservation of Fauna and Flora in their Natural State* [64] provides:

> Considering that the natural fauna and flora of certain parts of the world, in particular Africa, are in danger, in present conditions, of extinction or permanent injury;
>
> Desiring to institute a special regime for the preservation of flora and fauna;
>
> Considering that such preservation can best be achieved by the constitution of national parks, strict nature reserves, and other reserves within which the hunting, killing or capturing of fauna, and the collection or destruction of flora shall be limited or prohibited...

The Convention goes on to provide that Contracting Governments shall explore the possibility of setting up national parks and strict nature reserves, as defined in the Convention, in their territories,[65] and sets out comprehensive measures for protecting flora and fauna within those areas.

Similarly, the preamble to the *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*[66] provides:

> The Governments of the American Republics, wishing to protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control; and
>
> Wishing to protect and preserve scenery of extraordinary beauty, unusual and striking geologic formations, regions and natural objects of aesthetic, historic or scientific value...

The terms of the Convention require Contracting Governments to explore the possibility of establishing national parks and reserves, as defined in the Convention, and provide for measures to protect wildlife.

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64 (1933) 172 *LNTS*, 242.

65 Article 3.

66 (1940) 161 *UNTS*, 194.

This ecological approach was expanded in the second stage of the development of international environmental law. In recognition of the importance of ecological relationships Unesco convened an Inter-Governmental Conference of Experts on a Scientific Basis for Rational Use of the Resources of the Biosphere in 1968. This Conference represented a step forward in that it began to recognize the importance of ecological relationships.[67] The Conference was followed in 1970 by the establishment of Unesco's Man and the Biosphere programme to promote research designed to provide practical answers for decision-makers involved in the interactions between natural systems and man's activities.

Expansion in Environmental Law

The third feature of the stage is the enormous expansion in the number and type of environmental treaties, the subject-matter and terms of which reflect the broadening of the environmental issues of concern to the international community, as well a new recognition of the inherent of the natural world .

The International Geophysical Year of 1957/8 gave international cooperation a major impetus by demonstrating the possibility and effectiveness of tacking worldwide scientific problems at the international level.[68] The International Geophysical Year provided the impetus for the enormous expansion in the body of international environmental law in the 1960s and 1970s. There was increasing domestic awareness of environmental issues, encouraged by the buoyant economies of industrialized states which meant that governments were free to spend time and resources considering environmental effects of development. The prominent and much publicized effects of contemporary environmental disasters also played a role in the development of domestic environmental awareness.[69] It became evident that the necessary scientific information to tackle problems effectively could only be gained through international cooperation. Many problems, such as transboundary pollution in Europe, could only be tackled at the international level. There was clear evidence of the continuing deterioration of the environment and scientific forecasts made many fear for the future of the planet.

A number of conventions were negotiated to address these problems, including the 1954 *International Convention for the Prevention of Pollution of the Sea by Oil*,[70] under which Contracting Governments undertake significant obligations to

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67 Caldwell (1972), 73.

68 Holdgate *et al* (1982), 4.

69 Kay and Jacobson (1983), 1 and United Nations Environment Programme, T*he Environment in 1982; Retrospect and Prospect*, 3-4.

70 (1954) 327 *UNTS*,4.

prevent this form of marine pollution; the *Antarctic Treaty* of 1959[71] which, although not dealing with the Antarctic environment as such, provides, inter alia, for the exchange of scientific information with respect to Antarctica and prohibits the exploding of nuclear weapons or the disposal of radioactive waste in Antarctica; and various agreements concerning the peaceful use of the commons.[72]

The development of international environmental law in the second stage reflects the changing attitudes of the international community towards the environment. The utilitarian philosophy of early years is replaced by an understanding of the broader value of the environment, and of the importance of protecting ecological systems. The growing sense of the importance of environmental issues is reflected in the increasing international, regional and non-governmental activities aimed at addressing those issues. This expansion meant that the international approach to environmental issues was fragmented through the large numbers of organisations which were now involved.

The Third Stage

By the end of the 1960s it had become clear that the fragmentation of international activities through the United Nations system, regional groups and non-governmental organisations was not a sufficiently effective means of tackling international environmental problems; some kind of overall programme and central coordinating body was needed. In recognition of this, the United Nations General Assembly in 1968 adopted the initiative of the Swedish delegation and resolved to hold the United Nations Conference on the Human Environment (UNCHE). The purpose of the Conference was said at that time to be:

> to provide a framework for comprehensive consideration within the United Nations of the problems of the human environment in order to focus the attention of Governments and public opinion on the importance and urgency of this question and also to identify those aspects of it that can only or best be solved through international cooperation and agreement.[73]

Environment and Development

Considerable preparation was involved in the lead up to the Conference. It was necessary to negotiate with the developing countries who were wary of the new environmental consciousness. Prior to the decision to hold UNCHE, the developing

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71 (1959) 402 *UNTS*, 71.

72 Including the *Treaty on Principles Concerning the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (1967) 610 *UNTS*, 206; and United Nations General Assembly Resolution No. 1962 (XVIII) - *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, December 13, 1963 among many others.

73 United Nations General Assembly Resolution 2398 XXIII (Dec 3 1968).

world had not generally been involved in negotiation of agreements related to the environment. Relevant bilateral and multilateral conventions were basically negotiated between the European powers. This was largely because, simply by reason of the fact of their under-development, many of the developing nations did not face the environmental degradation of the Northern European region in the first half of the century. However, during the 1950s and 60s, the global ecological nature of many environmental problems became obvious. Further, it was apparent that in the process of development, the third world was beginning to face the same environmental problems that the rest of the international community was suffering from. The importance of involving developing nations in tackling environmental issues was clear.

In the lead up to the Stockholm Conference the Third World was reluctant to become involved. They were concerned that their development was threatened by the movement, and saw the traditional environmental concerns of industrialised countries as irrelevant to the developing world.[74] However, through a series of meetings, and particularly the 1971 Founex Panel of Experts on Development and Environment and the meeting of the SCOPE/UNCHE working party on environmental problems in developing countries, held in Canberra in 1971, compromise was reached.[75] Industrialized nations began to accept that the problems of human poverty, overpopulation, lack of sanitation and prevalence of disease in many nations were among the most important environmental issues to be confronted. The developing world in turn began to accept that it was in their interests that solutions were found to the problems of pollution, resource utilization, conservation of natural resources, among others.[76]

While some reconciliation was reached at Stockholm, it is still the case that developing countries in particular 'are not willing to accept international limitations on their economic policies which might result in a slowing down of their development.[77] One of the major problems in international environmental law making over the last two decades has been in coming to grips with the relationship between the environment and development. How, for example, can one appropriately impose uniform international standards on States with vastly different levels of economic development?

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74 Leonard and Morell (1981), 282-3.

75 United Nations Environment Programme, *The Environment in 1982*, (1982), 4-5.

76 In the end the Conference was boycotted not by the developing countries, who reacted favourably to the broad agenda of the Conference, but by the Soviet Union and other Eastern European Communist States, protesting the failure of the Conference to accord full participation privileges to the German Democratic Republic.

77 Timagenis (1980), 16.

Successful negotiation with the developing nations over environmental regulation will still depend, to a large extent, on achieving a good balance between developmental imperatives and environmental demands.[78] Where multi-lateral environmental conventions are negotiated it may be necessary to include special dispensations for developing countries in order to encourage their participation.[79] In many cases the developing world simply does not have the resources to redress existing environmental problems. It is crucial, therefore, that schemes of international assistance and aid be established in appropriate circumstances.[80]

The United Nations Conference on the Human Environment (UNCHE)

It was against this background that the agenda for UNCHE was developed through meetings of the preparatory committee set up by the General Assembly of the United Nations.[81] In addition to consideration of a *Declaration on the Human Environment,* six main items were to be addressed: the planning and management of human settlements for environmental quality; environmental aspects of natural resource management; identification and control of pollutants of broad international significance; educational, informational, social and cultural aspects of environmental issues; development and environment; and the international organizational implications of action proposals. Detailed work on specific proposals went forward in intergovernmental working groups concerned with marine pollution, conservation,

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78 See Tsamenyi and Blay (1989), 22. The recent *Declaration of the Hague* (1989), for example, in addressing the problem of atmospheric change, recognises that:

> What is needed here are regulatory, supportive and adjustment measures that take into account the participation and potential contribution of coutries which have reached different levels of development. Most of the emissions that effect the atmosphere at present originate in the industrialized nations. And it is in these same nations that the room for change is greatest, and these nations are also those which have the greatest resources to deal with this problem effectively.
>
> The international community and especially the industrialized nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere although the responsibility of many of them for the process may only be marginal today.

79 For example, under the Montreal *Protocol on Substances that Deplete the Ozone Layer*, (1987) 26 *I.L.M.* 1542, developing countries whose annual calculated level of consumption of relevant ozone-depleting substances is less than 0.3 kilograms per capita are permitted to delay applying the control measures for a period of ten years (Article 5.1). Further, to help developing countries meet their international obligations under the Protocol, the developed countries also make undertakings to facilitate access to environmentally safe alternative substances and technology for the developing nations and to assist them to make expeditious use of such alternatives; and to facilitate the provision of subsidies, aid, credits, guarantees or insurance programmes to the developing countries for the use of alternative technology and for substitute products (Articles 5.2 and 5.3).

80 The *ad hoc* arrangements made between Unesco and various developing nations to salvage various of their important cultural sites are a classic example of such cooperation- see Chapter II. The *World Heritage Convention* establishes a permanent system for achieving such cooperation.

81 By Resolution 2581 (XXIV).

monitoring and a draft declaration on the human environment. International non-governmental organizations also took a major role.

The Declaration that was adopted at the conclusion of the Conference proclaimed a world-wide desire to preserve and enhance the human environment and enunciated principles to guide efforts towards this goal.[82] The Declaration is an important statement of basic outlook and principles, broadly acceptable to all participating nations, designed to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.[83] It takes account of the concerns of the developing countries, making the point that in those states most of the environmental problems are caused by under-development.[84] It stresses the need for international cooperation:

> A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest.[85]

The Declaration enunciates 26 principles covering such issues as safeguarding of representative samples of natural ecosystems, halting the discharge of toxic substances or other substances and the release of heat, pollution of the seas, issues of development, education, poverty, population. Principle 24 states as follows:

> International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral agreements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states.

The Conference adopted an action plan with 109 specific recommendations for international steps that should be taken with respect to the environment.[86] These recommendations are grouped under the agenda headings and cover a broad range of topics, including: development assistance in the planning of human settlements;[87] long-term programmes of improvement and global promotion of the environment;[88] international acquisition of knowledge and transfer of experience on soil capabilities,

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82 The Declaration can be found at (1972) 11 *I.L.M.* 1416.

83 *Ibid.*

84 Para 4.

85 Para 7.

86 The *Action Plan for the Human Environment* can be found at (1972) 11 *I.L.M.* 1421.

87 Recommendation 1.

88 Recommendation 2.

degradation, conservation and restoration;[89] minimizing the release to the environment of toxic or dangerous substances;[90] and establishing an information programme to create the awareness which individuals should have of environmental issues.[91]

The Action Plan is comprehensive, covering a great range of environmental issues, and is very specific in many of its recommendations which are addressed to national governments, the Secretary-General of the United Nations and various United Nations Agencies. It reflects the sense of alarm and urgency which was engendered by scientific evidence of the continuing deterioration of the many different aspects of the environment and the progression towards taking a holistic view of the relationships between population, resources and the environment.[92]

The United Nations Environment Programme (UNEP)

Perhaps the most important achievement of the Stockholm Conference, apart from the bringing about of a greater awareness of environmental issues and a determination to address them, was the institutional framework which was established to provide an ongoing forum for the identification, monitoring and solution of environmental issues.[93] Central monitoring of environmental problems and coordination of international responses is very much a feature of this third stage in the development of international environmental law. So far as the institutional arrangements were concerned, the Conference recommended the establishment of the institutional machinery to constitute what was to be known as the United Nations Environment Programme (UNEP), to be responsible for the implementation of the Action Plan and for any other future environmental activities undertaken by the United Nations. Four bodies were established by resolution 2997 (XXII) of 15th December 1972. They were the Governing Council of the United Nations Environmental Programme; the Environmental Secretariat, headed by the Executive Director of the Environment Fund, and the Environment Coordination Board.[94]

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89 Recommendation 20.

90 Recommendation 71.

91 Recommendation 97.

92 Kay and Jacobson (1980), 72.

93 In the lead up to the Stockholm Conference different suggestions were made about the institutional implications of the new international environmental consciousness; they included: a proposal for the development of a new organisation, established outside the United Nations by the major industrial and polluting states of the northern hemisphere; the suggestion that a "global authority" be created within the framework of the United Nations with the authority to police and enforce environmental regulations; or simply expanding the work of the specialised agencies of the United nations as needed - see Hargrove (1972), 9.

94 The programme is based in Nairobi and funds a wide range of environmental projects through voluntary contributions from Member States. Examples of projects funded by the UNEP include: the preparation by IUCN of the World Conservation Strategy and the contribution to the evolution of the Strategy's basic themes and structure; the compilation by Unesco of a world register of rivers discharging into oceans; the development of the South Pacific

UNEP is responsible for instituting the Stockholm Action Plan. The General policy objectives of the UNEP are:

> (a) To provide, through interdisciplinary study of natural and man-made ecological systems, improved knowledge for an integrated and rational management of the resources of the biosphere, and for safeguarding human well-being as well as ecosystems;
>
> (b) To encourage and support an integrated approach to the planning and management of development, including that of natural resources, so as to take account of environmental consequences, to achieve maximum social, economic and environmental benefits;
>
> (c) To assist all countries, especially developing countries, to deal with their environmental problems and to help mobilize additional financial resources for the purpose of providing the required technical assistance, education, training and free flow of information and exchange of experience, with a view to promoting the full participation of developing countries in their national and international efforts for the preservation and enhancement of the environment.[95]

UNEP is the "environmental consciousness" of the United Nations[96] and acts primarily as a catalyst for environmental action, often becoming involved in cooperative efforts with United Nations agencies and other inter and non-governmental organisations such as the IUCN.[97] It is responsible for the "Earthwatch" programme which monitors pollution and other environmental factors. It also prepares a yearly report on the "State of the Environment", highlighting for policy-makers and the public the major environmental issues for that year.

The question of the effectiveness of the UNEP has been a source of continual debate in the international community. There seems to be a general consensus that improvements in the efficiency and direction of the programme could be made. A new world environmental order, comprising a more powerful international organization within the United Nations to protect the world environment was proposed at the Hague Environment Summit in 1989. The *Declaration of the Hague*[98] supports the establishment of an entity with the powers to initiate and enforce international

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Regional Environment Program- 'United Nations Environment Program', in June 1983, *Australian Foreign Affairs Review*, 238.

95 Decisions of the Governing Council of the United Nations Environment Programme at its First Session, June 21-22, 1973. For text see Ruster and Simma (1975), vol. 1, 183.

96 See 'United Nations Environment Program', June 1983, *AFAR*.

97 For example, UNEP has been working with the WMO to assemble information on the environmental impact of weather modification, with IUCN and FAO to review the status and effectiveness of legislation for the protection of wildlife and habitats and for the conservation of living marine resources; has cooperated with other UN bodies to control pollution in several marine regions such as the Persian Gulf, the Carribean and the Gulf of Guinea; and has worked with the IUCN and WMO in the development and adoption of several international conventions- see UNEP article (1977) 3 *Environmental Planning and Law Journal*, 58.

98 See the *Weekend Australian*, April 1-2, 1989.

agreements to control pollution, legal compliance with which would be ensured by the International Court of Justice.[99] The new environmental order would include an executive body (Globe), a judicial branch- the World Court- and a legislative one, which would be the UN Assembly.[100] It is envisaged that the new organization might incorporate "a strengthened version of UNEP".[101] The whole proposal will be reviewed at the 1992 UN meeting in Stockholm to review the UNEP's character.[102]

Post- 1972 Developments

The Stockholm Conference, the Action Plan and the establishment of the United Nations Environment Programme provided a new impetus to international environmental law. Conventions and recommendations on a vast range of environmental topics were adopted in great numbers; in the decade 1971-1980 over 500 such agreements were concluded as compared to less than 300 in the previous decade.[103] International agreements concluded in the early seventies included the *Convention for the Conservation of Antarctic Seals*,[104] the Nordic *Convention on the Protection of the Environment*,[105] the *Convention for the Prevention of International Trade in Endangered Species of Wild Fauna and Flora*,[106] the *Convention for the Protection of Wetlands of International Importance*,[107] the *Convention for the Prevention of Pollution from Ships*[108] and the Economic Commission for Europe's *Convention on Long Range Transboundary Air Pollution*.[109] In the decade after Stockholm there were conferences on population (Bucharest, 1974), food (Rome, 1974), human settlements (Vancouver, 1976), water (Mar de Plata, 1977) and desertification (Nairobi, 1977).

Following the reconciliation between the Less Developed Countries and the Developed Countries which had been reached at Stockholm, the third world became more involved in environmental issues, ratifying Conventions and participating in international cooperative programmes dealing with environmental problems. For example, an `Asian Plan of Action on the Human Environment' was adopted in 1974 by the United Nations Economic Commission for Asia and the Far East. In the present

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99 (1989) 19/2 *Environmental Policy and Law*, 44.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.*

103 These figures are arrived at from counting the numbers of such agreements identified by Ruster and Simma (1975), in their comprehensive set of volumes.

104 (1972) 11 *I.L.M.* 257.

105 (1974) 13 *I.L.M.* 591.

106 (1973) 12 *I.L.M.* 1085.

107 (1972) 11 *I.L.M.* 969.

108 (1973) 12 *I.L.M.* 1319.

109 (1979) 18 *I.L.M.* 1442.

decade developing nations of the South Pacific Region have adopted environmental conventions, including the South Pacific Forum's *South Pacific Nuclear Free Zone Treaty* (1985) [110], and the South Pacific Region's *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.*[111] This latter convention is one of a number adopted as a result of the UNEP's Regional Seas Programme, which was initiated in 1974 as 'an action-oriented programme having concern not only for the consequences but also for the causes of environmental degradation and encompassing a comprehensive approach to combating environmental problems through the management of marine and coastal oceans.'[112]

Other conventions adopted by developing regions as a result of this programme include the *Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region* (1981)[113] and the *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region* (1983).[114]

A large number of multilateral environmental conventions were adopted in the 1980s. One of the most important of these is the 1982 United Nations *Convention on the Law of the Sea* .[115] The Convention covers a broad range of issues relevant to the protection of the marine environment, including conservation of the fisheries and other living resources[116] and pollution.[117] It is also the first major multilateral convention to deal with the issue of pollution from land-based sources.[118]

The 1985 Vienna *Convention for the Protection of the Ozone Layer,*[119] and the 1987 Montreal *Protocol on Substances that Deplete the Ozone Layer*[120] address one of the new environmental issues that has emerged in the most recent stage in the development of international environmental law. The depletion of the ozone layer and the "Greenhouse Effect" relate to changes in the atmosphere which are likely to have drastic effects upon life on Earth unless control measures are introduced expeditiously.

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110 (1985) 24 *I.L.M.* 1442.

111 (1987) 26 *I.L.M.* 38.

112 U.N.E.P. *Achievements and Planned Developments of UNEP's Regional Seas Programme and Comparable Prgrammes Sponsored by Other Bodies.* UNEP Regional Seas Reports and Studies No. 1. UNEP, 1982.

113 (1981) 20 *I.L.M.* 746.

114 New York: U.N., 1983.

115 U.N. document A/Conf.62/121 of October 21, 1982.

116 Articles 61 - 68, Articles 118 and 119, Article 145.

117 See Part XII, section 5.

118 Article 207.

119 Doc. UNEP/IG.53/3.

120 (1987) 26 *I.L.M.* 1542.

To this end, the Montreal Protocol is quite specific in the steps which should be taken by States Parties to address the issue of the depletion of the ozone layer through the release of chloroflourocarbons and halons. The urgency of the environmental problem and the great international concern over it is reflected in the language of the Protocol in particular. Obligations on States Parties are stated in quite specific and strong terms. For example, by Article 2:

> Each Party shall ensure that for the twelve-month period commencing on the first day of the seventh month following the date of the entry into force of this Protocol, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed its calculated level of consumption in 1986.

Following on from the move at UNCHE to involve the developing world as much as possible in the international environmental movement, and recognising the special problems these nations face, the Protocol makes special dispensation for developing countries in order to encourage their participation in the Protocol.[121] The Convention and Protocol was followed by the establishment of the Intergovernmental Panel on Climate Change established by UNEP and WMO in late 1988. Its job is to formulate response strategies, assess scientific information and study the environmental, social and economic consequences of climate change.[122] The IPCC has established working groups, including the Response Strategies Working Group whose task is to develop limitation and adaptation strategies for climate change based on various scenarios.[123]

Other measures aimed at addressing the issue of global atmospheric change include the U.N. General Assembly *Resolution on the Protection of the Global Climate*[124] in which climate change is recognised as a common concern of mankind, and the adoption, in March 1989, of the *Declaration of the Hague*, which addresses the issue of climate change and the protection of the atmosphere.[125] In this Declaration signatory nations recognised that:

> Because the problem is planet-wide in scope, solutions can only be devised on a global level. Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-a-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.

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121 See *supra*, note 79.

122 Hare (1989), 10.

123 *Ibid.*

124 Resolution 43/53 (1988).

125 The text of this Declaration was published simultaneously in major newspapers around the world by signatory nations- see *The Weekend Australian*, April 1-2 1989.

The signatories recognise that the industrialised nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere, although the responsibility of many of them for the process may only be marginal today. Under the Declaration signatories undertake to promote the creation of a new institutional authority responsible for combatting any further warming of the atmosphere.

The continuing debate over the issue of exploitation of the Antarctic region led to the negotiation of the *Convention on the Regulation of Antarctic Mineral Resource Activities* (1988) [126] which establishes the institutional framework for assessing and approving mining proposals in the region subject to informed judgments about the environmental implications of such proposals[127] and strict environmental controls.[128]

In the international environmental law developments with regard to climate change and Antarctica which we have examined there is an important change of emphasis. On these two subjects in particular, the international community is looking to ways of addressing environmental problems before they arise. This is an important development in the 1980s. It is also reflected in greater forward-planning through international studies and commissions resulting in the formulation of strategies for tackling environmental problems both at the domestic and global levels.

The beginning of the decade saw the release of the World Conservation Strategy, developed by the IUCN, UNEP, and the World Wildlife Fund to provide both an intellectual framework and practical guidance for necessary conservation actions.[129] In 1983 the United Nations established a special independent World Commission on the Environment and Development. This Commission was to address the challenge of developing long-term strategies for achieving sustainable development by the year 2000 and beyond. The Commission's mandate gave it three objectives: to

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126 (1988) 27 *I.L.M.* 868-900.

127 See Article 4(1) of the Convention by which it is provided that:

> decisions about Antarctic mineral resource activities shall be based upon information adequate enough to enable informed judgments to be made about their possible impacts and no such judgments shall take place unless this information in available for decisions relevant to those activities.

128 Thus, the Convention provides in Article IV that no Antarctic mineral resource activity shall take place unless it is judged, based upon assessment of its possible impacts on the Antarctic environment and on dependent and associated ecosystems, that the activity shall have no significant adverse effects on air and water quality, or cause significant changes in atmospheric, terrestrial or marine environments; or in the distribution, abundance or productivity of Antarctic fauna or flora; or the degradation of areas of special biological, scientific, historic, aesthetic or wilderness significance.

129 See `Borrowed from Our Children: The World Conservation Strategy', (1983) 7 Unesco Review, 12.

re-examine the critical environment and development issues and to formulate realistic proposals for dealing with them; to propose new forms of international cooperation on these issues that will influence policies and events in the direction of needed changes; and to raise the levels of understanding and commitment to action of individuals, voluntary organizations, businesses, institutes and governments.[130]

The Commission's report to the United Nations General Assembly, entitled *Our Common Future* (the Brundtland Report), is divided into three parts which deal with common concerns, common challenges and common endeavours. The Report makes many significant recommendations on issues such as population and human resources, food security, species and ecosystems, energy, industry and the urban challenge. It is vast in the scope of subjects that it deals with, recognising the environmental maxim that everything belongs to everything else.[131]

These international documents have developed a body of information and approaches to environmental management which are useful for national governments in forming policy. For example, the notion of sustainable development which involves meeting the needs of the present generation without compromising the ability of future generations to meet their needs,[132] was expounded and developed by the World Conservation Strategy and the World Commission on Environment and Development. This philosphy is now one of the fundamental ideals behind many land-use decisions.

During this third stage in the development of international environmental law, more international agreements have been negotiated on an even broader range of subjects relevant to the environment. The ecological approach to the environment has become entrenched. Further, international cooperation involving states adopting clear and definite obligations with regard to the environment has become a feature of these conventions. In addition, the institutional framework for central monitoring of the environment and of regulatory measures has come into existence. The developing, as well as the developed world became concerned and involved with measures to protect the environment. Finally, there is now a general understanding of the importance of forward-planning with regard to the tackling of international environmental problems.

Conclusion

International environmental law has progressed through three main stages. It began with the adoption of *ad hoc* measures on selected environmental issues, and

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130 World Commission on Environment and Development (1987), 3-4.

131 Starrs (1989), 596.

132 World Commission on Environment and Development (1987), 8.

has reached the stage where there are now comprehensive international environmental conventions on a broad range of topics. We have moved from a situation where there was little concerted international, regional or non-governmental activity on environmental issues, through the stage of expansion and fragmentation of such activities, to a new age of international coordination. The utilitarian ideals of the first stage of international environmental regulation have been replaced by a broader understanding of the environment, and of the importance of adopting an ecological approach to its protection. Crucially, international environmental regulation is no longer the province simply of the developed world.

This progression set the scene for the formal adoption of the world heritage concept, which recognises a universal interest in crucial aspects of the environment of States. The adoption of this concept involves the creation of obligations on States to cooperate in the protection of such a heritage. Particularly, it involves establishing mechanisms for enabling the developed world to assist the less developed States in protection of their environments. The adoption of such a concept is aimed not at rectifying damage to the environment, but rather in averting threats to it, and in recognising the importance of these aspects recognition and giving them long-term protection. Thus, the formal adoption of the world heritage concept emerged out of the third stage in the development of international environmental law.

CHAPTER II

BACKGROUND TO THE WORLD HERITAGE CONVENTION

Introduction

The *World Heritage Convention* draws upon the idea which began to develop in international law in this century that there is such a thing as a heritage of Mankind, and adopts this concept as a rationale for a scheme of international protection of the environment in the exclusive jurisdiction of a State. The meaning of the heritage concept as a theoretical basis for the *World Heritage Convention* occupies the first part of this chapter. The Chapter also considers the Convention itself in the context of previous international agreements and recommendations dealing with the protection of the cultural and natural aspects of the environment which could be regarded as part of a world heritage. These aspects of the environment include moveable objects of cultural property, monuments and sites of cultural interest, floral and faunal species, and areas of natural significance. These international instruments paved the way for the formal adoption of the world heritage concept in the *World Heritage Convention* in that they began to implicitly recognise a universal interest in aspects of the environment within a State.

The Concept of the Heritage in International Law

The early rationale for much of the international environmental law was based on concepts of State responsibility and a mutual interest in regulating particular aspects of the environment. Thus, where living resources migrated between States, and hence could be affected by the actions of more than one State, or where waterways flowed through several States, the protection of those features of the environment was seen as appropriately achieved through international law.[1]

In the latter half of the century more sophisticated rationales for international regulation relative to the environment emerged. One such rationale has been that there is such a thing as a heritage of Mankind. There are two types of such heritage which have been expounded in international law: the common heritage of Mankind and the world heritage.

The appropriateness of the use of the word "heritage" in the context of cultural sites cannot be denied. The concept of heritage envisages 'some property or

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1 For details see Chapter I, notes 36-38.

property interest which belongs to a person or is reserved to him by reason of his birth'.[2] Cultural sites developed by our forebears can be legitimately described as heritage. However, one wonders in what sense unique natural sites are heritage, in the ordinary sense of the word. Indeed, as has been pointed out, the use of the word "heritage" in this context seems almost to have religious connotations, as if these resources are a part of Humankind's inheritance from some Supreme Being.[3] However, fundamentally, the concept of a heritage recognises a universal interest of past, present and future generations in a particular aspect of the environment.

The Common Heritage of Mankind

The concept of a common heritage of Mankind (CHM) in international law emerged in the 1960s in relation to the regulation of activities in the global commons. It simply recognises that Mankind, being past, present and future generations, has available to it certain resources which lie outside national boundaries and that these should be available for the benefit of all nations, and not simply to those with the technical capabilities for exploitation.

The CHM concept was first put forward in the United Nations by Malta's representative, Ambassador Pardo[4] in 1967. Malta's argument was that the objective of the international community should be the preservation of the international character of the sea-bed and ocean floor and of their sub-soil underlying the high seas beyond the limits of present national jurisdiction, not as a *res omnium communi*, usable for any convenient purpose and the resources of which are indiscriminately and competitively exploitable,[5] but through the acceptance of the principle that these vast areas of our planet have a special status as a CHM, and, as such, should be reserved exclusively for peaceful purposes and administered by an international agency in the name and for the benefit of all peoples and of present and future generations.[6]

Following several resolutions referring to the common interests of Mankind in this area,[7] the United Nations General Assembly in 1970 formally accepted the application of the principle in its *Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction.*[8]

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2 Gorove (1971-2), 398.

3 *Ibid.*

4 The use of the phrase actually dates back to the nineteenth century but this was the first time it had been discussed in an international forum- see Zuleta (1983).

5 This notion is embodied in Article 2 of the Geneva *Convention on the High Seas.*

6 U.N. Doc. A/AC.135/1, 29.

7 See Res 2340(XX11); 18 Dec 1967; Res 2467(XXIII); 21 Dec 1968.

8 Resolution 2749(XXV); 17 December 1970.

The concept has subsequently been adopted in the United Nations *Convention on the Law of the Sea* (1982).

While falling short of declaring outer space as part of the CHM, the General Assembly has adopted the principle that this global common should not be subject to national appropriation and should be exploited for the benefit of Mankind. In 1959 the Assembly recognised early what it called the "common interest of mankind as a whole" in furthering the peaceful uses of outer space.[9] This was followed by the *Treaty on Principles Concerning the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* [10] which stipulates that the exploration and use of outer space shall be carried out for the benefit and in the interests of mankind.[11] In the same way, the Treaty declares that astronauts shall be regarded by the parties as "envoys of mankind."[12]

There have been suggestions that the concept should be applied to the Antarctic continent, providing the basis for either the creation of a World Park or an international regime of exploitation, however the common heritage of Mankind concept has been abandoned under the *Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA),*[13] which has yet to come into effect. The Convention recognises the need to take into account the interests of the international community as a whole in relation to Antarctic mineral resources,[14] and adopts the principles of encouraging and promoting cooperation and international participation in Antarctic mineral resource activities, particularly by developing countries.[15] However, subject to the very strict controls imposed by the Convention, mining activities may be carried out by operators of a sponsoring State. Such operations are not carried out by an international regime on behalf of all Mankind. Hence, the CHM concept has not been adopted in this Convention.

The adoption of the concept in relation to the deep sea-bed and to outer space had a strong economic rationale. It is essentially a concept of '*exploitation of and access to* resources'.[16] It had strong support among the Group of 77, a loose entity of Third World Countries in the United Nations for whom 'the basic implication of the concept of the common heritage of mankind was that in deepsea mining, the benefit of

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9 G.A. Res 1472 (XIV)(1959).
10 (1967) 610 *UNTS*, 206.
11 Article 1.
12 Article V.
13 (1988) 27 *I.L.M.* 868.
14 Article 2.3(g).
15 Article 6.
16 Brownlie (1981), 36.

all should prevail over the interest of a few great powers.'[17] Those who introduced and adopted the concept on the international scene did not have the object of environmental protection foremost in their consideration.[18] However, the potential of the heritage concept as a basis for ensuring environmental protection, not only of the Commons, but also of parts of the internal territory of States, is apparent.

The World Heritage Concept

The concept of the CHM differs from that of the world heritage in that the former only applies to areas outside national jurisdiction whereas the latter has application within the exclusive territory of a State. Further, while the adoption of the CHM concept was prompted by economic considerations, the application of the world heritage rationale is motivated by environmental concerns. However, the idea of a "heritage" is crucial in both concepts: it involves the acceptance that present and future generations of Humankind have an interest in a certain resource or aspect of the environment.

As we will see in the second half of this Chapter, there is evidence in some of the international environmental agreements negotiated during the twentieth century of an implicit recognition of a universal interest in aspects of the environment within a State. Some of these Conventions and other documents simply cannot be explained in terms of traditional State responsibility. The idea that some unique cultural and natural sites may constitute a part of the heritage of Humankind was first developed by the Committee on Natural Resources Conservation and Development in connection with the White House Conference on International Cooperation, working in 1965. This Committee recommended:

> That there be established a Trust for the World Heritage that would be responsible to the international community for the stimulation of international cooperative efforts to identify, establish, develop, and manage the world's superb natural and scenic areas and historic sites for the present and future benefit of the entire world citizenry.[19]

The concept of a "World Heritage Trust" has been described as "disarmingly simple":

> It is merely an extension of the concept of national parks. The national park concept is based on the recognition that certain areas are of such national significance and value that they should receive national recognition as such, and the nation as a whole should

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17 Mahmoudi (1987), 127.

18 Although the *Law of the Sea Convention* in Part XI dealing with principles governing the area gives some emphasis to protection of the marine environment (Article 145), imposing an obligation on the International Sea-bed Authority to take the necessary measures with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities.

19 Train (1974), 379.

> take a responsibility to assist with their protection and maintenance. With our broader international viewpoint, we now recognize that there are certain areas of such universal natural, cultural or historic interest that they belong to the heritage of the entire world...Consequently, these areas should receive necessary assistance in their protection and maintenance from the international community.[20]

One must ask, however, whether this is really sufficient for realising the world heritage trust concept put forward by the Committee on Natural Resources Conservation and Development. The proposal suggested by the Committee seems to contemplate internationalization of the sites in the same way as has occurred in relation to the deep sea-bed. The so-called World Heritage Trust would be responsible for identifying, establishing, developing and managing the unique cultural and natural sites. The Committee clearly contemplated more than simply international assistance in protection and maintenance.

The Relationship of the World Heritage Concept to State Sovereignty

It can be seen that the application of the world heritage concept has great implications for State sovereignty. State sovereignty is qualified by the fact that States can become bound by international obligations. The acceptance of the idea of a world heritage involves a greater qualification than this, for allowing that there is a universal interest in parts of the exclusive territory of States is the antithesis of the notion of State soveignty. Principle 21 of the United Nations *Declaration on the Human Environment* provides that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[21]

The suggestion that Humankind has a true interest in part of the exclusive territory of a State conflicts with this long-established principle of the sovereignty of States over their natural resources, and, indeed, with the broader concept of sovereignty, as embodied in the United Nations Charter.[22] As Wilson has stated:

> Nations bend their sovereign prerogatives when concerned with such areas as the high seas because the actual political price is often of little consequence and may, indeed, improve the national position... But when internal actions require sacrifices for the international good, only national sovereignty remains as the distinguishing factor [between the law of environmental protection and other areas of international law].[23]

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20 *Ibid*, 378.

21 *Declaration of the United Nations Conference on the Human Environment* (1972) 11 *I.L.M.* 1416.

22 Article 2.1. The Organization is based on the principle of the sovereign equality of all its Members

23 Wilson, 'Environmental Policy and International Law' in Nagel (1976), 105.

Even in the convention which first embodied the notion of a CHM, the United Nations *Convention on the Law of the Sea*, the traditional reference to the concept of the sovereignty of States over their own resources is made.[24] It has been suggested recently that, 'it would be relevant to conduct further research on the way the principle of permanent sovereignty and that of the common heritage of mankind[25] could complement each other'.[26] It is recognised that traditional notions of State responsibility do not offer an appropriate solution to problems such as the protection of the world's tropical rainforests and that the heritage concept may provide the basis for such a solution, particularly in providing for collective responsibility, sharing of benefits and costs of conservation, and taking into account the interests of future generations.[27]

It is possible that the world heritage concept will become accepted as a qualification on State sovereignty, and a general basis for environmental responsibility of States. As has been suggested:

> it may be predicated that the international law may come to recognise that other States do have identifiable interests in life-support systems and genetic resources situated wholly within the host State's territory. These rights, derive from the imperative interests of the world community, which the international law (of which the doctrine of sovereignty is only a part) was developed to serve, and are a direct product of the world heritage concept which has done so much to advance the cause of conservation in other respects.[28]

The Concept in the World Heritage Convention

The *World Heritage Convention* is the first true embodiment of the world heritage concept in its application to the exclusive territory of States. While the sense of some international interest in preservation of aspects of a State's environment is implicit in some international agreements from an earlier date, this ethic is made express and embodied as a true rationale in the 1972 Convention.

The *World Heritage Convention* defines the world heritage as consisting of both cultural and natural elements. It is very specific in its definition of the world

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24 *Law of the Sea Convention*, Article 193- "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'.

25 I would prefer the notion of a CHM to be reserved for application to the global commons. The idea of a world heritage has already been developed in application to parts of the internal environment of States in the *World Heritage Convention*. Clearly the problems faced in the commons are different from those which apply in relation to the exclusive territory of States. Crucially, the territorial sovereignty issue must be addressed in the latter case. Further, the rationale for the CHM concept has been primarily economic, whereas the world heritage concept looks towards international environmental protection.

26 Peters *et al* (1989), 311.

27 *Ibid.*

28 Burhenne-Guilmin *et al* (1986), 203.

heritage, requiring particular characteristics and an overriding "outstanding universal value."[29] The Convention embodies the concept of a world heritage in the sense that the preamble sentiments are to the effect of 'the deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world' and that parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.[30] In view of this principle, 'it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding value, by the granting of collective assistance which, although not taking the place of action by the state concerned, will serve as an effective complement thereto'.[31]

The Convention was not designed to be an instrument for bringing about the internationalization of world heritage sites; it preserves inviolate the concept of national sovereignty.[32] As will be seen in Chapter III, there are numerous concessions throughout the *World Heritage Convention* to national sovereignty. It thus does not truly embody the concept of a "World Heritage Trust". The application of the concept of a heritage of mankind in unique cultural and natural sites differs markedly from its application in relation to the deep sea-bed where it justifies the establishment of an international management body.

It was suggested soon after the negotiation of the Convention that, 'the day may yet come when the United Nations flag will fly over cultural sites and natural areas of the world heritage, constituting a system of international parks and land marks transferred to the United Nations by Member States.'[33] Regrettably, this day seems no closer in 1990s than it did in 1972. The *World Heritage Convention* does, however, take a first step in that direction in its explicit recognition of an international interest in the preservation of local property and its affirmation of the duty of the international community to cooperate and assist in that end.[34]

Future Applications for the World Heritage Concept

Thus far, the world heritage concept has only been explicitly applied to unique cultural and natural sites. It is however, an appealing rationale for international regulation of other aspects of the internal environments of States. For

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29 See Articles 1 and 2 of the Convention. The issue of how the world heritage is defined is dealt with in detail in Chapter III.

30 In paragraphs 2 and 6.

31 In paragraph 6.

32 Meyer (1973), 63.

33 *Ibid.*

34 *Ibid.*

example, it has been suggested that life-support resources such as the outer-layer of soil and subsoil on which man's food supply largely depends are part of the CHM.[35] One would have to agree with Robinson that the problems of loss of productive topsoil are of international concern and need international solutions, however, there seems no basis for the conclusion that such is the heritage of mankind. If one uses the phrase in this sense all that it really provides is a rationale for the international regulation of internal aspects of the State environment, the destruction or damage of which will have consequences for Mankind.

It has also been suggested that the concept should be extended to allow for the creation of a novel system for the conservation of species. This suggestion was first put by Dr Norman Myers in 1979, who called for the setting up of a world "Trust for Species", based on the World Heritage Trust, and a similar 'Trust Fund" to protect diminishing tropical rainforest.[36] In 1984 the IUCN recognised that genetically controlled processes form part of the CHM and should be and remain available to present and future generations and, further, that the world community has the responsibility to preserve these resources for future generations; States, as the custodians of these resources, have a duty of stewardship for those wild genetic resources under their jurisdiction or control.[37] De Klemm, a Member of the IUCN's Committee on Environmental Policy, Law and Administration, has suggested that a system should be developed to ascribe a value to species, that property of species should be vested in the world community and that a global conservation treaty based on reciprocal obligations and providing for sustainable financing of conservation action should be concluded at world level.[38] As the Brundtland Commission has stated:

> Collective responsibility for the common heritage would not mean collective international rights to particular resources within nations. This approach need not interfere with concepts of national sovereignty. But it would mean that individual nations would no longer be left to rely on their own isolated efforts to protect species within their borders.[39]

A treaty for the protection biological diversity is currently being developed by the IUCN, on the basis of a world heritage rationale.[40]

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35 Robinson, N.A. 'Problems of Definition and Scope' in Hargrove (1972), 56. See the comment at note 27.

36 Kennedy (1989), 28.

37 See Resolutions and Recommendations of the 16th General Assembly of the IUCN, reprinted in (1984) 13/3 *Environmental Policy and Law,* 127.

38 De Klemm (1982), 122.

39 World Commission on Environment and Development (1987), 162.

40 Kennedy (1989), 29.

An Emerging Sense of a World Heritage

Since the beginning of the twentieth century there have been multilateral agreements and recommendations which provide for the protection, particularly of unique cultural property and sites, but also of areas of natural beauty and importance and floral and faunal aspects of the environment. A study of the relevant documents shows an emerging concern in the international community over appropriate means for protecting these elements of the environment. The ideas and motivations behind the international arrangements changed, as did their scope; those negotiated during the first stage of the development of international law identified in Chapter I were directed at preventing needless destruction in time of war or were generally negotiated on the basis of purely utilitarian motives, protecting species of wildlife valuable to mankind in an economic sense. However, there is evidence in the conventions and recommendations on relevant subjects that towards the end of the first stage of the development of international environmental law there began to develop among the international community a sense that the natural and cultural heritage of a State is intrinsically valuable, that its preservation is important to the whole of the world and that cooperation towards conservation at an international level is desirable and necessary. Slowly the sorts of values and ideals which inspired the *World Heritage Convention* began to be reflected in international documents. These documents are examined in three categories: agreements that deal with protection of cultural sites and objects, agreements that aim to protect aspects of the natural environment, and documents specifying regional or international standards for bringing about the protection of what can be regarded as a 'heritage'. These agreements paved the way for the adoption of the *World Heritage Convention.* The emphasis in the early years is particularly on cultural sites, where the sense of a "heritage" is perhaps greater because of the human hand at work in their development. The early precursors to the *World Heritage Convention* which were concerned with natural aspects of the environment focussed, as we have seen in Chapter I, on protection of particular species. The emphasis in the *World Heritage Convention*, on the other hand, is with the protection of habitats and ecological sites. The intrinsic value of nature was not recognised until the middle of the century.

International Agreements for the Protection of Cultural Sites

The earliest conventions were military conventions only partially concerned with preventing the destruction of historical, cultural and religious sites in time of war. This emphasis reflects the fact that the pursuit of military activities represented the major and most visible threat to such sites at this time. Just as the approach to conservation of species during the first stage was to look at obvious threats such as hunting, rather than the broader issue of environmental degradation, so agreements to

protect cultural aspects of the environment focussed upon obvious dangers such as military operations, rather than threats from industrial pollution and the effects of tourism.

These early conventions imposed obligations on signatories not to damage the heritage of other States during military operations. States Parties only undertook very limited obligations towards the heritage situated within their own territory. The relevant Conventions are: the *Annex to the Convention With Respect to the Laws and Customs of War on Land* (1899)[41], the *Annex to the Convention Respecting the Laws and Customs of the War on Land, Regulations Respecting the Laws and Customs of War on Land* (1907)[42], the *Convention Respecting Bombardments by Naval Forces in Time of War* (1907) [43], and the 1935 *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* (the "*Washington Pact*").[44] The relevant provisions of these Conventions are outlined below.

The 1899 and 1907 Annexes to the Laws and Customs of War on Land Conventions

These Annexes contained identical provisions which required Contracting Parties to take all necessary steps in sieges and bombardments to protect buildings dedicated to religion, art, science and charitable purposes and historic monuments.[45] Further, the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, were to be treated as private property and all seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science was forbidden and to be made the subject of legal proceedings.[46] The only obligation on the State where the sites were situated was to indicate the relevant monuments or edifices by particular visible signs.[47]

The Convention Respecting the Bombardment by Naval Forces in Time of War

This Convention, also adopted in 1907, provided that in bombardments by naval forces, all the necessary measures were to be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals and places where the sick or wounded were

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41 The Hague, July 29, 1899: Malloy (ed), *Treaties, Conventions, International Acts, Protocols and Agreements Between the USA and Other Powers 1776-1909*, Washington, 1910, Vol.II, 2042.

42 The Hague, October 18, 1907: *ibid*, 2269.

43 The Hague, October 18, 1907: *ibid*, 2314.

44 Washington, April 15, 1935: 167 *LNTS*, 290.

45 In Article XXVII of both Annexes.

46 In Article LVI of both Annexes.

47 In Article XXVI of both Annexes.

collected, on the understanding that they were not used at the same time for military purposes.[48] It was the duty of inhabitants to indicate such monuments, edifices, or places by visible signs.[49]

The "Washington Pact"

The 1935 *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* (the "Washington Pact") signed by South American States[50] and the United States of America, is the first of these treaties to deal exclusively with the protection of monuments and sites. Under this treaty lists of historic monuments, museums, scientific, artistic, educational and cultural institutions to be regarded as neutral were to be sent to the Pan American Union.[51] These sites were to be respected and protected by belligerents and to be given the same respect and protection in time of war as in time of peace.[52] The signatory Governments agreed under Article II to adopt the measures of internal legislation necessary to ensure that such protection and respect would be afforded to the monuments and institutions without any discrimination as to their State allegiance.

The Hague Convention

The *Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention)*[53] was concluded at a conference convened by Unesco, held at the Hague from 21 April to 14 May 1954.[54] This Convention was primarily aimed at conservation and offers evidence of the beginnings of a conviction that the cultural heritage of a country has importance beyond the boundaries of that country. The Preamble to the Convention is a significant indication of a change of attitude:

> The High Contracting Parties,
>
> ... Being convinced that damage to cultural property belonging to any people whatsoever means damage to the culture of all mankind, since each people makes its contribution to the culture of the world;
>
> Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection; ...

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48 Article V.

49 *Ibid.*

50 Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatamala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uraguay and Venezuala.

51 Article IV.

52 Article I.

53 The Hague, May 14, 1954: (1956) 249 *UNTS* , 240.

54 The States Parties to the Convention were Egypt, San Marino, Burma, Yugoslavia, Mexico, Hungary, Poland and Bulgaria.

The Convention defines cultural property as covering, irrespective of ownership,

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which as a whole are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> (c) centres containing a large amount of cultural property as defined in paragraphs (a) and (b), to be known as "centres containing monuments."[55]

Under the *Hague Convention* the High Contracting Parties undertook to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict by taking such measures as they considered appropriate.[56] They further undertook to respect cultural property situated within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings, or of the appliances in use for its protection, for purposes which were likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property. [57]

In its other provisions the *Hague Convention* attempted to ensure protection and respect for these sites during times of occupation and war. Obligations undertaken by States Parties included: to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property;[58] to refrain from requisitioning movable cultural property or from any act directed by way of reprisals against cultural property;[59] and to refrain from any act of hostility against any property under special protection. Special protection was afforded to any site which was a refuge to shelter movable cultural property, a centre containing monuments, or other immovable cultural property of very great importance.[60] Under Article 23 the High Contracting Parties could call upon Unesco for technical assistance in organizing the protection of their cultural property.

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55 Article 1.
56 Article 3.
57 Article 4.1.
58 Article 4.3.
59 Articles 4.3 and 4.4.
60 Article 9.

The *Hague Convention* is significant for several reasons. First, it was one of the earliest conventions to deal exclusively with the conservation of cultural sites in a broader sense. Second, the Convention reflects the beginnings of an idea that the heritage of one country is also part of a broader world heritage. Third, obligations were undertaken by States Parties with respect to sites within their own territory. This was a significant development in agreements of this type. This fact reflects the underlying ideal, as expressed in the Preamble to the *Hague Convention*, that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of mankind. The Convention was the first to deal with the conservation of cultural sites which was initiated by Unesco. It also marked the beginning of the use of international organisations to provide expertise to ensure that a State has the capabilities necessary to protect its heritage.

The European Cultural Convention

The next development was a move towards protection of the cultural aspects of the environment other than in times of war. For example, in 1954 the members of the Council of Europe in the *European Cultural Convention* [61] provided that:

> Considering that the aim of the Council of Europe is to achieve a greater unity between its Members for the purpose, among others, of safeguarding and realising the ideals and principles which are their common heritage;
>
> ... Considering that for these purposes it is desirable not only to conclude bilateral cultural conventions between Members of the Council but also to pursue a policy of common action designed to safeguard and encourage the development of European culture;
>
> Having resolved to conclude a general European Cultural Convention designed to foster among the nationals of all Members, and of such other European states as may accede thereto, the study of the languages, history and civilisation of the others and of the civilisation which is common to them all[62],...

Article 5 of this Convention then provided that each Contracting Party must regard objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe and should take appropriate measures to safeguard them and to ensure reasonable access to them.

The *European Cultural Convention* was later supplemented by the *European Convention on the Protection of the Archaeological Heritage,* signed in 1969.[63] This Convention made more detailed specifications with regard to measures to be taken by States Parties to promote the conservation of the cultural heritage. Archaeological objects were defined for the purposes of the Convention as all remains and objects, or

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61 Council of Europe, *European Conventions and Agreements, vol. 1 (1949-1961),* 108.

62 Preamble.

63 (1971) 788*UNTS* , 227.

any other traces of human existence, which bear witness to epoches and civilisations for which excavations or discoveries are the main source or one of the main sources of scientific information.[64] Contracting Parties undertook to prohibit and restrain illicit excavations; take the necessary measures to ensure that excavations are entrusted only to qualified persons; ensure the control and conservation of the results obtained;[65] take all practicable measures necessary to ensure the most rapid and complete dissemination of information to scientific publications on excavations and discoveries;[66] among other measures for promoting the scientific, cultural and educational aims of the Convention.

The Cultural Property Convention

The *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*[67] (hereinafter referred to as the *Cultural Property Convention*) was adopted by the General Conference of Unesco at its sixteenth session, held in Paris in 1970. The Convention set up the mechanism for achieving international cooperation to protect property which is specifically designated by a State Party as being of importance for archaeology, prehistory, literature, art or science and which belongs to one of a list of categories, including: rare collections and specimens of fauna, flora, minerals and anatomy; products of archaeological excavations; rare manuscripts and incunabula, old books and documents.[68] The import, export or transfer of ownership of cultural property contrary to the provisions of the Convention by States Parties is illicit.[69] Under Article 5 States Parties undertake, "as appropriate for each country", to establish one or more national services for the protection of the cultural heritage with various functions, including: drafting laws and regulations designed to secure the protection of the cultural heritage; establishing and keeping up to date a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national heritage; and various educational, promotional and research roles. So far as protecting the cultural property of other States Parties is concerned, States undertake to take legislative measures to, *inter alia*: prevent the acquisition by museums of such property illegally acquired from another State Party; prevent the import of such property; and, upon request from the State Party of origin, to take appropriate steps to recover and return any such cultural property.[70] As part of

64 Article 1.
65 Article 3.
66 Article 4.
67 For text see Rusta and Simma (1975), vol. XIV, 7216.
68 Article 1.
69 Article 3.
70 Article 7.

the scheme of international cooperation, States Parties may call on the technical assistance of Unesco, which organization may also help parties in dispute over the implementation of the Convention, to reach a settlement, upon request by at least two such State Parties.[71]

The Unesco *Cultural Property Convention* was an important precursor to the *World Heritage Convention* in that it is an instrument for achieving international cooperation through measures undertaken both at the national and international levels. The importance of the Convention is explained in the following excerpt:

> If people feel some apprehension about the global village it's possibly because they don't altogether relish the prospect of becoming global villagers. Somewhere in that economic and technological utopia, there looms the spectre of lost identity. It is much the same with nations faced with the global power play of the mighty in which small is no longer beautiful nor variety the spice of life. National identity, as reflected in cultural history, becomes important politically and psychologically in the bid to maintain independence and self esteem.[72]

In other words, it is recognised that the illicit import, export and transfer of ownership of cultural property is an obstacle to the understanding between nations. It is further recognised that the international community has an interest in ensuring such objects remain in their proper setting because the true value of cultural property can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.[73] States Parties also recognize that 'the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations;'[74] the Convention is designed to ensure that this interchange takes place on the basis of international cooperation rather than through covert and private operations for personal profit.

Ad Hoc Arrangements for Protection of Cultural Sites

Another important part of the background to the *World Heritage Convention* was the negotiation of various international agreements providing for emergency measures to save specific sites of unique value which were threatened as a result of natural or manmade causes. These campaigns, usually sponsored by Unesco, reflect the growing concern of the international community during this stage over environmental problems associated with development projects in poorer nations.

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71 Article 17.

72 Battersby (1986), 120.

73 See Preamble to the *Cultural Property Convention.*

74 *Ibid.*

The first such agreement was actually negotiated at the end of the second stage; in 1960 the rising waters of Lake Nasser imperiled the Egyptian temples of Abu Simble, constructed in the thirteenth century B.C. by Ramses II. In 1963 Unesco and the Government of the United Arab Republic agreed to measures to salvage the Abu Simble Temples which were endangered by flooding due to the construction of the Aswan High Dam.[75] Unesco arranged for voluntary contributions to be taken to fund a project to move the Temples to higher ground. In 1970 there was a similar campaign to save the Temples of Philae[76], also in Egypt. In the same year the Consultative Assembly of the Council of Europe resolved on a "Save Venice" campaign, involving the collection of funds under the auspices of the Assembly of the Council of Europe. Unesco has also participated in operations and financial ventures in relation to Acre in Israel; Aleppo, Damascus and Palmyrae in Syria; Baalbec in Lebanon; the Medina in Tunisia and sites in Carthage and Tunisia; various monuments and sites in Ethiopia and Iran; and the Borobudur in Indonesia.[77] These were *ad hoc* measures designed to meet threats as they arose; they clearly precipitated the establishment of a coordinated permanent system for international cooperation to protect the world heritage.

International Agreements to Protect Aspects of the Natural Environment

In addition to the conventions identified which provide protection for cultural sites, agreements which deal with the conservation of important parts of the natural world, including flora and fauna, have been adopted throughout the twentieth century. The earliest Conventions on these subjects were primarily concerned with the protection of particular species.[78]

The *World Heritage Convention*, on the other hand, takes a broader ecological approach and is concerned with the protection of those aspects of the natural environment which constitute habitats of rare or endangered species, or form a particularly valuable ecosystem. One of the few treaties of this very early period on the subject of nature conservation which recognises the intrinsic value of fauna and the importance of the protection of habitat is the 1916 *Treaty for the Protection of Migratory Birds*, a bilateral treaty between Canada and the United States. This is an important agreement in that it was not based on economic motives. Further, it gave the United States Government the constitutional power to enact implementing legislation establishing a Migratory Bird Commission and a system of permanent wildlife refuges.[79]

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75 Cairo, November 9, 1963: (1964) 489*UNTS* , 244.

76 (1971) 797 *UNTS* , 370.

77 See Goy (1973), 118.

78 See the agreements referred ;to in Chapter I.

79 Caldwell (1972), 59-60.

The first multilateral convention to reflect concern with wildlife for its own sake and recognition of the importance of habitat was the African *Convention Relative to the Preservation of Flora and Fauna in their Natural State* (1933), [80] negotiated between the Union of South Africa and the African colonial powers.[81] This agreement involves specific prohibitions on the hunting and harassment of wildlife and has provisions for the protection and administration of their habitats.[82] Under Article 21 of the Convention 'each Contracting Party shall furnish to the Government of the United Kingdom information as to the measures taken for the purpose of carrying out the provisions of the preceding articles'. This information is then to be distributed to other governments.

In 1940, under the sponsorship of the Pan American Union, the *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere* was signed.[83] Under it the signatories undertook to preserve all species and *genera* of native American fauna and flora from extinction, and to preserve areas of extraordinary beauty, striking geological formation or aesthetic, historic or scientific value.[84] This was to be achieved through the establishing of national parks, reserves, nature monuments and wilderness areas;[85] safeguarding wildlife habitats; cooperation between Governments in the field of research;[86] and the control of trade in protected fauna and flora.[87]

There was a gradual move towards the broader ecological approach adopted in the *World Heritage Convention* throughout the second half of the twentieth century. Relevant agreements include the 1950 *International Convention for the Protection of Birds*[88] and the African *Convention on the Conservation of Nature and Natural Resources,* signed by the Member States of the Organization of African Unity (OAU) in 1968.[89] The *Convention for the Protection of Birds* was adopted in recognition of the need to amend the 1902 *Convention for the Protection of Birds Useful to*

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80 London 1933: (1936) 172 *LNTS*, no. 3995, 242.

81 Belgium, United Kingdom of Great Britain and Northern Ireland, Egypt, Spain, France, Italy, Portugal and the Anglo-Egyptian Sudan.

82 Caldwell (1972), 61.

83 *United States Treaty Series*, 981.

84 Kiss (1983), 3.

85 Article 2.

86 Article 6.

87 Article 9.

88 Negotiated between Belgium, the Netherlands, Spain, Switzerland, Iceland, Luxembourg, Sweden and Turkey: (1950) 638 *UNTS*, 186.

89 Organization of African Unity, General Secretariat (ed.), *African Convention on the Conservation of Nature and Natural Resources*, Addis Ababa, 1969- see Rusta and Simma (1975), Vol. V, 2037.

Agriculture.[90] There is a noticeable change of emphasis and broadening of attitude in the later Convention. Thus, the 1950 Convention was not concerned simply with the protection of birds useful to agriculture but with the protection of birds in the wild state.[91] Further, the preamble recognised that all birds should as a matter of principle be protected, not only in the interests of the economy of each nation, but also in the interests of science and the protection of nature. The substantive terms of the later Convention reflected this change in emphasis. High Contracting Parties undertook to protect all birds during the breeding seasons and to protect species in danger of extinction or of scientific interest throughout the year.[92] Further, under the later Convention there were obligations relating to the protection of bird habitats and to indirect threats. Thus, by Article 10 High Contracting Parties undertook to consider and adopt measures to prevent the destruction of birds by hydrocarbons and other sources of water pollution, by lighthouses, electric cables, insecticides or poisons or by any other means. Further, by Article 11, in order to alleviate the consequences of the rapid disappearance of suitable breeding grounds for birds as a result of human intervention, High Contracting Parties undertook to encourage and promote immediately, by every possible means, the creation of water or land reserves of suitable size and location where birds could nest and raise their broods safely and where migratory birds could also rest and find their food undisturbed.

The African *Convention on the Conservation of Nature and Natural Resources*, negotiated by the African States, emphasised the importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view.[93] Its fundamental principle was that Contracting States should undertake individual and joint action for the conservation, utilisation and development of soil, water, floral and faunal resources in accordance with scientific principles and with due regard to the best interests of the people.[94] Contracting Parties undertook to take effective measures to conserve and improve the soil and control erosion and land use;[95] to establish policies to conserve, utilize and develop water resources, prevent pollution and control water use;[96] and to protect floral and conserve faunal resources and ensure the best utilization, management of populations and habitats, control hunting, capture and fishing.[97] Provision was also made for certain listed species to be

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90 See the Preamble to the *Convention for the Protection of Birds.*
91 Article 1.
92 Article 2.
93 Preamble.
94 Article II.
95 Article IV.
96 Article V.
97 Article VII.

totally protected and for others to be taken only with authorization.[98] Further, there was provision for the establishment and maintenance of conservation areas; for conservation and ecological factors to be considered in development plans; and for parties to cooperate where ever necessary in implementing the Convention.[99]

More recent agreements concerned with the protection of the natural heritage include the *Convention on Wetlands of International Importance especially as Waterfowl Habitat;* [100] the *Convention on International Trade in Endangered Species of Flora and Fauna;*[101] the *Convention on Conservation of Nature in the South Pacific;* [102] the *Convention on the Conservation of Migratory Species of Wild Animals;*[103] and the *Convention on the Conservation of European Wildlife and Natural Habitats.* [104]

As is suggested by the titles of these later conventions, and in line with the development of international environmental law, the move has been away from the adoption of isolated measures to protect particular species and towards the protection of whole areas of ecological importance. The *Convention on Wetlands of International Importance*, for example, was adopted a year before the *World Heritage Convention* and is based on similar ideals to that later Convention. States Parties aim to stem the progressive encroachment on and loss of wetlands, recognizing the fundamental ecological functions they serve and their economic, cultural, scientific and recreational value.[105] Further, in this Convention we see the beginnings of some of the arrangements which became part of the *World Heritage Convention* a year later, including an identifying List of Wetlands of International Importance[106] and the use of the IUCN as a consultant in relevant matters. Obligations undertaken by Contracting Parties include: to designate at least one national wetland for inclusion in a List of Wetlands of International Importance;[107] to consider their international responsibilities for conservation, management and wise use of migratory stocks of wildfowl;[108] to establish wetland nature reserves; and to cooperate in exchange of information and train personnel for wetland management.[109]

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98 Article III.
99 Articles X and XVI.
100 (1972) 11 *I.L.M.* 257.
101 (1973) 12 *I.L.M.* 1085.
102 For text see Kiss (1983), 463.
103 (1980) 19 *I.L.M.* 15.
104 For text see Kiss (1983), 463.
105 *Ibid*, 32.
106 Article 2.
107 *Ibid.*
108 Article 2(6).
109 Article 4.

International and Regional Standards for Protection

The recommendations made by international bodies and regional organizations to members relating to uniform standards to be applied in the protection of cultural and natural sites reveal a developing philosophy of protection.which was taken up in the *World Heritage Convention* These recommendations are very much a feature of the second and third stages of the development of international environmental law, in line with the expansion in environmental activities by international and regional organizations, and the establishment of NGOs with environment-related objectives.

In 1956 Unesco produced a *Recommendation on International Principles Applicable to Archaeological Excavations.*[110] The Preamble reflects the sentiments which were beginning to inspire people working in this field;

> Convinced that the feelings aroused by the contemplation and study of works of the past do much to foster mutual understanding between nations, and that it is therefore highly desirable to secure international cooperation with regard to them...Considering that, while individual states are more directly concerned with the archaeological discoveries made on their territory, the international community as a whole is nevertheless the richer for such discoveries...

The emphasis on international cooperation as a result of the recognition of a universal heritage is reflected in the fact that the instrument recommends: that free concessions to excavate be given to foreign excavators;[111] that Member States which lack the necessary resources for the organization of archaeological excavations in foreign countries should be accorded facilities for sending archaeologists to sites being worked by other Member States;[112] that there should be participation by foreign experts where technical or other resources are insufficient in a State;[113] and that there should be international cooperation in repressive measures.[114]

Unesco has adopted a number of other recommendations on the subject of protection for sites of value to Humankind including the 1962 *Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites.*[115] Again, the Preamble reflects the growing sense of heritage:

> Considering that at all periods men have sometime subjected the beauty and character of landscapes forming part of their natural environment to damage which has impoverished the cultural, aesthetic and even vital heritage of whole regions in all parts of the world...

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110 Rusta and Simma (1975), vol. XIV, 7253.

111 Articles 14 and 15.

112 Article 17.

113 Article 18.

114 Article 30.

115 For text see Ruster and Simma (1975), vol. XIV, 7275

This was the first international document to put cultural and natural sites together, recognising the importance of both and their integral relationship, and is particularly significant for that fact. In relation to the continuing deterioration of the sites, the preamble states that 'this phenomenon affects the aesthetic value of landscapes and sites, natural or man-made, and the cultural and scientific importance of wild life'. The Recommendation deals with various means of ensuring that the beauty and character of landscapes is safeguarded, particularly: supervision of works and activities likely to damage them; adoption of appropriate town planning and rural planning schemes; scheduling of extensive landscapes "by zones"; the scheduling of isolated sites; the establishment of natural reserves and national parks; the acquisition of sites by communities; and the education of the public.

Similarly, Unesco has adopted the *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*[116] and *Recommendation for the Protection at National Level of the Cultural and Natural Heritage.* [117] The Council of Europe has adopted the *Recommendation on the Strengthening and Rationalisation of International Cultural Cooperation.* [118] This Recommendation recognizes the interests of all Europeans in the protection of the European culture and incorporates various provisions for bringing about cooperation in identifying, preserving and sharing information about the sites.

The Development of the World Heritage Convention

It was against this background of international conventions and recommendations that the *World Heritage Convention* emerged. The *World Heritage Convention* was adopted by the General Conference of Unesco on November 16, 1972, at its seventeenth session by a vote of 75 to 1 with 17 abstentions. The adoption of the Convention was a response to the threats which faced many of the unique man-made and natural sites of the world. Unesco was faced with an increasing number of requests for assistance in the face of emergencies. The feeling was that:

> It would...be highly desirable for the role of the Organization to be determined and conditioned by rules laid down by the international community. While Unesco is bound to fulfil its moral obligations vis-a-vis the Member States, it must be able to do so in the best possible circumstances. It appears that the adoption by means of an international Convention of the principles underlying an international system for

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116 Paris, 19 November 1968: *ibid*, 7289

117 Paris, 16 November 1972: Unesco Doc. 17C/107, (1972) 11*I.L.M.*, 1367. This document will be dealt with in detail in Chapter III as it plays an important part in matters arising under the *World Heritage Convention.*

118 Recommendation 497(1967): *ibid*, 7323.

protection for monuments, groups of buildings, and sites of universal value, might effectively meet this requirement.[119]

The *World Heritage Convention* was developed from two separate draft conventions of Unesco and IUCN. The Unesco draft convention, entitled the *Convention Concerning the International Protection of Monuments, Groups of Buildings, and Sites of Universal Value,* originally dealt primarily with the cultural heritage, while IUCN was working on a *Convention for the Conservation of the World's Heritage,* concerned primarily with natural sites.

The first concrete proposals for Unesco involvement in a Convention to establish a permanent system for the protection of unique and outstanding sites came at the 14th session of the Unesco General Conference in 1968. At this session the General Conference authorized the Director-General 'to coordinate and secure the international adoption of appropriate principles and scientific, technical and legal criteria for the protection of cultural property, monuments and sites.'[120] The work plan of the resolution stated that 'a meeting of experts will be convened to coordinate, with a view to the scientific, technical and legal criteria which would make it possible to establish an effective system for protecting and exploiting monuments and sites.'[121] At the same session the General Conference authorised the Director-General 'to study the possibility of arranging an appropriate system of international protection, at the request of the state concerned, for a few of the monuments that form an integral part of the cultural heritage of mankind.'[122] Following these recommendations a meeting of experts was convened at Unesco Headquarters from 26 February to 2 March 1968 at which all the non-governmental organizations concerned were represented. At its conclusion, the meeting invited Unesco to continue its action aimed at 'establishing an effective system for the protection of monuments, groups of buildings and sites at national level and at implementing an international system for the protection of monuments and sites of universal value and interest.'[123]

The 1969-1970 programme and budget adopted at the fifteenth session of the General Conference enabled the continuation of this action.[124] A second meeting of experts was held in July 1969 to consider ways and means of establishing the necessary international arrangements. This meeting concluded that the Director-General should:

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119 Unesco Doc. 16C/19 Annex- Preliminary Report of the Director-General on the Desirability of Adopting an International System, 11.

120 Resolution 3.342.

121 Unesco Doc. 16C/19.

122 Resolution 3.3411.

123 Unesco Doc. SHC/CS.

124 Unesco Doc. 16C/19.

> (a) prepare an International Recommendation based on the scientific, technical and legal principles and criteria contained in the present document which could be used in setting up or improving national systems for the protection of monuments, groups of buildings and sites; and
>
> (b) prepare an International Convention or have recourse to any other appropriate means favouring the establishment of an international system for the protection of monuments, groups of buildings and sites of universal interest, in accordance with the principles and conditions laid down in this report.[125]

Accordingly, the sixteenth session of the General Conference was invited:

> (a) to decide whether the question of the protection of monuments and sites of universal value should be regulated at the international level,
>
> (b) if so, to what extent the question can be regulated and whether the method adopted should be an international convention or, alternatively, a recommendation to Member States,
>
> (c) to decide whether it is necessary to set up a special committee of government experts to draw up a final draft to be submitted to the General Conference at its seventeeth session.[126]

At its sixteenth session the General Conference had before it the preliminary study of the Director-General. The proposal considered in this study was for some sort of international action to provide for both international and national protection for immovable cultural property, faced as it was with increasing threats. The essential purpose of this system was to be to rescue monuments, groups of buildings and sites of universal interest which if neglected would inevitably decay and be lost to mankind, with particular emphasis on the needs of developing countries.[127] There was never any suggestion of internationalization of the cultural property in question nor of any form of extraterritoriality.[128] It was envisaged that international action could do no more than encourage the action of Member States and urge them to adopt new protective measures while also giving technical, and possible financial assistance to States in pressing need thereof.[129] This international action should apply only to monuments, groups of buildings and sites of outstanding interest to the international community, whereas protective measures at the national level should apply to all components of the cultural heritage, whatever their relative importance.[130] Unesco was seen as the appropriate organization to shoulder the work consequent on an eventual agreement to establish an international system; while the non-governmental organizations were involved in the relevant areas they would not be able to take over

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125 Unesco Doc. SHC/MD/4.

126 Unesco Doc. 16C/19 p 2.

127 *Ibid*, Annex, 6.

128 *Ibid.*

129 *Ibid*, Annex, 3.

130 *Ibid.*

full responsibility for operating an international system. In any case, their statutes would not allow them to negotiate with governments, nor to enter into obligations which would go beyond the limits of their functions.[131]

From the beginning it was envisaged that all international organizations engaged in relevant activities should participate in the scheme for international cooperation. Specifically, it was considered that the Rome Centre and ICOMOS and the IUCN would be involved. The conclusion of the Director-General was that the time had not yet come to draw up a convention on the national protection of sites, but rather to recommend that Member States 'consider whether, depending on their particular circumstances, they would find it possible to modify their domestic legislation in accordance with new principles.'[132] The international system, on the other hand, in view of comparative urgency of the situation, should be dealt with by means of a convention.[133]

At it sixteenth session the General Conference, having considered this preliminary report, made the decision to draft an international convention and recommendation and also to convene a committee of experts.[134] A draft *Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value* was then drawn up[135], along with a draft *Recommendation Concerning the Protection, at National Level of Monuments, Groups of Buildings and Sites*. These were circulated in July 1971 to Member States who were invited to submit their comments and observations on the drafts. Meantime a special inter-governmental working group of Unesco experts and the Committee of UNCHE met to examine the possibility of drawing up a single convention concerning both the cultural and natural heritage.[136] This working group revised the IUCN draft, emphasizing the conservation of natural areas, but not excluding cultural sites, and recommended that the Stockholm Secretariat inform Unesco of the revised IUCN draft, possibly with an eye toward drafting a single convention.[137] By March 1972, in response to Unesco's requests for comments on its Convention, the United States had submitted an entirely new *World Heritage Trust Convention* which took into account both natural and cultural sites on the basis of the world heritage concept.[138]

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131 *Ibid*, Annex, 7.
132 *Ibid*, Annex, 11.
133 *Ibid.*
134 Resolution 1.412.
135 Unesco Doc. SHC/MD/17.
136 Meyer (1976), 47.
137 *Ibid.*
138 *Ibid*, 48.

A Special Committee of Government Experts was convened in November 1971 and met in Paris from 4 to 22 April. It was during these meetings that the draft Convention was strengthened to cover both the cultural and natural heritage.[139] This revised draft was completed in time for delegates at the Stockholm Conference to discuss it. In the United Nations Action Plan for the Human Environment it was recommended that:

> Noting that the draft convention prepared by Unesco concerning the protection of the world natural and cultural heritage marks a significant step towards the protection, on an international scale of the environment...[Governments should] examine this draft convention with a view to its adoption at the next General Conference of Unesco.[140]

At the seventeenth session of the General Conference of Unesco, in November 1972, the *World Heritage Convention* and *Recommendation Concerning the Protection, at the National Level, of the Cultural and Natural Heritage* (hereinafter referred to as the Heritage Recommendation)[141] were adopted. The Convention serves the purpose of setting up the arrangements for achieving international cooperation for the protection of the world heritage, and outlining the obligations of Parties to the Convention at both the national and international levels. The *Heritage Recommendation*, as was envisaged by the sixteenth session of the General Conference of Unesco, establishes guidelines for Parties in ensuring the protection of their national heritage, including those aspects of it which are of world heritage value. Subsequently, the World Heritage Committee established under the Convention adopted the *Operational Guidelines of the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage for the Implementation of the World Heritage Convention* (hereinafter referred to as the *Operational Guidelines*).[142] The *Operational Guidelines* constitute the basis for all decisions made by the World Heritage Committee regarding the implementation of the Convention and have been modified and added to at successive meetings.

The Legal Status of the Heritage Instruments

The United Nations organs and specialised agencies, Unesco among them, are not supra-national legislative bodies and so, unlike the European Parliament, these organizations cannot assume broad legislative powers to adopt decisions which have a direct legal effect on their members.[143] The specialised agencies can, however, form their resolutions into binding obligations on members. The *World Heritage*

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139 *Ibid.*

140 (1972) 11 *I.L.M.* 1421, Recommendation 99.

141 (1972) 11 *I.L.M.* 1367. Reproduced as Appendix B.

142 Unesco Doc. WHC/2. Reproduced as Appendix C.

143 See Bowett (1982), 140-141.

Convention and accompanying *Heritage Recommendation* were adopted by the General Conference pursuant to Article 4.4 of the Unesco Constitution which provides that the General Conference can adopt recommendations and international conventions, the former on the basis of a majority vote and the latter requiring a two-thirds majority vote. Each of the Member States is then to submit recommendations or conventions to its competent authorities within a period of one year from the close of the General Conference at which they were adopted.[144]

Thus, the constitutive document of Unesco gives the General Conference the authority to adopt conventions and recommendations. Under the Constitution, Member States undertake the obligation of submitting these recommendations and conventions to the relevant competent authorities, and further, under Article VIII, to report periodically to the Organization on the action upon such recommendations and conventions.

In order to bind Member States, Conventions adopted by the General Conference of Unesco must be ratified or acceded to; there is no obligation on Member States under the constitutive document to take this step. So far as recommendations are concerned there is no ratification or accession step; the document is simply adopted by a majority vote of the General Conference, the Members of which are then required to submit the recommendation for consideration to the competent authorities. Generally speaking, recommendations of international organizations do not create international obligations on Member States.[145] While treaties are written agreements by which sovereign Governments undertake legally binding obligations at international law[146], recommendations often simply attempt to set down standards for States to consider adopting into their municipal law. In Unesco practice, recommendations lay down principles and norms designed to regulate international problems.[147]

The *Operational Guidelines* perform a crucial function in the operation of the *World Heritage Convention*. Parts of this document merely lay down various criteria and conditions which, under the *World Heritage Convention*, the Committee is required to specify. For example, under Article 11.5 the World Heritage Committee is

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144 For a detailed analysis of the Unesco Convention-making process see Alexandrowicz (1973), 20-30.

145 See Castaneda (1969), 8-9 where he states: "There is no doubt that the prevailing meaning [of the term recommendation] is that of "invitation"; hence recommendations are only the resolutions adopted with no intention of binding their addressees".

146 Williams and de Mestral (1987), 342.

147 See Goy (1973), 140 citing Art. 1 of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution, adopted by the General Conference at its fifth session (resolution 5C/406), amended at its 7th session (resolution 7C/43).

required to establish criteria for determining whether or not a property may be included in the World Heritage List or List of World Heritage In Danger; this is done under paragraphs 23-36 and 56-61 of the *Operational Guidelines*. Where they perform this function, the *Operational Guidelines* have a clear legal status; States Parties have undertaken in the *World Heritage Convention* to accept the criteria adopted by the World Heritage Committee.

In other paragraphs the Guidelines act simply as comprehensive rules setting down appropriate policies, procedures and directions to States Parties on matters left by the Convention to the Committee; for example, under Article 13.3 the World Heritage Committee is to decide on action to be taken with regard to requests for international assistance.

The Legal Status of the World Heritage Concept

We have briefly examined the legal status of the instruments which are crucial in the fulfilment of the world heritage concept in international environmental law. This concept was first articulated in relation to the *World Heritage Convention,* which is the only international document to formally incorporate it as a rationale for international cooperation on environmental protection. However, the rationale upon which it is based, namely, that there is a universal interest in some aspects of the environment which justifies international regulation, emerges very early on in agreements related to the protection of particular aspects of the environment of the exclusive territory of States.

That there is such a thing as a heritage of Humankind seems now to be an accepted notion in the international community. However, the extent and application of the concept beyond the specific terms of the *World Heritage Convention* is uncertain. What, beyond the unique cultural and natural sites of outstanding universal value as defined in the *World Heritage Convention*, is the "world heritage"? Further, given the concessions in the Convention document itself, the legal effect of the concept, and particularly the extent to which it is a qualification on sovereignty, is uncertain. At present the concept is more a rationale for international cooperation, than a basis for claiming legal rights of Mankind. The concept may become a basis for reassessing sovereignty when it comes to dealing with aspects of the internal environment of States in which Mankind can justifiably claim an interest. This will depend upon the incorporation of the concept in other multi-lateral treaties where obligations assumed by States Parties are less qualified than they are in the *World Heritage Convention* , and an acceptance by States that the world heritage concept is truly a qualification to the exercise of their sovereign rights.

Conclusion

The world heritage concept provides a rationale for international action towards environmental protection. Previously the primary rationale had been State responsibility. The notion of a "heritage" in international law has also been applied in relation to the global commons which were described as the common heritage of mankind. In its application to the exclusive territory of States and its fundamental environmental rationale, the world heritage concept differs from the CHM. Because the term "heritage" is now being used in a very broad context, it provides a convenient rationale for international regulation of the internal environment of States. While, given the potential political costs in terms of sovereignty that a State suffers by agreeing to the application of the concept, its application in definite terms has been somewhat tentative so far, it seems likely that it may develop into a true qualification on sovereignty at some time in the future. A fundamental challenge to international environmental law lies in the embracing of this concept and a working out of its true relationship to concepts of sovereignty. As it is incorporated in the *World Heritage Convention*, the concept is qualified by recognition of sovereign interests. This is politically necessary, but somewhat inconsistent with the notion of a universal interest.

CHAPTER III

THE TERMS AND OPERATION OF THE WORLD HERITAGE CONVENTION

Introduction

The *World Heritage Convention* is a significant and unique agreement, both in terms of the development of international environmental law and in the context of previous treaties and recommendations for the protection of the natural and cultural heritage. The purpose of this chapter is to provide a detailed analysis of the terms and operation of the *World Heritage Convention.* The actual terms of the Convention must be seen in the context of their practical implementation. The details of such operations are set down by the primary policy and decision making body established under the Convention, the World Heritage Committee, in its *Operational Guidelines.* For example, the Convention specifies that the world heritage shall consist of natural and cultural parts with certain special features which exhibit outstanding universal value. The question of what constitutes outstanding universal value for the purposes of the Convention, however, is dealt with in the *Operational Guidelines.* The Convention provides for the establishment of the World Heritage List and for the granting of international assistance for the protection of listed properties. However, sites are inscribed and assistance given within guidelines established by the Committee and specified in the *Operational Guidelines.* The terms and practical operation of the Convention are inextricably linked and it is not possible to separate our discussion of these two aspects.

Defining the World Heritage

The task of defining the world heritage must be seen in two contexts. First, there are the definitions in the *World Heritage Convention,* identifying what constitutes the world heritage. Second, there are the World Heritage Committee's guidelines for interpreting this definition for the purposes of deciding what properties shall be included in the identifying list of world heritage properties, the World Heritage List. A property can fulfill the criteria prescribed in the Convention, and thus be legitimately described as part of the world heritage, and yet be rejected for inscription on the World Heritage List because it does not satisfy the requirements of the Committee

One of the unique and important features of the *World Heritage Convention* is its recognition of the interdependence and equal importance of the natural and cultural aspects of the heritage. Cultural heritage is enhanced by evidence of its

relationship with its natural environment. The natural heritage is crucial to our understanding of human culture, provides inspiration for the flowering of such culture, and, as Mankind has only recently begun to realise, has an intrinsic value of its own. Thus, the world heritage consists of both cultural and natural aspects.

The Cultural Heritage

Article 1 of the Convention defines the "cultural heritage" for the purposes of the Convention. Three broad types of heritage are specified, namely, monuments, groups of buildings and sites. The first heading includes `architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features which are of outstanding universal value from the point of view of history, art or science'. "Groups of Buildings" are defined more specifically as, `groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science'. Relevant sites are `works of man or the combined works of nature or of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view'. The Convention thus deals with immovable sites, rather than moveable objects. The sorts of factors which endanger moveable cultural property are clearly very different from those which threaten immovable cultural heritage. The 1970 Unesco *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* deals specifically with moveable cultural heritage.[1]

Natural Heritage

Article 2 lists the sorts of natural sites which shall be considered as "natural heritage" for the purposes of the Convention. Again there is a three-part definition broadly covering natural features, special formations, and areas and natural sites. Within the first category are `natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view'. Relevant special formations and areas are `geological and physical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science of conservation'. While reference is made in this Article to threatened species, the natural heritage is clearly defined to consist of the sites which constitute the habitats of these species, rather than the species themselves. Under the broad heading "natural sites," are included `natural

1 See discussion of this Convention in Chapter II of this work.

sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty'.

Outstanding Universal Value

The requirement that the heritage be of "outstanding universal value" is common to all definitions of the world heritage. The phrase "outstanding universal value" is not defined in the Convention. The World Heritage Committee has addressed the question of what is meant by the word "universal". There was doubt about whether property significant only for a continent or a large region of the world would fulfill the requirement.[2] The Committee expressed the opinion that `the term "universal" must ... be interpreted as referring to a large or significant segment of humanity.'[3] There seems little doubt, then, that property of significance to a whole continent would be regarded as of outstanding universal value.

The only other guidance with regard to the meaning of the phrase "outstanding universal value" is provided in the *Operational Guidelines.* The Guidelines stipulate that the intention is `not to provide for the protection of all properties of great interest, importance or value, but only for a select list of the most outstanding of these from an international viewpoint.'[4]

The question of what exactly is meant by outstanding universal value only really becomes important in terms of deciding which properties are to be included on the World Heritage List. The *Operational Guidelines* set down the criteria by which the value of a property nominated for listing can be judged.

In order to be considered of outstanding universal value, cultural properties must:

> a)(i) represent a unique artistic achievement, a masterpiece of the creative genius; or
> (ii) have exerted great influence, over a span of time or within a cultural area of the world, on developments in architecture, monumental arts or town-planning and landscaping; or
> (iii) bear a unique or at least exceptional testimony to a civilization which has disappeared; or
> (iv) be an outstanding example of a type of building or architectural ensemble which illustrates a significant stage in history; or
> (v) be an outstanding example of a traditional human settlement which is representative of a culture and which has become vulnerable under the impact of irreversible change; or
> (vi) be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance (the Committee considers that this criterion should justify inclusion in the List only in exceptional circumstances or in conjunction with the criteria);

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2 Meyer (1976), 49.

3 Unesco document CC.77/Conf.001/4, 6.

4 Unesco document WHC/2 Revised December 1988 at para 6(i).

and

b)(i) meet the test of authenticity in design, materials, workmanship or setting (the Committee stressed that reconstruction is only acceptable if it is carried out on the basis of complete and detailed documentation on the original and to no extent on conjecture).
(ii) have adequate legal protection and management mechanisms to ensure the conservation of the nominated cultural property ... Assurances of the effective implementation of these laws are also expected ... the State Party concerned should be able to provide evidence of suitable administrative arrangements to cover the management of the property, its conservation and its accessibility to the public.[5]

Natural properties should fulfil one of the following criteria:

(i) be outstanding examples representing the major stages of the earth's evolutionary history; or
(ii) be outstanding examples representing significant on-going geological processes, biological evolution and man's interaction with his natural environment as distinct from periods of the earth's development, this focuses upon on-going processes in the development of communities of plants and animals, landforms and marine areas and fresh water bodies; or
(iii) contain superlative natural phenomena, formations or features, for instance, outstanding examples of the most important ecosystems, areas of exceptional natural beauty or exceptional combinations of natural and cultural elements; or
(iv) contain the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation still survive.[6]

The natural heritage must satisfy conditions of integrity:

(i) the sites described in (i) should contain all or most of the key interrelated and interdependent elements in their natural relationships; for example, an "ice age" area would be expected to include the snow field, the glacier itself and samples of cutting patterns, deposition and colonization.
(ii) the sites described in (ii) should have sufficient size and contain the necessary elements to demonstrate the key aspects of the process and to be self-perpetuating. For example, an area of tropical rain forest may be expected to include some variation in elevation above sea level, changes in topography and soil types, river banks or oxbow lakes, to demonstrate the diversity and complexity of the system.
(iii) the sites described in (iii) should contain those eco-system components required for the continuity of the species or of the other natural elements or processes to be conserved. This will vary according to individual cases; for example, the protected area of a waterfall would include all, or as much as possible, of the supporting upstream water shed; or a coral reef area would include the zone necessary to control siltation or pollution through the stream flow or ocean currents which provide its nutrients.
(iv) the area containing threatened species as described in (iv) should be of sufficient size and contain necessary habitat requirements for the survival of the species.
(v) In the case of migratory species, seasonable site necessary for their survival, wherever they are located, should be adequately protected. The Committee must receive assurances that the necessary measures be taken to ensure full life cycle. Agreements made in this connection, either through adherence to international conventions or in the form of other multilateral or bilateral arrangements would provide this assurance.
(vi) The sites described ... should have adequate long-term legislative, regulatory or institutional protection. They may coincide with or constitute part or existing or proposed protected areas such as national parks. If not already available, a management plan should be prepared and implemented to ensure the integrity of the natural values of the site in accordance with the Convention.[7]

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5 Paragraph 24.

6 Paragraph 36(a).

7 Paragraph 36(b).

Identification of the World Heritage

Under Article 3 of the *World Heritage Convention* it is for each State Party to identify and delineate the properties on its territory which conform with the definitions in Articles 1 and 2. The Article thus makes a concession to State sovereignty. It is for the World Heritage Committee to make the decision about whether or not a nominated property within a State satisfies the criteria for inclusion on the World Heritage List.[8] Article 3, therefore, does not relate to identification for the purposes of listing except in the sense that it works in conjunction with Article 11.3, which provides that the inclusion of a property in the World Heritage List requires the consent of the State concerned, to ensure that nominations for world heritage listing are made only by the State Party concerned.

As we have noted, however, properties may be world heritage sites although they do not qualify for world heritage listing. Indeed, Article 12 of the Convention provides that the fact that a property belonging to the cultural or natural heritage has not been included in the World Heritage List shall in no way be construed to mean that it does not have an outstanding universal value for other purposes. Thus, Article 3 makes it clear that, apart from the ultimate identification involved in the inscription of a nominated property on the World Heritage List, it will be for each State to identify the world heritage within its borders, and it will be in relation to heritage identified by the State that the obligations outlined in the Convention will arise.

National and International Obligations on States Parties

As we saw through our discussion of the background to the *World Heritage Convention*, obligations to refrain from destroying the cultural heritage of other States date from the first half of the twentieth century.[9] The *World Heritage Convention* is unique in that it moves beyond such negative international obligations and requires participation in a scheme of international cooperation for the protection of the heritage. The Convention also incorporates obligations on States to adopt measures to protect the world heritage within their own borders. This section examines the national and international obligations assumed by Parties under the Convention and also makes reference to recommendations made with regard to national action in the *Heritage Recommendation.*

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8 This procedure is discussed subsequently in relation to the institutional arrangements for the protection of the world heritage.

9 See Chapter II

Obligations at the National Level

Part II of the Convention lays down the principal obligations on Parties to the Convention so far as the protection of the world heritage is concerned. Under Articles 4 and 5 States Parties undertake to protect the world heritage within their own borders.

Article 4 contains the primary obligation of Parties with respect to the heritage in their own borders, while again conceding to State sovereignty:

> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory belongs primarily to that state. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

These obligations are specified in more detail in Article 5 of the Convention. Consistent with special provision made for the participation of developing countries in other international environmental documents,[10] and in line with general concessions to sovereignty, States Parties are only required to "endeavour", "in so far as possible", and "as appropriate for each country", to carry out these obligations. The obligations are very general:

> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
>
> (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
>
> (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
>
> (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
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> (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

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10 See Chapter I.

Articles 4 and 5 mark most significantly the change in the world community attitudes to the issue of protection of the heritage. These articles are significant because, unlike previous agreements for the protection of the cultural heritage, States Parties specifically commit themselves to domestic action with regard to the heritage within their own borders.

Given the development which these provisions represent, and the inappropriateness of prescribing in too much detail standards which may vary in their applicability according to national conditions, a decision was made to supplement the national obligations within the Convention in the *Heritage Recommendation.* The Recommendation, which was designed to outline specific measures to encourage and assist states to protect their national heritage, also helps to ensure that any part of that heritage which may amount to world heritage is protected. The Recommendation is thus an important compliment to the *World Heritage Convention* in its provision for national action to protect the heritage, and warrants closer examination.

The Heritage Recommendation

The *Heritage Recommendation* was adopted, along with the *World Heritage Convention,* at the seventeenth session of the General Conference of Unesco in 1972. The *Recommendation* had been drafted in accordance with a direction from the 16th General Conference of Unesco. The General Conference had considered the report of the meeting of experts held in July 1969, that the Director-General should prepare an International Recommendation based on scientific, technical and legal principles and criteria for setting up or improving national systems for the protection of monuments, groups of buildings and sites.[11]

The Preamble to the *Heritage Recommendation* refers to the obligation on every country to protect the world cultural and natural heritage. The definitions of cultural and natural heritage in the *Heritage Recommendation* are virtually identical to those in the Convention, except for the different standards of value required; the Recommendation requires only that sites shall be of "special", rather than of "outstanding universal value". Thus, the *Heritage Recommendation* covers all sites of world heritage value, but many more as well. This was in line with the view of the drafters of the *World Heritage Convention* that:

> Although, by virtue of the heritage of cultural property being regarded as a whole, protective measures must apply at national level to all components of that heritage, whatever their relative importance, that is not the case with international protection. Being complementary to that of Member States and applicable only to monuments,

11 Unesco doc. SHC/MD/4.

groups of buildings and sites of outstanding interest to the international community, it would intervene in favour of those of universal interest only.[12]

Article 4 of the *Heritage Recommendation* provides that-

> The cultural and natural heritage represents wealth, the protection, conservation and presentation of which impose responsibilities on the States in whose territory it is situated, both vis-a-vis their own nationals and vis-a-vis the international community as a whole.

The *Recommendation* further provides that all States should formulate, develop and apply a policy to secure the protection, conservation and presentation of the cultural and natural heritage.[13] It then specifies a number of general principles to be applied in the development of this policy. The principles include: that the cultural and natural heritage should be considered in its entirety as a homogeneous whole;[14] that none of the works or items should be dissociated from its environment;[15] that the protection, conservation and presentation of the heritage should not be regarded as a check on national development but as a determining factor in such development;[16] and that it should be considered as one of the essential aspects of regional development plans and planning in general.[17]

So far as organization of services are concerned, the *Heritage Recommendation* provides that, with due regard for the conditions appropriate to each country, Member States should set up in their territories one or more specialized public services to be responsible for the discharge of the following functions; compiling an inventory of the cultural and natural heritage; training and recruiting scientific, technical and administrative staff to be responsible for working out identification, protection, conservation and integration programme and directing their execution; organizing close cooperation among specialists of various disciplines to study the technical conservation problems of the cultural and natural heritage; using or creating laboratories for the study of all the scientific problems arising in connection with the conservation of the cultural and natural heritage; and ensuring that owners or tenants carry out the necessary restoration work.[18]

Article 18 of the *Heritage Recommendation* provides that Member States should, as far as possible, take all necessary scientific, technical and administrative,

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12 Unesco doc. 16C/19 Annex, 3.
13 Article 3.
14 Article 5.
15 Article 6.
16 Article 7.
17 Article 8.
18 Article 13.

legal and financial measures to ensure the protection of the cultural and natural heritage in their territories. Part V provides details of recommended protective measures under these headings. Recommended scientific and technical measures include regular surveillance of the components of their heritage by means of periodic inspections;[19] affording added protection to those components of the cultural and natural heritage that are threatened by unusually serious dangers;[20] restoration of the heritage, wherever possible, to its former use or to a new and more suitable function;[21] and undertaking studies and research to determine the impact of visitor use and to monitor interrelationships so as to avoid serious damage to the heritage and to provide adequate background for the management of the fauna and flora.[22]

Under the *Recommendation*, States are to adopt administrative measures, including drawing up an inventory for the protection of the cultural and national heritage;[23] finding suitable uses for groups of historic buildings no longer serving their original purpose;[24] drawing up plans for the protection, conservation, presentation and rehabilitation of groups of buildings of historic and artistic interest;[25] requiring authorization by the town and country planning authorities for any work which might result in changing the existing state of the buildings in a protected area;[26] and developing short and long range plans to achieve a system of conservation to meet the needs of their countries.

The *Recommendation* also contemplates that States will adopt legal measures, particularly legislative protection for components of the cultural and natural heritage, either individually or collectively;[27] enforcement of protective measures applying to individual owners and to public authorities when they are the owners of components of the cultural and natural heritage;[28] empowering of public authorities to expropriate a protected building or natural site;[29] and imposing penalties or administrative sanctions on anyone who wilfully destroys, mutilates or defaces a protected monument, group of buildings or site.[30]

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19 Article 19.
20 Article 21.
21 Article 22.
22 Article 27.
23 Article 29.
24 Article 32.
25 Article 33.
26 Article 35.
27 Article 40.
28 Article 41.
29 Article 44.
30 Article 47.

Finally, it contemplates appropriate financial measures, including central and local authorities appropriating in their budgets a certain percentage of funds for the purposes of maintaining, conserving and presenting protected property of which they are owners;[31] granting of tax concessions on expenditures incurred by owners or users of the cultural or natural heritage in protecting, conserving and presenting that heritage;[32] indemnifying, if necessary owners of protected areas for losses they might suffer as a consequence of protective programmes;[33] the setting up of "Cultural and Natural Heritage Funds", with tax concessions available to those making gifts, donations or bequests to such funds;[34] the making of special arrangements, particularly by way of loans for renovation and restoration work.[35]

The national obligations included in the *World Heritage Convention* are thus supplemented by the recommendations in the *Heritage Recommendation*..

Obligations at the International Level

Article 6 reaffirms the principle that 'the States Parties to this convention recognize that the cultural and natural heritage mentioned in Articles 1 and 2 constitute a world heritage for whose protection it is the duty of the international community as a whole to cooperate.[36] This is qualified by the statement that States Parties fully respect the sovereignty of the States on whose territory the heritage is situated and that property rights provided by national legislation are not prejudiced.[37]

The obligations of the States Parties at the international level involve undertaking to give their help in the identification, protection, conservation and preservation of the cultural and natural heritage included on the World Heritage List and the List of World Heritage in Danger. As we have seen in Chapter II, previous Conventions and agreements had dealt with protecting cultural sites from wanton destruction in time of war. Article 6.3 goes beyond this. States Parties undertake not to take any deliberate measures which might damage, directly or indirectly, the world heritage. By imposing liability only for deliberate measures, this paragraph does not impose strict liability for unintentional damage caused, for example, by pollution.[38]

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31 Article 59.
32 Article 51.
33 Article 52.
34 Article 55.
35 Article 57.
36 Article 6.1.
37 *Ibid.*
38 Meyer (1972), 52.

The question has been raised whether the protective provisions of the Convention apply during time of war, or whether they are supplanted by the *Hague Convention*, dealing with the protection of cultural property in the event of armed conflict.[39] No mention is made of the *Hague Convention* in the text of the *World Heritage Convention*. It seems clear that the conventions can operate together. Bolla has described the *World Heritage Convention* as "the peacetime Red Cross" for monuments and natural sites, while the Hague Convention is the "war-time Red Cross" for monuments.[40] However, it is desirable that the *World Heritage Convention* operates in time of war because the *Hague Convention* does not provide any protection to natural sites.

International protection of the world heritage under the *World Heritage Convention* is to be understood as a system of international cooperation and assistance designed to support State Parties to the Convention in their efforts to conserve and identify that heritage. In other words, the role is one of supporting, rather than replacing, the protective efforts of the nations concerned.

Institutional Arrangements for the Protection of the World Heritage

One of the major reasons for the adoption of the Convention was to establish a permanent institutional framework for the collective protection of the world heritage. This framework is made up of the major policy and decision-making body, the World Heritage Committee, with its executive body the World Heritage Bureau. The World Heritage Committee is responsible for the other aspects; the World Heritage List, List of World Heritage in Danger and the World Heritage Fund, as well as determining requests for international assistance.

The World Heritage Committee

The Convention establishes the Committee, to be called the World Heritage Committee, within the United Nations Educational, Scientific and Cultural Organization.[41] The Committee was originally to be composed of the representatives of 15 States Parties to the Convention, elected by States Parties meeting in General Assembly. This number was increased to 21 at the second General Assembly, in accordance with Article 8.1, when the number of States Parties had reached 40.

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39 See Chapter II.

40 Bolla (1980), 5.

41 Article 8.

The terms of office of States Parties extend for three meetings of the General Conference of Unesco, with a third of members being replaced at each session.[42] Members are to choose as their representatives persons qualified in the fields of cultural or natural heritage. Article 8.2 provides that election of members of the Committee must ensure an equitable representation of the different regions and cultures of the world. Representatives of three of the non-governmental organizations referred to in Chapter I, namely, the Rome Centre, IUCN and ICOMOS, as well as any other intergovernmental or non-governmental organization with similar objectives requested by States Parties in General Assembly,[43] may be invited to attend the meetings of the Committee in an advisory capacity.[44] This provision is designed to prevent duplication of effort and to keep channels of communication open between the Committee and organizations with expertise in relevant areas.[45]

Emphasis is placed on cooperation between the Committee and, IUCN, the Rome Centre and ICOMOS throughout the Convention. Thus, Article 13.7 provides that:

> The Committee shall cooperate with international and national governmental and non-governmental organizations having objectives similar to those of this Convention. For the implementation of its programmes and projects, the Committee may call on such organizations, particularly the International Centre for the Study of the Preservation and Restoration of Cultural Property (The Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for the Conservation of Nature and Natural Resources (IUCN), as well as on public and private bodies and individuals.

The Committee uses IUCN and ICOMOS not only to analyse nominations for world heritage listing but also to prepare reports on various issues for its consideration and to monitor progress in the protection of properties on the World Heritage List or List of World Heritage in Danger.[46]

The Executive of the Committee, the World Heritage Bureau, consisting of a chairperson, four vice-chairpersons and a rapporteur, meets twice a year.[47] The Bureau decides what nominations will be transmitted to the World Heritage

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42 Article 9.1.

43 The Committee has invited the United Nations, the United Nations Environmental Programme, the Food and Agriculture Organization and the World Food Programme, among others, to attend its meetings.

44 Article 8.3.

45 Meyer (1972), 54.

46 See for example, Unesco doc. SC.87/CONF.005/9 at paras 12-22.

47 Unesco document WHC/2 at para 109.

Committee and examines and makes recommendations on certain questions to facilitate the work of the Committee.[48]

The original World Heritage Committee was elected at the first General Assembly of States Parties to the Convention, held in Nairobi in November, 1976.[49] Fifteen members were elected and, in conformity with Article 9.2, a choice by lot was made on terms of office of the first members of the World Heritage Committee. The Committee held its first meeting in Paris from 27th June - 1st July, 1977. At this meeting the Committee adopted Rules of Procedure, in accordance with Article 10.1.[50] Decisions are taken by two thirds majority vote, with a majority constituting a quorum.[51] The World Heritage Committee meets once in the second half of each year in various countries, at the invitation of States Parties.[52]

The Committee is assisted by a Secretariat appointed by the Director-General of Unesco.[53] The Director-General is responsible for preparing the Committee's documentation, agendas and for the implementation of its decisions.[54] The cultural part of the Convention is handled by the Division of Cultural Heritage of the Sector for Culture of Unesco, while the natural part is handled by the Division of Ecological Sciences in the Science Sector.[55]

The World Heritage Committee has three essential functions.[56] These are:

> (i) to identify, on the basis of nominations submitted by States Parties, cultural and natural properties of outstanding universal value which are to be protected under the Convention and to list those properties on the World Heritage List.[57]
>
> (ii) to decide which properties included in the World Heritage List are to be inscribed on the List of World Heritage in Danger.[58]

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48 Unesco document CC.78/Conf.009/2.

49 See Unesco document SHC.76/Conf.014/col.9.

50 Unesco document WHC/1.

51 Article 13.8.

52 The dates and places of the meetings of the World Heritage Committee are as follows: First session - 27th June - 1st July 1977, Paris: Second Session - 5th - 8th September 1978, Washington D.C. Third session - 23rd - 27th October 1979, Luxor; Fourth session - 1st - 5th September 1980, Paris; Fifth session - 26th - 30th October 1981, Sydney; Sixth session - 13th - 17th December 1982, Paris; Seventh session - 5th - 9th December 1983, Florence, Eighth session - 29th October - 2nd November 1984, Buenos Aires; Ninth session - 2nd - 6th December 1985, Paris; Tenth session - 24th - 28th November 1986, Paris; Eleventh session - 7th - 11th December 1987, Paris; Twelth session - 5th - 9th December 1988, Brasilia.

53 Article 14.1.

54 Article 14.2. In performing these functions, the Director-General is to utilize to the fullest extent possible the services of the NGOs.

55 Unesco document 22C/91.

56 See Unesco document WHC/2 para 3.

57 Article 11.2.

58 Article 11.4.

> (iii) to determine in what way and under what conditions the resources in the World Heritage Fund can most advantageously be used to assist States Parties, as far as possible, in the protection of their properties of outstanding universal value.[59]

Each of these functions will be dealt with in turn.

(i) The World Heritage List

The World Heritage List is provided for in Article 11.2. It is the part of the institutional framework which enables identification of uniquely valuable sites. The World Heritage List is to consist of `properties forming part of the cultural and natural heritage, as defined in Articles 1 and 2, which the World Heritage Committee considers as having outstanding universal value in terms of such criteria as it shall have established'.[60] As we have seen, these criteria are established in the *Operational Guidelines.*

Most of the properties on the World Heritage List satisfy more than one of the criteria specified. Further, some properties satisfy both cultural and natural heritage criteria; these properties are inscribed as `mixed sites'. The inclusion of properties is a gradual process and no formal limit is imposed on the total number of properties on the List or on the number of properties which can be nominated by States.[61]

Efforts are made to avoid any disproportion between cultural and natural heritage properties on the List,[62] the fear being that States Parties will be discouraged from nominating natural properties if they see the list as essentially one of cultural properties. There has, however, always been a greater number of cultural properties than natural ones.[63] This can be explained in terms of the difficulty of assessing the values of natural heritage properties, and also by the greater consequences for the resource exploitation of States Parties of a nomination of a natural heritage site, given that these are inevitably larger than cultural sites, and subject to a variety of uses. Recently the World Heritage Committee found it necessary to include a provision in the *Operational Guidelines* that, in view of the difficulty in handling the large number of cultural nominations being received, States Parties should 'consider whether their

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59 Article 13.

60 Article 11.2.

61 *Operational Guidelines,* Paragraph 6(iv). An average number of thirty properties per year has been included on the World Heritage List.

62 Para 6(iii).

63 The IUCN has expressed concern at this disproportion: see Resolutions and Recommendations of the 16th General Assembly of IUCN, reprinted in (1984) 13/3 *Environmental Policy and Law,* 127.

cultural heritage is already well represented on the List and if so to slow down voluntarily their rate of submission of further nominations.[64]

As at January 1989, there were 315 properties on the List; 230 of these were cultural sites, 73 natural sites and 12 mixed sites.[65] It is clear that the disproportion is not a real problem and was inevitable given that the natural properties are of considerably greater size than the cultural ones; for example, the Djoudj National Bird Sanctuary in Senegal consists of 16,000 acres, the Australian Great Barrier Reef extends over 350,000 square kilometres, Los Glaciares National Park, Argentina, covers 600,000 hectares, and the Gambian Niokolo-Koba National Park 800,000 hectares.

Nomination Procedure

It was originally envisaged that the nomination procedure would involve the submission by States Parties of tentative lists, from which would be selected appropriate outstanding properties for inclusion on the World Heritage List. Article 11.1 provides for these tentative lists, requiring each State Party to submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage and suitable for inclusion in the World Heritage List. The inventories are not to be regarded as exclusive nor do they definitely commit either States or the Committee. They are treated in a confidential manner.

The aim of requiring tentative lists is to enable the Committee and the NGOS to carry out the comparative and serial studies which are necessary for a methodical approach to building up the World Heritage List.[66] 'The tentative lists are indispensable to the evaluating bodies for they provide them with the advance notice they need in order to prepare objective comparative assessments and to discuss the issues involved with the nominating authorities.[67]

The World Heritage Committee has had considerable difficulty in obtaining these tentative lists from States Parties.[68] Throughout its meetings it has been stressed that the lists are extremely important, especially in allowing comparisons to be made between cultural properties, to decide which are "outstanding examples" and of

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64 Para 6(iv).

65 The World Heritage List is provided in Appendix D.

66 Unesco doc SC.81/Conf. 009/8, para 20.

67 Unesco (1989).

68 The explanation for Australia's failure to submit tentative lists is undoubtedly a political one; the Government has been unwilling to create a controversy by making it clear that it believes an area to be of world heritage value without actually taking the step of nomination- See Chapter VI.

"universal value." In 1985 a decision was made not to consider any nominations of cultural properties for the World Heritage List from States which had not submitted tentative lists[69] and in 1988 it was decided to give priority to those natural property nominations from States which have submitted tentative lists unless a State Party has given a specific explanation why it cannot be provided.[70] Under recent amendments to the *Operational Guidelines* each State Party is requested to submit to the World Heritage Committee a tentative list of properties which it intends to nominate for World Heritage Listing in the following five to ten years.[71]

The procedure for dealing with nominations for the World Heritage List involves several steps. The State Party nominating the property is required to complete a detailed nomination form,[72] which should be a "well-argued case", providing all the information to demonstrate that the property nominated is truly of "outstanding universal value".[73] The competent authorities of States Parties are required to provide details in relation to the property, including information as to its specific location, juridical data, state of preservation/conservation, justification for inclusion in the World Heritage List, legal information and administrative framework. Information is also required on bibliographical references along with photographs and films describing the property. The Secretariat also requires maps indicating the location of the property and any other relevant details.

These nomination forms and other information must be received by the Secretariat at Unesco by 1st October for processing the following year. By 1st November the Secretariat transmits the nominations to the appropriate international organization (either ICOMOS or IUCN) which undertakes a professional evaluation of each nomination according to the criteria adopted by the Committee and transmits these evaluations to the Secretariat under three categories; namely, (a) properties which are recommended for inscription without reservation; (b) properties which are not recommended for inscription; (c) properties whose eligibility for inscription is not considered absolutely clear.[74]

The Bureau examines the nominations during June. Following this, the summaries of nominations and recommendations of the Bureau are transmitted to all States Parties concerned. During December the Committee examines those

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69 Unesco doc. SC.81/Conf.009/8, para 18.

70 Unesco doc. WHC/2, para 7.

71 *Ibid.*

72 *Operational Guidelines*, Para 52.

73 Para 10.

74 Para 53.

recommendations and makes the final decision as to which properties are to be listed.[75]

There is provision in the *Operational Guidelines* for the waiving of deadlines in cases involving properties which, in the opinion of the Bureau, after consultation with the competent NGO, would unquestionably meet the criteria for inclusion in the World Heritage List and which have suffered damage from disaster caused by natural events or by man's activities. Such nominations are processed on an emergency basis to enable them also to be included in the List of World Heritage in Danger, if necessary.[76] The nomination by Yugoslavia of the Natural and Culturo-Historical Region of Kotor was processed on this basis in 1979, following serious earthquake damage.[77]

Consent to Nomination

Article 11.3 of the *World Heritage Convention* represents a significant concession to State sovereignty. It provides that the inclusion of a property in the World Heritage List requires the consent of the State concerned. In any case, the World Heritage Committee only considers listing properties when it has received a closely-argued nomination from the State concerned. Early drafts of the *World Heritage Convention* had allowed the Committee to include a property on the World Heritage List without a State requesting it, if the Committee had subsequently obtained the State's consent. This was changed because it was considered an infringement on sovereignty. This change is in line with the emphasis on international cooperation rather than international authority.[78]

The situation faced by Federal States which are parties to the *World Heritage Convention* is interesting. Recognition is given in the Convention to the special situation of such States, by the inclusion of a so-called "federal clause,"[79] which provides that for States Parties which have a federal or non-unitary constitutional system where the implementation of the Convention comes under the legal jurisdiction of individual constituent states, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government is to inform the competent authorities of the relevant jurisdiction of the Convention and recommend its adoption. In federal states where the implementation of the Convention comes under the legal jurisdiction of the central government,

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75 *Ibid*, para 52.

76 Para 55.

77 Unesco Doc. CC.79/CONF.003/12 & REV.

78 Meyer (1972), 55.

79 Article 34.

however, the obligations of that Government shall be the same as for those States Parties which are not federal states.

This federal clause does not affect the position with regard to consent to nomination. It is clear in the terms of the Convention that it is only the consent of the central government, with status in international law, and which ratifies or accedes to the Convention, which is required. Thus, in a nation like Australia, with a Federal Government and six constituent States, the World Heritage Committee does not require the consent of the government of the State where the property is situated in order to accept a nomination for world heritage listing. For example, the State Government of Tasmania under former Premier Mr Lowe originally requested the nomination of the Western Tasmanian Wilderness National Parks for world heritage listing in 1981. When this consent was withdrawn in 1982 by the newly-elected Gray Tasmanian Government in light of the Gordon River Hydro-Electric Power Development,[80] the nomination went ahead and was accepted nonetheless. Further, the nomination of the Wet Tropical Rainforests of North Eastern Australia was vigorously opposed by the Queensland State Government, but this did not prevent the property from being listed. It is desirable if the constituent governments can cooperate in nominations. Evidence of a lack of cooperation could in fact lead to the rejection of a nomination as the World Heritage Committee must now be satisfied that the property nominated has adequate long-term legislative, regulatory or institutional protection.[81] The Committee may well not be satisfied of this if the constituent Governments are unable to cooperate with regard to the protection and management of the nominated area.

Removal of a Property from the World Heritage List

The issue of the circumstances in which a property can be removed from the World Heritage List raises the issue of the nature of the universal interest in the world heritage. There are specified procedures under which the World Heritage Committee can delist a property. The *Operational Guidelines* outline a procedure in cases where either the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List or where the intrinsic qualities of a world heritage site were already threatened at the time of its nomination by action of man and where the necessary corrective measures as outlined by the State Party at the time, have not been taken within the time proposed.[82] The rationale for removal in the first circumstance is clear; the site will no longer exhibit the qualities

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80 For more detailed facts of this controversy, and the High Court case which followed, see Chapter X.

81 WHC/2, Para 36 (b)(vi).

82 Para 37.

for which it was listed. In the second case it seems that there is recognition that where the State Party has not taken steps to prevent potentially damaging activities which are within its control, it is not appropriate that the site be given special status. The Guidelines only contemplate the removal of a site in these two circumstances.

One question which arises is whether a State Party can withdraw its consent to the listing of the property after that property has been inscribed on the World Heritage List, and thereby unilaterally delist it. There are three circumstances in which one can envisage that a State may wish to withdraw a property from the List: first, where there was a change of Government and adoption of a developmentalist policy with regard to utilization of resources; second, where a State had insufficient economic resources to protect the area, or a financial need to exploit any natural resources within that area; and third, where a property had deteriorated so that it no longer warranted the description of world heritage.

As yet neither of the first two situations have arisen, although there have been suggestions by opposition parties in Australia that attempts could be made to have Australian sites withdrawn should they win Government.[83] The third situation is catered for in the *Operational Guidelines*. The State Party is required to inform the Secretariat of the Committee.[84] The situation will then be investigated by the Committee. Using the services of the NGOs, the Committee will take a decision whether to remove the property, depending on whether or not it still fulfills the criteria for inscription.[85]

If the world heritage concept is to mean anything in practice, the international community must acquire some interest upon the inclusion of a property in the World Heritage List. Thus, although the obligations on Parties to protect world heritage within their borders are necessarily qualified by reference to State circumstances and resources, it is surely not appropriate that the property can be unilaterally delisted by the nominating State.

The Convention itself is silent on this matter, although the view that a State cannot take this step finds some support in the fact that Article 11.3 of the Convention only requires a State's consent to initial inclusion of the property, and that there is nothing to require the continuation of consent. From the other point of view, however, there is nothing in the Convention to prevent a State from withdrawing its nomination. Apart from arguments as to the possibility of the withdrawal of consent

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83 Hobart *Mercury*, August 15th, 1988.

84 Para 38.

85 Paras 41-42.

to listing, where a previous Government had nominated a property and seen it accepted for listing by the World Heritage Committee, a State Party would be flouting its international obligations in attempting to have it removed from the List. For a State Party to decide that it cannot economically afford to ensure protection for a listed site would be one thing. The Convention attempts to ensure that international assistance is available to assist States Parties to protect world heritage sites, but States are only required to carry out their obligations with regard to such properties to the utmost of their resources and as appropriate for each country. An attempt to have a site removed from the List, however, would be indicating that the State Party is unwilling to accept its obligation to protect that property if this is at all possible.

World Heritage Listing and Territorial Disputes

The Convention envisages situations involving world heritage properties which are subject of a territorial dispute or where the boundaries of the property overlap national boundaries. Article 11.3 provides that the inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute. The *Operational Guidelines* provide that in cases where a cultural or natural property which fulfils the criteria adopted by the Committee extends beyond national borders the States Parties concerned are encouraged to submit a joint nomination.[86]

The provisions with regard to joint nominations and nominations in areas where there are territorial disputes have been relevant in two particular cases. In 1981 the Old City of Jerusalem was included on the World Heritage List, despite the dispute between Jordan and Israel over that territory. The World Heritage Committee, in considering a nomination of the site from Jordan referred to the unique value of the nominated area and opened it up to the established procedure for nomination.[87] In 1981 the property was listed, with only the United States of America dissenting on the basis that Jordan had no standing to make a nomination and that the consent of Israel was required to the listing. In 1979 the United States and Canada nominated the first joint world heritage site - the National Parks of Wrangell - St Elias and Kluane on the Alaskan-Canadian border.

In the cases of both jointly nominated properties and those where there are territorial disputes, there may well be problems satisfying the Committee that there are adequate legal protection and management mechanisms to ensure the conservation of cultural properties[88] or adequate long-term legislative, regulatory or institutional

86 WHC/2, para 16.

87 See Unesco doc. CC.80/Conf.016/10 Rev.

88 *Ibid*, para 24(b) (ii)

protection for natural properties. It is only since 1988 that these requirements have been included, and it seems unlikely that the Committee could be satisfied of these factors in relation to the Old City of Jerusalem, were it to be nominated today.

The Role of the World Heritage List

The World Heritage List is to be a representative identifying list of cultural and natural properties which meet the Convention's and Committee's criteria. Properties should be evaluated relatively.[89] There had been considerable debate in the negotiations finalizing the Convention over whether it was desirable to have a World Heritage List and as to what purpose the List should serve, or what goals it should promote.[90]

The World Heritage List serves four main purposes. First, it identifies the most outstanding sites for which international assistance under the Convention is then made available. Second, it draws the attention of governments, organizations and individuals to the outstanding qualities of the listed site, thus encouraging government and public support for the protection of that site. Third, when a site is listed the Committee makes statements with regard to the protection of that property which influence government decisions in relation to it. Fourth, the List enables monitoring of the most outstanding properties in an attempt to ensure that they are properly protected.

The practical effect of listing is better protection for the property, by making the international assistance scheme available in relation to that property. Thus, the immediate and obvious benefit of international listing is to strengthen the hand of those who are committed to its protection, whether they be the conservation personnel of national antiquities or parks services, who must compete with other government agencies for limited funds, local authorities or even private associations of concerned citizens.[91]

The World Heritage Committee frequently makes comments at the time of listing designed to draw the attention of States Parties to the need to protect properties, or to extend and enlarge their nominations. For example, when inscribing the historic centre of Rome on the World Heritage List, the World Heritage Committee recommended to the representative from Italy that the site be extended, a recommendation which was followed up by the State Party.[92] The Committee further

89 *Ibid*, para 47.

90 Meyer (1972), 56-57.

91 Unesco (1989).

92 Unesco Doc. CC.80/CONF.016/10 REV.

stated that it considered it desirable that the Vatican City be protected and recommended that an invitation to accede to the Convention be addressed by the General Conference of Unesco to the Holy See.[93] This was done, with the subsequent accession of the Holy See and the inscription of the Vatican City on the List. Once listed, the properties also become part of a monitoring programme carried out by the NGOs, which report on various properties and aspects of their protection to the World Heritage Committee.[94] In 1987 the Committee approved a system of sending out questionnaires to States Parties for the purpose of monitoring the conservation of cultural properties.[95]

(ii) The List of World Heritage In Danger

The second function of the World Heritage Committee is to establish, extend and publish a List of World Heritage In Danger.[96] This List serves to identify those world heritage properties which face special danger and for the conservation of which international efforts are needed. The Committee may include a property on this list only when five requirements are met. The property under consideration must be on the World Heritage List; it must be threatened by serious and specific danger; major operations must be necessary for the conservation of the property; assistance under the Convention must have been requested for the property; and an estimate of the cost of such operations must have been submitted.[97]

As the World Heritage Committee has noted, properties may face both ascertained and potential danger.[98] Examples of ascertained danger are the serious deterioration of structure and/or ornamental features (for cultural properties) and a serious decline in the population of endangered species or other species of outstanding universal value (for natural properties). Examples of potential danger include modification of juridical status of the property diminishing the degree of protection for it, and the adoption of an inadequate management plan.[99]

There are seven properties on the List of World Heritage in Danger. These are the Royal Palaces of Abomey (Benin), the Old City of Jerusalem and its Walls (Hashemite Kingdom of Jordan), the Bahla Fort (Oman), the Chan Chan archaeological Zone (Peru), the Ngorongoro Conservation Area (United Republic of

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93 *Ibid.*

94 See Unesco doc. SC.87/CONF.005/9, paras 16-22.

95 It will deal with 50 such properties in each year- Unesco doc. SC.87/CONF.005/9, paras 12-15.

96 Article 11.4.

97 See WHC/2, para 56

98 *Ibid*, paras 58 and 59.

99 *Ibid.*

Tanzania), the Natural and Culturo-Historical Region of Kotor (Yugoslavia) and the Garamba National Park (Zaire). The properties have been inscribed for various reasons. The Djoudj National Bird Sanctuary of Senegal, which was included on the Danger List until December 1988, was threatened by a proposal for the construction of a dam.[100] The Garamba National Park was listed because of the critical situation of the white rhinoceros population, which had been reduced to 15 specimens at the time of listing.[101] The Royal Palaces of Abomey had been damaged by a tornado in 1984.[102] Kotor suffered from serious earthquake damage;[103] and the Old City of Jerusalem was faced with destruction of religious properties due to urban development plans, deterioration of monuments due to lack of maintenance and responsible management, as well as the disastrous impact of tourism on the protection of monuments.[104]

The Danger List Inclusion Procedure

Unlike the position with regard to inclusion of properties on the ordinary World Heritage List, the consent of the State on whose territory the property is situated is not required for the inclusion of a world heritage property on the Danger List. It is necessary, however, that the State has requested assistance for the property under the Convention. The World Heritage Committee has established additional criteria for the inclusion of properties in the List of World Heritage in Danger, in accordance with Article 11.5 of the *World Heritage Convention.* As well as specifying the sorts of ascertained and potential dangers which a candidate for the List of World Heritage in Danger might face, the Committee requires that the factor or factors which are threatening the integrity of the property must be those which are amenable to correction by human action.[105]

The procedure for the inclusion of properties on the List of World Heritage in Danger is specified in the *Operational Guidelines.* When considering the inclusion of a property in this List, the Committee is required to develop, and adopt in consultation with the State Party concerned, a programme for corrective measures.[106] In order to do this, the Committee can request information about the property and the dangers it faces and may send a mission of qualified observers from one of the relevant NGOs. The Committee then examines the information and makes a decision, informing the

100 See Unesco Doc. CLT.85/WS/11.

101 *Ibid.*

102 See Unesco Doc. CLT.85/Conf.008/Col.1.

103 See Unesco Doc. CC.79/CONF.003/12 &REV.

104 See Unesco Doc. CLT.82/CH/Conf.015/8.

105 *Ibid,* para 60.

106 *Ibid,* para 62.

State Party of that decision. The Committee is required to review the state of the property at regular intervals and to decide whether additional measures are needed, or whether the property should be deleted from the List of World Heritage in Danger (if the property is no longer under threat) or from both the lists if the property has lost those characteristics which led to its inclusion on the World Heritage List.[107]

The List of World Heritage in Danger primarily serves to alert the public and governments to the serious dangers a world heritage property faces. As the Committee has realised, decisions which affect world heritage properties are taken by Governments after balancing all factors. The advice of the World Heritage Committee can often be decisive if it can be given before the property becomes threatened.[108]

The Relationship of Listing to the Obligations of States Parties

We have noted that properties can satisfy the world heritage criteria in the Convention and yet be rejected for inclusion on the World Heritage List. It may be that they do not exhibit the quality of "outstanding universal value" according to the guidelines established by the World Heritage Committee. Alternatively, they may satisfy all criteria except that which requires ongoing protective regimes to be in place. Article 12 of the *World Heritage Convention* provides that the fact that a property belonging to the cultural or natural heritage has not been included in either of the lists shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in the lists. As we shall see, the only consequence of inclusion on the World Heritage List is that international assistance is then available with regard to that property. Article 12 makes it clear that, although a property which is not listed will not be able to be part of the international assistance scheme established under the Convention, obligations in relation to it may well still apply. This is because the obligations under the Convention relate not to listed items as such, but to sites which constitute part of the world heritage.

Taken with Article 4, which provides that it is primarily the duty of the State Party to identify world heritage within its territory, it is clear that obligations arise in relation to all such sites identified by States Parties, whether they are formally nominated or not. Further, once a property is identified by a State, the fact that it has been rejected for listing does not excuse that State from its obligations. Once a nomination has been made, the State Party has indicated a domestic identification of

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107 *Ibid*, paras 68 and 69. The Djoudj National Bird Sanctuary, in Senegal was removed from the Danger List only in December 1988.

108 *Ibid*, 61.

world heritage and hence obligations arise in relation to the property, even in the absence of listing.

(iii) International Assistance

The third important function of the World Heritage Committee is to determine in what way and under what conditions the resources in the World Heritage Fund can most advantageously be used to assist States Parties in the protection of the world heritage. This function is dealt with in Article 13 of the *World Heritage Convention.* The Committee is to consider requests for international assistance from States Parties with respect to property forming part of the cultural or natural heritage which is included or potentially suitable for inclusion on the World Heritage List.[109] The conditions and arrangements for such assistance are provided for in Part V of the Convention, which will be dealt with following.

International assistance is provided from a Fund for the Protection of the World Heritage (the World Heritage Fund), which is established in Part IV of the Convention. Article 15.1 establishes the Fund, which is a trust fund, in conformity with the Financial Regulations of Unesco.[110] The resources of this Fund are to consist of voluntary and compulsory contributions to be made by State Parties, contributions, gifts or bequests, interest accrued on the fund and funds raised to benefit the Fund.[111]

At the first General Assembly of States Parties to the Convention, held in Nairobi in November 1976, compulsory and voluntary contributions to the World Heritage Fund were set at 1% of the contributions to the regular budget of Unesco. Contributions have remained at this level ever since. This was in accordance with Article 16.1 under which States Parties undertake to pay regularly, every two years, to the World Heritage Fund, contributions set at a percentage determined by the General Assembly of States Parties up to a maximum of 1%. States Parties are permitted by Article 16.2 to declare themselves not bound by Article 16.1 at the time that they deposit their instruments of ratification, acceptance or accession. Article 16.4 provides for voluntary contributions to be made by those States Parties taking this course, and provides that the amounts to be paid 'should not be less than the contributions which they should have paid if they had been bound by the provision of paragraph 1.' Voluntary contributions must also be paid on a regular basis, at least every two years. Any State Party which is in arrears with the payments of its compulsory or voluntary contributions for the current year of the calendar year

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109 Article 13.1.

110 Article 15.2.

111 Article 15.3.

immediately preceding it shall not be eligible to be a member of the World Heritage Committee.[112]

The resources of the Fund may only be used for such purposes as the Committee shall define.[113] It is, however, specified that the Committee may accept contributions to be used only for a certain programme or project, provided that it has already decided on the implementation of the project or programme.[114] No political conditions may be attached to contributions made to the Fund.[115] Revenue for the protection of the world heritage is also generated through fundraising. This is dealt with in Article 167, which provides that States Parties shall consider or encourage the establishment of national, public or private foundations or associations whose purpose is to invite donations for the protection of the heritage. States Parties undertake to give their assistance to international fund-raising campaigns organized for the World Heritage Fund under the auspices of Unesco and to facilitate collections made by the bodies listed as able to make contributions to the Fund.[116]

The World Heritage Committee has faced considerable difficulty in maintaining the resources of the Fund at a sufficient level to meet the needs of countries seeking assistance to protect the world heritage. In 1984, for example, the total sums requested for technical cooperation greatly exceeded the allocated budget of $200,000, and technical cooperation projects had to be limited to a maximum of $20,000 each. The funds available for providing for the operating costs and international assistance have varied between $489,250 in 1979 and $2,700,000 in 1987. Since 1987 there has been a standard allocation of $100,000 for preparatory assistance, $700,000 for technical cooperation and $500,000 for training with between $100,000 and $230,000 allocated for emergency assistance.[117] The budget for 1989 has available resources of $2,112,974.[118]

Conditions and Arrangements for International Assistance

As noted earlier, one of the major functions of the World Heritage Committee is to deal with grants or applications for international assistance. Part V of the Convention details conditions and arrangements for such international assistance. The

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112 Article 16.5. On this basis several states have withdrawn their nominations for the Committee, including the Federal Republic of Germany and Costa Rica in 1978- see Unesco Doc. CC.78/Conf.011/6, para 11.

113 Article 15.4.

114 *Ibid.*

115 Article 15.4.

116 Article 18.

117 Consideration of the state of the World Heritage Fund is a standing item at all World Heritage Committee meetings.

118 See Unesco doc. SC/88/CONF.001/13, para 56.

Convention provides that any State Party may request international assistance from the World Heritage Committee for property forming part of the cultural or natural heritage of outstanding universal value situated within its territory.[119] This assistance can take one of five forms: preparatory assistance, emergency assistance, training, technical cooperation and assistance for promotional activities.[120]

Preparatory assistance is available for the purpose, among others, of preparing tentative lists of properties, organizing meetings for the harmonization of tentative lists within the same geo-cultural area, and preparing nominations of cultural and natural properties.[121] Emergency assistance is provided in relation to properties included or suitable for inclusion in the World Heritage List which have suffered severe damage due to sudden, unexpected phenomena or which are in imminent danger of severe damage.[122] Such assistance can be made available for preparing urgent nominations of properties for the List, drawing up emergency plans to safeguard properties and undertaking necessary emergency measures.[123] Examples of emergency assistance include the granting in 1981 of $56,000 to Pakistan for salaries for workmen and purchase of equipment for emergency restoration work at Lahore Fort and Shalimar Gardens and, in the same year, a contribution of $95,000 to Tunisia for emergency restoration work at Dar Haddad Palace in the Medina of Tunis. In 1982 $20,000 was granted to the People's Republic of Yemen for elaborating a plan for installation of a waste water drainage system within the Old City of Shiban and in 1988 a contribution of $70,000 was made to Ecuador, Quito, for urgent work required for consolidation of monuments damaged by earthquakes. Training assistance related to the implementation of the *World Heritage Convention* is available.

Technical cooperation can be requested for work foreseen in safeguarding projects for properties included in the World Heritage List. It is these requests which now take the bulk of the resources of the World Heritage Fund. Recent examples of technical cooperation include the 1988 grant of $50,000 to Petra, Jordan, as a contribution towards research work on weathering and subsequent protection of the property; a contribution of $50,000 to Selons Game Reserve in Tanzania for equipment for anti-poaching measures; and a grant in 1989 of $54,000 to the Galapagos Islands (Equador) for the purchase of two boats for strengthening protection for this site.

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119 Article 19.

120 Part III of the Guidelines.

121 Para 70.

122 Para 72.

123 *Ibid.*

Except so far as preliminary inquiries, assistance with training of staff and specialists[124] and assistance to national or regional centres[125] are concerned, international assistance may only be granted to property forming part of the cultural and natural heritage which the World Heritage Committee has decided or may decide to enter in either the World Heritage List or the List of World Heritage in Danger.

The *World Heritage Convention* does not spell out in any detail the procedure for dealing with requests for international cooperation. The only provisos in the Convention are that the request should define the operation contemplated, the work that is necessary, the expected cost thereof, the degree of urgency and the reasons why the resources of the state requesting assistance do not allow it to meet all expenses. Further, by Article 21.2, requests based upon disasters or natural calamities should be given immediate priority consideration and a reserve fund should be at the Committee's disposal for such contingencies. Article 22 specifies the types of assistance which the World Heritage Committee can grant. These include, provision of experts, training of staff, supply of equipment, low-interest or interest-free loans and, in exceptional cases and for special reasons, the granting of non-repayable subsidies. As a general rule only part of the cost of work necessary is borne by the international community.[126] 'The contribution of the state benefiting from international assistance shall constitute a substantial share of the resources devoted to each programme or project, unless its resources do not permit this.'[127]

The Committee has defined the procedure by which requests are considered, in accordance with Article 21. Further, the Committee has, under Article 13.4 specified an order of priorities for the granting of international assistance. At the head of the order of priorities is emergency measures to save property included or nominated for inclusion in the World Heritage List. This is followed by preparatory assistance for drawing up tentative lists of cultural and/or natural properties suitable for inclusion in the World Heritage List. The third priority is projects which are likely to have a multiplier effect because they stimulate general interest in conservation, contribute to the advancement of scientific research, contribute to the training of specialized personnel or generate contributions from other sources.[128] No preference is given to properties on the List of World Heritage in Danger; the fact that a property is included or not included on that List will have no bearing on the likelihood of assistance being available with regard to it.

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124 Article 22(c).
125 Article 23.
126 Article 25.
127 *Ibid.*
128 Para 88.

Article 26 of the *World Heritage Convention* requires the World Heritage Committee and the recipient state to define in an agreement the conditions under which a programme or project for which international assistance under the terms of the Convention has been granted, shall be carried out. A standard agreement has been drawn up by the World Heritage Committee covering the scope and nature of the technical cooperation granted, the obligations of the Government, the facilities, privileges and immunities to be applied by the Government to the Committee and/or Unesco, to the property, funds and assets allocated to the project as well as to the officials and other persons performing services on behalf of the Committee and/or Unesco in connection with the project.[129]

Miscellaneous Provisions

The long-term promotion of the aims of the *World Heritage Convention* require their dissemination through widespread education programmes. States Parties commit themselves to encouraging such programmes under Part IV of the Convention. This Part has as its aim ensuring that the appreciation and respect of the peoples of the world for the cultural and natural heritage and an awareness of the dangers threatening this heritage should be promoted by States Parties. Article 29 requires States Parties to submit reports to the General Conference of Unesco giving information on the legislative and administrative provisions which they have adopted and other action which they have taken under the Convention. The Committee in turn is required to submit a report on its activities at each ordinary session of the General Conference.

Conclusion

The *World Heritage Convention* was, in several ways, a significant progression from the earlier international agreements we have examined. The basis of the Convention is the world heritage trust concept. This is a new idea in the realm of international cooperation. It provides a rationale for the existence of the Convention. Because of the idea that states where the heritage is situated are responsible for it as trustees for the rest of the world and for future generations, obligations are placed on States Parties to undertake significant measures to protect the world heritage within that State's borders; the obligations on such states are far more comprehensive and extensive under previous conventions, although definite concessions are made to national sovereignty. The Convention is also unique in that it establishes a permanent institutional system for achieving international cooperation to replace the

129 Para 91.

ad hoc measures taken by Unesco with regard to endangered sites such as the Abu Simble Temples.

The Convention is designed to foster international cooperation. The institutional arrangements which it establishes have survived and flourished in the seventeen years since the Convention was adopted by the General Conference of Unesco. With 108 ratifications or accessions as at 12th December, 1988, there are now only 54 states among Unesco's total membership who are yet to become parties.[130] This makes the *World Heritage Convention* 'not only Unesco's most broadly accepted international agreement but also the world's most ratified agreement on conservation.'[131] States Parties have been keen to nominate appropriate properties for inscription on the World Heritage List; the number of such nominations after an initial burst between 1974 and 1979, has averaged about 30 annually. While States Parties have not always promptly paid their contributions to the World Heritage Fund, the Fund now has sufficient resources to enable the World Heritage Committee to make significant contributions to international assistance programmes to protect the world heritage.

States Parties have made many requests for international assistance under the Convention and the World Heritage Committee has become involved in such projects as supporting the development of alternative energy sources to save the forests of the Sagarmatha National Park in Nepal, providing equipment for the protection of rare fauna in Ethiopia's Simen National Park, helping to prepare management plans in the Ngorongoro Conservation Area of Tanzania and the Maya site of Copan in Honduras, and supplying equipment necessary to eliminate feral species in the Galapagos Islands of Equador.[132]

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130 The Convention is subject to ratification or acceptance by all States which are members of Unesco and also open to accession by all other States which are invited to accede by the General Conference. A full list of States Parties is provided as Appendix E.

131 Unesco (1989), 2.

132 These examples are given by Slayter (1983), 144.

PART 2

THE IMPLEMENTATION OF THE WORLD HERITAGE CONVENTION IN AUSTRALIA

CHAPTER IV

THE DEVELOPMENT OF AN ENVIRONMENTAL CONSCIOUSNESS IN AUSTRALIA

Introduction

The implementation of the *World Heritage Convention* into Australian domestic law has been characterised by bitter conflict between the Federal and State Governments. These controversies can only be explained in terms of an analysis of the development of a domestic environmental consciousness. This environmental consciousness has created the political will for the institution of legislative and administrative measures within which the world heritage is protected. The consciousness is particularly strong on issues such as the conservation of the aspects of the environment which make Australia so unique. The *World Heritage Convention* provides a rationale for protection of these unique sites.

One response to the growing domestic environmental consciousness has been the increasing involvement of Australian Governments in global environmental debates. These issues provide a forum for Australia to develop a significant voice on the international scene, and also provide opportunities for the Government to capitalize on the domestic environment vote. World heritage issues have played an important part in enabling Australia to develop such an international voice by providing opportunities for Australian Governments to demonstrate commitment to international cooperation on environmental matters.

This chapter discusses the growth of environmental consciousness in Australia. This background is imperative to provide an understanding of the conflicts over world heritage protection.

Australia's Environmental Problems

It is only in recent years that Australia, settled only 200 years ago and for many years centred around a rural-based economy, has begun to experience the major urban pollution problems of the Northern European and North American nations. Its unique characteristics and history of settlement and development, have meant that Australia has faced its own particular environmental problems.

Land degradation arising from pastoral exploitation has long been evident. While problems of soil erosion and salinity were evident from the earliest days of

settlement, they have recently been recognised as significant hazards to growth and prosperity. It has been estimated that, even in 1975, some 91 percent of land in use in the State of New South Wales required treatment for land degradation.[1] Land degradation is directly linked to overclearing, overstocking and overcultivation.[2] Further, settled as it was in circumstances which required maximum utilization of natural resources for survival, Australia was early exposed to over-exploitation of its natural resources, without consideration of environmental consequences. Exploitation of timber resources, for example, has been an issue since the very earliest days of settlement.[3] By the 1850s most of the better agricultural land had been taken up and, through consistent heavy hunting, kangaroos and emus had become scarce.[4]

Australia's very geographical isolation has meant that it has a unique cultural and natural heritage. However, in just 200 years of European settlement its natural heritage has been radically affected; only about 50% of the forest area which existed before European occupation remains today and 75% of rainforests have been cleared.[5] Further, some 13%, or 40 of the known 329 mammal species found in Australia are threatened with extinction.[6] The first species to disappear after European arrival in Australia were the lesser stick-nest rat, the big-eared hopping mouse, and the Darling Downs hopping mouse; all as early as 1840.[7] Native populations of many species have now reached bedrock, with 70 mammal, bird, reptile, frog and fish species likely to be lost within 30 years unless urgent action is taken.[8]

As the Australian population grows and pressure on the urban environment becomes greater, it is likely that the traditional environmental problems of the industrialised European and North American nations will become of greater importance than they have been in the past. Australia is one of the most urbanized countries in the world[9] and has recently begun to face the problems associated with

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1 See Conacher, A. and J. 'The Exploitation of the Soils' in Heathcote, (1988),127. The authors provide a table of proportions of land in use in each Australian State and Territory requiring treatment, and the estimated cost at June 1975. The lowest figure is 3.6 percent in Tasmania; all the rest of the States and Territories have figures over 37 percent.

2 *Ibid*, 129

3 See Mosley, G. 'The Australian Conservation Movement' in Heathcote (1988), 178.

4 *Ibid*, 179.

5 Hare (1988), 15.,

6 *Ibid.*

7 Austin (1988), 51.

8 *Ibid*, 48.

9 85.4% of the Australian population lives in urban localities; Australia thus ranks seventh in world in degree of urbanisation behind Singapore, Spain, Israel, Iceland, the Netherlands and Scotland. Further, in 1986, 61.4% of the population resided in the six State capital cities- see Department of Immigration, Local Government and Ethnic Affairs, (1988), 5, citing the

the deterioration in urban environments.[10] While issues such as toxic waste are not as great in Australia, with its small population and industrial base, as in North America and Europe, they are becoming so. It has been suggested that while to date Australia's conservation battles have concentrated on soil erosion, rainforest and wilderness areas, the tide will turn increasingly to urban-based problems such as coastal water pollution.[11]

The Development of a Domestic Environmental Consciousness

Instances of attempts by the authorities to institute measures for environmental protection exist from the very earliest days of settlement.[12] However until the last half of the nineteenth century the overriding occupation of the Australian settlers was with survival, which was seen in terms of achieving the greatest possible exploitation of resources at the greatest possible rate.

Even though there was no real environmental consciousness as we know it today, the Australian conservation movement is commonly believed to date from April 1879 when 8600 hectares of Crown land near Port Hacking, 23 kilometres south of Sydney, were set aside 'for the use of the public forever as a national park.'[13] During the last decades of the nineteenth, and the early part of the twentieth centuries, several clubs and societies with preservation of the natural environment as their main aim, were established.[14] During this time a number of major areas were set aside for conservation purposes, including the Wilson's Promontory National Park in Victoria (1898) and the Queensland Lamington National Park (1915).[15] Even as early as 1908, James Watt Beattie was engaged in a successful tussle to stop Broken Hill Proprietary (BHP) mining the limestone Marble Cliffs beside Tasmania's wild Gordon River.[16] Despite the involvement of increasing numbers of scientists, bushwalkers and

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following sources: United Nations, *UN Demographic Yearbook 1986, World Almanac 1985*, and Australian Bureau of Statistics, 1986, *Census of Population and Housing.*

10 Note that in the last decade pollution problems have become a major public issue. For example, public concern over the pollution of Sydney's beaches and of the various Australian harbours was demonstrated in Easter 1989 when more than 100,000 Sydneysiders gathered to register their mounting concern (see Grant (1989), 4).

11 Austin (1989), 36.

12 Gilpin, *Environmental Policy in Australia* (1980), 6-7 cites examples including: in July 1788 Governor Phillip described a plan for the development of Sydney which provided for main streets two hundred feet wide; from 1795-1810, attempts were made to regulate the clearing of trees from land surrounding the only local water suply, the Tank Stream; in the early years of the twentieth century, Governor Macquarie launched a series of proclamations aimed at environmental control of industries in the Sydney area, particularly along the banks of the Tank Stream.

13 Mosley in Heathcote (1988), 179.

14 The Field Naturalists Club of Victoria (1880), the Wildlife Preservation Society (1909), National Parks and Primitive Areas Council (1933)- *ibid*, 179-180

15 *Ibid.*

16 Brown (1987), 10.

intellectuals, there was by no means a popular conservation movement before the middle of this century.

Environmental consciousness among the general public spread significantly during the 1960s and 1970s.[17] This corresponded with the increase in standards of living and amount of leisure time available to spend in the "great outdoors." Further, more scientific evidence establishing the dangers faced by environmental degradation became available.[18] The general populace was also made aware of environmental issues through the popular culture: books such as Rachel Carson's *Silent Spring,* and singers such as Bob Dylan, the 'Moody Blues' and 'The Who'.[19]

In 1965 the Australian Conservation Foundation (ACF), a truly national body concerned with a wide range of environmental issues, was formed with the aim of promoting the understanding and practice of conservation.[20] The ACF, which has become the most prominent of all the Australian voluntary conservation bodies, concentrates on nature conservation issues, particularly on protection of wilderness areas, world heritage matters, protection of endangered species, Antarctic environmental issues and woodchipping.

The late 1960s and 1970s saw a rapid expansion in the number of groups established with environment-related objectives. By 1978 the ACF directory listed 1198 non-government conservation bodies and by the turn of the decade such environmental groups had an estimated membership of some 370,000.[21] These organisations have played an important role in raising environmental consciousness in Australia. They have provided the impetus for the major conservation campaigns of the last two decades. The campaigns, which have involved protection of unique areas, have been marked by a perceived conflict between conservation and development.

The Lake Pedder Conservation Campaign

The first major such campaign occurred several years before the negotiation of the *World Heritage Convention* and long before its implementation in Australia appeared on the agenda of the Government. It began in the rugged wilderness of South West Tasmania, at the site of a 'comparatively small, elevated lake of unusual

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17 The 1970s werethe period of the "green bans" when union labour refused to work on development projects which were seen to be socially or environmentally damaging- for an excellent analysis of this movement see Roddewig (1978).

18 See Bates (1987), 7.

19 *Ibid.*

20 Gilpin, *Environmental Policy in Australia* (1980), 82.

21 These groups exist at both the national and state levels. Examples are the Friends of the Earth, the Wilderness Society, the Australian Council of National Trusts, the Keep Australia Beautiful Council, the National Trust of Australia (NSW) and the Conservation Council of Victoria.

character and significance.[22] This Lake became the focus of a campaign for its protection which assumed national and international proportions.

In 1962 the South West Committee, a federation of twelve Tasmanian Organizations concerned with conservation and outdoor recreation, was formed in response to Hydro-Electric Commission (HEC) investigations into the generation potential of the Gordon River region. The formation of the Committee was the first organized activity aimed at the conservation of South West Tasmania.[23]

In 1967 the HEC[24] submitted to the State Parliament proposals for a hydro-electric power generation scheme on the Gordon River, a consequence of which would be the flooding of Lake Pedder. This move resulted in the formation of the Save Lake Pedder National Park Committee in 1967. As a result of the environmental concerns, the Tasmanian Upper House, the Legislative Council, appointed a Select Committee to inquire into the development. This Committee found that no modification of the proposed scheme was practicable or desirable, and that the establishment of a thermal power station as proposed should be approved.[25]

Even before the findings of this Committee were released, the Parliament, led by developmentalist Labor Premier Eric Reece,[26] refusing to yield to growing public pressure, introduced the enabling legislation for the scheme.[27] Following adjournment of the debate to await the Select Committee's findings, the legislation passed through the Parliament in September 1967. From 1968-1971 public interest waned somewhat.[28] In 1971, however, with the beginning of flooding pending, the public protests gathered momentum. In March of 1971 1000 people visited the lake to demonstrate[29]. The Lake Pedder Action Committee was formed in 1971 and the United Tasmania Group (UTG), the first green political party in the world,[30] contested the 1972 State elections.[31]

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22 Committee of Inquiry on the Flooding of Lake Pedder (1975), 9.

23 *Ibid*, 22.

24 For an interesting account of the development of the Hydro-Electric Commission see McHenry, K. 'A History and Critical Analysis of the Controversy Concerning the Gordon River Power Scheme' in Australian Conservation Foundation (1972), 9. Also see Bates, G. 'The Aftermath of Lake Pedder' in Sornarajah (1983), 14-16. Further see Green (1981), 11-13.

25 Gilpin, *The Australian Environment:12 Controversial Issues*, (1980), 207.

26 On Reece and his philosophy see Green (1981), 27-38.

27 The *Hydro-Electric Commission (Power Development) Bill* 1967

28 Committee of Inquiry on the Flooding of Lake Pedder (1975), 27.

29 *Ibid*, 27.

30 *Branching Out*, (Newsletter of the Tasmanian Branch of the Wilderness Society), June 1989.

31 None of the UTG candidates gained a seat, although one came within 150 votes of doing so-*ibid*, 28.

The flooding of the Lake began early in 1973. Conservationists, led by the UTG, then targeted the newly-elected Federal Whitlam Government and Minister for the Environment in an effort to have the flooding reversed.[32] The Federal Government established the Burton Committee of Inquiry into the flooding of Lake Pedder in Tasmania. The finding of the Interim Report was that the alternatives to the adopted scheme had not been adequately investigated and that the Federal Government should provide finance to allow a moratorium of further flooding until alternatives were properly investigated, but the Tasmanian Government refused to cooperate.[33]

In its final report the Committee reiterated its finding that the alternatives had not been adequately explored. It further found that the preceding scientific investigation had been totally inadequate and that there had been no real attempt to investigate the aesthetic and recreational values of Lake Pedder, nor to take account of any public views or attitudes about the proposed scheme.[34] The report of the Committee made many criticisms of the legal and administrative procedures leading to the decision to flood the Lake,[35] and made recommendations with regard to the adverse consequences arising from the flooding.[36] It made recommendations about the lessons to be learnt from the controversy including the desirability of multi-objective planning, land-use planning, environmental impact studies and public involvement in the decision-making process.[37]

There seems little doubt that the area of which Lake Pedder was a part would have been inscribed on the World Heritage List now had it survived.[38] The IUCN argued that 'Lake Pedder is regarded as being of special importance to international science' and appealed to the Governments of Tasmania and Australia to take 'whatever action possible to preserve Lake Pedder because of its unique scientific importance.'[39] The Lake was given special mention in the Unesco/International Biological Programme "Project Aqua" as a study area of international significance whose destruction would represent a considerable scientific loss.[40] Further, during the

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32 See Green (1981), 56-57 where Dr R. Jones describes the U.T.G.'s efforts in Canberra.

33 Gilpin, *The Australian Environment: 12 Controversial Issues* (1980), 209.

34 Committee of Inquiry on the Flooding of Lake Pedder (1975), 159.

35 *Ibid*, 160-161.

36 162-3.

37 163-169.

38 For information on the unique nature of the Lake Pedder environment see 'Lake Pedder: Its Importance to Biological Science', by Drs I.A.E. Bayly, P.S. Lake, R. Swain and P.A. Tyler in Australian Conservation Foundation (1972).

39 Hobart *Mercury* 21/4/1972, referred to in an advertisement for the United Tasmania Group's "Save Lake Pedder Campaign".

40 Committee of Inquiry on the Flooding of Lake Pedder (1975), 27.

conservation campaign, scientists discovered thirteen animal and four plant species endemic to Lake Pedder.[41] The Burton Committee in its interim report found that 'Lake Pedder was of significant international scientific interest and importance.'[42].

In the Lake Pedder campaign the conservationists lost their battle to have the Commonwealth Government act to the full extent of its constitutional powers to protect this area of unique natural values. Indeed, at that time there was probably very little the Federal Government could have done beyond offering the State grants to stop the project. 'We're not interfering in the State's affairs. There's no head of power we can use to implement legislation or anything like that. Too bad', were the words of Prime Minister Whitlam to his Minister for the Environment, Dr Moss Cass.[43] It was to be the next Labor Government which would test all possible powers of the Commonwealth in its bid to save another unique Tasmanian area.[44]

The importance of the Pedder saga in the development of an Australian environmental consciousness is threefold. First, it marked the first truly national campaign to preserve a truly national natural treasure. Emphasis was given by conservationists of the era to the fact that the loss of Lake Pedder would be a loss, not only to Tasmania, but to the nation as a whole.[45] As was stated in one newspaper: 'Lake Pedder does not belong to Tasmania alone, any more than the Great Barrier Reef belongs to just Queensland. It is a NATIONAL asset and it is as a NATIONAL asset that it should be considered.'[46]. In its interim report the Burton Committee found that 'the wilderness area is outstanding and that it is a national asset to meet a need for people living outside Tasmania, as well as Tasmanians.'[47] In his conclusion to the *Pedder Papers*, Sir Garfield Barwick, Vice-President of the Australian Conservation Foundation wrote: 'Those who will lose something as a result of the destruction of Lake Pedder are not only Tasmanians but Australians in general. The case of Lake Pedder emphasizes the lack of any national power to protect what are in truth national assets'.[48] The development of this sense of a national heritage was very important and is a concept that was drawn upon in later campaigns over the Great Barrier Reef, Fraser Island, the Queensland and New South Wales Rainforests and the Tasmanian wilderness.

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41 Gilpin, *The Australian Environment: 12 Controversial Issues*, 207.
42 19.
43 Green (1981), 72.
44 See Chapter V.
45 See UTG's advertisement in the Hobart *Mercury* 21.4.72.
46 Melbourne *Age*, 10.3.67.
47 Committee of Inquiry into the Future of Lake Pedder (1974), 17.
48 63.

Second, the campaign involved the mobilisation of a great deal of public support through conservation lobby groups and attempts by conservationist political candidates to be elected to office primarily on the basis of policies of environmental protection. While the failure of any UTG candidates to gain office indicates that the electorate was not yet ready for "Green" parliamentarians, there seems little doubt that this campaign laid the foundation for later successful campaigns, particularly by independent candidates in Tasmania, for election to Parliament. The role of the conservation groups, and particularly the ACF and the Tasmanian Wilderness Society has been crucial in later campaigns.

Third, the Lake Pedder issue demonstrated the weakness of the administrative and legislative controls on environmental decision making in the country, and hence precipitated much of the environmental legislation of the 1970s. The importance of the Lake Pedder issue in determining future Government policy on the environment has been recognised:

> What began as a forlorn local effort to preserve an exquisite natural feature became a national and even international cause celebre. It also set many Australians questioning the adequacy of the decision-making processes where irreversible alterations to the environment were concerned. It raised the novel idea that in assessing such projects there might be values to be considered other than the traditional yardsticks of technical feasibility, economic demand, and political expediency.[49]

The Interim Report of the Burton Committee noted a significant change in public and political attitudes to environmental issues following the decision to flood Lake Pedder.[50] 'The Lake Pedder case marks the end of Australia's pioneering days and it ushers in a new phase of conscious concern by all sections of the community for the long-term future of the natural and human environment.'[51]

The Beginnings of Federal Environmental Initiatives

Government action at both the administrative and legislative levels in the 1970s reflected the growing environmental awareness. In 1971 the Commonwealth Government created a portfolio of Environment, Aborigines and the Arts. A separate department responsible for environmental matters was created in 1972 (although in 1975 this department was abolished, its functions being absorbed by the new Department of Environment, Housing and Community Development).[52] The early

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49 Raymond (1980).

50 21. The Committee referred to the fact that the changing climate of opinion cuts across party political lines and is reflected in the policy statements of various political parties.

51 H.R.H. the Duke of Edinburgh, in his capacity as President of the Australian Conservation Foundation, for *Pedder Papers,* Australian Conservation Foundation (1972).

52 The area is now part of the Department of Arts, Sport, the Environment, Tourism and Territories (DASETT).

1970s also saw the establishment of two important Ministerial Councils related to the environment. The Australian Environment Council (AEC), a forum for consultation between Commonwealth and State Ministers with responsibility for environmental matters, was set up in 1971. In 1974, the Council of Nature Conservation Ministers (CONCOM) was established with the aim of developing coordinated policies for nature conservation.

The foundations of achievement with respect to nature conservation and environmental management in Australia were laid during the period of the Whitlam Labour Federal Government, between 1972 and 1975.[53] As Davis puts it:

> The Whitlam Cabinet came to office committed to the notion of improved quality of life for all Australians, but at a fortunate time, since the community consciousness and economic prosperity prevailed. Australia was the "Lucky Country", where all things seemed feasible. It was a period favourable to innovation, but the legislation enacted then has remained durable in subsequent less fortunate times, when countervailing interests have mounted a significant backlash against environmental legislation and the Australian Conservation Movement.[54]

Committee of Inquiry into the National Estate

An important response to the development of an Australian environmental consciousness was the establishment of the Committee of Inquiry into the National Estate (the Hope Committee).[55] The Committee was established in May 1973 by the Prime Minister, Mr Whitlam, in response to both international recognition of the importance of heritage protection, as evidenced by the adoption of the *World Heritage Convention* and the *Heritage Recommendation*, and to increased domestic awareness of nature conservation issues through controversies such as that which surrounded the flooding of Lake Pedder.[56] The National Estate was defined as consisting of three components of the cultural and natural environment which are:

> (a) of such outstanding world significance that they need to be conserved, managed and presented as part of the heritage of the world.
>
> (b) of such outstanding national value that they need to be conserved, managed and presented as part of the heritage of the nation as a whole.
>
> (c) of such aesthetic, historical, scientific, social, cultural, ecological or other special value to the nation or any part of it, including a region or locality, that they should be conserved, managed and presented for the benefit of the community as a whole.[57]

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53 Davis (1980), 3.,

54 *Ibid*, 3-4.

55 The Committee of Inquiry was headed by Mr Justice Hope of the Court of Appeal Division of the Supreme Court of New South Wales.

56 Mosley, former Director of the ACF, suggests that the Comittee of Inquiry into the National Estate was established as a direct result of the flooding of Lake Pedder in Green (1981), 41.

57 Committee of Inquiry into the National Estate (1974), 34-5.

In announcing the establishment of the Hope Committee, Mr Whitlam stated that 'the task force is needed because increasing numbers of Australians are concerned to preserve for the enjoyment of future generations the best buildings of our past and the best features of our natural environment.'[58] The Committee received more than 650 submissions from Government bodies, non-governmental organizations, professional associations and individual members of the public. Its final report was published in September 1974.[59]

The Hope Committee found generally that the Australian Government had inherited

> a National Estate which has been downgraded, discarded and neglected. All previous priorities accepted at various levels of government and authority have been directed by a concept that uncontrolled development, economic growth and 'progress', and the encouragement of private as against public interest in land use, use of waters, and indeed in every part of the National Estate, was paramount.[60]

The Committee commended the Government's move to conserve and present the national estate as one of the "most far-sighted decisions" it had made.[61] The Committee concluded that it 'will be a vital turning-point in conserving an Australia of which we can be proud.'[62] Foremost among its recommendations was a proposal for the establishment of a National Estate Commission to work for the protection, conservation and presentation of the National Estate.[63]

The Report also made specific recommendations in relation to the natural environment,[64] the built environment,[65] Aboriginal sites and other special areas,[66] cultural property,[67] taxation,[68] education for conservation[69] and voluntary organisations.[70] This Report was highly praised in Parliament by both the Government and the Opposition and also received considerable support in the media and among conservation bodies.[71]

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58 House of Representatives Hansard, 17th May, 1973.

59 Committee of Inquiry into the National Estate (1974).

60 *Ibid*, 13.

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

64 *Ibid*, 335-338.

65 *Ibid*, 338-340.

66 *Ibid*, 340-341.

67 *Ibid*, 341-342.

68 *Ibid*, 344-347.

69 *Ibid*, 347-348.

70 *Ibid*, 348-349.

71 Manning (1974), writes that "the book [the Final Report] is likely to become the most influential case for stopping the depletion of the Australian heritage yet published'.

Aftermath of the Hope Report

Much of the Commonwealth environmental legislation dates from the period immediately following the release of the Report of the Committee of Inquiry into the National Estate. In particular, the Australian Environment Council adopted principles for environmental impact procedures in December 1973.[72] Despite limitations on the extent to which it could act to ensure environmental protection,[73] the reformist Whitlam Labor Government enacted four major pieces of environmental legislation, which form the backbone of Commonwealth environmental legislation. These were the *Australian Heritage Commission Act* 1975, the *Environment Protection (Impact of Proposals) Act* 1974, the *Great Barrier Reef Marine Park Act* 1975 and the *National Parks and Wildlife Conservation Act* 1975. Additional Commonwealth environmental legislation, primarily aimed at fulfilling international obligations on the environment was enacted in the early 1980s.[74]

Much of the State legislation on environmental protection also dates from the 1970s; there is now a plethora of environmental legislation on all manner of subjects. All States of the Commonwealth of Australia now have environmental assessment requirements and procedures.[75] Further there is legislation in each State providing for the reservation of land for conservation purposes.[76] New South Wales and South Australia have legislation designed to protect and conserve the heritage of those states,[77] while Victoria, New South Wales and South Australia have special legislation in relation to historic sites.[78] All states except Victoria give legislative recognition to the National Trust Organization, a body charged with overall responsibility for identifying, protecting and if necessary acquiring elements of the

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72 Gilpin, *Australian Environment: 12 Controversial Issues* (1980), 211.

73 See Chapter V.

74 For example, the *Antarctic Treaty (Environment Protection) Act* 1980, the *Pollution of Sea (Prevention of Pollution from Ships) Act* 1983, the *Whale Protection Act* 1980 and the *World Heritage Properties Conservation Act* 1983.

75 The *Environmental Planning and Assessment Act* 1979 (NSW), the *Environmental Effects Act* 1978 (Vic), the *State Etc Development, Public Works Organisation Etc Act* 1971 (Queensland), the *Planning Act* 1982 (SA), the *Environmental Protection Act* 1971(WA), the *Environment Protection Act* 1973 (TAS) and the *Environmental Assessment Act* 1982 (NT).

76 On the establishment of national parks particularly see National Parks and Wildlife Acts of Tasmania (1970), South Australia (1972), and New South Wales (1974), the *National Parks Act* 1975 (Vic), *Conservation and Land Management Act* 1984(WA), the *Nature Conservation Ordinance* 1980 (ACT) and the *Parks and Wildlife Conservation Ordinance* 1976 (NT).

77 The *Heritage Act* 1977 (NSW) and the *Heritage Act* 1978 (SA). The Tasmanian Government intends to introduce a Heritage Act in the near future.

78 The *Historic Buildings Act* 1981 (Victoria), the *Historic Houses Act* 1980 (NSW) and the *History Trust Act* 1981 (SA).

national estate.[79] Each State also vests responsibility for prevention and control of pollution in a relevant body.[80] Other significant environmental subjects on which there are now relevant State legislative provisions include, land use planning, environmental protection in the use and development of natural resources and wildlife conservation.[81] While these measures vary in their effectiveness and have 'been associated with various degrees of tension,'[82] they indicate a legislative recognition of the need to protect the environment, coinciding with the growing public environmental consciousness.

The last decade has seen expansion even further in the adoption of general policy guidelines in the National Conservation Strategy in 1983,[83] reflecting the global priorities of the World Conservation Strategy.[84] The National Strategy was prepared by a Steering Committee of representatives from the six States, the Northern Territory and the Commonwealth, which guided a task force within the Department of Home Affairs and Environment. In May 1982 a discussion paper, *Towards a National Conservation Strategy,* was distributed and over 500 responses from the public were received by 15 September 1982.[85] From this and a National Conference held in June 1983, the Strategy was drawn up. The Commonwealth Government endorsed the National Conservation Strategy for Australia in June 1984 and has established an Interim Consultative Committee to advise on its implementation.[86] The goals of the Strategy are based on principles of sustainable development, public participation in planning and decision making and a coordinated national approach to the issues.

A broad outline of environmental policies was made by the Hawke Labor Government in July 1989, in the form of a statement "Our Country, Our Future". The major part of the statement was a programme to combat land degradation. It also incorporated policies on ozone-depleting substances, the Greenhouse Effect and timber resources and promised an increase of $32 million per year for the environment. While the statement was criticized by conservation groups for failing to

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79 Bates (1987), 164. Note the *National Trust of Australia Acts* NSW 1960; SA 1955; WA 1964; Tas 1975; *National Trust of Queensland Act* 1963; *National Trust (Northern Territory) Ordinance* 1976.

80 *State Pollution Control Commission Act* 1970 (NSW); *Environment Protection Act* 1970 (Vic); *Clean Air Act* 1963, *Clean Waters Act* 1971 and the *Noise Abatement Act* 1978 (Queensland); the *Environment Protection Council Act* 1972 (SA), the *Environmental Protection Act* 1971 (WA), the *Environment Protection Act* 1973 (TAS); and the *Air and Water Pollution Ordinances* of 1984 (ACT).

81 See generally Bates (1987).

82 Gilpin, *The Environment: 12 Controversial Issues,* (1980), 2.

83 'The National Conservation Strategy for Australia', Canberra: AGPS, 1984.

84 IUCN, UNEP, World Wildlife Fund, (1980).

85 Wilson (1983), 2.

86 Castles, (1986), 674-5.

address some key issues,[87] the fact that it was made, and in an atmosphere of much media hype, indicates the recognition of the Government of the growing conservation consciousness. Taken with recent decisions to include 90% of the Kakadu conservation zone in the National Park, thus preventing mineral activities from continuing; to support the creation of a World Park in Antarctica; and to expand the boundaries of the Tasmanian World Heritage area, the statement is evidence of the administration's realisation of the importance of the environmental vote.

There is perhaps no greater indication of the growth in public environmental consciousness than the election in May 1989 of five green independent candidates in the Tasmanian State election. This has been described as 'a signpost to an historic change in public attitude.'[88] The major parties, seen by the conservation movement as having completely inadequate environmental management policies, were dealt a negative swing in each electorate, while the Green Independents received a statewide vote of 18%, resulting in representation in each electorate.[89] Subsequently these independents signed an Accord with the Labor Party to enable the formation of a minority Government with green support.[90]

It has been suggested by Federal Environment Minister, Senator Richardson, that fears about the Greenhouse gas build-up and ozone layer depletion have brought a revolution in Australians' thinking ever since 1988.[91] He estimates that whereas the core green vote was worth between 1% and 2% of the vote at the 1987 Federal election, it is now worth 5%, enough to determine the outcome of future elections.[92] He also suggests that the environment will overtake the economy as the number one issue because of the massive cost in cleaning up and heading off imminent catastrophes.[93] Indeed, recent opinion polls show that almost 90% of respondents are alarmed about the environment.[94]

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87 See 'Environment on the National Agenda', editorial in (1989) 21/7 *Conservation News* (Newsletter of the Australian Conservation Foundation), 1: G. Lambert (1989), 5.

88 O'Reilly (1989), 48.

89 *Branching Out,* June 1989.

90 The Accord relates primarily to issues of the environment, including nominations for world heritage listing, national park protection, review into alternatives to logging National Estate forests, the banning of logging and roading operations in Jackey's Marsh, the refusal to allow the proposed Huon Forest Products woodchip mill to proceed. Other major reforms of government processes to which the ALP government is committed by the Accord include: the establishment of freedom of information, wilderness and environmental assessment legislation, amendments to the *Environment Protection Act*, *Mines Act* and *Sea Fisheries Act* and a full review of the Forestry Commission and a move to abolish the concession system- *Branching Out*, June 1989.

91 O'Reilly (1989), 48.

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

The importance of environmental issues in the political context was emphasised in the 1990 Federal elections with the revival of the "Green" political party, the United Tasmania Group in Tasmania and the establishment of the Western Australian Greens to contest a number of seats. While none of these candidates were successful, the preferences of the Australian Democrat and "Green" candidates were responsible for the election of Labor Party members in a number of seats. The Labor Party attracted a high percentage of these preferences because of the importance it has attached to environmental issues, particularly during the latter part of its last term. Public statements on the environment made during 1989, and the decisions on a number of important environmental issues were aimed at targeting the "Green" vote and illustrate a recognition of the importance of the environmental vote in Federal politics. It was on the basis of the Government's environmental policies and record that the ACF recommended to its supporters that they vote for the Australian Democrats and Green groups first, but direct their preferences to the Labor Party.[95]

Australia and International Environmental Law

The growth of environmental consciousness in Australia has also had an international dimension. Australia is geographically isolated from many of the major environmental problems requiring international action by the Northern European and American nations. It has not been affected, for example by transboundary pollution and pollution of common waterways, two of the major issues requiring regional action. However, in these days of truly global ecological problems, such as depletion of the ozone layer, the "Greenhouse Effect", and protection of the marine environment, geographical isolation cannot justify lack of international involvement in environmental issues.

During the last two decades particularly, Australia has actively participated in the international and regional organizations with environmental mandates, including the United Nations Environment Programme (UNEP),[96] the Environmental Committee of the Organization for Economic Cooperation and Development (OECD), and International Union for the Conservation of Nature and Natural Resources (IUCN).[97] Australia was a founding member of the United Nations Educational, Scientific and Cultural Organization (Unesco) and in 1983 appointed a former Prime Minister, Mr E.G. Whitlam, as cultural Ambassador to the Organization, reflecting

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95 (1990) 22 *Conservation News*.

96 Australia was represented on the Governing Council of UNEP in 1987-88- see Department of Arts, Sport, Environment, Tourism and Territories *Annual Report (1988)*, 120

97 DASETT is Australia' State Member of IUCN and a member of the Australian Committee for IUCN which was set up in 1979 to further the objective of IUCN in this country.

the importance attached to Unesco by the Australian Government. It has also actively participated in the environmental programmes established by these organisations, including the Global Monitoring System of the UNEP, the OECD's Eutrophication and Unesco's Man and the Biosphere Programmes.[98] It further makes significant contributions to the World Wildlife Fund.[99]

Australia has played a major role in the efforts of States in the South Pacific region to avoid the extensive pollution and environmental degradation experienced in the more heavily industrialized parts of the world. Specifically, the Federal Government was involved in the negotiation of the *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.*[100] It also played a role in the development of the South Pacific Forum's *Nuclear Free Zone Treaty.*[101] Through the South Pacific Bureau for Economic Cooperation and the South Pacific Commission, Australia is helping to develop a program of environmental management for the South Pacific.[102] Aid programmes with environmental objectives have been instituted in the region. In 1988 the Australian Government announced the approval of a $19 million assistance package over four years to improve the management and development of Philippine natural resources.[103] This project is being implemented through the Department of Environment and Natural Resources and the Australian Development Assistance Bureau.[104] During the 1988 South Pacific Forum meeting Australia offered to provide assistance in monitoring and researching the problem of the Greenhouse Effect for island states of the region.[105]

Australia has become increasingly involved, particularly in the last five years, in major international environmental campaigns. The increasing involvement of the Federal Government in these issues and the importance attached to them is reflected in the announcement in July 1989 of the appointment of former Governor-General Sir Ninian Stephen as Australia's first Ambassador for the Environment. His role will be to help give Australia a strong and clear voice in the important

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98 Department of Environment, Housing and Community Development, (1977), 554.

99 DASETT *Annual Report (1987)*, 42-43.

100 (1987) 26 *I.L.M.* 38.

101 (1985) 24 *I.L.M.* 1442.

102 Department of Environment, Housing and Community Development, (1977), 555.

103 See news release issued by the Minister for Foreign Affairs and Trade, Mr Bill Hayden, on April 12, 1988 in *Australian Foreign Affairs Review*, 169.

104 *Ibid.*

105 The region is likely to suffer particularly from the Greenhouse Effect. For atoll States such as Kiribati, Tuvalu, the Marshall Islands and Nive, a rise in sea-level would result in erosion of the islands, reducing their overall area and hence their ability to cater for their populations- Commonwealth Joint Select Committee on Foreign Affairs, Defence and Trade (1989), 117.

international debates on environmental issues now taking place.[106] Australia is the only nation to have such an Ambassador.[107]

Australia recently announced its decision to refuse to sign the *Convention on the Regulation of Antarctic Mineral Resource Activities* (CRAMRA) purportedly on the basis of conservationists' arguments that the absence of a minerals regime as such on Antarctica would discourage operators from investing in Antarctica in view of unresolved issues of sovereignty on the continent.[108] In the statement announcing the decision, Senator Richardson stated:

> Although we recognise that the recently concluded CRAMRA is very much better than no protective regime of any kind in relation to these activities, we believe it is both desirable and possible to seek stronger protection for what remains of the world's last great wilderness.[109]

Soon after the announcement of this decision the Prime Minister, Mr Hawke, went on an overseas tour to promote proposals for a World Park to be created in Antarctica, stating, 'I hope the pressure of informed public opinion around the world.. will lead to a clear majority of antions concerned to embrace the Australian position' and 'I will be outlining in the clearest terms Australia's concern to prevent mining in the Antarctic and the need to provide a comprehensive environmental protection plan for that continent.'[110] The plan is to negotiate for a comprehensive environmental protection convention within the framework of the Antarctic treaty system.[111] Mr Hawke received strong support from both India and France for his proposal, although the United States and the Great Britain were intially steadfastly opposed.[112] The Australian Government is continuing its lobbying for an Antarctic World Park internationally through its newly-appointed Ambassador for the Environment.[113]

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106 (1989) 6/3 *Ecofile* (A Quarterly Report on the Environment from the Ministry of Arts, Sport, Environment, Tourism and Territories), 1.

107 *Ibid.*

108 See Blay and Tsamenyi (1989), 1.

109 (1989) 6/3 *Ecofile*, 4.

110 (1989), 21/7 *Conservation News*.

111 (1989) 6/3 *Ecofile*, 4.

112 *Ibid.*

113 Recent evidence suggests that the lobbying effort is having a significant effect. In February 1990 it was announced that an *Antarctic Protection and Conservation Act* would be introduced in the United States of America. This Bill would protect Antarctica from mineral exploration and is meant "to place the United States in a position of leadership in the international movement to permanently protect the pristine environment of Antarctica" (Statement of Honorable Silvio O. Conte, Press Conference for Antarctic Protection and Conservation Act, February 8, 1990). Further support for the Australian proposal has come from the Soviet Union and New Zealand. In a speech at an Australian parliamentary dinner in February 1990, the Chairman of the Council of Ministers of the Soviet Union, Mr Nikolai I. Ryzhov stated that "We are prepared to collaborate with Australia and other countries in implementing those initiatives that cover the survival of the Antarctic- a global preserve and a common nature

On issues of atmospheric change, including the protection of the ozone layer and the "Greenhouse Effect", the Australian Government has recently taken action. Australia was the first state to enact legislation implementing the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987).[114] Under the *Ozone Protection Act* (1989), the Federal Parliament has not only acted to fulfill its obligations under the Protocol and the Vienna *Convention for the Protection of the Ozone Layer* (1985)[115] but has also taken additional steps, within its powers, to regulate trade and commerce and corporations in the importation and manufacture of specified products containing ozone-depleting substances. The Australian Government has also participated, through the Australia and New Zealand Environment Council (ANZEC), in the development of the ANZEC Strategy for Ozone Protection, which consists of guidelines and targets which will result in a 95% reduction in the use of CFCs and halons by 1995 and a total phase out by 1998.[116]

The other major issue of atmospheric change, the "Greenhouse Effect", has also brought a major response from the Australian Government. In April 1989, the Commonwealth Government launched a major national program in response to the global threat posed by the Greenhouse Effect. It provided $7.8 million for greenhouse research and policy support up to 30 June, 1990 and appointed a National Greenhouse Advisory Committee to provide advice on priority areas for further greenhouse research and to promote public understanding of greenhouse issues.[117]

As a major coastal nation, Australia has long had an interest in the protection of the marine environment and has ratified and implemented domestically all the major international conventions on this subject.[118] In addition, Australia's geographic isolation and its consequently unique flora, fauna, natural and cultural heritage, has meant that this country has placed a particular emphasis on international

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laboratory." The Prime Minister of New Zealand, Mr Geoffrey Palmer, recently announced that New Zealand will not be ratifying CRAMRA and will negotiate for a no-mining position with the Australians (Press Release, RT Hon Geoffrey Palmer, Monday 26 February 1990).

114 (1987) 26 *I.L.M.* 1542.

115 (1987) 26 *I.L.M.* 1516.

116 (1989) 6/3 *Ecofile*, 10.

117 (1989) 6/2 *Ecofile* .

118 The *International Convention for the Prevention of Pollution from Ships* (1973), is implemented through the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983; the *Convention on Civil Liability for Oil Pollution Damage* (1976) is implemented through the *Protection of the Sea (Civil Liability) Act* 1981; the *Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* is implemented through the *Protection of the Sea (Powers of Intervention) Act* 1981 and the *Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter* is implemented through the *Environment Protection (Sea Dumping) Act* 1981.

efforts to conserve this heritage.[119] Australia has thus been heavily involved in the implementation of conventions with this aim, including the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property* (1970),[120] the *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)* (1973),[121] the *Convention on the Protection of Wetlands of International Importance Especially as Waterfowl Habitat* (1972),[122] and the *World Heritage Convention.* Each of these important instruments for achieving international cooperation on environmental issues has been ratified by Australia and been implemented through domestic legislation.[123]

It is against this background that the implementation of the *World Heritage Convention* in Australia must be analysed. Support for the *World Heritage Convention* has been generally bipartisan and evident in the Governments led by three Prime Ministers which have held power since the adoption of the Convention by the Unesco General Conference. The Convention was ratified in August 1974 by the Whitlam Labor Government. It was this Government which enacted some of the legislative framework for the protection of world heritage property. The Fraser Government, which followed Whitlam into office in 1976 nominated the first Australian properties for the World Heritage List. Fraser expressed his support for the ideals of the Convention in 1981 when, while opening the meeting of the World Heritage Committee hosted by the Australian Government in Sydney, he stated:

> The concept of world heritage, which includes both the cultural and natural heritage of mankind and which means that individual nations will hold sites and properties of universal value in trust not just for their own peoples, but for the whole of mankind, is surely a profound expression of cooperation between people and a willingness to share.[124]

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119 Department of Environment, Housing and Development (1977), 552.

120 For text see Ruster and Simma (1975), vol. XIV, 7216.

121 (1973) 12 *I.L.M.* 1085.

122 (1972) 11 *I.L.M.* 969.

123 The 1970 *Convention on Cultural Property* has been implemented through the *Protection of Moveable Cultural Heritage Act* 1986; the *CITES Convention* through the *National Parks and Wildlife Act* 1975 section 69, the *National Parks and Wildlife Regulations* no. 139/1987 and the *Wildlife Protection (Regulation of Exports and Imports) Act* 1982; the *Wetland Convention* through the *National Parks and Wildlife Act* section 69.

124 Cited in House of Representatives Hansard, 21st April 1983, 51. One should, however, note the anti-internationalist feelings expressed by some members of the Liberal Party. For example, in the debate over the *World Heritage Properties Conservation Bill,* Senator Crichton-Browne made the following statement:

> To give force to the legislation before us countries such as Bulgaria, Iraq, Libya, Zaire and Panama all sit in judgment on whether our recommendations might be accepted. Let us look at some of the signatories to this wonderful United Nations Convention (sic) for the Protection of the World Cultural and Natural Heritage. They are: Iraq, Iran, Yugoslavia, Poland, Ethiopia, Nicargua, the Seychelles, Cuba- just to name a few. Can honourable Senators not imagine these countries with undying dedication and enthusiasm for ensuring there is no destruction of their environments or their culture?... Imagine also their compassion and understanding in protecting

Under the Fraser Government Australia played an active role on the decision-making bodies established by the *World Heritage Convention* and nominated the first three Australian world heritage sites.[125]

The next Commonwealth Government, the Hawke Labor Government, came to power partly on the issue of the protection of the Western Tasmanian Wilderness National Parks World Heritage Area[126] and enacted significant legislation and adopted administrative measures implementing the *World Heritage Convention.* The significance which the administration attaches to the Convention is reflected in the Minister for Home Affairs and Environment, Mr Cohen's second reading speech on the *World Heritage Properties Conservation Bill.*

> For many years, and particularly since the end of the Second World War, there has been growing international awareness of heritage values and a sense of concern and shared responsibility for the protection of the cultural and natural heritage. Many specific examples could be given of this sense of concern, and of Australia's own involvement in it. Australia has expressed its own commitment to heritage values, and to the need to conserve heritage in Australia, under successive Governments. One of the most important instruments in this field is the treaty known as the *World Heritage Convention*..[127]

Conclusion

The implementation of the *World Heritage Convention* in Australia must be seen in the context of the unique environment of this country, and the development of the environmental consciousness, the growth of which has been particularly marked in the 1970s and 1980s. The environmental consciousness has had a strong voice through the various lobby groups established in response to it. This environmental consciousness began to have a major public face during the Lake Pedder controversy. The Pedder controversy illustrated the need for Federal involvement in environmental issues which, until the early 1970s, was virtually non-existent. The Federal legislative and administrative framework for environmental

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their cultural and environmental heritages for the benefit of all mankind so as to ensure that tourists and future generations can look with wonder upon their achievements which they have retained as a result of being signatories to this Convention (Senate Hansard, 12th May, 1983, 416). See also Senate Hansard 17th May, 1983, 472 and 475 and Senate Hansard 18th May, 1983, 572.

125 Australia has been represented on the World Heritage Committee since 1975, was elected to the Vice-Chairmanship in 1980 and to the Chairmanship in 1981 and 1982.

126 Forty-two percent of voters in the Flinders by-election of that year wrote "No Dams" on their ballot papers. The "No Dams" Candidate in the seat of the Deputy Leader of the Opposition, Mr Howard, polled 14% of the votes in that electorate in the Federal election, the highest independent vote recorded in Australian politics at that time (House of Representatives Hansard, 5th May, 1983, 255). Labor Party members readily admit the influence that the conservation vote had on the 1983 election. See, for example, the comment of Tasmanian Senator Coates: 'nobody can assess exactly how many people voted precisely and only on that issue. But at least one can say that it was an issue that assisted the A.L.P. into Government on 5th March' (Senate Hansard, 17th May, 1983).

127 House of Representatives Hansard, 21 April, 1983, 49.

protection was developed in response to this realisation, which was expressed in the recommendations of the Lake Pedder and National Estate Inquiries.

World heritage issues must be seen in the context.of the Australian environmental consciousness. Protection of the unique natural heritage has been the major environmental issue in Australia. The political will to nominate and protect world heritage sites, even in the face of the sorts of conflicts and controversies which we will examine in Chapter X, depends upon the strength of this environmental consciousness.

Once very much isolated from the major international environmental problems of the Northern European and North American nations, and without a long history of international or even regional cooperation, Australia has only recently begun to participate in global environmental debates. In the 1980s, partially in response to the growing domestic awareness, this nation has developed a significant voice in such debates. The commitment demonstrated by successive governments to the *World Heritage Convention* is part of the beginnings of this participation. As the world faces the reality of the truly international issues of atmospheric and climate change, and the question of how to protect the last wilderness continent, Antarctica, there seems no question that Australia will play a significant role in developing responses to these problems.

CHAPTER V

THE CONSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL DECISIONMAKING IN AUSTRALIA

Introduction

The implementation of the *World Heritage Convention* in Australia is essentially a matter for the Commonwealth Government. However, Australia is a Federal State where restrictions on the two tiers of Government are determined according to a written Constitution. This complex power system has consequences for environmental law making in Australia. Thus, an understanding of the basis of the system, the division of powers between the tiers of government, the express checks and balances designed to protect the Federal system, and the implied theories on the nature of the system is crucial in any discussion of environmental issues in this country. This Chapter examines these matters, and also explores the potential for the Commonwealth to legislate on environmental matters, and particularly in relation to the world heritage.

The Federal System

In defining the spheres of government for which the Federal and State tiers were to be responsible, the framers of the *Constitution of the Commonwealth of Australia* adopted the approach of specifying, in section 51 of the Constitution, certain enumerated powers, held concurrently with the States, in respect of which the Federal Parliament may make laws "for the peace, order, and good government of the Commonwealth".[1] The Commonwealth also has exclusive power to legislate with respect to certain subjects, including the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes.[2] The undefined residue of power is left to the States through the operation of section 107 of the Constitution by which States retain 'every power of the Parliament of a colony which has become or becomes a State... unless it is exclusively vested in the Parliament of the State.' Commonwealth laws made validly under its allocated concurrent powers are guaranteed to prevail over inconsistent State laws by section 109 of the Constitution.[3]

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1 For a discussion of these powers see Lumb and Ryan (1973), 67-190.

2 Section 52.

3 Section 109 provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The provisions of the Constitution are entrenched. Any proposed law for such alteration must be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives. The referendum question must be approved by a majority of electors in a majority of States before any law can be presented to the Governor-General for the Queen's assent.[4]

Certain protections for States and individuals are expressly built into the Constitution. So far as environmental law making is concerned, one of the most important restraints on the Commonwealth relates to the acquisition of land. The Constitution provides that the Commonwealth may acquire property from any State or person for any purpose in respect of which the Federal Parliament has power to make laws, but with the qualification that any such acquisition must be upon just terms.[5] In a usual case, the acquisition of property by a Government will involve the conveyance of title in that property to the Government. However, cases are not always as clear as this. A Government may impose a great variety of restrictions on the use of land, ranging from simple planning regulations through to legislative prohibitions on almost all activity. There is an argument that in the most extreme cases, a *de facto* acquisition of land has occurred, despite the absence of a conveyance of title, and that just compensation must be paid under the terms of the Constitution. This issue is crucial in world heritage matters when the Federal Government may wish to impose strict limitations on exploitative activities so as to ensure the protection of the unique values of the property in accordance with its international obligations.

The question of whether an imposition of limitations on the use of a property can amount to an acquisition of property was dealt with in *Commonwealth v Tasmania* (hereinafter referred to as the *Tasmanian Dam Case).*[6] Tasmania argued that certain restrictions imposed under the Commonwealth's *World Heritage Properties Conservation Act* 1983[7] on the use of State-owned land in South-West Tasmania included on the World Heritage List were of such drastic effect that they amounted to an acquisition of the land requiring the provision of just compensation. In the result Mason, Murphy and Brennan JJ, three of the majority judges, found that there was no such acquisition. These judges took the view that the Government must acquire an actual interest in the land before the constitutional requirement for just compensation will take effect. In the words of Murphy J, 'extinction or limitation of property rights does not amount to acquisition...Unless the Commonwealth gains some property from

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4 Section 128 of the Constitution.

5 Section 51(xxxi).

6 (1983) 46 *A.L.R.* 625. For details of this case see discussion of the external affairs power in this Chapter, and further analysis in Chapters Vii and X.

7 For details of this Act see Chapter VII.

the State of person, there is no acquisition within the paragraph.[8] However, Deane J, the fourth majority judge, was willing to accept that where restrictions were severe enough there could be an acquisition of land. The minority judges did not decide this question. Thus, no majority of the court decided in favour of either side of the argument. Given the views of three of the four majority judges, however, it seems likely that the prohibition of the use of land, even to the degree that occurred under the *World Heritage Properties Conservation Act*, will not be regarded as an acquisition requiring compensation in just terms under section 51(xxxi).[9]

It is important to recognise the great difficulties which would be involved in the adoption of any other approach. Government regulation over land use takes a great variety of forms and a range of degrees. The problem, which Deane J did not resolve in the *Dam Case*, is where the line should be drawn such that one can say acquisition has occurred. While one must agree with Zines that the distinction between "taking" and "acquisition" is highly literalistic, particularly if one has regard to the fact that an important constitutional guarantee is involved,[10] it may be that the only practical view is to adopt the interpretation of Mason CJ, Murphy and Deane JJ. In any case, compensation for direct losses flowing from protection of world heritage properties is likely to be granted by the Federal Government for political reasons. Thus, despite the finding that there was no legal obligation to do so, a compensation package was negotiated with the Tasmanian Government following the upholding of prohibitions involved in the *Dam Case*, and the *Lemonthyme and Southern Forests (Commission of Inquiry) Act* made provision for claims for compensation for losses flowing from the interim protection provided for in that Act.[11]

This brief analysis of the features of the Australian federal system belies its complex nature. While the Constitution itself provides certain guarantees to the States, others have been suggested as a matter of political theory. As has been pointed out:

> From the earliest days of the High Court, the judges considered that the broad structure of the Constitution required the application of doctrines, of one sort or another, which were derived from a concept of federalism not to be found expressly in the Constitution. The nature of these doctrines changed over the decades as different notions of federalism were applied.[12]

This approach is well evidenced in the application of the reserve powers and implied immunities doctrines.

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8 At 738.

9 *Ibid.*

10 Zines 'The Environment and the Constitution' in Mathews (1985), 29.

11 The provisions of this Act are examined in detail in Chapter VI.

12 Constitutional Commission (1988), vol. 1, 55.

Reserve Powers Doctrine

The Reserve Powers doctrine was invoked from the time of Federation with a view to limiting the extent to which the Commonwealth could legislate on some matters. It involved the Court reading the powers in section 51 narrowly in order to protect what were perceived to be powers implicitly reserved to the States. The consequences of the doctrine have been described in the following terms:

> it followed that no other head of power could be so interpreted as to destroy or significantly reduce the implied reserve powers. If, therefore, a particular power in s51 could, on ordinary principles of interpretation, be given a broad or a narrow meaning, the narrow meaning should be adopted in any case where that would either avoid or reduce Commonwealth invasion of this reserved field.[13]

Thus, it was held in *Huddart Parker v Moorehead* [14] that where s51(i) gave to the Federal Government power over trade and commerce with other countries, and among the States, it must have been intended that power over intra-state trade was to be reserved to the States and no Commonwealth legislation could interfere with this reserved right.[15] Further, the term "trademarks" in section 51(xviii) was held not to include a mark indicating that the members of a trade union had produced a product to which that mark was affixed.[16]

Implied Immunities Doctrine

The other important doctrine by which those seeking to protect the independence of the States sought to limit the effect of Commonwealth legislation on the States was the doctrine of implied immunities by which it was said that neither the Commonwealth nor the States could legislate to bind each other.[17] Thus, for example, legislation enacted by one tier of government could not validly tax a public servant of the other.[18] Had the implied immunities doctrine been upheld, the Commonwealth could not have legislated to prohibit the Hydro-Electric Commission, a State Government instrumentality, from carrying out the proposed Gordon-below-Franklin scheme in South West Tasmania.[19]

The reserve powers and implied immunities doctrines were both held not to be valid in *Amalgamated Society of Engineers v the Adelaide Steamship Company*

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13 Zines (1981), 5.

14 (1909) 8 *C.L.R.* 330.

15 On this issue see Zines (1981), 5.

16 *Attorney General for NSW v Brewery Employers Union of NSW (Union Label Case)* (1908) 6 *C.L.R.* 469. In *Peterswald v Bartley* (1904) 1 *C.L.R.* 497 and *R v Barger* (1908) 6 *C.L.R.* 41 the court went so far as to refer to all 'domestic affairs' of a State as reserved.

17 This doctrine began with *D'Emden v Pedder* (1904) 1 *C.L.R.* 91.

18 *D'Emden v Pedder* and *The Railway Servants' Case* (1906) 45 *C.L.R.* 488.

19 For details of this controversy see Chapter X.

(hereinafter referred to as the *Engineers Case*).[20] In this case the High Court stated that the words and language of the Constitution were to be read as literally as possible, without any preconceptions about the nature of the federal system, so as to give the words their natural, ordinary meaning. The approach taken in *Engineers* had the effect of abolishing the doctrine of reserve powers and severely limiting the effect of the implied immunities doctrine, although an attempt was made to revive that doctrine by counsel for Tasmania in the *Tasmanian Dam Case*. The attempt involved seizing on the cases which had pointed to a limited immunity where legislation discriminates against a State[21] and, possibly, where a power of the Commonwealth, by its inherent nature, could be used to upset the federal balance, or where legislation interferes with an essential State government function to the extent that that State's ability to function is seriously impaired. The majority found in this case that the legislation did not discriminate against Tasmania, nor did it interfere with an essential State function to a sufficient extent; the State's independent existence was not threatened. Further, there was no special immunity where a power could allegedly be used to upset the Federal balance.

The reserved powers and immunities doctrines are implied theories as to the nature of the Australian constitutional system. These theories operate in relation to those written specifications in the Constitution dealing with matters such as the allocation of Federal legislative powers. It is to these specified powers and their use in environmental regulation to which I now turn.

The Federal Government's Powers and the Environment

The Federal Government is not given any specific power to legislate with respect to land use or the environment. This omission must be understood in historical perspective; environmental issues were virtually unknown at the time the Constitution was drafted in 1901.[22] As a matter of simple constitutional interpretation issues relating to the environment come under State control. With the emergence of world-wide environmental consciousness in the late 1960s and early 1970s, coupled with the assumption of numerous international obligations regarding the environment by Australia, Federal Governments began to look for ways to implement these obligations

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20 (1920) 28 *C.L.R.* 129.

21 See *Melbourne Corporation Case* (1977) 74 *C.L.R.* 31.

22 Although, as recently as 1988, the Constitutional Commission has recommended against the amendment of the Constitution to include a Commonwealth power with respect to the environment. This was despite the growing importance of environmental issues, and the recognised need for a national approach on many such issues. The arguments against such amendment are canvassed in Chapter X, and primarily relate to the difficulty involved in defining an appropriate power so as to ensure that the crucial role of the States in environmental regulation is preserved (see Constitutional Commission (1988), vol. 2, 765).

in domestic law and to exercise some influence over environmental matters and land-use generally. There are specified powers given to the Commonwealth in section 51 of the Constitution which can be used as the basis for such environmental regulation. The issue of determining whether a particular piece of legislation is justified by one such power involves characterising the legislation. The tests for characterisation will be dealt with as a preliminary matter in this section because the question of the legality of an exercise of Commonwealth legislative power will depend upon the way in which legislation is to be characterised. This discussion illustrates the scope for the use of Commonwealth powers to legislate with respect to the environment.

Characterisation of Laws

When a piece of legislation is challenged on the basis that its subject matter is not within the legislative competence of the Commonwealth, the court must decide whether that legislation is "with respect to" a particular subject within the Commonwealth's powers, a process of characterisation. Further, questions of constitutional interpretation arise where the Court is required to determine what the various powers encompass and how they should be read. What, for example, is an external affair? What is a trading corporation and can the Commonwealth only legislate to control the trading activities of trading corporations, or is the power broader than that?

The difficulty of characterisation may be illustrated in the following hypothetical example. The Commonwealth passes an Act which limits the amount of pollutants which may be discharged by all trading corporations into the atmosphere and the water-ways during their operations. Should such a law be characterised as with respect to trading corporations, and therefore *intra vires* the Commonwealth, or should it really be characterised as a law with respect to pollution control, an area of residual power falling to the States? Can a law only be characterised in one way or can it be seen as a law with respect to both subjects and valid because one of the subjects it is with respect to is within the legislative competence of the Commonwealth? Further, as a matter of constitutional interpretation, what sort of corporations are covered by the legislation? Is this law invalid in that it does not control the trading activities of trading corporations? It can be seen that these important questions of characterisation and constitutional interpretation arise in determining the extent of Commonwealth powers.

Australian judicial interpretation of how legislation should be characterised has changed in recent years. The decision in *R. v. Barger* [23] is authority that the "true

23 (1908) 6 *C.L.R.* 41.

subject matter" of the law had to be ascertained. This was in the days when the "rights" of States were carefully guarded. In accordance with the reserve powers doctrine, the true subject matter of the legislation had to be ascertained so that it could be determined whether or not those "rights" were being invaded by the Commonwealth. Legislation could only have one true subject matter. In our example, the true subject matter of the Act would almost certainly have been pollution control, despite the fact that the activities of trading corporations were controlled, and the hypothetical legislation would be *ultra vires* the Commonwealth Government. There were clear problems with this test; legislation could well have more than one true subject. A Court faced with such legislation would have great difficulty in resolving a dispute.[24]

The decision in the *Engineers Case* abolished the "true subject matter" approach by holding that Commonwealth powers should be read widely without any reference to State powers. Today it is possible for legislation to have multiple characterisations. In *Actors and Announcers Equity v. Fontana Films*, Stephen J. explained:

> An accurate description of any at all complex law will necessarily be relatively detailed if it is to encompass the several elements which together go to make up the impugned law. However, constitutional grants of power such as those in s.51 are customarily expressed quite differently - succinctly and in terms of wide generality. Thus, when an accurate, and hence relatively detailed, description of a law is sought to be matched against one or other of the tersely expressed grants of legislative power contained in s.51 of the Constitution, it will not infrequently be found that different parts of the description fall within different paragraphs of s.51; still other parts may be found to fall within none of those enumerated grants of power.[25]

So long as the legislation could be characterised as "with respect to" one of the subjects in s.51, it would be valid.[26] Thus, in our example, the legislation could be said to be with respect both to trading corporations and pollution control; because the Commonwealth has power to legislate with respect to trading corporations the Act would be valid.

We are still left with the question of what test should be used for characterisation. Although 'if the connection is so insubstantial, tenuous or distant by the character of the control or restriction ... it ought not to be regarded as enacted with respect to s.51,[27] it is clear from cases such as *Fairfax v. The Federal Commissioner*

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24 As to the subjective nature of such a decision see Stephen J. in *Actors Equity v. Fontana Films* (1982) 40 *A.L.R.* 609 at 624.

25 At 623.

26 At 624.

27 Per Dixon J. in *Melbourne Corporation v. The Commonwealth* (1947) 74 *C.L.R.* 31.

for Taxation,[28] where a law exempting superannuation funds from tax if they invested in Government securities was held to be valid legislation with respect to taxation, that the connection between the legislation and the subject need only be formal. The question asked by the court in that case was whether the legislation changed the parties' duty to pay tax. As it did, the legislation was valid. It can be seen, however, that the connection between taxation and the legislation was only formal. So, following *Fairfax*, where legislation changes trading corporations' obligations or rights that legislation can fairly be characterised as with respect to trading corporations.

It can further be seen from this case that the purpose of the Commonwealth in enacting the legislation is irrelevant to the characterisation of that legislation.[29] In our example the purpose of the Commonwealth was clearly to provide for the regulation of pollution levels, an area not within its legislative competence. That fact will not affect the validity of the legislation.

From this general discussion of the test for characterising legislation, we move to consider the specific powers which the Commonwealth can use to enact environmental legislation. Of particular relevance to this thesis is the external affairs power, contained in section 51 (xxix). Other relevant powers include:
-the corporations power (section 51(xx),
-people of a particular race (section 51 (xxvi)),
-territories (section 122),
-financial powers contained in section 96,
-trade and commerce (section 51(i)),
-the implied nationhood power.
The scope of three of these powers was discussed in one of the major Australian environmental cases, the *Tasmanian Dam Case.*

Background to the *Tasmanian Dam Case*

The fact that legislation can have multiple characterisations, and that the Government's purpose in enacting it is irrelevant to its validity, is illustrated well in the case of *Commonwealth v Tasmania* (hereinafter referred to as the *Tasmanian Dam Case*).[30] The case is dealt with in considerable detail later in the thesis, but is introduced here to illustrate how the Commonwealth can use its other powers in section 51 in appropriate circumstances to ensure the protection of the world heritage in Australia.

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28 (1965) 111 *C.L.R.* 1.

29 See Dixon J. in the *Melbourne Corporation Case.*

30 (1983) 46 *A.L.R.* 625.

This case involved a challenge to the *World Heritage Properties Conservation Act* 1983 (C/w), and to regulations under that Act and under section 69 of the *National Parks and Wildlife Conservation Act* 1975 (C/w). The *Heritage Act*, which will be examined in some detail in Chapter VII, was enacted as a result of the decision by the Hydro-Electricity Commission of Tasmania (a statutory corporation) to construct a dam for electricity generation in the South West Tasmania Wilderness area which had been listed as a world heritage property in 1982.[31] The wilderness area in question consists of three large national parks proclaimed under the Tasmanian *National Parks and Wildlife Act* (1970), occupying a total area of 769,355 hectares and described as comprising 'most of the great temperate wilderness remaining in Australia and one of the last remaining in the world.'[32] Significant Aboriginal sites are also found in this area.[33] In enacting protective legislation and attempting to ensure its constitutional validity, the Commonwealth relied on three different protective sections which relied in turn on three different powers in section 51. The three powers relied on were the external affairs power, the corporations power and the "people of a particular race" power. The sections were alike in that they prohibited similar sorts of activities within the identified area.

The proclamations made declared various parts of the listed area to be properties to which each of the sections applied. Under section 6(3) a proclamation declared the Franklin-Lower Gordon Wild Rivers National Park and areas designated as the Franklin natural and cultural areas to be properties to which section 9 applied. A proclamation was made under section 7 declaring the H.E.C. work area to be a property to which section 10 applied and, under section 8(3), that section 11 applied to the Franklin cultural area, part of which included some caves of considerable archaeological value.

The External Affairs Power

Section 9 of the *World Heritage Properties Conservation Act* applied to any person and prohibited activities that were likely to damage the general environment of an area. This section relied upon the external affairs power of the Commonwealth. This power is probably the most significant source of power for the Federal Government in regulating environmental matters.

In providing for the external affairs power in the Constitution the Founding Fathers envisaged the necessity for the Commonwealth Government to have the power to engage in diplomatic, trade and intergovernmental relations with other nations, and particularly with Great Britain herself. At the time the Constitution was drafted the

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31 For detailed background to the case see Davis (1984) at 17 and Somarajah (1983).

32 (1983) 46 *A.L.R.* at 635.

33 *Ibid.*

body of international law was far less than it is today. The classical international law of Grotius dealt primarily with rules of conduct in international diplomacy.[34] It was after World War Two and the establishment of the various United Nations organisations that issues previously regarded as of purely domestic concern came to be seen as legitimate areas of international regulation.

While the fundamental determination of the initiators of the United Nations Organization was undoubtedly to prevent the outbreak of the sort of wars which had plagued the first half of the century, there was also a feeling that the 'Peoples of the United Nations should reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.'[35] The leaders of the nations had realised that the surest way to ensure the development and maintenance of international peace was for there to be a feeling of common humanity and interests superseding national boundaries, among the members of the international community. This concept was a major motivation for the framers of the *World Heritage Convention.*

The Founding Fathers could never have contemplated that women's rights, industrial relations, the preservation of endangered species, the regulation of air navigation, racial discrimination, the retention of movable cultural heritage in the country of whose culture it forms a part, and the protection of the world cultural and natural heritage, among many other subjects, would come to be regulated by international law, and particularly be multilateral treaties.[36] Such treaties have become commonplace in the last half of the twentieth century.

The Commonwealth Government's power to ratify treaties providing for such international action is an executive power.[37] At Federation and for some years afterwards, the power was thought to be exercisable only by the Imperial Crown. But, at least since the *Statute of Westminster Adoption Act* 1942, the power is exercisable by the Australian Government through the Governor-General, pursuant to section 61 of the Constitution.[38] The ratification of such treaties is not enough to affect the rights

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34 Friedmann (1964), 4.

35 See the Preamble to the United Nations Charter.

36 Treaties on these subjects include the *Convention on the Political Rights of Women; the Convention Concerning Freedom of Association and Protection of the Right to Organise*; the *Convention for the Regulation of Aerial Navigation,* the *International Convention for the Elimination of All Forms of Racial Discrimination,* the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,* and the *Convention for the Protection of the World Cultural and Natural Heritage.*

37 Zines (1981), 245.

38 Section 61 provides that 'the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.'

and duties of citizens within Australia.[39] The High Court recognised early that the external affairs power should give the Commonwealth Government legislative power to implement treaties.[40] At the same time it was also recognised that the expansion in the kinds of areas governed by international agreements which led to the need for an expansive interpretation of the external affairs power, also suggested that there should be limits on the types of treaties which the Commonwealth Government can constitutionally implement.[41] Without such limitations, it was argued, the Federal balance of the Constitution would be overturned, for the Commonwealth Government could bring any subject within its power simply be signing a treaty relating to it.

The attempt to come to grips with appropriate limitations to the power has been largely fought on the stage of challenges to prevent Commonwealth protection of world heritage properties, and will be discussed in further detail in Chapter X. At this stage one can isolate some limitations on the exercise of the power. First, the treaty must be *bona fide*, or not entered into as a "mere device."[42] Second, the mere fact of the existence of a treaty on a certain subject does not make that subject an independent head of power. Legislation implementing the treaty must be reasonably able to be considered appropriate and adapted to the enforcement of the Convention.[43]

Section 9 of the *Heritage Act* relied on the external affairs power in that it purported to implement the *World Heritage Convention* into Australian domestic law. Because of the High Court's view in the *Tasmanian Dam Case* that protective measures implementing the *World Heritage Convention* domestically must be appropriate and adapted to Australia's obligations under that Convention, only the subsections which allowed the prohibition by regulation of particular activities which were likely to damage the world heritage values of the area were held to be valid. The High Court's reasons for finding sections 9(1)(h) and 9(2) to be a valid exercise of the external affairs power will be analysed in Chapter X.

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39 See *Walker v Baird* (1892) *A.C.* 491. The early drafts covering cl.5 of the *Constitution Act*, apparently taking Article VI of the United States Constitution as their model, contemplated that treaties made by the Commonwealth should become laws of the land but the final draft attempted no such departure from the common law doctrine of *Walker v Baird*- see Stephen J in *Koowarta v Bjelke-Petersen*, 211.

40 See *R v Burgess: Ex Parte Henry* (1936) 55 *C.L.R.*608.

41 In *R v Burgess*, Dixon J stated at 669 that:

> it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligations undertaken by the Executive, could not be considered as a matter of external affairs.

42 See *Tasmanian Dam Case* per Brennan J, 779, Deane J, 805.

43 See Starke J in *Burgess*, 659-660; *Tasmanian Dam Case*, per Mason J, 702, Murphy J, 730, Brennan J, 782 and Deane J, 805-806.

The Corporations Power

The second protective provision of the *World Heritage Properties Conservation Act* prohibits a trading or foreign corporation from carrying out certain activities without ministerial consent. The majority upheld this section as legislation with respect to those corporations (the H.E.C. was held to be a trading corporation). The same test as in *Fairfax* was used by Mason J. when he stated[44] that 'the true principle is that the character of the law is to be ascertained from its legal operation, that is by reference to the rights, duties, obligations, powers and privileges which it creates.' Using this test and agreeing with Stephen J. that an Act could have multiple characterisations, Mason J. rejected the submission of Mr. Merrals Q.C. for Tasmania that s.10 of the *World Heritage Properties Conservation Act*, was not a law about trading corporations but about the activities which are prohibited by the section or, alternatively, about the Western Tasmanian Wilderness area.[45] As a matter of constitutional interpretation, three of the majority judges found that there was no need for the activities prohibited to be related to the particular functions of trading corporations.[46] All majority judges stressed that the purpose of the Commonwealth in passing the legislation was irrelevant.

People of a Particular Race Power

The third protective provision of the *Heritage Act* prohibits without Ministerial consent the general activities included in the other sections but also makes it unlawful for a person 'to damage or destroy any artefacts or relics situated on any site to which this section applies' and 'to remove any artefacts or relics situated on any site to which this section applies'. This section was tailored to protect the Aboriginal heritage in an area and was enacted under the "People of any Race" power. The majority found that this section was with respect to people of a particular race. So far as the power was concerned, the majority rejected the view of Stephen J. in *Koowarta v. Bjelke-Petersen*[47] where he found that the legislation must have some special connection with the people of any race. The decision of the majority was that this power is not restricted to justifying laws which confer special legal rights or obligations on a race (which this legislation clearly did not: it applied to all persons, regardless of race). The rationale of the majority is well explained by Bates when he argues that:

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44 At 497.

45 *Ibid.*

46 The fourth majority judge (Brennan J) found it unnecessary to decide the matter.

47 (1982) 39 *A.L.R.* 417 at 447-8.

> the cultural heritage of a people is so closely interwoven with the characteristics of that people that a law protecting their cultural heritage must be a law with respect to the people of that race.[48]

The *Dam Case* illustrates the potential for the use of three of the Commonwealth's powers in the regulation of environmental matters. There are other powers in section 51 and elsewhere in the Constitution which also allow Federal involvement in this area.

Financial Powers of the Commonwealth

Because of the very nature of the Federal structure, the Commonwealth can indirectly influence State Governments, which have the major responsibility for land use decisions, by imposing conditions where some Commonwealth involvement in the activity is sought or required. For example, section 96 of the Constitution provides that:

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This provision has not been used as the temporary measure it was probably intended to be. The provision has been used as a means of exerting Commonwealth influence over State activities. The High Court's interpretation of section 96 has been that there are no limits to the sorts of terms and conditions the Federal Government can apply. The most important decision on this matter is *Victoria v. The Commonwealth*,[49] which involved challenges to certain provisions of the uniform taxation system legislation and particularly, for our purposes, the *State Grants (Tax Reimbursement) Act* 1946-1948 which authorised the payment of money to a State as financial assistance on condition that the Treasurer of the Commonwealth is satisfied that the State has not, in the relevant year, imposed a tax on incomes. This legislation was challenged by the plaintiff on the grounds that the Commonwealth cannot use section 96 to interfere with a State's legislative or executive power (in this case the power to tax incomes). The plaintiff argued that to allow the Commonwealth so to do would be contrary to the federal nature of the Constitution. It was further argued that in order for section 96 to have effect there must be a need of relief or a reason for giving assistance which is not in itself created by the Commonwealth legislation. The High Court rejected these arguments and upheld the *States Grants Act* under section 96. Reviewing two earlier cases on the issue, *Victoria v. The Commonwealth*[50] the *Deputy Federal*

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48 Bates (1984), 335, referring to Mason J, 719, Brennan J, 794 and Deane J, 819-820.

49 (1957) 99 *C.L.R.* 575.

50 (1926) 38 *C.L.R.* 339.

Commissioner of Taxation (NSW) v. W.R. Moran Pty. Ltd.,[51] Dixon CJ came to the conclusion that the power conferred by section 96 is well exercised although:

(1) The State is bound to apply the money specifically to an object that has been defined;

(2) The object is outside the powers of the Commonwealth;

(3) The payments are left to the discretion of the Commonwealth Minister;

(4) The money is provided as the Commonwealth's contribution to an object to which the State is also to contribute funds.[52]

The Commonwealth can, and does, impose land use planning conditions on such grants to the States. It also makes special grants for the protection of the heritage. The National Estate Grants Program, through which funds are made available to the States under the *Urban and Regional Development (Financial Assistance) Act* 1974 to assist in the conservation of the National Estate, consists of "section 96 grants" from the Commonwealth.[53] Thus, the section 96 powers of the Commonwealth have a direct bearing on the protection of the national estate, and consequently the world heritage, in Australia.

Commonwealth Development Project Approval

The Commonwealth can influence decisions on land use and conservation in cases where some sort of Commonwealth approval, such as an import or export licence, or an overseas loan approval is required under Federal legislation. Such legislation will itself be based on one of the powers of the Commonwealth, such as the trade and commerce power.

The Act which dictates appropriate procedures for environmental inquiries to be made in the face of the need for a Commonwealth decision on permits or funding is the *Environment Protection (Impact of Proposals) Act* (1974) (EPA). This Act has as its object ensuring, to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in relation to those matters listed in section 5. That section lists the following matters: the formulation of proposals; the carrying out of works and other projects; the negotiation, operation and enforcement of agreements and arrangements; the making of decisions or recommendations; and the incurring of expenditure by, or on behalf of, the Australian Government and authorities of Australia, either alone or in association with any other government, authority, body or person. Under section 11 of the Act the Minister for the Environment may direct that an inquiry be conducted in respect of

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51 (1939) 61 *C.L.R.* 735.

52 At 597-611.

53 This program is discussed in greater detail in Chapter VII.

all or any of the environmental aspects of any matter referred to in section 5. Apart from an inquiry, the Minister for the Environment can require an Environmental Impact Statement on the project.

The controversy over Fraser Island illustrates how the EPA has been used to implement Commonwealth policies with regard to the environment. This was the classic example of a dispute between conservationists who valued the Island's isolation, wilderness value, unusual and unique features and extraordinary beauty[54] and developers who were mining and exporting the valuable heavy metals on the island. The Federal administration, led by Prime Minister Fraser, had a policy of protecting Fraser Island. The avenue which it used to realise this objective was the *Customs Act* 1901-1973. Regulations under this Act, which was based on the Federal Government's trade and commerce power, enabled the Minister for Minerals and Energy to give or refuse mining export permits. Export licences were important in the Fraser Island dispute because there was no domestic market for the minerals sought to be mined on the island. The Government instituted an inquiry into the environmental implications of the proposed mining under section 11 of the EPA. Following a finding by the Inquiry that in general, the continuation of sand mining was inconsistent with the conservation of the natural environment of the island,[55] the Commonwealth Minister refused the grant of export permits.

In the High Court case which followed,[56] the Court found that, under the Customs legislation, the Minister was entitled to refuse to grant permits on the basis of any considerations, including the probable environmental implications of such a grant. It was made clear in this case that the EPA was purely procedural and achieves nothing unless it works in conjunction with another statutory provision that is constitutionally valid.

Commonwealth Power over Territories

Under section 122 of the Constitution the Commonwealth has a plenary power with respect to the Territories.[57] This power has enabled the Commonwealth to act to proclaim and protect the world heritage areas within the Northern Territory under the *National Parks and Wildlife Conservation Act* 1975.

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54 *Ibid.*

55 *Ibid,* 105.

56 *Murphyores Inc. Pty. Ltd. v. The Commonwealth and Others* (1976) 50 *A.L.J.R.* 570.

57 This includes not only the external territories of Australia, such as Norfolk Island and the Australian Antarctic Territory, but also the two internal ones, the Australian Capital Territory (A.C.T.) and the Northern Territory.

Implied Nationhood Power

This power is not specifically referred to in the Constitution, but is recognised by some judicial commentators as arising from the fact of the creation of a nation at federation. The power has been described in the following way:

> The Commonwealth enjoys, apart from its specific and enumerated powers, certain implied powers which stem from its existence and its character as a polity...So far it has not been suggested that the implied powers extend beyond the area of internal security and protection of the State against disaffection and subversion. But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of sections 51 (xxxix) and 61, a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[58]

It could thus be argued, for example, that the establishment of the Australian Heritage Commission and Commonwealth legislation providing for proclamation and protection of national parks could be justified under the nationhood power.

Conclusion

It is to use a cliche to say that the Federal balance has been tipped in favour of the Commonwealth in the decades since the Second World War. Judicial interpretation of the Constitution has abolished the doctrine of reserve powers and severely limited the operation of the implied immunities doctrine, both of which were seen to protect States' rights under the Constitution. The tests for characterisation of laws in the context of the Constitution have resulted in legislation with only a formal connection with the head of Commonwealth power on which they rely being held to be valid.

The Commonwealth has powers in section 51, principally the external affairs, corporations, people of a particular race, and trade and commerce powers, which could be used to a greater extent than they have been thus far to achieve national environmental regulation.[59] The considerable financial powers of the Commonwealth, particularly through the use of section 96 grants, and the uniform taxation system, have allowed the Commonwealth to exert a great deal of influence over State Government decision making in many areas.

In this discussion the emphasis has been on the use of the Commonwealth's powers for the protection of the heritage. There is clear potential, however, for their

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58 Mason J in *Victoria v Commonwealth and Hayden* (1975) 134 *C.L.R.* 338 at 362. Also see Jacobs J at 412-13.

59 For an overview of the possibility of using other powers to legislate on environmental matters see Zines, 'The Environment and the Constitution' in Mathews (1985), 13.

use in other aspects of environmental regulation. For example, the corporations power could be used to bring about the introduction of national pollution legislation, the trade and commerce power to place restrictions on the import of goods which are not produced in accordance with certain environmental guidelines, and the financial powers could be used to encourage State legislation on a variety of matters relevant to the protection of the environment. Because of the lack of a broad Commonwealth power, however, Federal action will be limited to the particular situation. Thus, for example, the Commonwealth could only legislate on pollution with respect to incorporated bodies. Despite the absence of a Federal environment power, there is considerable scope under the Constitution as it now stands for the Commonwealth to act to bring about national environmental regulation in general, and to protect the world heritage in particular.

CHAPTER VI

AUSTRALIA AND THE INSTITUTIONAL ARRANGEMENTS ESTABLISHED UNDER THE WORLD HERITAGE CONVENTION

Introduction

The Australian Government ratified the *World Heritage Convention* in August, 1974. Since then the country has assumed a high profile internationally in matters and institutions relating to the Convention. It has contributed to the World Heritage Fund and nominated properties for world heritage listing. This Chapter examines Australia's international profile in relation to the Convention.

Australia and the World Heritage Committee

Since ratifying the *World Heritage Convention*, Australia has played an active role on both the World Heritage Committee and the World Heritage Bureau. It is the only State Party to have been continuously represented on the Committee. Australia was elected to the Vice-Chairmanship of the Committee in 1980 and 1984 and to the Chairmanship in 1981 and 1982, with consequent representation on the World Heritage Bureau.[1] In 1981 the Australian Government hosted the 5th session of the World Heritage Committee, which met in Sydney from 26th - 30th October.[2] Because of this involvement, Australian representatives have played an active role in shaping the policies of the World Heritage Committee, and, specifically, in determining nominations for world heritage listing and applications for international assistance under the Convention.

Australia and the World Heritage Fund

Australia did not declare, at the time of the deposit of its instrument of ratification, that it would not be bound by the provisions of Article 16.1 of the *World Heritage Convention* and hence it makes mandatory contributions to the World Heritage Fund of 1% of its contribution to the Regular Budget of Unesco.[3] The amount of Australia's contributions since 1981 is set out below.

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1 Professor R.D. Slatyer was Australia's representative on the Bureau in each of these years.

2 The Report of the Rapporteur of the Meetings of the World Heritage Committee at this session is contained in Unesco Document CC.81/Conf//003/6.

3 See Chapter III for a discussion of the provisions in the Convention relating to the World Heritage Fund. Unpublished correspondence with the Department of Arts,Sport, the Environment, Tourism and Territories.

Australian Contributions to the World Heritage Fund

Year	Amount $US
1981	36,048
1982	36,048
1983	36,048
1984	26,714
1985	26,714
1986	29,928
1987	29,928
1988	39,289
1989	39,289

Source: Department of Arts, Sport, Environment, Tourism and Territories, Canberra.

While Australia's contribution is not substantial, it does constitute an average of approximately 2% of the annual budget of the Fund, and its annual subscription is sufficient to fund a major technical cooperation project in each year.

Australia has not sought international assistance from the World Heritage Fund.[4] The Convention provides that 'any State Party to this Convention may request international assistance for property forming part of the cultural or natural heritage of outstanding universal value situated within its territory.'[5] The *Operational Guidelines*, in establishing order of priorities for the granting of international assistance,[6] give no preference to requests from States which are otherwise unable to finance projects from their own resources. However, it was not the aim of the Convention to assist in funding projects by States whose financial resources enable the funding of relevant projects.

The preamble to the *World Heritage Convention* recognises that the protection of the world heritage at the national level 'often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technical resources of the country where the property to be protected is situated.' The Convention provides that studies preceding international assistance on a large scale shall 'seek means of making rational use of the resources available in the State concerned'[7] and that 'as a general rule, only part of the cost of work necessary shall be borne by the international community.' The contribution of the State benefiting from international assistance shall constitute a substantial share of

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4 See Chapter III for an analysis of the provisions of the Convention dealing with international assistance.

5 Article 19.

6 WHC/2 paras 88-90.

7 Article 24.

the resources devoted to each programme or project, *unless its resources do not permit this.*'[8] It seems unlikely that Australia would make a request for international assistance, particularly given the considerable difficulty which the World Heritage Committee has faced in maintaining the resources of the Fund at a sufficient level to meet the needs of States Parties seeking assistance to protect the world heritage.[9]

Australia and the World Heritage List

Australia now has eight properties on the World Heritage List: the Great Barrier Reef, Stages 1 and 2 of the Kakadu National Park, the Willandra Lakes Region of New South Wales, the Lord Howe Island Group, the Western Tasmanian Wilderness National Parks, the Australia East Coast Temperate and Sub-Tropical Rainforests, Uluru National Park and the Wet Tropical Rainforests of North-East Australia. A nomination to extend the boundaries of the Western Tasmanian Wilderness World Heritage Area was accepted by the World Heritage Committee at the December 1989 meeting.

Australian world heritage properties are primarily listed for their natural heritage values. Having only been settled 200 years ago, a tradition of non-Aboriginal culture has not been established long enough for there to be sites in Australia comparable to those in Europe and Asia. The cultural heritage criteria do not necessarily require great age. There is no reason, for example, why modern Australian cultural sites could not represent a unique artistic achievement, a masterpiece of the creative genius.[10] It would be difficult, however, for Australian cultural properties to have exerted great influence, over a span of time or within a cultural area of the world, on developments in architecture, monumental arts or town-planning and landscaping[11] or to be outstanding examples of a traditional human settlement which is representative of a culture and which has become vulnerable under the impact of irreversible change.[12]

Indeed, the only nomination by Australia which has been rejected by the World Heritage Bureau was of a modern cultural site. In 1981 it nominated the Sydney Opera House in its setting with the Sydney Harbour Bridge and the surrounding waterways of Sydney Harbour from Bradley's Head to McMahon Point. The Bureau, commenting in relation to this nomination that 'modern structures should only be accepted when there was clear evidence that they had established, or were outstanding

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8 Article 25.

9 See Chapter III.

10 Criterion (i) for cultural heritage in WHC/2 para 24.

11 Criterion (ii) for cultural heritage in WHC/2 para 24.

12 Criterion (v) for cultural heritage in WHC/2 para 24.

examples of, a distinctive architectural style,'[13] was of the view that the nomination did not satisfy these criteria.

Aboriginal culture has been existent in Australia for thousands of years. Several of the Australian world heritage sites contain very unique Aboriginal cultural sites. These aspects contribute to the natural heritage value of these sites, in the sense that they represent natural features of sites which are outstanding examples representing man's interaction with his natural environment.[14] They may also justify the inclusion of the sites as cultural heritage, satisfying the criteria of being a monument or site which bears a unique or at least exceptional testimony to a civilization which has disappeared.[15] These sites are thus listed as "mixed sites". Australia has two such mixed sites: Kakadu National Park and the Willandra Lakes Region.

Two case studies of the management of particular world heritage properties, Kakadu National Park and the Great Barrier Reef, are provided in Chapter IX. It is appropriate, however, to include in this Chapter a brief introduction to the Australian world heritage properties and the features which have justified their inclusion on the World Heritage List. It is the nomination and acceptance of high quality sites for world heritage listing which contributes to Australia's high profile on world heritage matters.

The Great Barrier Reef

The Great Barrier Reef, situated off Australia's North-East Coast, was inscribed on the World Heritage List in 1981. It was found to satisfy all the natural heritage criteria established in the *Operational Guidelines.*[16] The property is a huge one, consisting of 350,000 square kilometres. It is a long series of reefs composed of over 400 species of coral which provide a diverse habitat to a huge variety of marine life.[17] It also provides a major feeding and nesting grounds for endangered species, including the dugong and several species of turtle.[18]

Kakadu National Park

Kakadu National Park, situated in the Alligator Rivers region east of Darwin in the Northern Territory, was listed in two stages. Stage one, which consists of 6,144

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13 Unesco Doc. CC.81/Conf.002/4, para 6.

14 Criterion (ii) for natural heritage in WHC/2 para 36

15 Criterion (iii) for cultural heritage in WHC/2 para 24.

16 See Unesco Doc. CC.81/Conf.002/4 at para 6.

17 See Unesco Information Bulletin No. 21-22, 'World Cultural Heritage', 16.

18 *Ibid.*

square kilometres, was inscribed in 1981, and a slightly larger stage 2 was added in 1987. The present Australian Federal Government has made a commitment to nominate an additional area to constitute stage 3 of the Kakadu National Park at some time in the future.[19] The Kakadu National Park world heritage property is a mixed site. It provides a habitat for a rich variety of fauna and flora, exhibits biological features of importance, a range of landforms and a wide range of scenic sites of considerable beauty and grandeur. Kakadu has been acknowledged by the World Heritage Committee as satisfying three of the four natural heritage criteria, representing significant ongoing geological processes, biological evolution and man's interaction with his environment,[20] containing superlative natural formations and features,[21] and containing the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value still survive.[22] The area also demonstrates an abundance of unique Aboriginal art and occupation sites and paintings and its cultural value lies in its exceptional testimony to a civilisation which has disappeared.[23]

Willandra Lakes Region

The Willandra Lakes Region of New South Wales, covering 6,000 square kilometres, was listed in 1981. Like Kakadu, it is a mixed site. Its natural heritage value lies in it being a fine example of a regional semi-arid environment, unmodified by the processes of glaciation or enstatic sea-level changes.[24] Its cultural heritage value lies in its 30,000 year-old archaeological sites which provide crucial information relating to the period when man became dominant and the large species of wildlife became extinct.[25] Major archaeological discoveries include a 26,000 year old cremation site (the oldest known cremation site in the world); a 30,000 year old ochre burial site (comparable in age to ochre burial sites in France); the remains of giant marsupials in an excellent state of preservation; and grind stones or mortars from a period 18,000 years ago which were used to crush wild grass seeds to flour, and whose age is comparable to that claimed for the earliest seed grinding economies.[26] The Region is thus an outstanding example representing the major stages of the earth's

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19 Senate Hansard, 10th December 1987, 2883. Where a State Party wishes to nominate an extension of nominations for properties already inscribed on the World Heritage List the Party must supply the same documentation and the same procedure will apply as for new nominations, unless there is a simple modification of the limits of the property- WHC/2 para 54.

20 This is criterion (ii) with regard to natural properties, see WHC/2, para 36.

21 Criterion (iii) with regard to natural properties, ibid.

22 This is criterion (iv) with regard to natural properties, ibid.

23 See Unesco Doc. CC.81/Conf.002/4. Thus satisfying cultural heritage criterion (iii), WHC/2 para 24.

24 Australian Heritage Commission (1980), 5.

25 Unesco Information Bulletin No. 21-22, 17.

26 Australian Heritage Commission (1980), 5.

evolutionary history and significant ongoing geological processes, biological evolution and man's interaction with his environment.[27] In addition, this site satisfies the cultural heritage criteria of bearing a unique testimony to a civilisation which has disappeared.[28]

Western Tasmanian Wilderness

The Western Tasmanian Wilderness National Parks, consisting of the Cradle Mountain-Lake St Clair National Park, the South West National Park and Franklin-Lower Gordon Wild Rivers National Park,[29] were inscribed in 1982. This site fulfills all four of the natural heritage criteria adopted by the World Heritage Committee.[30] It is an outstanding example representing the major stages of the earth's evolutionary history and significant ongoing geological processes, biological evolution and man's interaction with his natural environment. It contains superlative natural phenomena, formations or features and contains the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value still survive.[31] The original nomination of the Parks consisted of 770,000 hectares of largely wilderness containing rugged peaks, buttongrass plains, rainforests, stands of huon pine up to at least two thousand years old and some of the last wild rivers in the world.[32] The area is one of only three large temperate wilderness areas remaining in the Southern Hemisphere.[33] Further:

> an impressive array of archaeological sites bears testimony to Aboriginal life during the extreme climatic conditions of the last ice age. Together with more recent sites they represent a storehouse of information on human adaptation to one of the harshest environments humans have endured.[34]

A nomination to expand this site has recently been accepted by the World Heritage Committee. In December 1988, following agreement between the Tasmanian and Commonwealth Governments in the aftermath of the Helsham Inquiry,[35] a joint nomination for listing was made of 262,000 hectares, adding to the property listed in 1982 some 80 percent of the Lemonthyme and Southern Forests area,

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27 Criteria (i) and (ii) for natural heritage properties.

28 Unesco Doc. CC.81/Conf.002/4 at para 6. Criterion (iii) for cultural properties.

29 Proclaimed as State Reserves under section 15 of the *National Parks and Wildlife Act* 1970 (Tas).

30 Unesco doc. CLT.82/Conf.014/6, para 7.

31 Para 33 of the *Operational Guidelines*.

32 Department of Arts, Sport, Environment, Tourism and Territories, 'Australia's World Heritage Properties'.

33 Tasmanian Department of Parks, Wildlife and Heritage (1989).

34 *Ibid.*

35 See Chapter VIII.

together with the Walls of Jerusalem National Park[36] and the Central Plateau Conservation Area.[37] The new areas contain large pristine tall forest ecosystems, together with superlative examples of wilderness, rainforest, alpine ecosystems and glacial landscapes. They also provide habitats for rare and endangered species and contain a number of sites of major Aboriginal cultural significance.[38] Following the coming to power of the Labor Government in Tasmania, with the support of the Green Independents, an additional nomination of 600,000 hectares was made in September 1989 of areas of significance bordering the original listed and nominated areas. The areas nominated in 1989 included the Hartz National Park, the Denison Spires, the Lower Gordon Catchment and the Central Plateau Protected Area.[39] These areas exhibit various world heritage features, including outstanding wilderness values and spectacular natural features.[40] Several of the smaller areas nominated, including the Tiger Range, Governor Headwaters and Broken Hills were included as a buffer to existing world heritage areas, or to protect the integrity of the areas.[41]

Lord Howe Island

The Lord Howe Island Group was listed in 1982 for its superlative natural formations and features and its importance as a habitat for threatened species of animals and plants of outstanding universal value, including one of the rarest birds in the world, the Lord Howe Island Woodhen.[42] The islands are situated off the coast of New South Wales, and the group is considered to be an outstanding example of an island system developed from submarine volcanic activity.[43] It demonstrates exceptional natural beauty as well as unique landforms and diverse and largely intact ecosystems. The diversity of landscapes and biota and the high proportion of rare and endemic animals, plants and invertebrates make them outstanding examples of independent processes from the point of view of science and conservation.[44]

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36 Proclaimed a State reserve under section 15 of the *National Parks and Wildlife Conservation Act*.

37 Proclaimed under section 14 of the *National Parks and Wildlife Conservation Act*.

38 Autumn 1989 6/1 *Ecofile* (a quarterly report on the environment from the Ministry of Arts, Sport, the Environment, Tourism and Territories).

39 Reserved for public and recreational purposes under section 8(2) of the *Crown Lands Act* 1976.

40 Hobart *Mercury*, 6/9/89.

41 *Ibid.* The Operational Guidelines specify that:

Whenever necessary for the proper conservation of a cultural or natural property nominated, an adequate "buffer zone" around a property should be provided and should be afforded the necessary protection. A buffer zone can be defined as an area surrounding the property which has restrictions placed on its use to give an added layer of protection; the area constituting the buffer zone should be determined in each case through technical studies- WHC/2 para 17.

42 Department of Arts, Sport, Environment, Tourism and Territories, 'Australia's World Heritage Properties'. See also Unesco Doc. CLT.82/Conf.014/6 at para 7.

43 New South Wales Government et al (1981), 3.

44 *Ibid.*

East Coast Temperate and Sub-Tropical Rainforest Parks

The Australian East Coast Temperate and Sub-Tropical Rainforest Parks were listed in 1986. The listed property consists of a number of national parks and reserves scattered over a large part of Eastern New South Wales, divided into six groups and covering an area of 203,088 ha.[45] This property 'includes the major part of the remaining pristine or near pristine rainforest in New South Wales and encompasses extensive rainforest/sclerophyll forest transitions and examples of other non-rainforest communities.'[46] Again, a natural heritage property of outstanding universal value in its demonstration of evolutionary history, its significant ongoing geological processes and biological evolution and its superlative natural formations and features.[47] The region's value includes its fossil record and evidence of distribution of organisms, which provide opportunities for understanding the evolutionary history of Australia's rainforests.[48] It contains examples of important biomes and sites where significant continuing evolution of biota may be occurring.[49] The superlative natural formations and features of the region include the distinctiveness of the rainforest with its surrounding vegetation, the Tweed (Mount Warning) volcano and the Great Escarpment, a geomorphic feature which can be traced over several thousand kilometres.[50]

Uluru National Park

In 1987 the Uluru National Park[51] in Central Australia, some 300 kilometres Southwest of Alice Springs, was included on the World Heritage List. It is listed for its exceptional geological formations, including the huge, rounded, red sandstone monolith, Ayers Rock, and the 36 steep-sided rock domes of the Olgas, which represent significant ongoing geological processes and man's interaction with his natural environment,[52] as well as constituting superlative natural formations and features.[53]

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45 Adam (1987), 109. The groups are the Tweed Volcano Group, the Washpool/Gibraltar Range Group, the Coastal Group, the New England Group, the Hastings Group and the Barrington Group. The areas include the Border Ranges National Park (31,228 ha.), Limpimwood Nature Reserve (2,442 ha.), Washpool National Park 927, 715 ha.), New England National Park (29,823 ha.) , Werrikimbe National Park (34,753 ha.) and Barrington Tops National Park (38,637 ha.).

46 Adam (1987), 46.

47 Unesco Doc. CC.86/Conf.001/11 at para 7.

48 Adam (1987), 82. For more details about the evidence the area otffers as to rainforest evolution see pp 84-89.

49 *Ibid*, 89. For more details see pp 89-90.

50 *Ibid*, 90.

51 Proclaimed under section 7 of the *National Parks and Wildlife Conservation Act* 1975 (Cth).

52 Criterion (ii) for natural heritage.

53 Criterion (iii) for natural heritage.

Wet Tropical Rainforests of North East Australia

The most recent Australian property to be included on the World Heritage List consists of the Wet Tropical Rainforests of North East Australia, an area of approximately 9,200 square kilometres in Queensland.[54] This property satisfies all of the natural heritage criteria. The Wet Tropical Rainforests include some of the most diverse habitats and superb scenery in Australia, including deep crater lakes surrounded by tropical forest. It provides a habitat for a number of primitive relic species, including the recently discovered *Idiospermum australiense*, a species which is the only member of its family and which provides clues to the origins of plants.[55]

> Many of the distinctive features of the region relate to the diverse terrain and to high rainfall. A wide range of rainforest plant communities and habitats occur throughout the Wet Tropics and differ according to variations in rainfall, soil type and drainage, altitude and evolutionary history. The wet tropical rainforests are a relict of a vegetation dissected by other vegetation types including schlerophyll forest and woodlands, mangroves and swamps. The area thus supports a rich and varied array of habitats, flora and fauna.[56]

Domestic Factors and the World Heritage List

Australia has nominated a significant number of unique sites of high quality, covering large areas of the country, for world heritage listing. However, the conflicts and controversies surrounding the implementation of the *World Heritage Convention* discussed in Chapter X have affected Australia's involvement in the listing procedure established under the Convention. The effects have been two-fold. First, Australia is one of the countries which has not submitted a tentative list of properties it intends to nominate for listing. This can in part be explained by the second factor, which is that there is a great deal of pressure on the Federal Government with regard to future nominations. This fact has in turn resulted in the nominations being far less extensive than they might otherwise have been.

Tentative List of World Heritage Properties

Australia has not submitted to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the World Heritage List (a "tentative list"), in accordance with its obligations under Article 11.1 of the Convention.[57] As we have seen in Chapter III, it was originally envisaged that the procedure for nominating properties for listing would involve the submission by States Parties of tentative lists, from which

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54 This property was inscribed at the World Heritage Committee's meeting in Brasilia in December 1988.

55 IUCN's Commission on National Parks and Protected Areas (1982), 53-54.

56 Department of Arts, Sport, Environment, Tourism and Territories (1988), 3.

57 For an explanation of the role played by these Lists and of the difficulty which the World Heritage Committee has had in obtaining them, see Chapter III.

would be selected appropriate outstanding properties for inclusion on the World Heritage List. The aim of requiring these lists is to enable the Committee and the NGOs to carry out the comparative and serial studies which are necessary for a methodical approach to building up the World Heritage List.[58] Thus far, the fact that Australia has not submitted a tentative list has not affected its nominations for the World Heritage List. This is probably in part because Australian natural and cultural sites are so unique and do not need to be compared with similar sites in other States in order to determine whether they are of outstanding universal value or not. In contrast, for example, there are a number of European cathedrals on the List. It is obviously necessary in order to maintain the quality of the List, that these sites have been compared with other similar ones and found to be of unique value.

While, until now, Australian nominations have been accepted despite the failure to submit a tentative list, the Government will have to seriously consider the submission of such a list if it does not wish any future nominations to be affected. The World Heritage Committee has specified that 'priority will be given to the consideration of nominations [of natural heritage properties] from States Parties which have submitted a tentative list, unless the State Party has given a specific explanation why it cannot be provided.[59] Such an explanation may, however, be able to be provided by Australia. Nominations of Australian properties for world heritage listing have inevitably been a matter of great public debate and controversy, for reasons which will be discussed at length in Chapter X. The failure to submit a tentative list can be seen in the light of this factor. The Government seems to be unwilling to create political controversy by formally identifying areas it believes to be of world heritage quality without taking the actual step of nomination. Recently the World Heritage Committee has specified that 'in all cases, so as to maintain the objectivity of the evaluation process and to avoid possible embarrassment to those concerned, States Parties should refrain from giving undue publicity to the fact that a property has been nominated for inscription pending the final decision of the Committee on the nomination in question.'[60] The Australian Government may be able to avoid submitting a tentative list, without affecting future nominations, on this basis.

Future Nominations

It is doubtful that all Australian sites of world heritage value have as yet been included on the World Heritage List. There have been two major studies which have sought to identify the world heritage properties in Australia. The first of these

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58 Unesco doc SC.81/Conf. 009/8, para 20.

59 WHC/2 para 7. The Committee will not consider cultural nominations from States which have not submitted a tentative list.

60 WHC/2 para 14.

studies was carried out by the advisory NGO to the World Heritage Committee on natural heritage properties, the IUCN. A more recent study has been completed by Figgis and Mosely, who have been heavily involved in the Australian conservation lobby,[61] from which there is continuing pressure to nominate sites for world heritage listing. Apart from those areas identified in the Figgis study, conservationists have called for the nomination of other areas, including the limestone karst areas on the Nullabor together with its off-shore marine park.[62] It is also regularly suggested that more extensive parts of sites already listed, particularly in Arnhem Land and Western Tasmania,[63] are part of the world heritage.

The IUCN Study

In 1982 the IUCN published a report for the World Heritage Committee entitled, *The World's Greatest Natural Areas: An Indicative Inventory of Natural Sites of World Heritage Quality.* There were five major aims in compiling this inventory. First, to assist countries in the preparation of the State inventories requested by the World Heritage Committee. Second, to illustrate to countries the sorts of areas they have within their borders which may be worthy of World Heritage consideration. Third, to provide the World Heritage Committee with a list of outstanding areas to illustrate the potential number of sites to be considered, to facilitate comparisons between nominated sites, and to help redress the imbalance between natural and cultural sites. Fourth to stimulate the submission of nomination forms for the properties listed. And finally to provide guidance to the Committee for providing preparatory assistance to States Parties in need of such assistance.[64]

All the Australian world heritage properties are included in the inventory but so are six other Australian sites which have not yet been nominated. The IUCN suggests that the Channel Country of Queensland and the Northern Territory, the Cape York Peninsula and Great Sandy Region in Queensland, and the Kimberlies, Shark Bay, and the Forest and Wildflower Regions of Western Australia are all worthy of inscription on the World Heritage List because of their natural heritage values.[65]

This study in itself puts pressure on the Australian Government with regard to the nomination of the suggested sites. The IUCN is the World Heritage Committee's principal advisor with regard to natural heritage properties. The NGO

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61 Penelope Figgis is a Vice-President of the A.C.F. and Geoff Mosley is a former Director of the A.C.F. from 1973 to 1986.

62 Toyne (1988), 7.

63 Law (1989), 5.

64 *Ibid*, 8.

65 *Ibid*, 51-56.

has a clear interest in maintaining the quality and integrity of the World Heritage List. It is of the view that many more areas of Australia than those already nominated are of world heritage quality. Should the Government not seriously consider further nominations, Australia's commitment to the *World Heritage Convention* may come to be questioned by the international community.

Figgis and Mosely Study

Studies from the Australian conservation movement result in a different kind of pressure on Government policy. The continual lobbying from conservationists for the nomination of further areas puts political pressure on the Government to comply. Inevitably, however, there is strong opposition from the very vocal developmentalist lobby.

In their study, Figgis and Mosely identify areas in Australia of world heritage quality beyond those already nominated. The authors include the Western Arid Region, encompassing the Uluru National Park (already included on the List), the MacDonnell Ranges (one of the world's most ancient mountain ranges) and the Finke River (claimed as the oldest rivercourse on earth). This area features numerous endemic species, some of great evolutionary importance, and the richest reptile fauna in the world.[66]

The Figgis study further identifies the Great Sandy Region in Queensland, including Fraser Island, the Cooloola sand mass on the mainland, and the Great Sandy Strait between as forming part of the world heritage. The authors are of the view that:

> the Great Sandy deserves its place on the World Heritage List principally because it is the greatest coastal sand mass in the world. Apart from a single dune, Mt Tempest on nearby Moreton Island, the dunes of the region are the highest and contain the oldest age sequence of any known dunes. These attributes alone make the region of great scientific interest; however, this great sand mass has many other outstanding features. Most surprising is the extensive system of lakes which perch in organically lined depressions, often high in the dunes[67].

Other areas identified are the Kimberley area on the North-West coast of Western Australia, covering some 180,000 square kilometres, Shark Bay, the Cape York Peninsula, the Eastern Arid Region of Central Australia, Southwest Western Australia, the Australian Alps[68] and the SubAntarctic Islands.

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66 Figgis and Mosely (1988), 143.

67 *Ibid*, 189. Sinclair has also called for international recognition for Fraser Island's amazingly diverse biota and outstanding aesthetic and cultural significance- see Sinclair (1988) 19.

68 This identification is supported by Johnson (1988), 20.

While the authors admit to taking a broad-brush approach to the identification of world heritage areas, and that boundaries need to be more clearly defined, the areas they identify are enormous. The Cape York Peninsula area, for example, consists of 15 million hectares, the Kimberley area of 180,000 square kilometres, the Eastern Arid Region of Central Australia of 400,000 kilometres, straddling South Australia, Northern Territory and Queensland, and Southwest Western Australia of 310,000 kilometres. The economic and political costs involved in prohibiting natural resources exploitation and restricting other land uses in these areas, consistent with their nomination for the World Heritage List would be enormous. This fact would mitigate against their being nominated by the Federal Government.

Given the legal and political controversy which has surrounded nomination and protection of world heritage properties in Australia, the Commonwealth Government is keen to obtain State consensus for future nominations in accordance with guidelines established by CONCOM in 1984. The Commonwealth and Western Australian Governments are currently having discussions about the possibility of nominating the Shark Bay site.[69] The question of appropriate procedures for consultation in nominations is dealt with in Chapter VIII in a discussion of the domestic implementation of the Convention.

Conclusion

Through its participation on the World Heritage Committee and Bureau, its contributions to the World Heritage Fund, and its nomination of quality sites for world heritage listing, Australia has earned a high reputation with regard to the international aspects of implementation of the Convention. However, domestic legal, political and economic problems to be discussed in Chapter X have negatively affected these international aspects. Nomination of properties for the World Heritage List will inevitably result in restrictions in use of the land in the Australian domestic context. Because of these consequences, the Australian nominations for world heritage listing have undoubtedly been less extensive and comprehensive than might otherwise have been the case. These factors have also affected the Australian Government's compliance with the obligation under Article 11.1 of the Convention to submit a tentative list of world heritage properties to the World Heritage Committee. These problems will be explored in greater depth in the domestic context, to which I now turn.

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69 Australian Mining and Environment Council Working Party (1989), 40.

CHAPTER VII

THE LEGISLATIVE FRAMEWORK FOR WORLD HERITAGE PROTECTION IN AUSTRALIA

Introduction

This Chapter examines the legal framework for world heritage protection in Australia through an analysis of the relevant legislation. The Australian Federal Parliament has enacted legislation specifically to give effect to its obligations under the *World Heritage Convention.* Relevant Acts are:

-the *World Heritage Properties Conservation Act* 1983,

-the *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1987.

In addition to these, there is other legislation enacted at Commonwealth level, which, while not specifically directed at the implementation of the Convention, and indeed enacted prior to the ratification of the Convention by the Australian Government, enables the fulfilment of obligations assumed under it. The relevant statutes are:

-the *Australian Heritage Commission Act* 1975,

-the *National Parks and Wildlife Conservation Act* 1975,

-the *Great Barrier Reef Marine Park Act* 1975.

This chapter analyses all but the last of these Acts, which is dealt with in the separate case study in Chapter IX.

Several of the world heritage properties within constituent States of the Commonwealth are reserved areas under various legislation of those States, rather than, for example, national parks proclaimed under the Commonwealth *National Parks and Wildlife Conservation Act.* This is because there are constitutional limitations on the extent to which the Commonwealth can assume responsibility for the management of reserved areas within the States, and also because the areas can often most efficiently and effectively be managed at State level. It is in the context of this State legislation, then, that ongoing management of most of the Australian world heritage sites takes place. The various State land reservation acts are therefore an important part of the legal framework for world heritage protection in Australia. An analysis of the common features of this legislation follows the consideration of Commonwealth enactments.

The Australian Heritage Commission Act 1975

The first Australian legislative enactment which affects the implementation of the *World Heritage Convention* is the *Australian Heritage Commission Act* 1975. Establishment of a permanent statutory commission to advise the Government and the

Parliament on the condition of the National Estate and on how it should be protected was recommended by the Hope Committee of Inquiry into the National Estate in its final report.[1] In response to the Hope Report, and specifically to the recommendation that a permanent commission be established to advise the Government and the Parliament on the condition of the National Estate and on how it should be protected, the *Australian Heritage Commission Act* was introduced into the House of Representatives by the then Minister for Urban and Regional Development, Mr. Uren, on 14th May, 1975.

"National Estate"

The *Heritage Commission Act* does not use the term "heritage" but adopts the phrase of the Hope Committee, namely "National Estate". The Act defines the "National Estate" as consisting of 'those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.[2] Thus, although there is no attempt to use the *Heritage Recommendation's* definition of "heritage", the *Heritage Commission Act,* like the *World Heritage Convention* and associated *Recommendation*, recognizes the importance to present and future generations of Australians of particular sites, and that

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1 Committee of Inquiry into the National Estate (1974), 348-349.

2 Section 4(1). By the *Australian Heritage Commission Amendment Bill*, 1989, which has yet to be read a third time in the House of Representatives, what shall constitute the national estate is defined in more detail. The Bill introduces a new section 4 (1A) which provides that:

> without limiting the generality of subsection (1), a place that is a component of the natural or cultural environment of Australia is to be taken to be a place included in the national estate if it has significance or other special value for future generations as well as for the present community because of any of the following:
>
> (a) its importance in the course, or pattern, of Australia's natural or cultural history;
>
> (b) its possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;
>
> (c) its potential to yield information that will contribute to an understanding of Australia's natural or cultural history;
>
> (d) its importance in demonstrating the principal characteristics of:
>
> (i) a class of Australia's natural or cultural places; or
>
> (ii) a class of Australia's natural or cultural environments;
>
> (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
>
> (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;
>
> (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
>
> (h) its special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history.

Thus, while the generality of the present provision is preserved, the Bill will insert specific criteria against which places under consideration for entry in the Register will be measured (Explanatory Memorandum to the Bill).

natural and cultural sites of this quality are integral to each other and of equal importance. The "National Estate" is not limited to places which might have special national significance. Sites may simply be of local or regional interest.[3]

More specific criteria have been laid down by the Commission on the question of what sorts of properties should be included on the Register of the National Estate. It believes that for the natural environment the Register should contain:

> (1) A representative list of those places which demonstrate the main stages and processes of Australia's geological and biological history;
> (2) Rare or outstanding natural phenomena, formations and features including landscapes and seascapes;
> (3) Habitats of endangered species of plants and animals;
> (4) Wilderness, forests and selected habitats and phenomena which, being readily accessible to populated areas, are as valuable as the rarer but less accessible places in the same categories.

The Heritage Commission has also laid down appropriate categories of cultural heritage. Cultural properties on the Register should include:

> (5) Significant rock art galleries, ceremonial grounds and sacred sites, quarries and shell mounds, rock and earth arrangements, and important historical and archaeological sites of the Aboriginal peoples;
> (6) Representative examples of the main stages of Australia's architectural and building history;
> (7) Monuments and historical landmarks, buildings, urban conservation areas and precincts which possess architectural, social, cultural, aesthetic, historical or
> (8) Buildings, bridges, roads, fences, urban and rural settings, and other structures or ruins which especially illuminate past ways of living, working or travelling.[4]

As is evident from these specifications of the Australian Heritage Commission, the criteria outlined by the World Heritage Committee for assessing properties nominated for the World Heritage List has influenced the assessment of Australian national estate sites.[5] Nevertheless, the legislation makes no mention of the *World Heritage Convention* and cannot be seen as implementing that Convention into Australian domestic law. In *Tasmanian Wilderness Society and Others v Fraser and Others* [6] a submission by the Tasmanian Wilderness Society that the *Heritage Commission Act* effectively implemented the *World Heritage Convention* was rejected by the Court. One would have to agree with Mason J that as the Statute makes no reference to the

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3 House of Representatives Standing Committee on Environment and Conservation (1979), 58.

4 Bates (1987), 160.

5 See Chapter III.

6 (1982) 66 *A.L.J.R.* 763. In this case the Wilderness Society was attempting to prevent the Gordon below Franklin scheme from going ahead by arguing that the Australian Loan Council was an "authority of the Commonwealth" and that, therefore, the protective provision, section 30 applied. Mason J rejected this submission, finding that the *Australian Heritage Commission Act* had no application to the Australian Loan Council, primarily because the Council was not set up by legislation, but rather by agreement, and was therefore not an authority of the Commonwealth.

Convention and the provisions do not either precisely nor even substantially reflect the articles of the Convention, it cannot be said to directly implement the Convention.[7] Nevertheless, as we shall see, the *Australian Heritage Commission Act* has great importance for the identification and protection of the world heritage in Australia.

The Australian Heritage Commission

The Australian Heritage Commission, a body corporate consisting of six commissioners and support staff is established by the *Australian Heritage Commission Act*.[8] The functions of the Commission are:

> (a) to furnish advice to the Minister, either of its own motion or upon request made to it by the Minister, on matters relating to the national estate, including advice relating to action to conserve, improve and present the national estate;[9]
> (b) to encourage public interest in, and understanding of, issues relevant to the national estate;
> (c) to identify places included in the national estate and to prepare a register of those places in accordance with Part IV;
> (d) to furnish advice and reports in accordance with Part V;
> (e) to further training and education in fields related to the conservation, improvement and presentation of the national estate;
> (f) to make arrangements for the administration and control of places included in the national estate that are given or bequeathed to the Commission; and
> (g) to organize and engage in research and investigation necessary for the performance of its other functions.[10]

The Commission is also given the power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.[11]

A legislative direction is given to the Commission to consult with Departments and authorities of the Commonwealth and of the States, local government authorities and community and other organizations in the performance of

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7 The constitutional bases for the *Heritage Commission Act* are not specified in the legislation, but it seems to depend for its validity on section 52 of the *Australian Constitution*, that is, the Commonwealth power over Commonwealth instrumentalities and the public service, in that the Australian Heritage Commission is a statutory authority and the Act seeks in part to affect the decisions of Commonwealth Ministers (Bates (1987), 38).

8 Section 6.

9 This subsection is to be amended by the *Australian Heritage Commission Amendment Bill* 1989, under which section 7(a) is ommitted and the following paragraph included:

> (a) on its own motion or on the request of the Minister, to give advice to the Minister, on matters relating to the national estate, including advice relating to:
> (i) action to identify, conserve, improve and present the national estate; and
> (ii) expenditure by the Commownealth for the identification, conservation, improvement and presentation of the national estate; and
> (iii) the grant of financial or other assistance by the Commonwealth for the identification, conservation, improvement or presentation of the national estate.

The grant of these powers was necessary because under the Bill the Commission is given the power, subject to Part VA, to administer the National Estate Grants Program. This restores the previous responsibility of the Commission for the NEGP, which was removed in 1976.

10 In section 7.

11 Section 10(1).

its functions. In particular, the Commission is to consult with the Director of National Parks and Wildlife in relation to any matter that concerns the establishment or management of a park or reserve under the *National Parks and Wildlife Conservation Act* in the performance of its functions.[12] This provision was inserted by a Government amendment to the original Bill. The Minister proposed it because, 'it will place in the legislation our commitment to consultation.'[13]

The part of the Act establishing the Commission relates to the *Heritage Recommendation* provision that Member States should set up in their territory one or more specialized public services responsible for listed functions.[14] The functions of the Commission are similar to those listed functions in the Recommendation. Further, the provision relating to consultation takes account of Article 14 of the *Heritage Recommendation* which proposes that:

> The specialized services should work with bodies of experts responsible for giving advice on the preparation of measures relating to the cultural and natural heritage. Such bodies should include experts, representatives of major preservation societies, and representatives of administrations concerned.

The Register of the National Estate

The primary function of the Heritage Commission involves the maintaining of an ongoing Register of the National Estate. This Register is provided for in Part IV of the Act. This part of the *Heritage Commission Act* provides that the Commission shall keep a register, to be known as the Register of the National Estate, in which will be listed places included in the National Estate.[15] All registrations have status irrespective of the time of their entry and there is no grading between the different categories of places on the Register.[16] In addition to maintaining the Register, the Commission is required to keep a list of places that might be entered on the Register.[17] This list and the Register are available for inspection and for copying.[18] During the year 1987-88, 523 places were listed on the Register. Of these, 68 are of national significance, 133 of Aboriginal significance and 322 of historical significance. This brings to 8513 the total number of registered places.[19]

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12 Section 8.

13 House of Representatives Hansard, 28th May, 1975, 2917.

14 Article 13.

15 Section 22.

16 *The Australian*, 26th February, 1980.

17 Section 26.

18 Section 27.

19 Australian Heritage Commission (1989), 8.

Any person can nominate a site for the Register. These nominations, other than those from State Governments or National Trusts, are referred by the Commission to specially appointed expert panels which make a report on the nomination. Nominations made by independent groups are referred to the respective State Governments and to the Australian National Parks and Wildlife Service or the State National Trusts, whichever is appropriate.[20] A place cannot be listed unless the Commission has given public notice of its intention to do so, notifying persons of their right to object, and given due consideration to any objections.[21]

Various submissions were made to the House of Representatives Standing Committee on Environment and Conservation to the effect that the *Heritage Commission Act* should be amended to require that all property owners, and persons and organisations with identifiable interests and local authorities should be notified in writing by the Commission of a decision to proceed with the listing of a nominated place.[22] This suggestion has been taken up in the *Australian Heritage Commission Amendment Bill* 1989, which inserts a section 23A into the Act requiring that notice of an intention to enter a place in the register must be given to owners of property within the site and the local government authority for the area in which the place is situated. Objections were also made about the failure to provide for a right to compensation for any loss suffered as a result of listing on the grounds that, 'it is surely only justice to ensure that no one person bears disproportionately a share of the cost of the preservation of the National Estate.'[23]

The concerns of those who made submissions in relation to notice of listing and compensation for owners are somewhat misplaced, given the effect of national estate listing under the *Heritage Act.*. As we shall see, because of the limited nature of the Commonwealth's powers in this area, inclusion on the Register of the National Estate offers no direct protection to the property, nor can it directly disadvantage the owners of such places. Thus, compensation provisions seem inappropriate. In any case, many of the places that will be recorded on the National Estate Register are already recorded by National Trust bodies in the States and these listings do not carry the right to compensation.[24] It is desirable that the Commonwealth Government provides funding for projects relevant to the protection of the national estate, and this is done through the National Estate Grants Programme (see below). Ideally, property

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20 House of Representatives Standing Committee on Environment and Conservation (1981), 61.

21 Section 23. This procedure is clarified by the *Australian Heritage Commission Amendment Bill* 1989, clauses 7,8 and 9.

22 House of Representatives Standing Committee on Environment and Conservation (1981), 63.

23 House of Representatives Hansard, 27th May, 1975, 2879.

24 House of Representatives Hansard, 28th May, 1975, 2923.

owners should be notified personally of an intention to include a site on the Register of the National Estate, particularly so that they are aware of the value of the property to the community and of the possibility of applying for funds for preservation and restoration work.

The objectives of the Commission with regard to the Register include the compilation of a comprehensive list of all the places in Australia which have heritage value; to educate Australians, by means of this list, about the natural and cultural history of their country; to give all decision makers, inside and outside government, objective information to make better decisions; and to allow Commonwealth decisions and actions related to the national estate, in particular, to be taken as thoughtfully and carefully as possible.[25] According to the first Chairman of the Heritage Commission, David Yenchen, the register provides 'a starting point that allows people to at least know what is worthy of being saved or protected.'[26] It is in this respect that Davis has described the Register of the National Estate as an "alerting and educational inventory".[27]

The Register plays an important role in the protection of the national heritage, and directly addresses the *Heritage Recommendation.* It will be recalled that Article 29 of the *Recommendation* provides that each Member State should draw up, as soon as possible, an inventory for the protection of its natural and cultural heritage, including items which, without being of outstanding importance, are inseparable from their environment and contribute to its character. The Register of the National Estate satisfies this requirement.

Other Functions of the Commission

Under the original legislation the Commission was also responsible for advising the Government on the distribution of national estate grants through the National Estate Grants Program.[28] Through this Program, funds are made available to the States as section 96 grants under the *Urban and Regional Development (Financial Assistance) Act* 1974, to assist in the conservation of the National Estate.

In 1974-1975 the Interim National Estate Committee had $7 million to disburse and was calling for submissions from groups of people concerned with protection natural areas, historic buildings and areas, and archaeological and

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25 See an advertisement of intention to enter places on the National Estate Register, *The Australian*, 26.2.80.

26 *The Australian*, 22.6.77.

27 Davis (1989), 67.

28 This function is to be restored under the *Australian Heritage Commission Bill* 1989.

Aboriginal sites throughout Australia.[29] However, this programme was cut back under the Fraser Government and the function of the Commission in advising on the distribution of grants was removed from the legislation. In the 1979-1980 Federal budget, the national estate allocation to provide grants-in-aid for urgent projects around Australia was reduced by 23% to $2 million.[30] In recent years, the programme has begun to be restored to its former vigour and the Commission acts in consultation with the Department of Arts, Sport, Tourism, Territories and the Environment, to develop the proposed programs for national estate grants. Under the programme $3.437 million was provided in 1988-9.[31]

The program is given legislative recognition under the *Australian Heritage Commission Amendment Bill* 1989, which inserts Part VA into the Act, entitled "National Estate Grants Program." This provides that a State, an internal Territory or an approved body may apply to the Minister for grants of financial assistance under the grants program in respect of National Estate projects.[32] The Bill provides for the Minister to approve grants, having regard to any matters that are prescribed for the purposes of the section.[33]

The establishment of this programme implements the financial measures provision in the *Heritage Recommendation* that central and local authorities should appropriate in their budgets a percentage of funds for the purposes of maintaining, conserving and presenting protected property.[34]

Protection for the National Estate

The Commonwealth did not provide comprehensive protection for the national estate in the *Heritage Commission Act* because the States have primary responsibility for legislating with respect to land use, planning and the environment. Thus, the Act does not purport to affect the actions of State or Local Governments or individuals in relation to the National Estate. Protection, presentation and

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29 Melbourne *Age*, 2.10.74.

30 *The Bulletin*, 29.1.80.

31 Department of Arts, Sport, Environment, Tourism and Territories, *Annual Report, 1987-88* (1987),120.

32 Section 31A. "Approved body" is defined in clause 3 of the Bill as a body approved by the Minister for the purposes of this Act, being:
(a) an authority or body established by or under a law of the Commonwealth;
(b) an authority of a State or of a Territory: or
(c) a local governing body; or
(d) any body corporate consituted for purposes other than the acquisition of gain by its individual members.

33 Section 31C.

34 Article 49.

conservation of the National Estate largely depends on State initiatives[35] and cooperation.[36]

The legislation does provide some protection for the national estate. One of the ways in which it does this is by enabling the Commission to furnish to the Minister administering the *Environment Protection Act* such advice in respect of a matter relating to the national estate and to the operation of that Act as the Commission thinks fit.[37] Further, the Minister may request such advice, a request with which the Commission must comply. The Commission may furnish a report on a matter relating to the *Environment Protection Act* and National Estate, which is deemed to be a recommendation referred to in paragraph 8(b) of that Act.[38]

The principal protective provision in the *Heritage Commission Act* is section 30. By this section, Commonwealth Ministers and agencies must not take any action which would adversely affect any place in the Register, unless there is no feasible or prudent alternative, and unless all action is taken to minimise damage where there is no such alternative, and unless the Commission is informed and given time to comment. The type of action which may be deemed to affect a place adversely includes

> the making of a decision or recommendation including a recommendation in relation to direct financial assistance granted, or proposed to be granted, the approval of a program, the issue of a licence or the granting of a permission.[39]

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35 The States of New South Wales and South Australia have enacted legislation directed at the protection of the state heritage - the *Heritage Act* (NSW) 1977 and the *Heritage Act* (S.A.) 1978. Both these Acts establish bodies similar to the Heritage Commission at a State level with responsibility for such protection (by ss. 7 and 8 of the NSW legislation and s.5 of the S.A. legislation). Likewise, both Acts provide for a State Register (ss.22 and 4) and restrictions apply to activities which will affect listed items. In NSW listing may result in an interim or permanent conservation order (ss. 24 and 25), and in South Australia listed sites can be subject to heritage agreements undertaken between the Minister and the owner of registered items, and planning restrictions can apply under section 47(4) of the *Planning Act* 1982. At a more specific level, Victoria has enacted the *Historic Buildings Act* of 1981, while all States and the Northern Territory have legislation to enable the protection of Aboriginal sacred sites - see Bates (1987), 180-182.

36 In announcing the establishment of the Commission, the Minister for Urban and Regional Development, Mr. Uren stated that the Commission would serve as an example of cooperation between the States and the Federal Government: 'we will consult our state colleagues. This will be a togetherness thing' (*Australian* 10.1.75). David Yenchen has described the *Heritage Commission Act* as 'an important piece of Federal environmental housekeeping, which we hope will soon be matched by means of similar pieces of State housekeeping' (Yenchen (1976-77), 17).

37 Section 28.

38 Section 29.

39 Section 30(4).

These provisions were included on the recommendation of the Hope Committee that the legislation should contain sections similar to those in the United States *National Environmental Policy Act* which requires all Government agencies or departments to act so as to ensure the maximum possible conservation of items of the National Estate.[40]

Ministers who wish to proceed with a development despite possible adverse effects on a National Estate property can still do so under any of the exceptions noted above. However, the *Heritage Commission Act* does at least ensure that decisions are not made by Ministers and Commonwealth agencies without careful consideration of the possible effects of such a development of the site.

The Importance of the *Heritage Commission Act* for the World Heritage in Australia

Despite the fact that it was not designed to implement the *World Heritage Convention* into Australia domestic law, the *Heritage Commission Act* is important in any discussion of world heritage matters for two main reasons. Firstly, it addresses many of the proposals in the *Heritage Recommendation.* Secondly, the Act, in establishing the Heritage Commission and a Register of the National Estate enables the Australian Government to effectively carry out some of its obligations under the Convention, particularly so far as identification of world heritage properties are concerned.

The National Estate is defined so as to include the world heritage situated in Australia. The existence of the Register of the National Estate is essential to ensuring the initial identification and protection of the world heritage. As Davis has stated:

> It is almost inevitable that in cataloging places of national value, a few prime areas prospectively of world comparative quality may be identified. Furthermore, the comprehensive studies carried out for National Estate listing sometimes reveal hitherto unsuspected qualities or confirm earlier evidence that some place possesses scientific or other values that elevate it to world class, irrespective of whether scenically attractive or not.[41]

Without such identification sites of national, or even world, heritage value could be destroyed or adversely affected by decisions made without adequate information or realisation of the qualities of the area concerned. The determination that an area is of the natural heritage of the world is one that will be influenced by scientific studies of the site's ecosystems and evolutionary history and research into the species for which it provides a habitat. Such work, like that which is necessary to determine that an area is of the cultural heritage of the world, can take many years.

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40 Committee of Inquiry into the National Estate (1974), 343.

41 Davis (1989), 69.

The *Heritage Commission Act* at least ensures that the areas are not destroyed without careful consideration of the need for the development, of means of ensuring the least possible damage is caused and of any possible alternatives to the development. The advisory, research and investigative roles of the Commission, as well as the part it plays in public education and training, have the potential to bring about the political will and the technical ability to adequately protect the heritage and directly fulfil the obligations in relation to those subjects undertaken by Australia under Article 5 of the *World Heritage Convention*. Further, the functions carried out by the Commission correspond closely to those which Australia has undertaken to establish services to perform by Article 5 of the Convention.[42] For these reasons, the *Australian Heritage Commission Act* plays a very important role in ensuring that Australia is able to fulfil its obligations under, and achieve the aims of, the *World Heritage Convention*.

The National Parks and Wildlife Conservation Act 1975

Like the *Australian Heritage Commission Act*, the *National Parks and Wildlife Conservation Act* was not enacted specifically for the purpose of implementing the *World Heritage Convention*. However this Act, one of the four major pieces of environmental legislation enacted by the Whitlam Labor Government as a response to the developing environmental consciousness in Australia, is also an important part of the legislative framework which enables the Australian Government to fulfill its obligations under that Convention. Not only does it create another important specialized service with a mandate to deal, among other things, with matters relating to the protection, conservation and presentation of the world natural heritage in Australia, but it also provides the framework for the creation and management of national parks under the control of the Commonwealth Government. This has proved an important mechanism for the protection of the Northern Territory world heritage areas, the Uluru and Kakadu National Parks.

The *National Parks and Wildlife Conservation Act* was introduced into Federal Parliament by the then Minister for the Environment and Conservation, Dr. Cass, in October 1974. In his second reading speech Dr. Cass spoke of the "world-wide concern for the conservation of wildlife and of places of natural, scenic scientific and recreational significance".[43] He received broad support from the Opposition of

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42 Article 5 provides that States Parties should endeavour, in so far as possible, and as appropriate for each country (a) 'to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions.'

43 Senate Hansard, 10th December, 1974, 3274.

the day, reflecting the sense in the community that there was a need for a National Parks and Wildlife Service with responsibilities for management of Australia's national parks.[44]

The Creation and Management of National Parks

Section 6(1) of the *National Parks and Wildlife Conservation Act* outlines the constitutional powers on which the Commonwealth relies in enacting the legislation. These are the "implied nationhood power", the power to make laws with respect to the Territories,[45] and those of the Commonwealth Government as the recognised entity in international law over the Australian coastal sea and the continental shelf of Australia,[46] the external affairs power, and the trade and commerce power.

The Commonwealth Government recognised the likelihood of political rhetoric and legal challenges from the States if it attempted to create national parks in State territory and manage them under the Commonwealth legislation. Thus, section 6(2) of the *National Parks and Wildlife Act* provides that land in a State which is reserved under the law of that State for purposes relating to conservation and protection shall not be acquired by the Commonwealth for the purposes of establishing a park without the consent of the State.[47] The consent of the Northern Territory Government is also required, except as it relates to land in the Uluru National Park and in the Alligator Rivers Region, where the Kakadu National Park is situated.[48] At the time of the adoption of the legislation there was general recognition of the unique values of these regions and of the desirability of having them managed under the Commonwealth legislation. Dr. Cass made it clear in his second reading speech on the Bill that the Government intended to move quickly for the proclamation of the proposed Kakadu National Park in the Northern Territory, with or without the consent of the Northern Territory Government.[49]

Under the legislation the Governor-General may, by Proclamation, declare an area of land to be a park or reserve and may declare the whole or part of that park or

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44 House of Representatives Hansard, 3rd December 1974, 4491.

45 In paragraph 122 of the *Australian Constitution Act* 1901..

46 See the *Seas and Submerged Lands Case: New South Wales v The Commonwealth* (1975) 135 *C.L.R.* 337.

47 Section 6(2) was inserted from an amendment moved by the Opposition, which was concerned that cooperation between the Commonwealth and States be fostered, and that the States did not see the Commonwealth taking over and duplicating their conservation regimes- House of Representatives Hansard, 3rd December, 1974, 4493.

48 Section 6(3).

49 Senate Hansard 10th December, 1974.

reserve to be a wilderness zone.[50] The link with section 6 and the constitutional powers referred to in that section is provided by section 7(1). In that section the definition of "area" is limited to:

(a) areas owned or held under lease by the Commonwealth, including any area that has been dedicated or reserved under a law of a Territory for the purposes of a national park, nature reserve, protected area of wildlife sanctuary; or

(b) areas of Aboriginal land held under lease by the Director (of National Parks and Wildlife, an office established under the Act); or

(c) areas of the Australian coastal sea in respect of the sea-bed and sub-soil beneath which no interest is vested in a person other than the Commonwealth; or

(d) areas of sea over a part of the continental shelf of Australia in respect of which no interest is vested in a person other than the Commonwealth; or, finally,

(e) areas of land or sea outside the Australian coastal sea in respect of which Australia has, under an agreement between Australia and any other country or countries, obligations relating to wildlife that may appropriately be carried out by the establishment and management of the area as a park or reserve.

Once such a park or reserve has been declared, any interest held by the Commonwealth in respect of the land becomes vested in the Director.[51] No such interests can be sold, leased or otherwise disposed of,[52] although where the plan of management[53] relating to the park or reserve so provides, the Director may grant leases or licenses over land in the park or reserve, in accordance with the plan of management. Further, interests held by the Director may be surrendered to the Commonwealth for the purposes of Part II of the *Aboriginal Rights (Northern Territory) Act* 1976, which enables a grant of land to an Aboriginal Land Trust.[54]

Conservation Zones

In 1978 the *National Parks Act* was amended to enable the declaration of "conservation zones" within "the Region."[55] The object of such a declaration is the protection and conservation of wildlife in, and the protection of the natural features of, an area of land or sea in the Region until a decision is made whether or not to declare

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50 Section 7. Under section 10(5) these wilderness zones are to be maintained in their natural state and are to be used only for scientific research and such other recreational and other purposes, other than the recovery of minerals, as are specified in the plan of management in relation to the wilderness zone.

51 Section 7(7).

52 Section 9(1).

53 Provided for in section 11.

54 Detail on this Act and its operation in relation to Kakadu National Park is provided in Chapter IX.

55 Section 8A.

they are to be a park or reserve.[56] This declaration is to be done by Proclamation of the Governor-General.[57] "The Region" is defined as "so much of the Alligator Rivers Region (i.e. situated in the Northern Territory and surrounding the Kakadu National Park), as does not include the Arnhem Land Aboriginal Reserve and certain listed pastoral leases.

The Ranger Inquiry (discussed in Chapter IX) had recommended that the whole of the South Alligator River catchment area, which includes the two pastoral leases, be included in the Park. On 13th March, 1984, the Government gave notice of its intent to submit a report recommending the declaration of the leases as part of the National Park. Intensive pressure from the mining lobby resulted in only about 65% of the leases being included, with the remaining 35% declared part of the conservation zone. As a consequence of strong lobbying from environmental groups the Gimbat and Goodpala pastoral leases in this region were purchased by the Commonwealth Government in the 1960s. In 1987 an amendment Act removed those leases from this exclusion, thus enabling the parts of the leases which were not to be included in the Kakadu National Park to be declared as conservation zones.[58]

Special regulations can be made in relation to conservation zones.[59] The regulations can cover such objects as: regulating or prohibiting operations for the recovery of minerals and regulating the carrying on of fishing, pastoral or agricultural activities for commercial purposes, among others. By amendment in 1987, regulations in relation to operations for the recovery of minerals have effect notwithstanding that they may be inconsistent with interests in respect of land or in respect of minerals on, in or beneath that land. Any operation for the recovery of minerals pursuant to such an interest shall be deemed to be a proposed action within the meaning of the procedures made under the *Environment Protection (Impact of Proposals) Act* 1974, thus enabling the Minister to require an Environmental Impact Statement from the proponent of any such operation.[60]

Existing Interests in Reserved Areas

An ongoing problem in relation to the conservation of land, in the Northern Territory particularly, is the presence of existing mineral and pastoral interests in many areas. Another amendment to the *National Parks Act* in 1978 addresses the issue of existing interests in parks, reserves and conservation zones, and provides that the

56 Section 8A(1).
57 Section 8A(2).
58 No. 16 of 1987.
59 Section 8A(8).
60 No. 16 of 1987.

provisions of the plan of management do not affect interests in respect of the land or in respect of minerals on, in or beneath the land held by any person, nor the application of the law of any State or Territory.[61] However, such an interest held by a person shall not be renewed, except with the consent in writing of the Minister, and subject to any conditions specified by the Minister.[62] Thus, the Minister administering the *National Parks and Wildlife Act* is able to consider the conservation values of the relevant area and the potential effect on these values of the existing interest and refuse to renew that interest, or attach conditions designed to protect conservation values, or for any other purpose. Persons adversely affected by section 8B(1)(b) are entitled to be paid reasonable compensation by the Commonwealth.[63]

In recognition of the importance of mineral operations to the economy, section 8B(1)(b) does not apply to interests in respect of minerals beneath the land concerned. A mineral interest can be renewed without the consent of the Minister for the Environment. It should be noted, however, that by section 10 of the legislation, no operations for the recovery of minerals can be carried out in a park or reserve other than Kakadu National Park, unless they are carried out in accordance with the plan of management. Thus, an existing mineral interest in a national park will be of little use unless the plan of management permits its exploitation. By amendment of 1987, section 8B is specifically stated not to apply to any interest in respect of any minerals on, in or beneath land within the Kakadu National Park nor to any other interest in so far as it relates to operations for the recovery of any such minerals. The exclusion of Kakadu National Park from this section is in view of the amendment to section 10 of the Act (following) which specifically prohibits operations for the recovery of minerals in that Park.

Operations for the Recovery of Minerals

One of the crucial issues which had to be dealt with in the legislation, particularly given that most of the national parks declared under it are in the Northern Territory and that the economy of the Territory depends to a large extent on mineral exploitation, was the question of whether operations for the recovery of minerals should be allowed to proceed in parks and reserves. There is a prohibition on operations for the recovery of minerals in a park or reserve (not being Kakadu National Park), other than operations carried on in accordance with the plan of management.[64] Further, except where necessary for the management of the park and the protection of the area and wildlife in the area, controlling authorized scientific research or

61 Section 8B.
62 Section 8B(1)(b).
63 Section 8B(2).
64 Section 10(2).

protecting persons or property, there is a prohibition on excavation, building, works and timber felling or taking, again except in accordance with the plan of management. The special value of the Kakadu National Park was recognised in 1987 when an amendment to the legislation provided in accordance with a major Cabinet decision that no operations for the recovery of minerals shall be carried out in Kakadu National Park.[65] The Commonwealth is not liable to pay compensation to any person by reason of the enactment of this 1987 amendment Act, notwithstanding any law of the Commonwealth or the Northern Territory.[66]

Managing National Parks

One of the major instruments provided for in land conservation legislation in Australia is the management plan. These plans set out the general objectives of the management authorities for the area.[67] Under the Commonwealth *National Parks Act*, plans of management are to be prepared by the Director as soon as practicable after a park or reserve has been declared, unless a Board is established under Part IIA for a prescribed reserve,[68] in which case the Board and the Director together prepare a plan of management.[69]

The objects which are to be had regard to in the preparation of the plan of management, include the encouragement and regulation of the appropriate use, appreciation and enjoyment of the park by the public or the regulation of the use of the reserve for the purpose for which it was declared; in the case of a park or reserve wholly or partly within a defined region of the Alligator Rivers Region, Kakadu National Park, to the interests of the traditional Aboriginal Owners of, and of other Aboriginals interested in it; and the preservation of the park or reserve in its natural condition and the protection of its special features.[70] The plan of management may provide for the division of the park or reserve into zones and set out the conditions under which each zone shall be kept and maintained.[71]

Where there is a disagreement between the Director and the Board both parties are required to advise the Minister accordingly and the Minister is to take such steps as he considers appropriate to resolve the disagreement.[72] Plans of management

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65 Section 10 (1A).

66 Section 7 of no. 15 of 1987.

67 See Fisher (1987), 145.

68 Defined in section 3(1) as either the Uluru National Park or a park or reserve declared by regulations to be one.

69 Section 11.

70 Section 11(8).

71 Section 11(9).

72 Section 11(11A) and (11B) inserted by no. 94 of 1985.

are to be laid before both Houses of Parliament and either House may, in pursuance of a motion upon notice, pass a resolution disallowing the plan of management where upon the Minister is to give to the Director a direction that a fresh plan of management be prepared.

The question of the legal status of these management plans is a moot point.[73] Given that they will generally simply set out the objectives of the management authorities with regard to the site, there is unlikely to be any real problems on this issue. It will be the regulations which provide for the details of management.[74] The legislation makes it clear that while a plan of management is in force, the Director shall perform his functions and exercise his powers in relation to the park or reserve to which the plan relates in accordance with that plan and not otherwise.[75] On certain issues the plan of management is clearly of direct import in terms of the legislation. This is so with regard to the establishment of townships where the plan of management so provides,[76] the granting of leases or licences in respect of land where the plan of management so provides and in accordance with that plan[77] and the carrying out of operations for the recovery of minerals only where the plan of management allows such.[78]

In most nature conservation legislation there is a recognition that in devising plans of management there should be public input.[79] Provision is made in the *National Parks Act* for public inspection of, and comment on, management plans.[80] Given the particular interest of the Aboriginal people in much of the areas reserved for national parks in the Northern Territory, the legislation recognises the desirability of giving particular emphasis to input from representatives of the Aboriginal community. Part IIA of the Act provides for the establishment of the Boards mentioned in relation to plans of management for National Parks where an area of Aboriginal land is situated wholly or partly within a prescribed park or reserve and the Minister and the Aboriginal Land Council for the area in which the land is situated agree that a board should be established for that park or reserve. This Board is to consist of a majority of Aboriginals nominated by the traditional Aboriginal owners of that land. The

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73 See Fisher (1987), 145.

74 *Ibid.*

75 Section 14(1).

76 Section 8C(1).

77 Section 9(1) and (2).

78 Section 10(2).

79 Thus, under section 75 of the New South Wales *National Parks and Wildlife Act* (1974), the Director must give notice that the plan of management has been prepared, can be inspected and that representations can be made in relation to it. A similar procedure applies under section 20 of the Tasmanian *National Parks and Wildlife Act* 1970.

80 Section 11(10).

functions of the Board are specified in section 14D and include the preparation, in conjunction with the Director, of plans of management in respect of the park or reserve and making decisions, being decisions that are consistent with the plan of management in respect of that park or reserve, in relation to the management of that park or reserve.

The Director of National Parks and Wildlife

Part III establishes the office of the Director of National Parks and Wildlife and sets out the Director's functions,[81] giving the Director the power to do all things that are necessary or convenient to be done for and in connection with the performance of his functions.[82] The functions of the Director are directly relevant to Australia's fulfilment of its obligations under Article 5 of the Convention to set up services for the protection, conservation and presentation of the cultural and natural heritage and to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field. The Director is required to, among other things, protect, conserve, manage and control wildlife; conduct surveys and collect statistics, of an in relation to animals and plants; cooperate with any country in matters relating to the protection and conservation of animals and plants in that country; to provide and assist in the provision of training in the knowledge and skills relevant to the protection, conservation and management of wildlife and the establishment of national parks and nature reserves; and to carry out himself or in cooperation with other institutions and persons, research and investigations relevant to the establishment and management of national parks and nature reserves and the protection, conservation and management of wildlife.

Regulation-making Powers

While management plans provide the broad objectives of management and there are some specific prohibitions with regard to management in the legislation, the details of management of parks and reserves are generally provided for in regulations.[83] Thus, in Part VII of the Act, which deals with miscellaneous matters, the Governor-General is given a broad power to make regulations prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.[84]

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81 Section 16(1).

82 Section 17(1).

83 See Fisher (1987), 145.

84 Section 71.

The other regulation-making section relies specifically on the Commonwealth's power with respect to external affairs and provides as follows:

> International Agreements
>
> (1) The Governor-General may make regulations for an in relation to giving effect to an agreement specified in the Schedule.
>
> (2) Regulations made under sub-section (1) in relation to an agreement that has not entered into force for Australia shall not come into operation on a date earlier than the date on which the agreement enters into force for Australia.

A schedule is attached to the legislation which specifies those international agreements to which Australia is a party and to which section 69 applies. There are five, including the *Convention for the Protection of the World Cultural and Natural Heritage.*[85] This provision thus amounts to the first domestic legislative recognition given to the *World Heritage Convention* in Australia. Section 69 was included in view of the Hope Report's recommendation that the *World Heritage Convention*, among other international agreements, be ratified by the Australian Government immediately and the obligations and principles in it be accepted by the Australian Government.[86]

The Importance of the *National Parks Act* for the World Heritage

The *National Parks and Wildlife Conservation Act* is important for world heritage matters for three reasons. Firstly, it gives the first domestic legislative recognition to the *World Heritage Convention* by enabling the making of regulations to implement that Convention. Second, it creates the office of the Director of National Parks and Wildlife Services with responsibilities relating in part to the protection, conservation and presentation of the cultural and natural heritage and for training in such protection, which is clearly relevant to Australia's obligations under Article 5 of the *World Heritage Convention.* Third, it allows for the creation of national parks and for their management through a national agency. The *National Parks and Wildlife Conservation Act* has been used extensively in relation to the two

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85 The other international instruments are the *Convention on Wetlands of International Importance especially as Waterfowl Habitat,* the *Convention for the Conservation of Antarctic Seals, the Convention on International Trade in Endangered Species of Wild Fauna and Flora* and the *Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Bird in Danger of Extinction and their Environment.*

86 Committee of Inquiry into the National Estate (1974), 344. The original clause in the *National Parks and Wildlife Conservation Bill* provided that regulations could be passed for the implementation of any international agreements for the conservation of wildlife to which Australia became a signatory. This provision was rejected as too broad. The Opposition attempted to have clause 69 removed altogether the House of Representative Hansard, 4th December 1974, 4549.

Northern Territory world heritage areas, Uluru National Park and Kakadu National Park.[87]

The *World Heritage Properties Conservation Act* 1983

The *World Heritage Properties Conservation Act* was the first piece of Commonwealth legislation enacted solely in pursuance of the Government's obligations under the *World Heritage Convention.* While it was enacted in response to a specific threat to a specific world heritage property, it has the potential to apply to all world heritage properties in Australia, and, as a result of amendments passed in 1988, can have application to a broader range of sites than that.

The specific threat which the legislation was designed to counter was to the Western Tasmanian Wilderness National Parks, which had been inscribed on the World Heritage List in December 1982, following a nomination by the Federal Liberal Government in November 1981 at the request of the then Premier of Tasmania, Mr. Doug Lowe. The area had become embroiled in controversy over a proposal for the Gordon below Franklin Hydro-Electric scheme, which would flood parts of the wilderness region, and particularly, parts of the Franklin River. The Fraser Government, while believing that the dam should not go ahead for environmental and economic reasons, refused to intervene in the construction of the dam.[88] Following its election on 5th March 1983 with the clear policy of using all possible constitutional powers to protect the region from this scheme, the Hawke Labor Government, having attempted unsuccessfully to negotiate with the Liberal Premier of the State, Robin Gray, took legislative action to stop the dam and protect the world heritage area.[89]

The *World Heritage Properties Conservation Act* was enacted in response to the Commonwealth's responsibilities under Articles 4 and 5(d) of the *World Heritage Convention.*[90] It will be recalled that under Article 4 the Government had undertaken to do all that it could to the utmost of its resources to ensure the protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory. Under Article 5(d) its was obliged to take the

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87 The management of Kakadu National Park is taken as a special case study in Chapter IX illustrating the conflict between developmentalist and conservationist ideologies in world heritage matters in Australia.

88 House of Representatives Hansard, 8th December 1982, 3086 - Ministerial Statement on South-West Tasmania.

89 The facts and details of this controversy are dealt with in more detail in chapter X in which the High Court case resulting from it is examined.

90 The Act was preceded by a private member's Bill which had been introduced into the Senate by Democrat Senator Mason on 27th October, 1982.

appropriate legal measures necessary for the protection, conservation, presentation of this heritage. The legislation was designed to achieve these goals.

Application and Constitutional Bases

Prior to amendment in 1988, the legislation made the following provision for the protection of particular properties. First, an "identified property" was defined in section 3(2) as property or part of property forming part of the cultural or natural heritage, as defined in the *World Heritage Convention*, and which has been identified as such either by Commonwealth regulation or by being nominated through the international procedure.

There was considerable criticism in both Houses of Parliament about the fact that a property could be identified simply by regulation. Senator Evans pointed out that the obligations of the Government under the Convention extended to all world heritage, regardless of nomination. He also made the point that the regulations declaring any property to be of the cultural and natural heritage would be open to a motion of disallowance by the Parliament. Further, the legislation only justifies regulations where the property is in fact of the cultural and natural heritage in terms of the Convention.[91] Nevertheless, it is difficult to see why the provision was necessary, as a failure by the Government to submit the property on an inventory of the world heritage in its territory once it had identified it as such would be in breach of its obligations under Article 11 of the Convention.

Once it is established that the property is identified property, it must then satisfy a number of criteria in order to be subject to the protective provisions of the legislation. The principal protective provision, section 9, will only apply where the Governor-General has proclaimed the identified property to be a property to which that section applies. He can only do this if he is satisfied that the property is being or is likely to be damaged or destroyed.[92] Such proclamations can only be made in relation, firstly, to identified property that is not in any State,[93] and, second, to identified property that is in a State and is property to which one or more of a series of paragraphs applies to apply. The paragraphs set out various triggers which previous decisions of the High Court had indicated might justify the exercise by the Commonwealth Government of its external affairs power and which might apply to the

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91 Senate Hansard, 18th May, 1983, 552.

92 Section 6(3).

93 That is, in the territories, including the Northern Territory and the Australian Capital Territory; the Commonwealth Government has the clear constitutional power to legislate with respect to the territories, pursuant to section 122 of the Australian Constitution.

situation in Tasmania. The section moves from a narrow formulation of the external affairs power to broader ones:

> (a) the Commonwealth has, pursuant to a request by the State, submitted to the World Heritage Committee under Article 11 of the Convention that the property is suitable for inclusion in the World Heritage List provided for in paragraph 2 of that Article, whether the request by the State was made before or after the commencement of this Act and whether or not the property was identified property at the time when the request was made.[94]
>
> (b) the protection or conservation of the property by Australia is a matter of international obligation, whether by reason of the Convention or otherwise;
>
> (c) the protection or conservation of the property by Australia is necessary or desirable for the purpose of giving effect to a treaty (including the Convention) or for the purpose of obtaining for Australia any advantage or benefit under a treaty (including the Convention);
>
> (d) the protection or conservation of the property by Australia is a matter of international concern (whether or not it is also a matter of domestic concern), whether by reason that a failure by Australia to take proper measures for the protection or conservation of the property would, or would be likely to, prejudice Australia's relations with other countries or for any other reason.

This provision was inserted to ensure that the legislation was within power. Following the decision in the *Tasmanian Dam Case* it is clear that the protection and conservation of a property included on the World Heritage List is to be regarded as a matter of international obligation.[95] It also seems clear that once the Australian Government has identified a world heritage area, even if it has not nominated it for listing, it is still a matter of international obligation that it be protected. Thus, any property which was identified property within the meaning of the *World Heritage Properties Conservation Act* would also satisfy the criteria in section 6.

Section 6(2) ends with a paragraph which purports to rely upon the implied nationhood power also relied on in the *National Parks and Wildlife Conservation Act*, already discussed. Sub-paragraph (e) of that section, then allows the possibility of Proclamations in relation to property which is part of the heritage distinctive of the Australian nation by reason of its aesthetic, historic, scientific or social significance or by reason of its international or national renown.

In summary, a Proclamation may be made by the Governor-General that a property is one to which section 9 applies where that property is identified property,

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94 This provision was clearly designed to give a limited description of the ambit of the external affairs power which applied to the situation in Tasmania, where the Lowe Government had requested the nomination of the Western Tasmanian Wilderness National Park for world heritage listing. It was criticized by the Opposition as being of retrospective operation because the then Premier could not have known about the effect of his request at the time he made it- Senate Hansard, 18th May, 1983, 573.

95 See Chapter X.

fulfils one of the conditions set out in section 6(1) or (2), and where the Governor-General is satisfied that that property is in danger of being damaged or destroyed. These and all other proclamations under the Act are required to be laid before each House of Parliament within 5 sitting days of that House after the making of the Proclamation[96] and either House of Parliament can pass a resolution disapproving of the declaration in the Proclamation, causing the Proclamation to cease to be in force.[97] Section 16 deals with revocation of Proclamations where the Governor-General is satisfied that there is no longer a threat to the property, and a proclamation to this effect must be in accordance with a resolution passed by each House of Parliament.

Protective Provisions

The crucial provisions of the *World Heritage Act* are the protective provisions. Section 9 is headed "unlawful acts" and, prior to amendment in 1988, listed a series of acts which it was unlawful to carry out oneself or through one's agent on a property to which the section applied, without the consent in writing of the Minister. These acts included the carrying out of excavation works,[98] operations for recovery of minerals,[99] erecting buildings,[100] cutting down or damaging trees,[101] constructing roads or using explosives. In addition to these listed prohibitions, the section provided that it was unlawful to do an act which was prescribed for the purposes of the paragraph in relation to particular property to which the section applied.[102] This provision enabled the prohibition of relevant acts by regulation. There was further provision making it unlawful, except with the consent in writing of the Minister, for a person, whether himself or by his servant or agent, to do any act, not being an act the doing of which is unlawful by virtue or sub-section (1), that damaged or destroyed any property to which the section applied.[103]

The legislation contains additional protective provisions. Where the Governor-General is satisfied that any identified property is likely to be damaged or destroyed, he may, by Proclamation, declare that property to be a property to which section 10 applies.[104] The same approach is adopted in section 10 as in section 9. There is a list of activities prohibited without ministerial consent. Further, activities

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96 Section 15(1).
97 Subsection (2).
98 Section 9(1)(a).
99 Section 9(1)(b).
100 Section 9(1)(c).
101 Section 9(1)(d).
102 Section 9(1)(h).
103 Section 9(2).
104 Section 7.

can be prohibited by regulation. In addition, any activity not listed or prescribed that damages or destroys a relevant property is prohibited without Ministerial consent. This protective provision relies on the Commonwealth's power in paragraph 51(xx) of the Constitution to make laws with respect to foreign, trading and financial corporations. The activities are thus only unlawful if carried out by a foreign, trading or financial corporation or by its servant or agent.

The final protective provision relies on the Commonwealth's power to make laws with respect to the people of any race, for whom it is deemed necessary to make special laws, under paragraph 51(xxvi) of the Constitution.[105] It thus recognises that the value of several Australian world heritage properties is contributed to by the unique Aboriginal sites found within them, which provide a unique testament to past civilisations. Thus, section 8(1) is enacted as a special law for the people of the Aboriginal race. Section 8(2) provides that a reference to an Aboriginal site is a reference to a site -

> (a) that is, or is situated within, identified property; and
>
> (b) the protection or conservation of which is, whether by reason of the presence on the site of artefacts or relics or otherwise, of particular significance to the people of the Aboriginal race.

In summary, the site must be both part of the natural or cultural heritage of the world, as identified by nomination to the World Heritage List or by regulation and must be of particular significance to the Aboriginal race.

The Governor-General may proclaim an Aboriginal site to be a site to which section 11 applies where he is satisfied that it is likely to be damaged or destroyed or that any artefacts or relics situated on an Aboriginal site are being or are likely to be destroyed.[106] Section 11 of the legislation is virtually identical to section 9, except for the inclusion of an unlawful acts of damaging or destroying any artefacts or relics on the site or removing any artefacts or relics from the site.

Acts which are authorized under a zoning plan in operation under the *Great Barrier Reef Marine Park Act* or pursuant to a plan of management under the *National Parks and Wildlife Act* are not unlawful. The legislation also provides that exemptions may be made for acts which are authorized under a law of a State or Territory or pursuant to a plan or scheme formulated in accordance with a law of a State or Territory.[107] Thus, for example, if a plan of management for a national park

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105 The words "other than the Aboriginal race in any State" were removed by referendum in 1967.

106 Section 8.

107 Section 12(2).

under the Tasmanian *National Parks and Wildlife Conservation Act* 1970 permitted a certain activity which was made unlawful under any one of the protective provisions of the *World Heritage Properties Conservation Act,* the regulations could declare that such a plan was one to which the exemption applies in relation to the particular property or site.[108] However, for the exemption to be available the Governor-General must be satisfied that no act that is or may be authorized to be done by or pursuant to such a plan would damage or destroy property to which section 9 or 10 applies. In cases of property to which section 11 applies, the Governor-General must be satisfied that no such act would damage or destroy, or would be likely to result in damage to or the destruction of, such a site or any artefacts or relics on such a site.[109] These provisions recognise that State nature conservation legislation and plans of management made under such legislation may guarantee sufficient protection for world heritage sites. No exemption under the legislation has yet been granted because the protective provisions of the Act have only been proclaimed to apply in relation to certain parts of the Western Tasmanian Wilderness National Parks, for which, at the time, there was no management plan, and in relation to parts of the Wet Tropical Rainforests of North East Australia, much of which is not yet proclaimed a protected area under State legislation.

Ministerial Consent

It was important for the legislation to define the factors to be taken into account by the Minister in determining whether or not to give consent to particular activities. The legislation ensures that under the section which relies on the external affairs power, the only relevant considerations for the Minister relate to the Commonwealth's obligations of protection, conservation and presentation of the property under the *World Heritage Convention.*[110] This was necessary in order to make the legislation appropriate and adapted to the Convention obligations, and hence valid under the external affairs power.[111] There is no such qualification in relation to consents under sections 10 and 11 because the validity of the legislation does not depend upon there being one. Further, particularly in relation to Aboriginal sites, there may well be other valid considerations which should be taken account of by the Minister, such as the rights of traditional land owners.

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108 *Ibid.*

109 *Ibid.*

110 Section 13(1). The inclusion of the word "presentation" was by amendment to the original Bill. As was pointed out in the Senate debate on this Bill, "presentation" refers to accessibility to the public, so that a decision which may not be justified from a conservation point of view (for example, the building of a viewing structure), could well be justified on balance between the aims of conservation and presentation - Senate Hansard, 18th May, 1983, 583.

111 See Chapter X.

Consent given by the Minister pursuant to sections 9, 10 or 11 may be to a particular act or particular acts or a particular class or particular classes of acts. The legislation makes it clear that the *Administrative Decisions (Judicial Review) Act* 1977 applies to the decision of the Minister to give or refuse to give consent. It also defines "a person aggrieved" by the decision in terms of that Act to include: 'a person whose use or enjoyment or any part of the property is, or is likely to be, adversely affected by the decision', and 'an organization or association of persons if the decision relates to a matter which is included in the objects or purposes of the organization or association of persons if the decision relates to a matter which is included in the objects or purposes of the organization or association and to which activities engaged in by the organization or association relate.'[112] Accordingly, a broad range of persons and organization can challenge a Ministerial decision to give or refuse consent under the *World Heritage Properties Conservation Act.* It will not be necessary for such person or organization to establish a proprietary right which has been affected. Any member of the Aboriginal race is taken to be a person aggrieved for the purposes of the giving or refusing to give of consent under section 11.[113]

Enforcement

The *World Heritage Properties Conservation Act* is able to be enforced through the granting by the High Court or Federal Court, on the application of the Attorney-General or an interested person, of an injunction restraining a person from doing an act that is unlawful by virtue of section 9, 10 or 11[114] and, pending the determination of such an application, through the granting of an interim injunction.[115] An "interested person" is defined in the section in the same way as an aggrieved person in section 13(5). Thus it can be seen that the Act gives a very broad range of persons standing to apply to have the Act enforced. It is not necessary for a person's proprietary interests to be affected in order for them to have standing. Someone who could simply establish that they used the area, such as a bushwalker, and that that use would be adversely affected by the doing of an unlawful act could apply for an injunction to restrain the doing of that Act. Further, organizations such as the Wilderness Society and the Australian Conservation Foundation, having as part of their objects the protection of the National Estate and world heritage sites, would have standing under section 14 of the *World Heritage Properties Conservation Act..*[116]

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112 Section 13(5).

113 Section 13(7).

114 Subsection (1).

115 Section 14(2).

116 Generally on standing in environmental litigation see Bates (1987), 272-288.

Compensation

Another important issue with which the legislation deals is the question of compensation. The concern of the drafters of the legislation was that the High Court could interpret the provisions of the Act as resulting in a *defacto* acquisition of property, required by section 51(xxxi) of the Constitution to be compensated in just terms. Senator Gareth Evans pointed out that it was not the aim of the Government to acquire threatened world heritage property. This provision was simply included so that:

> If, by the exercise of one or more of the prohibitory powers contained in this Bill - the powers to stop the construction of dams or roads or whatever - the Commonwealth so interferes with the use and enjoyment of the land in question by its owner or occupier that the court is moved to find that that amounts to an acquisition of land, under those circumstances a procedure is set out for the determination of appropriate compensation.[117]

It was also pointed out that the provisions were not intended to cover any possible compensation which the Commonwealth Government may decide as a matter of policy to grant to a State in compensation for economic losses. As Mr. Cohen explained, in the case of Tasmania:

> the Government is not ruling out compensation to Tasmania in the event that the dam is prevented from being built merely because the requirement of this clause might not be met. The whole question of providing further employment and assistance with other projects is a matter that has to be taken up outside the Bill in an attempt to lay down a statutory procedure for the determination of compensation in this more general sense.[118]

The procedure provided for involved a person who considers that the operation of the Act or certain regulations under the *National Parks and Wildlife Act* has resulted in an acquisition of property from them, writing to the Minister requesting that the Commonwealth pay an amount of compensation specified in the notice.[119] The Minister could advise the claimant that he did not consider the operation of the Act or the regulations had resulted in an acquisition of property and then the person could make an application to the High Court for a declaration that they had. Where the Minister did not deny the acquisition of property or the High Court declared an acquisition of property to have occurred, the Commonwealth is liable to pay an agreed amount of compensation. Failing agreement, there was a complex mechanism for determining the amount, if the amount claimed was $5,000,000 or more, involving the establishment of a Commission of Inquiry. In the event of the amount being claimed

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117 House of Representatives Hansard, 5th May, 1983, 311.

118 Senate Hansard, 17th May, 1983, 491.

119 Section 17.

being less than that amount the procedure was for the person to apply to the Federal Court for that court to determine the compensation that was fair and just in respect of the application.

1988 Amendments to the *World Heritage Properties Conservation Act*

In March 1988 the Government introduced significant amendments to the *World Heritage Properties Conservation Act.* These amendments were designed to `clarify and strengthen' the protection afforded under that Act.[120] They were influenced in part by the majority decisions in the *Tasmanian Dam Case* and the *Tasmanian Forests Case* [121] and also by the need to address the continuing threat to the wet tropical rainforest of north-east Australia, which had been nominated by Australia for inclusion in the World Heritage List in December 1987.[122]

The *Conservation Legislation Amendment Act* made four important changes to the *World Heritage Properties Conservation Act.* These were:
-changing the definition of "identified property" such that property which is subject to an inquiry into its world heritage values is protected by the Act;
-amending the protective provisions of the Act to accord with the decision in the *Dam Case* that parts of section 9 were invalid;
-simplifying the compensation procedure;
-and providing for a system of inspectors to assist in the enforcement of the Act.

The *Conservation Legislation Amendment Act* also amended the *Environmental Protection (Impact of Proposals) Act* 1974 by inserting a section 4A after section 4 of that Act, making it clear that the Act does not apply to the doing of any thing under the *World Heritage Properties Conservation Act* nor to the submission by the Commonwealth of property to the World Heritage Committee as suitable for inclusion on the World Heritage List. This exclusion of the application of the *Environmental Protection Act* followed an attempt by the Queensland Government to argue in the High Court that a decision to nominate a property for World Heritage listing or to make declarations and proclamations under the *World Heritage Properties Conservation Act* fell within the terms of the *Environmental Protection Act.* Queensland argued that the provisions of that Act had not been complied with in relation to the North Queensland Rainforest nomination and proclamation.[123] It would seem ridiculous for the Commonwealth to be legally obliged to carry out an

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120 House of Representatives Hansard, 24th March, 1988,1342.

121 On which see Chapter X.

122 House of Representatives Hansard, 24th March, 1988, 1342.

123 *Queensland v Commonwealth* (1987) 77 *A.L.R.* 291, 293. This case is considered in greater detail in Chapter X.

environmental impact statement every time it took action designed to protect a property from any damaging development, and this amendment makes it clear that it is not so obliged.

"Identified Property"

The first of the 1988 amendments to the *World Heritage Properties Conservation Act* was to section 3. Section 3(2) (the definition of "identified property") is omitted and a new section 3A is inserted. This new section defines "identified property" as being any property in respect of which one or more of the following conditions is satisfied:

> (i) the property is subject to an inquiry established by a law of the Commonwealth whose purpose, or one of whose purpose, is to consider whether the property forms part of the cultural or natural heritage;[124]
> (ii) the property is subject to World Heritage List nomination;[125]
> (iii) the property is included in the World Heritage List provided for in paragraph 2 of Article 11 of the Convention;
> (iv) the property forms part of the cultural or natural heritage and is declared by the regulations to form part of the cultural heritage or natural heritage.

The change to the definition of "identified property" was designed to be more in line with the format of the Convention itself. As Mr. Punch pointed out in the second reading speech, 'the Act would follow the three stages of the *World Heritage Convention*: identification of property, nomination and listing. Interim protection would be afforded at each stage. This would cease, however, if the property ceased to be identified.'[126]

The only really significant change is in the inclusion of a property which is subject to an inquiry into its possible world heritage values. It will be recalled that the previous definition included property that was merely submitted to the World Heritage Committee for inclusion on the World Heritage List. The inclusion of inquiry properties was as a result of the decision of the High Court in *Richardson v The Forestry Commission* that it is constitutionally valid for the Commonwealth Government to provide interim protection for properties into the world heritage qualities of which an inquiry is being held.[127]

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124 Subsection (2) provides that the property shall be taken to be subject to an inquiry of that kind until the end of 42 days after the report of the inquiry is given to the person to whom it is required to be given. It is notable that no time limit is imposed upon the duration of such inquiries.

125 Subsection (3) provides that the property shall be taken to be subject to World Heritage List nomination from the time of its submission until the end of 7 days after the day on which the Committee informs, or first informs, Australia that it has included or decided not to include the whole or any part of the property in the List.

126 House of Representatives Hansard, 24th March, 1988,1344.

127 See Chapter X.

The new section 3A can thus be linked with section 6(2). That section set out the various formulations of the external affairs power which had to be satisfied so that the Governor-General could proclaim section 9 to apply to a particular property. Section 6(2)(a) clearly will not apply to properties under inquiry, as the Government will not yet have nominated the property. Nor can subparagraph (b), as there are as yet no obligations, because it has not yet been determined whether or not the property is of world heritage standard or not. The applicable formulation, which the High Court will clearly validate if it follows its decision in the *Tasmanian Forests Case*, is paragraph (c), which deals with the protection or conservation of the property being necessary or desirable for the purpose of giving effect to the treaty.

Protective Provisions

The second important amendment to the Principal Act is to section 9, which previously listed unlawful acts, as well as allowing for the prescription of other acts. As will be seen, the specification of acts in that section was found to be *ultra vires* in the *Tasmanian Dam Case,* and this amendment takes account of that decision. Subsections 9(1) and (2) are omitted and the following subsection is inserted:

> Where an act is prescribed for the purposes of this subsection in relation to a particular property to which this section applies, it is unlawful, except with the consent in writing of the Minister, for a person to do that act, or to do that act by a servant or agent, in relation to that property.

Thus, the approach of listing specified prohibited activities has now been abandoned in favour of a section which simply allows the prohibition of particular acts.

Compensation

The third 1988 amendment consists of the repealing and replacing of the compensation provisions in section 17. The procedure for ascertaining compensation has been significantly simplified, with the Commission of Inquiry approach abandoned in view of the High Court decisions in the *Tasmanian Dam Case.* The new section 17(1) defines "just terms" as having the same meaning as in paragraph 51(xxxi) of the Constitution and provides as follows:

> (2) Where, but for this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition.
> (3) Where the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the Federal Court determines.

Inspectors

The fourth amendment consists of the insertion of new sections 17A, B and C relating to the appointment of inspectors, and their powers. The Minister may appoint a person to be an inspector for the purposes of the Act.[128] This inspector may, for an eligible purpose, enter and search an eligible place, take photographs and record occurrences in an eligible place and inspect, examine and take photographs and measurements of an eligible thing.[129] The inspector may stop, detain, enter and search any vehicle for the purposes of inspecting, examining or taking photographs or measurements of an eligible things.[130] An "eligible purpose" is defined as meaning the purpose of:

> (a) determining whether an act that is unlawful by virtue of section 9, 10 or 11 has been, is being or is likely to be done; or
> (b) obtaining information that may be relevant to the making of a Proclamation or a regulation under this Act.[131]

"Eligible Place" is defined as any land, building or structure, whether or not identified property or on identified property, but does not include a dwelling house and an "eligible thing" is any thing prescribed by the regulations for the purposes of this definition.[132]

In order to carry out his or her inspections the inspector must either have the consent of the person in charge of the eligible place or vehicle, or have a warrant issued by a judge who is satisfied on information on oath by an inspector that it is reasonably necessary that the inspector should, for an eligible purpose exercise his/her powers under subsections (1) or (2). If the inspector does not have consent or a warrant, the following conditions must be satisfied in order to justify entry into a place or vehicle.

> (i) the inspector believes on reasonable grounds that it is necessary to enter in order to prevent the concealment, loss or destruction of any thing; and
> (ii) the entry is made in circumstances of such seriousness and urgency as to require and justify immediate entry without the consent of the person in charge or the authority of a warrant.

Inspectors are protected in the exercise of their statutory powers through the creation of an offence of obstructing or hindering, without reasonable cause, an inspector

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128 Section 17A(1).
129 Section 17A(2).
130 Section 17A(3).
131 Section 17A(10).
132 Section 17A(1).

exercising powers under this Act, which carries a penalty of $1,000 or imprisonment for 12 months, or both.[133]

An obligation of confidentiality is imposed on an inspector who has acquired information or a document relating to the affairs of another person while exercising his/her powers under the Act. An inspector shall not, except for the purposes of the Act, make a record of, or communicate to any person any of that information, or produce that document to any person.[134] A penalty of $1,000 or imprisonment for 6 months, or both is provided for. This section also makes it clear that the *Freedom of Information Act* applies to information or documents to which the section applies.

These provisions were inserted because most world heritage properties in Australia are almost entirely composed of Crown land. Access to Crown forest areas is controlled by the State Governments. In order to check reports of, for example, logging, the Federal Government currently must gain a permit from the various State forestry departments. This is clearly unsatisfactory; in the Tasmanian dam dispute Australian Federal Police were not allowed to inspect what was happening on State lands.[135]

The Importance of the *World Heritage Properties Act* for the World Heritage

The *World Heritage Properties Conservation Act* implements the *World Heritage Convention* into Australian domestic law. Primarily it enables the Commonwealth Government to fulfill its obligations under Article 5 of the Convention to ensure the protection of world heritage properties. The amendments to the *World Heritage Properties Conservation Act* strengthen the hand of the Commonwealth Government in fulfilling its obligations under the *World Heritage Convention.* The Act now enables the proclaiming of regulations to prevent destructive activities on properties which are being investigated for possible world heritage values and on identified world heritage sites. The Act is not used to provide for the every day management and protection of Australian world heritage properties. However, the *World Heritage Properties Conservation Act* enables the Commonwealth Government to take emergency measures to counter immediate threats.

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133 Section 17B.

134 Section 17C.

135 Senate Hansard, 15th March, 1988, 765.

The *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1987

Like the *World Heritage Act*, the *Lemonthyme and Southern Forests (Commission of Inquiry) Act* was enacted with the specific aim of fulfilling the Commonwealth's obligations under the *World Heritage Convention*. This Act was a part of the identification process of possible world heritage values in the Tasmanian forests which are situated to the east of, and basically adjoining, the Western Tasmanian Wilderness National Parks, which had been inscribed on the World Heritage List in 1982. At the time of that enactment, the *World Heritage Properties Conservation Act* applied only to properties which had already been identified as part of the cultural or natural heritage of the world. Thus, the 1987 legislation needed not only to provide for the establishment of the Commission of Inquiry but also to provide interim protection for the region, the natural qualities of which were threatened by the Tasmanian forestry industry, and to deal with compensation issues which arose from such interim protection.

The *Lemonthyme and Southern Forests Act* was designed to have effect within a specified time frame and thus no longer has any effect. However, an analysis of the Act is important in a description of the legislative action taken by the Commonwealth Government in pursuance of its obligations under the *World Heritage Convention*.

The object of the *Lemonthyme and Southern Forests Act* was stated as to "provide for measures that will enable effect to be given, in relation to the Lemonthyme area and the Southern Forests area, to Australia's obligations under the Convention, in particular the obligations" to (a) identify and delineate the natural and cultural heritage; and (b) take appropriate measures to protect and conserve that heritage.[136]

The Commission of Inquiry

Under Part II of the Act, a Commission of Inquiry into the Lemonthyme and Southern Forests was to be appointed, consisting of a Presiding Member and 2 other Members. The functions of this Commission were set out in section 8. Its first responsibility was to report on whether there were any qualifying areas. A "qualifying area" was defined in section 3 as meaning so much of any area that was:

> (a) wholly or partly within the Lemonthyme area or the Southern Forests area; and
> (b) a world heritage area or an area that contributes to the integrity or values of:

136 Section 4.

> (i) a world heritage area that is wholly or partly within the Lemonthyme area or the Southern Forests area;
> (ii) a nominated world heritage area;
> and is not a nominated world heritage area.

The boundary details of the two forests were provided in Schedules 1 and 2 to the Act. "Qualifying area" was defined to include areas partly within the Lemonthyme area or the Southern Forests area because of the possibility that the boundaries defined in the schedules may have inadvertently omitted some areas of world heritage.[137] The function of identifying areas which contribute to the integrity or values of a world heritage area took account of the fact that activities in areas adjacent to world heritage areas, such as logging, could have a damaging or destructive effect on those areas or on the manner of presentation of those areas.[138] Undoubtedly an obligation to protect a world heritage property could include an obligation to protect a contributing area where it is only by protecting such a contributing area that the World Heritage property itself can be adequately protected. The Government seems also to have been taking account of paragraph 14 of the *Operational Guidelines for the Implementation of the World Heritage Convention*, adopted by the World Heritage Committee. That paragraph provides that:

> Whenever necessary for the proper conservation of a cultural or natural property nominated, an adequate "buffer zone" around a property should be foreseen and should be afforded the necessary protection. A buffer zone can be defined as an area surrounding the property which has an essential influence on the physical state of the property and/or that way in which the property is perceived ...

The second function of the Commission related to the forestry resources in any qualifying areas. The Inquiry had responsibilities to report on the extent to which there are environmentally and economically prudent and feasible alternatives to the exploitation of forestry resources in any qualifying areas.[139] The Commission was charged with taking into account factors such as detriment to the forestry industry in Tasmania and the possibility of delaying exploitation consistent with proper forestry management. Contrary to the belief of many politicians and members of the public at the time when the Inquiry was set up, this provision does not address the Commonwealth's responsibilities under the *Australian Heritage Commission Act*, which arose because the Forests were on the Register of the National Estate. The Commission was required to report only on prudent and feasible alternatives to logging qualifying (world heritage) areas. There was no requirement for it to report on alternatives to logging in national estate areas which are found not be "qualifying

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137 Senate Hansard, 23rd March, 1987,1155.

138 *Ibid*,1154.

139 Section 8(b), (c), (d) and (e).

areas".[140] This was despite the fact that the legislators seem to have had in mind section 30 of the *Heritage Commission Act* in that they use the words of that section in requiring the Commission to inquire into "prudent and feasible alternatives" to exploitation of qualifying areas.[141]

There are three possible reasons for the omission of an obligation to inquire into prudent and feasible alternatives to exploiting the natural estate. The first is that the Federal Government fully expected the Commission to find most, if not all the Inquiry area to be a "qualifying area". Thus, the possibility that the resources of the whole area might not be dealt with was never considered. Second, the terms of reference of the Commission may have been limited in this way because of fears that the Act, if requiring the Commission to report on prudent and feasible alternatives to the exploitation of resources in all national estate areas would be struck down by the High Court as too broad to be justified under the external affairs power.[142] The third possibility is that the inconsistency was an oversight, arising because of the rush to produce special legislation to establish the inquiry and protect the area from forestry activities.

The Commission was required to give priority to identifying any part or part of the Lemonthyme area and the Southern Forests area that are definitely not qualifying areas and to report the identification of any such part or parts to the Minister.[143] The effect of such a report had the direct effect of removing the area(s) identified in it from the protection regime in Part III. This was because the "protected area" in that Part was defined in section 3 as the Lemonthyme and Southern Forests area, other than any area that was an excluded area. "Excluded area" was defined as an area specified in a notice published in the Gazette under section 20(a)(i). Under that provision the Minister shall, within 14 days of receiving an interim report under

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140 The understanding of some members of Parliament during the debate on the Bill seemed to be that the Commission would inquire into alternatives to exploiting the forestry resource in National Estate areas. See, for example, the comments of Mr. Milton quoted in House of Representatives Hansard for 26th February 1987, 947 where he is recorded to have said, 'the Commission will report on whether there are forestry resources within Tasmanian whose exploitation will cause no detriment to the Tasmanian forestry industry and would be an environmentally and economically prudent and feasible alternative to the exploitation of any forestry resources in the Lemonthyme and Southern Forests'.

141 Section 30(1) of the *Australian Heritage Commission Act* provides: 'Each Minister shall give all directions and shall do all such things as, consistently with any relevant laws, can be given or done by him for ensuring that the Department administered by him or any authority of the Commonwealth in respect of which he has ministerial responsibilities does not take any action that adversely affect, as part of the national estate, a place that is in the Register unless he is satisfied that there is no feasible and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse effects will be taken and shall not himself taken any action unless he is so satisfied.'

142 See Chapter X discussion on the validity of the Act.

143 Section 8(5).

section 8(5), arrange for publication in the Gazette of a notice specifying the area identified in the report.

Interim Protection

Part III of the *Lemonthyme and Southern Forests Act* provided interim protection for the Inquiry area. Section 16 prohibited various activities within the protected area, except with the consent of the Minister, during the interim protection period, which extended from the day of the commencement of the Inquiry to the end of the forty-second day after the end of the Inquiry period. The acts prohibited were as follows:

> (a) for the purposes of, or in the course of carrying out, forestry operations, to kill, cut down or damage a tree in, or remove a tree or part of a tree from, the protected area;
> (b) to construct or establish a road or vehicular track within the protected area;
> (c) to carry out any excavation works within the protected area;
> (d) to do any other act prescribed for the purposes of this paragraph, being an act capable of adversely affecting the protected area.

Section 16 went on to provide that:

> (2) Except with the consent in writing of the Minister, it is unlawful for a person, whether personally or through a servant or agent, during the interim protection period to permit, authorize, direct or order or purport to permit, authorize, direct or order any person to do an act that is unlawful under subsection (1).
>
> (3) Except with the consent of the Minister, it is unlawful for a person who is the owner or occupier of any part of the protected area to fail to take reasonable steps to prevent the doing within that part of the protected area of any act that is unlawful under subsection.

Consents

As with the *World Heritage Properties Conservation Act,* it was important for the legislation to specify the basis upon which consents should be given or refused. The *Lemonthyme and Southern Forests Act* thus provided that, in determining whether or not to give consent to activities prohibited under section 16, 'the Minister shall have regard only to Australia's international obligations under the Convention.'[144] He could give consent in relation to a particular act or particular class

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144 Three applications for consent under section 16 of the Act were made and consent was granted in all three cases. Eastern Australian Metals Exploration Ltd sought consent to carry out an exploration program in the Adamsfield area of Tasmania (consent granted on 24th February 1988); Mr. Groom, the Tasmanian Minister for Forests sought the consent of the Minister for the Forestry Commission to carry out fire fighting and fire management activities (consent granted on 4th December 1987); and the Solicitor-General for Tasmania on behalf of the Forestry Commission sought consent for extraction of 2000 m3 of gravel from existing granary sites of Warra Rd for the purpose of maintaining the road (consent granted October 1987) - see Department of Arts, Sport, Environment, Tourism and Territories, *Annual Report 1987-88,* (1988), 120.

or particular classes of act or to a particular person or particular persons or a particular class or classes of persons.[145]

Enforcement

The legislation could be enforced through the granting of the High Court or the Federal Court, on the application of the Minister, of an injunction restraining a person from doing an act that was unlawful under section 16.[146] The Courts could also grant interim injunctions.[147]

Compensation

Part III of the *Lemonthyme and Southern Forests Act* also contains provisions relating to compensation. The compensation provisions of this Act go much further than those contained in the *World Heritage Properties Conservation Act.* In the latter Act provision was only made for compensation in cases where there was an acquisition of property. In the *Lemonthyme and Southern Forests Act*, the Government recognised that there would be many people in the timber industry particularly who would suffer business losses as a result of the interim protection provisions. Given that it was possible that the area would be found not to contain world heritage values at all, and that logging activities would need to continue after the expiration of the inquiry period, it was desirable to give compensation to such persons. Thus the legislation provided that where a person refrained from doing an act made unlawful in section 16 by reason only of the fact that the act was made unlawful by that subsection or that an injunction or interim injunction was granted under section 17 restraining the person from doing the act and because the person refrains from doing the act that person suffers loss or damage, the Commonwealth was liable to pay compensation to that person.[148] Further, where the owner of any part of the protected area suffered loss or damage because another person refrained from doing an act referred to in paragraph (1) in that part of the protected area, the Commonwealth was liable to pay compensation.

In addition to this special compensation, the Act also provided that where there had been an acquisition of property the Commonwealth was liable to pay compensation in respect of the acquisition.[149] This amount is such reasonable amount as is agreed between the persons and the Commonwealth or, failing agreement, as is determined by the Federal Court. Thus, the complicated procedure for determining

145 Section 18(2).
146 Section 17.
147 Section 17(2).
148 Section 19(1).
149 Section 19.

appropriate compensation in cases involving large claims which was adopted in the *World Heritage Properties Conservation Act* was done was simplified under this later legislation.

Importance of the *Lemonthyme and Southern Forests Act* for the World Heritage

The Act is a part of the history of world heritage protection in Australia. However, should the situation arise again whereby the Commonwealth Government wished to receive the recommendations of an inquiry into the world heritage values of any area, legislation would only be necessary to establish the Inquiry and, possibly, to deal with the issue of compensation for economic losses not amounting to acquisition of property. The amended *World Heritage Properties Conservation Act* would provide protection for the property and deal with associated issues such as enforcement.

State Land Management Legislation

All the legislation primarily directed at the issue of world heritage protection has been enacted by the Commonwealth Government, which assumed the international obligations connected with the *World Heritage Convention* when it ratified that Convention in 1974. However, State legislation is also relevant to the implementation of the Convention as many of the world heritage properties are protected areas under State land reservation enactments. The Commonwealth has not yet used its *National Parks and Wildlife Act* to declare nominated world heritage areas within States as national parks. This is partly explained by the constitutional limitations on the Commonwealth, but also by the realisation that management can effectively be tackled under national parks legislation at State level.

The Western Tasmanian Wilderness National Parks consist of three National Parks proclaimed as State Reserves under the Tasmanian *National Parks and Wildlife Conservation Act* 1970. One-fifth of the Wet Tropical Rainforests of North-East Australia are proclaimed National Parks under the *National Parks and Wildlife Act* 1975-1984 (Queensland), while over half are State Forests under the *Forestry Act* 1959-1984 (Queensland).[150] The Australian East Coast Temperate and Sub-Tropical Rainforests consist of National Parks proclaimed under the *National Parks and Wildlife Act* 1974 (NSW) and flora and nature reserves under the *Forestry Act* 1916 (NSW).[151] Part of the Willandra Lakes Region is now included in the Mungo National Park under the *National Parks and Wildlife Act* 1974, while the rest is privately owned.[152] The other New South Wales world heritage site, the Lord Howe

150 Department of Arts, Sport, Environment, Tourism and Territories (December 1987), 2.

151 Adam (1987), 81.

152 Department of Arts, Sport Environment, Tourism and Territories, "Australia's World Heritage Properties".

Island Group has been subject to special legislation since 1953, following particular concern about how the area should be managed to protect its conservation values and also the interests of the Islanders. The Group was dedicated as a Permanent Park Preserve for the public purpose of preserving native flora and fauna under the *Lord Howe Island (Amendment) Act* 1981.[153]

A brief consideration of the major common features of these pieces of State legislation is therefore important in any analysis of the legal framework for world heritage protection in Australia. Such a discussion will also enable an understanding of the administrative procedures for ongoing management adopted between the Commonwealth and State Governments, which are discussed in Chapter VIII.

Administrative structure for reserve management

All of the relevant State nature conservation legislation establishes some form of office responsible for the management and administration of parks and reserves and generally some advisory body to the Minister. The New South Wales Act is administered by the Director of National Parks and Wildlife working within the National Parks and Wildlife Service[154] and the Minister is advised by the National Parks and Wildlife Advisory Council.[155] In Queensland National Parks used to be created under the *Forestry Act* 1959 with a Director of National Parks and Wildlife appointed to administer national parks and other reserves under the *National Parks and Wildlife Act* 1975.[156] Since 1982 parks have been reserved under the *National Parks Act.* In Tasmania the responsible authority is the Director of the National Parks and Wildlife Service[157] and the Minister is advised by a National Parks and Wildlife Council.[158] The *Lord Howe Island Act* establishes the Lord Howe Island Board with responsibilities for ordering the affairs of the Island.[159] Since amendment of the *Lord Howe Island Act* in 1981, this Board consists of five members appointed by the Minister, of whom three shall be Islanders; one shall be an officer of the Department of the Government responsible for the administration of the Act; and one shall be an officer of the National Parks and Wildlife Service nominated by the Minister administering the *National Parks and Wildlife Act*, 1974. The requirement of the inclusion of a person on the nomination of the Minister administering the *National Parks Act* is a significant change from the 1953 Act under which no account was taken

153 Inserting a section 19A(1) to the Lord Howe Island Act 1953.
154 Sections 6 and 7.
155 Section 14.
156 Bates (1987), 128.
157 Sections 4-6.
158 Sections 9-10.
159 Section 4(1).

in the specification of representatives on the Board of the need to consider the conservation values of the area.

The relevant Acts allow for various classifications of reserved land. In New South Wales land may be reserved for the purposes of national parks, nature reserves, wilderness areas, state recreation areas or historic sites.[160] The New South Wales world heritage areas are primarily national parks or nature reserves. "National Parks" are defined as 'spacious areas containing unique or outstanding scenery or natural phenomena' which are dedicated primarily to public enjoyment and education.[161] On the other hand, "Nature Reserves" are 'areas of special scientific interest containing wildlife or natural environments or natural phenomena'[162] and are dedicated to the conservation of such wildlife and natural environments.[163]

In Queensland, national parks may be declared in respect of Crown land which the Governor considers to be of scenic, scientific or historic interest.[164] In Tasmania reserved areas may be classified simply as conservation areas[165] or additionally as as State reserve or game reserve.[166] The expression "national park" is used in relation to certain State reserves.[167] Thus, the new nomination of parts of Tasmania for world heritage listing includes several State reserve national parks, including the Walls of Jerusalem National Park and the Harz National Park. It also includes the Central Plateau conservation area, proclaimed a conservation area under the *National Parks Act* ,but not a State reserve. Another part of the Central Plateau has been nominated which is simply reserved for conservation and public recreation purposes under the *Crown Lands Act* 1976.[168]

Management of Reserved Lands

The State nature conservation legislation generally provides for the development of a plan of management for the reserved area. In New South Wales this is the responsibility of the Director of National Parks and Wildlife.[169] The Director is to take account of a series of objectives, including the conservation of wildlife; the preservation of each national park, nature reserve, wildlife refuge or game reserve and

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160 Sections 7-8.
161 Section 8(2)(a).
162 Section 8(2)(c).
163 Section 49.
164 Section 20.
165 Section 14.
166 Section 15(1).
167 Section 15 (1A) and (1B).
168 Section 8(1).
169 Section 72.

the protection of the special features of the park, reserve or refuge; the prohibition of the execution of any works adversely affecting the natural condition or special features of each reserve; the encouragement and regulation of the appropriate use, understanding and public enjoyment of each national park and historic site by the public and the setting apart of the whole or part of a national park or nature reserve as a wilderness area.[170] These plans of management are publicly exhibited and finally determined by the Minister responsible for the National Parks and Wildlife Service.[171] No operations can be carried out in an area for which there is a plan of management except in accordance with that plan.[172]

Where land has been set aside as a flora reserve under the *Forestry Act* 1916, as is the case with parts of the New South Wales world heritage areas, the Forestry Commission of New South Wales is required to draw up a detailed scheme of operations for the reserve. The object of the scheme is the preservation of native flora on a flora reserve, and no operation may be undertaken in a flora reserve unless it is in accordance with the working plan for the reserve.[173]

Under the 1981 amendments to the *Lord Howe Island Act*, the provisions of the New South Wales *National Parks Act* in Part V, relating to the preparation of plans of management, are stated to apply to the Lord Howe Island Group.[174] The Lord Howe Island Board, rather than the Director of National Parks and Wildlife, is responsible for the implementation of the plan of management. Under the *Lord Howe Island Act*, any person who uses any part of the land in a manner that contravenes the plan of management commits an offence and is liable to a maximum penalty of $500.[175] Further, the Act provides for the making of regulations relevant to a range of matters, including the use and enjoyment of the land; the preservation or protection of, or prevention of damage to, trees, shrubs, and other vegetative cover on the land; and the preservation or protection of any animal or bird.[176]

An additional environmental protection measure for Lord Howe Island was introduced by the 1981 amendments to the Act. By that amendment the provisions of the *Environmental Planning and Assessment Act* 1979 are stated to apply to the region.[177] The consequence of this was to make necessary the adoption of a planning

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170 Section 72(4).
171 Section 75.
172 Section 81(4).
173 Section 25A(5).
174 Section 15B of the amended Act.
175 Section 19B(1).
176 Section 38(2A).
177 Section 15A of the amended Act.

scheme for the settled areas of the main island. Such a scheme was adopted in 1986.[178]

The Queensland *National Parks Act* does not provide for the making of management plans. However regulations may be made on various matters relevant to the operation of the Act, including the management and control of parks, the right of access by visitors and the conduct and duties of persons in parks.[179]

So far as State forests in Queensland are concerned, the Department of Forestry has the duty of managing all State forests 'with the object of maintaining as far as practicable adequate supplies in perpetuity of timber and other forest products therefrom.'[180] The term "management" includes control, regulation, construction, maintenance and protection.[181] While a conservation element is thus involved, this is for the purpose of ensuring productive forestry as a continuous process, rather than protecting the natural qualities and features of the area concerned.[182] Indeed the cardinal principle to be observed in the management of State forests is 'the permanent reservation of such areas for the purpose of producing timber and associated products in perpetuity and of protecting a watershed therein.'[183] Thus, the classification of "State forest" clearly does not give sufficient recognition to the natural qualities of the relevant world heritage area for it to be an appropriate designation for a world heritage property.

In Tasmania, plans for the use, development, and management of any lands reserved under the *National Parks and Wildlife Act* may be prepared by the Director.[184] These plans go on public display.[185] They may indicate the purposes for which, or the manner in which, that land, or any part thereof, is to be used, developed, or managed.[186] There is no provision under the Tasmanian *Crown Lands Act* for management plans. However, there is a broad power under the legislation which allows for the making of regulations for, among other things, the care, protection and management of Crown Lands.[187]

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178 Lord Howe Island Board (1986).

179 Section 72 and Schedule, para 11.

180 *Forestry Act* 1959 (Queensland), section 11(1)(ii).

181 Section 5.

182 Fisher (1987), 212.

183 Section 33.

184 Section 19(1) and 20(1).

185 Section 20.

186 Section 21(1).

187 Section 69.

Federal-State Cooperation and State Legislation

While many of Australia's world heritage areas are adequately protected under State national parks legislation, some are.not afforded any protection under State legislation or are managed under enactments governing resource exploitation where conservation of the natural values of the area are not the primary objective. Some considerable areas in the Willandra Lakes Region are private land and not subject to any particular controls. Large parts of the Wet Tropical Rainforests of North East Australia are managed under resource-based legislation.

The action which the Commonwealth can take with regard to ongoing management is limited by its constitutional powers. Where the listed and nominated areas are subject to State conservation legislation, this is appropriate for the ongoing management of the area. Management at State level allows greater account to be taken of public concerns and local conditions. The expertise which is developed at State level in each of the National Parks and Wildlife Services with regard to nature conservation in that particular state is important in ensuring technical knowledge and competence in management. This fact is recognised in the *Heritage Recommendation*, which provides:

> Considering the fact that the problems involved in the protection, conservation and presentation of the cultural and natural heritage are difficult to deal with and sometimes entailing hard choices, and that there are not enough specialized staff available in this field, responsibilities in all matters concerning the devising and execution of protective measures in general should be divided among central or federal and regional or local authorities on the basis of a judicious balance adapted to the situation that exists in each State.[188]

Indeed, the *Operational Guidelines* of the World Heritage Committee recognise that the sites nominated may coincide with or constitute part of existing or proposed protected areas such as national parks.[189]

A decision of the Commonwealth Government to nominate an area for world heritage listing ideally would lead the State Government to proclaim any parts of that area which are not properly protected as conservation reserves under relevant State legislation. This would ensure that the conservation of the property would be given the proper priority. Where there has been cooperation in the identification and nomination process this is likely to occur. Following the nomination of various additional areas of Western Tasmania in October 1989, the Tasmanian Government intends to proclaim most state-administered land in the new world heritage area as national parks.[190] One exception is the Central Plateau Protected Area, which it seems likely will be proclaimed a Conservation Area under the Tasmanian National

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188 Article 17.

189 WHC/2 para 36(b)(vi).

190 Tasmanian Department of Parks, Wildlife and Heritage (1989).

Parks legislation.[191] This will enable a plan of management for the area to be developed, taking into account the existing uses made of the Central Plateau. On the other hand, the Queensland Government took steps to oppose the Commonwealth Government over the nomination and protection of the Wet Tropical Rainforests of North East Australia. Thus far, the State Government has also refused to proclaim additional parts of the world heritage area under the Queensland national parks legislation. The Commonwealth Government is currently waiting for the Queensland Government to negotiate to establish the mechanisms for ongoing joint management of the Rainforests.[192] As we will see in the following chapter, administrative arrangements may be developed such that Commonwealth Government representatives have a role to play in the development of management plans under the relevant State legislation.

The *Operational Guidelines* now require a nominated site to have adequate long-term legislative, regulatory or institutional protection.[193] So far as much of the recently listed Wet Tropical Rainforests are concerned, the Commonwealth Government cannot yet guarantee such ongoing protection. Further, the guidelines now make clear that, if not already available, a management plan should be prepared and implemented to ensure the integrity of the natural values of the site in accordance with the Convention.[194] Again, this remains a role for the State Government authorities, and cannot be guaranteed by the Commonwealth Government.

Conclusion

Legislative action at the Federal level has ensured that, within its constitutional capabilities, Australia is able to fulfil its obligations under the World Heritage Convention. Some of this legislation, namely, the *Australian Heritage Commission Act* and the *National Parks and Wildlife Act* were enacted prior to the ratification of the Convention. They are nonetheless important in any consideration of world heritage matters in Australia as they enable the Government to fulfill its obligations under the Convention. Apart from this Commonwealth legislative framework, Australian world heritage properties are managed under the State legislation which we have examined. This State legislation thus plays an important part in the implementation of the *World Heritage Convention.*

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191 Correspondence with the Tasmanian Department of Parks, Wildlife and Heritage.

192 Media release from Senator Graham Richardson, Minister for the Arts, Sport, the Environment, Tourism and Territories, 30th June, 1989.

193 WHC/2 para 36(b)(vi).

194 *Ibid.*

Should the cooperation of the State Government in proclaiming world heritage sites under appropriate nature conservation legislation not be achieved, the Commonwealth Government has a comprehensive body of legislation on which to rely in order to fulfill its obligations under the *World Heritage Convention.* Under the *World Heritage Properties Conservation Act,* should any proposed activities threaten the world heritage qualities of a listed or nominated site, that property can be proclaimed to be a site to which the protective provisions, and particularly section 9, applies. The Government can then regulate to prohibit such activities without Ministerial consent. This legislation will clearly be used as a last resort should the management schemes under State legislation prove inappropriate given the status of the property as a world heritage site.

CHAPTER VIII

ADMINISTRATIVE ARRANGEMENTS FOR THE IDENTIFICATION AND PROTECTION OF THE WORLD HERITAGE IN AUSTRALIA

Introduction

The implementation of the *World Heritage Convention* in Australia, and indeed in any State, depends on the existence of appropriate administrative and other related institutional arrangements. The principal administrative body which has primary responsibility for world heritage matters in Australia is the Commonwealth Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) through the National Estates and World Heritage Section of the Heritage Branch of the Arts, Film and Heritage Division. The Conservation and Environment Assessment Division also has a role to play with regard to natural heritage properties. The Commonwealth Minister for the Environment, with the help of a number of specialist agencies,[1] is responsible for two important functions: the identification of world heritage properties; and the adoption of administrative measures in the management of such properties.

Identification of the World Heritage

General Administrative Procedure for Identification

Properties for nomination to the World Heritage List are identified by DASETT through consultation with the States where possible. DASETT has the ultimate responsibility of preparing the nomination form for submission to the World Heritage Committee. Advice on nominations is sought from the Australian Heritage Commission and from the Australian National Parks and Wildlife Service (ANPWS).

In 1984 the Council of Nature Conservation Ministers (CONCOM) adopted guidelines for encouraging cooperation between State and Commonwealth Governments on world heritage nominations. These guidelines provide as follows:

> - The Commonwealth Government to write to the State and Territory governments inviting them to submit suggestions, with supporting information, for places to be examined with a view to possible future nomination to the World Heritage List.
> - The Commonwealth Government to arrange for the appropriate authorities to examine the places against the stringent criteria for World Heritage Listing.

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1 Including the Australian Heritage Commission, the Australian National Parks and Wildlife Service, the Bureau of Flora and Fauna, which is a branch of the Conservation and Environment Assessment Division of the Department, and the Commonwealth Scientific and Industrial Research Organization.

- Any consideration by the Commonwealth Government of the issues to involve full consultation with the State and Territory Governments.
- Any suggestions for World Heritage Listing brought forward by other than a State or Territory Government to be referred, with supporting information, to the relevant State or Territory Government for comment prior to examination by the Commonwealth.[2]

The guidelines do not provide any detailed procedures within which such consultation is to take place. Nevertheless, they reflect a philosophy of cooperation wherever possible and have been effectively used in relation to some recent nomination proposals.

The cooperative spirit of the guidelines was realised in relation to the successful 1986 nomination of the Australian East Coast Temperate and Sub-tropical Rainforests, which was proposed by the New South Wales Government and subsequently investigated and put forward by the Federal Government. In accordance with the guidelines consultation is presently taking place between the Commonwealth and Western Australian Governments over the nomination of the Shark Bay region where a Western Australian Government Committee comprising Ministers of relevant portfolios and representatives of Local Government has been formed to have discussions with the Commonwealth.[3] The Commonwealth has been cooperative in providing information and has indicated that Western Australia will be allowed to complete its examination before addressing the nomination proposal.[4] Thus, because of this philosophy of cooperation, conflict has been avoided over the proposed Shark Bay nomination.

The Guidelines do not, however, provide a panacea to Federal-State conflict over world heritage matters. As we have seen in Chapter VIII, the nomination of the Queensland Wet Tropical Rainforests in 1988 went ahead despite the opposition of the Queensland State Government, when attempts by the Commonwealth Government to cooperate in the spirit of the CONCOM guidelines achieved no result.

While the CONCOM guidelines acknowledge the desirability of achieving agreement between the two tiers of Government, they are only guidelines; State Government consent to a nomination is not required as a matter of international or domestic law. Under the *World Heritage Convention* one of the main concessions to State sovereignty lies in the stipulation that the inclusion of a property in the World Heritage List requires the consent of the State concerned.[5] However, despite the

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2 The document, 'Communication between the Commonwealth and the States on world heritage matters, in particular the nomination of places in Australia for possible inclusion on the World Heritage List', is available from the Department of Arts, Sport, Environment, Tourism and Territories.

3 See Australian Minerals and Energy Council Working Party (1989), 40.

4 *Ibid.*

5 Article 11.3.

recognition that is given to the special circumstances of Federal States, through the inclusion of the so-called "federal clause", already discussed, the Convention does not require the consent of the constituent Government of a Federal State Party to nomination. It is the Federal Government which, with the Imperial Conferences of 1926 and 1930, the passing and adoption of the *Statute of Westminster* in 1931, and recognition by the international community, is the recognised nation State, the subject of international law.[6]

The decision to nominate a property for the World Heritage List is made by the Cabinet of the Commonwealth Government of Australia, exercising the common law prerogative of a sovereign State to enter into and take action under treaties. The constituent State governments of the Commonwealth cannot nominate properties, nor can their refusal to cooperate with the Commonwealth over the nomination of sites from within their boundaries legally prevent the inscription of those sites on the World Heritage List.

The Commission of Inquiry Approach to Identification

Given the resource implications of a nomination for world heritage listing, it is not uncommon to have disagreements between State and Federal Governments over identification. There may be a dispute over the qualities of the proposed site, or with regard to the desirability of bringing about the consequences of nomination, given the actual or proposed uses of the land. Given such a dispute, the Federal Government can proceed unilaterally with the nomination. However, in some cases the political pressure may be such that handling the issue at the departmental level may not seem appropriate and the use of some other method of identifying world heritage qualities may be desirable. Thus, an alternative approach may be adopted.

One approach which can be adopted involves the use of a public inquiry to determine world heritage values of a given area. The Inquiry may be established under special legislation, or may be undertaken by a permanent Commission, such as the Resource Assessment Commission, established under the *Resource Assessment Commission Act* 1989. Thus far the public inquiry approach has only been used in one nomination. In 1987 a Commission of Inquiry was established under special legislation in relation to the proposed nomination of parts of the Tasmanian Lemonthyme and Southern Forests. The indications are, however, that, given future disputes, this approach may be used again. The Lemonthyme and Southern Forests Inquiry is thus taken as a case study illustrating the difficulties in the adoption of such an approach.

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6 Zines (1983), 244.

The Helsham Inquiry

The approach adopted to identification of world heritage values, following disagreement between the State and Federal Governments, the Tasmanian Forestry Industry and conservationist groups over the proposed extended Tasmanian nomination, was to establish a Commission of Inquiry (the Helsham Inquiry), with the primary function of determining which parts of the region were of world heritage quality.

This region of Western Tasmania contains extensive tracts of eucalypt forest which are accessible for harvesting as commercial timber. The Tasmanian Forestry Industry has been proposing exploitation of this resource for some time and forestry operations in the region have already taken place.

Conservationists, on the other hand, had, since 1983, been calling for the protection of the forests, which are listed on the Register of the National Estate, and for their nomination for world heritage listing. In addition, questions continued to be raised about the way in which the forest resource in Tasmania was being exploited by large interstate and foreign-owned companies and the allegedly insufficient benefits which the State receives from such operations.

The Federal Government was placed in a difficult situation by the need to resolve this conflict. It was reluctant to antagonise the national conservation movement. The movement has a great deal of support within the Labor Party and had shown in 1983 that it could influence close Federal elections when it successfully advocated a vote for the Labor Party in the House of Representatives because of that Party's promise to prevent the Franklin Dam from going ahead if it won power.[7]

On the other hand, a decision to protect the forests would have severely damaged the Federal Government's political hopes in Tasmania. The forestry industry, led by the Tasmanian Forestry Commission, a statutory authority, maintained that the exploitation of resources in the Lemonthyme and Southern Forests was a matter of economic necessity for the State of Tasmania. The Forestry Commission was supported in this by the Tasmanian State Government. The then Premier, Mr. Robin Gray, was sure to make political capital out of the "State-rights" rhetoric as he had done during the Franklin Dam dispute. Huge compensation payouts would be necessary to minimise damage to the State and Federal Labor Parties in

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7 See Chapter IV, n. 124.

Tasmania which had been attempting to rebuild electoral support after the loss of all five Tasmanian Federal seats in the 1983 election.

When in 1983 the Tasmanian Government was pressing the Commonwealth to extend the woodchip export licenses, a move opposed by the conservation movement, it became clear that some sort of environmental assessment of the impact of the industry on the State's forest was necessary. Environmental groups called for a full environmental inquiry under the Commonwealth *Environmental Assessment (Impact of Proposals) Act* 1974.[8] The Federal Government rejected this approach, requiring only an Environmental Impact Statement (EIS) before a decision was made whether or not to grant an extension of woodchip licenses.[9] This EIS, in accordance with the Administrative Procedures of the *Environmental Assessment Act*, was carried out by the proponent of the action, in this case the Tasmanian Woodchip Export Study Group.

There were a number of deficiencies in the guidelines for the EIS agreed to between the proponents and the Department of the Environment.

> The draft EIS made no clear statement of the objectives of the proposal. It contained insufficient information about the proposed action and the environment likely to be affected by the proposed action or by any alternatives.[10]

Further, the final report did not incorporate the opposing views elicited by the draft report as it was required to do.[11]

In the end, the Federal Cabinet, working on departmental advice based on this inadequate report, decided at the end of 1985 to renew export woodchip licenses

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8 See Formby (1987), 193. Section 11 of the *Environmental Assessment (Impact of Proposals) Act* provides that the Minister for the Environment may direct that an inquiry be conducted in respect of all or any of the environmental aspects of any matter referred to in section 5. That section lists the following matters: the formulation of proposals, the carrying out of works and other projects, the arrangements, the making of decisions or recommendations and the incurring of expenditure by, or on behalf of, the Australian Government, either alone or in association with any other government, authority, body or person. By section 11 the Minister may, in the face of such matters, appoint a Commissioner or Commissioners to conduct the Inquiry.

9 The *Environment Protection (Impact of Proposals) Act* has as its object ensuring, to the greatest extent that is practicable, that the matters affecting the environment to a significant extent are fully examined and taken into account in relation to those matters listed in section 5 (see n.142). Section 6 of the Act authorises the making of Administrative Procedures to achieve these objects. Procedures under this section were published in June 1975. These procedures give the Minister involved in the relevant project the option of referring the proposed action to the Environment Minister. If the Minister exercises this option, the proponent is required to supply certain information about the project to the Department of the Environment. The Minister then makes a decision as to whether or not an EIS is required.

10 Formby (1987), 194.

11 The draft EIS is made available to the public for comment for 28 days. After that time the proponent is required to revise the EIS taking account of comments received from the public.

for a further fifteen years after 1988, with little protection for the National Estate sites within the proposed area of forestry operations.[12]

In June 1986 the Commonwealth and State Governments signed a "Memorandum of Understanding" on woodchip exports. This Memorandum established a consultative mechanism whereby all new logging proposals in the National Estate areas were to be carried out through consultation by the Tasmanian Government with the Commonwealth.[13] In November 1986, in breach of that agreement, the Tasmanian Government approved logging in Jackey's Marsh and other sensitive National Estate areas. This resulted in confrontations between conservationists and loggers. This action was followed by unsuccessful negotiations between the two governments. Finally, the Federal Cabinet resolved to prevent logging in National Estate areas while their true value was established, a step which some would suggest should have been taken before any extension of export licenses was granted. It was partly against this background that the Federal Government initiated action to set up the Commission of Inquiry.

Apart from these political considerations, the Commonwealth was under certain obligations in relation to the Forests. The Lemonthyme and Southern Forests are situated to the east of and basically adjoining the Western Tasmanian Wilderness National Parks, which had been inscribed on the World Heritage List in 1982. The Australian Heritage Commission, the IUCN and conservation groups asserted that, as well as being independently worthy of World Heritage listing and protection, the Lemonthyme and Southern Forests form an integral part of the existing world heritage area.[14] Further, because of the fact that the forests had been inscribed on the National Estate Register in 1982, and because the companies exploiting the resource in the region require Commonwealth export permits for their product, the Minister for Resources was required to be satisfied that there were no prudent and feasible alternatives to the exploitation of the forests, by reason of the operation of section 30 of the *Heritage Commission Act.*

The decision of the Commonwealth Government to establish a public inquiry to carry out the task of identifying world heritage areas in the forests was unusual and warrants analysis. There is no obligation under either the *World Heritage*

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12 Only nine sites were given protection from logging. The other National Estate sites were classified so as to require the Government to "take into account" the Commonwealth Minister's views about logging.

13 House of Representatives Hansard, 26th February, 1987, 832.

14 At the time that Tasmania's Western Tasmanian Wilderness National Parks were inscribed on the World Heritage List, the IUCN had written to the Australian Government expressing concern at the limited extent of that nomination and recommending the inclusion of additional West Coast sites - see Australian Conservation Foundation et al (1987), 2.

Convention or the *World Heritage Properties Conservation Act* for such a procedure to take place. The inquiry approach had not been used in any of the previous seven nominations of Australian world heritage properties. The normal administrative procedure with regard to domestic identification of Australian world heritage properties was for the Department to make a judgment based on all available advice. The Australian Heritage Commission and the IUCN had in fact recommended to the Commonwealth Government that the forests be nominated. Why then did the Commonwealth depart from the established administrative process of world heritage property identification in the case of the Lemonthyme and Southern Forests?

Many factors explain the decision to adopt the inquiry approach. As we have seen the Commonwealth Government was torn between the need to protect its reputation for being environmentally-conscious and thus retain the support of the conservation movement, and a reluctance to antagonise the Tasmanian State Government and thus further damage its political future in that state. The establishment of the Inquiry at least gave the Commonwealth Government twelve months during which time it was hoped that emotions generated by the controversy might die down and an acceptable political solution be reached. For that twelve months the heat surrounding the controversy could be deflected from the Commonwealth onto the Commission. Further, as we shall see in Chapter X, the Commonwealth had been subjected to legal challenges alleging insufficient consultation with those with private interests in properties prior to nomination; the forum of a public inquiry would ensure all parties were heard. Clearly it was also necessary to deal with the issue of the Tasmanian forest resource, which had not been satisfactorily settled by the EIS.

The Commission of Inquiry released an interim report on 20th November, 1987 pursuant to section 8(5) of the *Lemonthyme and Southern Forests Act,* which required the Commission to give priority to identifying any part or parts of the forests that were definitely not qualifying areas and to report any such identification to the Minister. In this report the Commission examined the coupes (parts of forest that are logged or intended to be logged in one operation)[15] which the Tasmanian Government and the Forestry Industry had submitted for consideration for the interim report.

In the interim report each of the coupes and road areas was examined, firstly for any special values which might make it scientifically or environmentally important from a world heritage point of view and, secondly, for its distance from, and for the effect which the types of proposed logging operations might have on, the existing

15 Commission of Inquiry into the Lemonthyme and Southern Forests (1988), vol. 1, 9.

world heritage areas. In this way the Commission sought to determine if the coupe could possibly be considered a qualifying area within the meaning of the Act; that is, either as a world heritage area or as an area which contributes to the integrity or values of a world heritage areas. The Commission concluded that four coupes were definitely not qualifying areas and should therefore be excluded from the protected area.

The Final Report

In the final report of the Helsham Commission there were clear and obvious differences on many issues between the two majority commissioners, Helsham and Wallace, and the dissenting Commissioner, Hitchcock.[16] Section 11 of the *Lemonthyme and Southern Forests Act* allows for questions arising before the Commission to be decided in accordance with the opinion of a majority of the members. The Commission made use of this provision throughout the final report.

The Commissioners were divided on the question of how far account could be taken of features lying outside the Inquiry area and their continuity with those inside it in identifying qualifying areas. The section 3 definition excludes from "qualifying area" a nominated world heritage site. Differences arose between the Commissioners when they considered the situation of a feature or attribute of the existing world heritage area, such as, for example, a glacial system, with a small part of it protruding into the inquiry area. The question was whether that small part could be designated as a qualifying area.[17] The way in which the Commissioners treated this question underscores the two different kinds of attitudes to identification of the world heritage which pervade the report.

Commissioner Hitchcock took a macrocosmic approach and found that neither the Act nor the Convention preclude the identification of a world heritage area which comprises two or more disjoint areas of land. So long as there is a natural nexus between the separate areas, collectively the separate sites may constitute part of the cultural or natural heritage and hence may constitute a single world heritage area. Thus, according to Commissioner Hitchcock;

> An evaluation of individual sites, formations or precisely delineated areas (which are wholly or partly within the inquiry area) which do not embrace other directly related sites, formations or precisely delineated areas, will produce very different results when compared to an evaluation which collectively embraces a natural suite of sites. For example, the alpine ecosystem of Tasmanian is naturally disjoint (mountain summits) and so it would be quite inappropriate to evaluate individual occurrences to see if they

16 Although at one stage Helsham joined Hitchcock in his identification of a qualifying area, leaving Wallace in the minority.

17 *Ibid.*

> are (individually) world heritage areas when it is the aggregate of individual but complementary occurrences which constitutes part of the natural heritage.[18]

The other two Commissioners would find qualifying areas only where a feature within the Inquiry area was, when examined separately, either of world heritage value or contributed to the integrity of a world heritage area. By this approach, sites are examined for World Heritage qualities individually rather than in the context of the region. This approach clearly fails to take account of the notes on the nomination form issued by Unesco, to which the Commissioners specifically stated that they made reference. Under point 5, headed "justification" (b) "natural property", the criteria for World Heritage Listing as set out in the Operational Guidelines of the World Heritage Committee are provided. The notes then state as follows:

> It should be realised that individual sites may not possess the most spectacular or outstanding single example of the above, but when the sites are viewed in a broader perspective with a complex of many surrounding features of significance, the entire area may qualify to demonstrate an array of features of global significance.

This statement clearly supports the macrocosmic approach adopted by Commissioner Hitchcock.This approach was allegedly supported by a leaked document from the Federal Attorney-Generals Department stating that two of the three commissioners had misunderstood the Inquiry's terms of reference and had used the wrong guidelines for determining world heritage values.[19]

The Commission's approach to assessing the inquiry area was to examine the various thematic components of the natural environment which could justify the classification of any part as a qualifying area and then to look at particular areas or sites containing such components to ascertain whether they were of outstanding universal value in terms of the Convention. The majority approach clearly does not take sufficient account of the direction from the World Heritage Committee outlined above.

The thematic components dealt with by the Commission were, cultural heritage, the tall eucalypt forests, rainforest, alpine flora, other flora, fauna, natural beauty, wilderness, karst and glaciation. The report addresses the issue of contributing areas separately. Although Commissioner Hitchcock dealt with the region under the various headings adopted by the majority commissioners, he considered the whole area with all its combination of features before making a decision on qualifying areas.

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18 *Ibid*, 24.

19 see Staples (1988), 6.

The majority report of the Commission was that only 8% of the protected area was worthy of world heritage nomination. Five areas were identified by a majority as constituting qualifying areas. The Forth Valley and Cathedral Mountain were identified because of their place in the viewfield of the existing world heritage area, making them areas which contribute to the integrity of that area. Exit Cave, Mt Anne and Mt Bob-The Boomerangs were found to be sites of outstanding universal value from the scientific point of view, and hence to be part of the world heritage.

Commissioner Hitchcock, on the other hand, identified as qualifying areas three large tracts of land which are wholly or partly within the inquiry area and which contain, in his opinion, multiple heritage values. He identified the main values as: wilderness, tall eucalypt forests ecosystem, rainforest, alpine ecosystem, threatened species of plants and animals, karst, glacial landscapes and natural beauty. The qualifying areas identified by Commissioner Hitchcock occupy a majority of the inquiry area and in several instances extend significantly beyond the inquiry area. They are much more substantial than the areas reported by the Commission.[20]

Reactions to the Report

The handing down of a report containing widely divergent views of the majority and minority of Commissioners put the Government in an even worse political situation than it had been in before the Inquiry was established. Clearly the report provided no easy political solutions. Reactions from the protagonists were quickly spelt out. The Federal Government contributed to the strength of reaction to the report by stating that it would not be responding to the Helsham Inquiry immediately as there were a number of contentious issues which needed to be examined carefully. According to the Minister for the Environment, Senator Richardson, the Government would respond to public pressure to save the forests if the "roar was deafening".[21]

The pro-logging groups who had initially opposed the setting up of the Inquiry and had boycotted some of its sittings now called on the Federal Government to abide by the umpire's decision. They were joined in this by the State Government whose Minister for Forests, Mr. Ray Groom, said 'we accept the umpire's decision.'[22]

The conservation movement had warned when the Inquiry was set up that submitting the issues of world heritage values to the adversarial process of judicial

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20 Commission of Inquiry into the Lemonthyme and Southern Forests (1988), vol. 2, 447.

21 Law and Nesbitt (1988), 6.

22 Hobart *Mercury*, 18.5.88.

inquiry would lead to chaos, arguing that the values of the forests should have been established via the normal world heritage nomination process involving assessment by experts of either the Department of the Environment or the Australian Heritage Commission. Now they rejected the Commission's recommendations, urging acceptance of the minority opinion. Conservationist leader Dr. Bob Brown MHA called for the adoption of the report of Commissioner Hitchcock stating that 'Justice Helsham's ignorant and inexperienced piecemeal approach to identifying single values in small places has been a disaster.'[23] Similarly, the ACF's director, Phillip Toyne called for 'Ministers Richardson and Cook to take the advice of the only expert on the tribunal with the expertise to evaluate world heritage. In other words protect the lot.'[24]

Conservationists were buoyed in their claims by various experts. Emeritus Professor DJ Mulvaney wrote a letter to the Federal Minister for the Environment, Graham Richardson in which he stated 'there are so many faulty interpretations in this Report that I propose further to alert Australians to its glaring weaknesses,' and called for the seeking of expert opinion from a wide range of experts before any action was taken on the Report.[25] Subsequently, nine of the eleven scientific consultants engaged by the inquiry disassociated themselves from the majority findings.

The Labor Party was split on the issue. While Tasmanian Federal Labor politicians supported a decision close to the minority report,[26] the State Labor Opposition declared a policy on the Helsham Inquiry identical to the State Government's. At the same time the State ALP's industry policy committee backed full world heritage listing.[27] Lobbying from all quarters reached a climax at the annual Labor Party Conference in Hobart in June, 1988.

The inquiry approach to the question of world heritage values had failed dismally to achieve a political compromise to the questions raised in relation to the forests. The Government was unwilling to alienate the conservation vote by accepting the majority recommendations of the Commission, particularly in the face of widespread criticism of those findings. At the same time, a decision to ignore those recommendations after having spent large sums of money on the inquiry would be politically damaging. In addition, the Parliamentary Labor Party became embroiled in an internal conflict between the Minister for the Environment, Senator Richardson

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23 *Ibid.*

24 Toyne, 'ACF Forest Strategy and the Accord' (1988), 2.

25 The letter is reproduced in (1988) 9/5 *Wilderness News* 18.

26 Staples (1988), 5.

27 Hobart *Mercury*, 20.7.88.

and the Resources Minister, Senator Cook. Richardson, worried about the conservation vote, favoured the nomination of 80% of the Inquiry area, with or without the State Government's support. Cook, on the other hand, had negotiated an agreement with the State Government whereby 10% of the area would be jointly nominated for world heritage listing and another 55% protected from logging under State national parks legislation. In return the Federal Government was to negotiate a compensation package with the State Government and forestry industry. These difficulties delayed a decision on the Helsham Report for more than three months. At a series of cabinet meetings on the issue the Labor front bench was presented with the different recommendations of the two Ministers involved in the dispute.

When a decision was finally made at the third cabinet meeting on the issue on the 4th August, 1988, it was clear that the findings of the Helsham Inquiry were to be virtually ignored. The decision of the Government was to adopt Richardson's proposal to protect 80% of the inquiry area from logging, along with Cook's industry package. Protection for the area would not necessarily involve nominating it for world heritage listing. In effect, the Tasmanian Government faced a situation in which it knew it must negotiate with the Commonwealth or risk a unilateral nomination of the 80% of the region and reduced compensation.

Lessons from Helsham

The whole Helsham saga was a complete and expensive disaster. It is very likely that confrontations between States and the Commonwealth over world heritage matters will continue. There are several lessons to be learnt from this most recent confrontation.

Cooperation between State and Federal Governments on nominations is highly desirable, particularly given that ongoing management of any listed sites will primarily be the responsibility of State authorities. Thus, future management issues should also be discussed during consultations over nomination to determine appropriate land uses for the region. Such cooperation is likely to better guarantee the future proper management of the region, which will generally be the responsibility of State authorities.

Further, some sort of balance must be drawn between nominating those truly unique areas, while areas of lesser conservation value and high resource value may legitimately not be nominated. In this way it can be ensured that listed sites are properly and permanently protected from damaging developments.

In some cases, however, agreement simply will not be able to be reached between the two tiers of Government. This will usually be a result of political and economic factors. The basis of the disagreement may be in relation to the world heritage values, or in relation to the consequences listing may have on present land uses, or both. Ultimately, as it is the Commonwealth Government which has accepted the international obligation to identify sites of world heritage quality within this country, it is the Commonwealth which must make the decision whether or not to nominate. The nomination of the Wet Tropical Rainforests of North East Australia occurred after the 1984 CONCOM guidelines for consultation between the relevant governments were established and the Queensland Government vigorously opposed the nomination, but it went ahead anyway.

The question is what should be the procedure where no agreement can be reached? The Helsham Inquiry saga illustrates that the forum of a public adversarial inquiry is not appropriate for making judgments about world heritage values. From the beginning there were pressures on the Inquiry, with the leading players making allegations of bias and prejudice.[28] It was obvious that neither the conservationists nor the developers were going to accept a decision of the Inquiry which went against them. Preferably, assessment of world heritage values should have been made through the normal channels of the IUCN, Australian Heritage Commission, Australian National Parks and Wildlife Service and C.S.I.R.O. These agencies have the expertise to objectively determine the qualities and uniqueness of a region. The Australian Heritage Commission should be provided with the resources to be an efficient on-going forum for collecting data to identify appropriate areas for nomination, for warning of degradation and exploring alternatives to exploitation of potential world heritage areas. The development of the Australian Heritage Commission as the apolitical body which makes clear and definite recommendations on these matters to the Commonwealth Government will reduce the political pressure on decision makers.

In all cases the Commonwealth Government should be aware of the conservation value of the area. Any areas clearly identified as of world heritage value then become the subject of international obligation and should be nominated and protected from any activities likely to damage those qualities.

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28 The ACF pointed to a secret meeting between the inquiry and counsel for the Tasmanian Forests Commission and decried the engagement of the former Chief Commissioner of the Tasmanian Forest Commission, "to report on the world heritage values of the forests that two years previously he was in charge of cutting down" - Law 'High Court Rebuffs Gray's Challenge' (1988), 3. Developmentalists labelled Hitchcock a "greenie".

The assessment of values may not always be clear, however. Following full investigation by the relevant experts, it may be that there is evidence that the area, or parts of the area are of marginal significance in terms of the *World Heritage Convention* or the exact boundaries of the area may be in dispute. Where development interests are clearly an issue in such marginal areas, the question of whether a nomination could legitimately be referred to the newly-established Commonwealth authority, the Resource Assessment Commission (R.A.C.). This Commission has the potential to determine the resource value of areas which, combined with the departmental assessment of the conservation qualities of the relevant region, should enable the Commonwealth Government to make balanced decisions about the desirability of proceeding with the nomination as a whole, or with particular parts of the nomination.

The Resource Assessment Commission

The *Resource Assessment Commission Act* 1989 establishes the R.A.C. and defines its functions and powers. According to the explanatory memorandum to the Bill: 'the Commission will hold public inquiries and inform and advise the Government on matters relating to the use of resources and involving the consideration of conservation and development issues.'

The Commission is to be guided by policy principles adopted by the Commonwealth Government for resolving competing claims for the use of resources. These principles are set out in Schedule 1 as follows:

> 1. There should be an integrated approach to conservation and development by taking both conservation and development aspects into account at an early stage.
>
> 2. Resource use decisions should seek to optimise the net benefits to the community from the nation's resources, having regard to efficiency of resource use, environmental considerations and an equitable distribution of the return of resources.
>
> 3. Commonwealth decisions, policies and management regimes may provide for additional uses that are compatible with the primary purpose values of the area, recognizing that in some cases both conservation and development interests can be accommodated concurrently or sequentially, and, in other cases, choices must be made between alternative uses or combinations of uses.

A Resource Assessment Commission Inquiry is unlikely to be surrounded by as much controversy as the Helsham Inquiry was. First, an assessment would have already been provided to the Commonwealth Government on the question of the world heritage value of the inquiry area, and the inquiry would only be in relation to marginal areas and into the resource potential of those areas. Areas of clear world heritage value would be nominated by the Commonwealth Government without inquiry. It would be envisaged that situations requiring an inquiry would occur only rarely. Second, the emphasis of the terms of reference of such an Inquiry would be

different from the Helsham Inquiry; it would focus on resource values, which are usually objectively calculable and thus the appropriate subject of a public inquiry. Third, the Commission is permanently established and not set up in an atmosphere of hysteria and haste as the Helsham Inquiry was. A reference to the Commission over a world heritage matter would thus, presumably cause less political controversy than the establishment of an Inquiry under special legislation.

Administrative measures in management of world heritage areas

As we have noted in the previous chapter, in Australia ongoing management of world heritage areas which are not within the Northern Territory takes place primarily under State legislation. The Commonwealth Government plays a significant role in this ongoing management process, at the administrative level.

Management of the Tasmanian World Heritage Area

A cooperative scheme of management of the Tasmanian World heritage area has been in place since 1985. A Ministerial Council, called the Tasmanian World Heritage Area Council was established to advise the Commonwealth and Tasmanian Governments on policy, management and financial matters concerning the Area. The Ministerial Council currently comprises: the Premier of Tasmania (Chairman), the Deputy Premier and the Commonwealth Minister for Arts, Sport, Environment, Tourism and Territories.[29] A Consultative Committee, comprising officials from a wide range of groups, including conservation, scientific, the Aboriginal community, local government, tourism and development was established in 1986.[30] Seven of these members are nominated by the Tasmanian Government and seven by the Commonwealth. The Committee has a jointly appointed chairman and acts as the advisory body which submits recommendations for consideration by the council.[31] The Ministerial Council and Consultative Committee are assisted by a Standing Committee of representatives from both governments which oversees policies and programmes.[32] The Director of the ANPWS is a member of this Standing Committee, which comprises representatives from the Tasmanian Department of Lands, Parks and Wildlife, Commonwealth Department of Arts, Sport, Environment, Tourism and Territories, Department of Prime Minister and Cabinet, Tasmanian Department of

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29 Jackson (1988), 36.

30 Department of Home Affairs and Environment (1987), 36.

31 *Ibid*, 22. One of the major issues dealt with by this Committee recently is the problem of erosion on the Gordon River banks.

32 Department of Arts, Heritage and Environment, *State of the Environment in Australia*, (1985), 131.

Premier and Cabinet, Tasmanian Department of Tourism and Tasmanian Treasury Department.[33]

The Commonwealth-State joint management arrangements provide for a rolling program of Commonwealth funding for planning and management of the World Heritage Area for the five years 1987-88 to 1991-92.[34] The Commonwealth Government provides funding on a basis of 2.2:1 cost sharing with the Tasmanian Government.[35] At present Commonwealth funding consists of $2.2 million a year, with the Tasmanian Government providing $1 million a year for recurrent expenditure and minor capital works.[36] Over the five year period the Commonwealth contribution will be $11 million and the State contribution $5 million.[37] In addition to this recurrent expenditure, the Commonwealth has made a commitment to provide funds for major capital works to be assessed annually on a project-by-project basis.[38]

One of the major functions overseen by this administrative conglomerate is the preparation of management plans for the two national parks within the world heritage area which do not have one. The management plan for the Cradle Mountain-Lake St Clair National Park was commenced prior to the coming into effect of the joint management arrangements and was completed in 1988.[39] There remains to be completed a joint management plan for the Southwest and Franklin-Lower Gordon Wild Rivers National Park. The Tasmanian Department of Parks, Wildlife and Heritage is seeking public submissions on the management of Tasmania's World Heritage Area between early December 1989 and the end of February 1990.[40] The draft management plan will be prepared between March and July 1990, which will be followed by a period of three months for public comment, and revision of the plan. It is expected that the plan will be submitted to the World Heritage Area Ministerial Council for approval in March 1991.[41]

Davis has described the conglomerate of decision-making and advisory bodies that have been established to manage the Tasmanian world heritage area as a "cumbersome institutional arrangement" and has suggested that members of the bodies are selected more to ensure that interests are represented and that candidates are

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33 Jackson (1988), 36.

34 *Ibid.*

35 *Ibid.*

36 Department of Home Affairs and Environment (1987), 36.

37 Jackson (1988), 36.

38 *Ibid.*

39 See Tasmanian Department of Lands, Parks, Wildlife and Heritage (1988).

40 Tasmanian Department of Parks, Wildlife and Heritage (1989).

41 *Ibid.*

acceptable to both governments than on the basis of any real expertise with regard to the region.[42] While it is desirable to have a broad range of interests represented on such management bodies and essential in ensuring cooperation between governments that parties are acceptable to both governments, there is no doubt that these criteria could be satisfied by appropriately qualified candidates. One would have to agree that, following the furore of the battle to save the South-West of Tasmania, the administrative arrangements which have sprung up for ongoing management have been somewhat ad hoc. It is unacceptable that the Department of Parks, Wildlife and Heritage is only at the stage of calling for public submissions for the management plan in December 1989, given that the area was listed in 1982 and the management authority established in 1983. However, the fact that any cooperation has been able to be achieved following the confrontations of the past is very positive. One has full confidence that the administrative arrangements will be smoothly extended to apply to the newly listed Tasmanian area.

Proposed Queensland Management Plan

The Commonwealth Government is also attempting to negotiate some method of ongoing management with the Queensland Government in relation to the Wet Tropical Rainforests of North East Australia.[43] The Commonwealth proposed management arrangements for the area in a discussion paper released in July 1988.[44] The paper proposes the establishment of cooperative management arrangements consisting of a Ministerial Council, Joint Rainforests Authority, Consultative Committee, Scientific Advisory Committee and Key Agency Group.[45]

The crucial organization would be the Joint Rainforest Authority, the functions of which would include the development of management plans, advise on policies, programs and funding and provide management of the Wet Tropics with particular reference to the protection, conservation and presentation of its world heritage values and integrity.[46]

The proposal is for the Rainforest Authority to consist of three members, one appointed by the State Government and one by the Commonwealth, with the Chairman to be appointed by consensus.[47] This is the "least-pain now" solution for

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42 Davis (1989), 70.

43 Media release from Senator Graham Richardson, Minister for the Arts, Sport, Environment, Tourism and Territories, 30th June, 1989.

44 See Department of Arts, Sport, Environment, Tourism and Territories, Wet Tropical Rainforests of North-East Australia: Future Management Arrangements: a Discussion Paper (1988).

45 *Ibid*, 9.

46 *Ibid*, 10.

47 *Ibid*, 11.

the Commonwealth but could cause problems in the future; the Commonwealth should reserve for itself the power and authority to resolve matters as it sees fit if representatives of the State or its agencies are uncooperative.[48] Given the difficulties which the Commonwealth is having in persuading the Queensland Government to cooperate in the establishment of a management system, it may well be that any greater Commonwealth involvement could simply not be achieved by agreement.

It is envisaged that the Ministerial Council would be established by simple agreement between the Governments with the other authorities constituted under complementary legislation enacted by the Commonwealth and Queensland Governments.[49] The discussion paper already referred to recognises the importance of development of a management plan providing for maintenance of existing agency responsibilities within the Wet Tropics in so far as this would be compatible with world heritage management principles and effective management; minimal regulation consistent with the objectives of management; provision for economic development consistent with the achievement of the objectives of management; provision for formal and structured public participation in planning and management; and coordination of activities of agencies with responsibilities in the Wet Tropics.[50] A system of management units (zones) is envisaged which would narrowly restrict the number and types of activities in areas of highest conservation importance and would impose fewer restrictions on areas of lesser conservation importance.[51]

No suggestion is made that the Queensland world heritage area be proclaimed and protected under State nature conservation legislation. While the paper makes it clear that commercial forestry operations, currently prohibited by proclamation and regulations under the *World Heritage Properties Conservation Act* would continue to be prohibited under future management arrangements,[52] it is envisaged that mining and other land uses including commercial recreation activities, construction, major infrastructure construction and subdivision could proceed with the approval of the Joint Rainforest Authority. From the management proposal and comments by the Federal Minister for the Environment it seems that land uses such as exploration and mining which did not involve wholesale clearance of rainforest would not be prohibited.[53] Given that the Queensland National Parks legislation provides that all mining and exploration, except for petroleum exploration and production, is

48 Abrahams (1988), 8.
49 *Ibid*, 10-12.
50 *Ibid*, 15.
51 *Ibid*, 16.
52 *Ibid*.
53 Australian Minerals and Energy Council (1989), 34.

prohibited, the Commonwealth has impliedly stated that it does not require the same protection to be given to the Queensland world heritage area as is given to national parks.

One would hope that where land-use activities were likely to damage the world heritage qualities for which the region was listed, the Commonwealth Government would not allow them to proceed. To fail to do so would be in clear breach of its international obligations. While logging poses the greatest threat to those qualities, there is no question that mining developments and other activities could cause untold damage to features such as habitats of rare and endangered species and the aesthetic values of the region.

The management scheme for the Queensland world heritage area will undoubtedly be more complicated than that which exists in Tasmania, where State legislation provided for plans of management and cooperative management authorities could simply be established at the administrative level. Complicated cooperative legislation at State and Commonwealth levels will be needed to effectively provide for management of the Wet Tropical Rainforests. It will be interesting indeed to see how the issues are resolved. It could be that we will see the first piece of legislation, at Commonwealth or State level concerned specifically and exclusively with ongoing management of an Australian world heritage property.

In the aftermath of the discussion paper's release, the Queensland Government of Premier Bjelke-Petersen refused to cooperate and the Commonwealth Government awaited the outcome of the Queensland State election. A Consultative Committee has been established at the administrative level to advise the Commonwealth Minister for the Environment. This Committee consists of representatives from local councils and technical experts, among others, but there is no State Government representative.[54] The Commonwealth's positive bargaining tool is the offer of funds for the management and consistent development of the area. On the negative side, the Queensland Government faces the possibility of the enactment of unilateral Commonwealth legislation. However, any decision by the Commonwealth to take this course would undoubtedly lead to political confrontation and legal challenge; the extent to which the Commonwealth can legislate with regard to world heritage areas is limited by their constitutional powers. In particular, any legislation based upon the external affairs power would have to be carefully adapted and appropriate to the fulfilment of the Commonwealth's obligations under the *World*

54 Correspondence with the Rainforest Unit, Department of Arts, Sport, Environment, Tourism and Territories.

Heritage Convention.[55] However, should the new State Government continue to refuse to cooperate it may be necessary for the Commonwealth to move beyond its approach to now and enact management legislation designed to fulfill its obligations to conserve and present areas it has identified as of world heritage value.

Another alternative may be for the Commonwealth to acquire those parts of the world heritage area which are not dedicated or reserved under the Queensland national parks legislation and proclaim them under the Commonwealth *National Parks and Wildlife Conservation Act* 1975. As already mentioned, those parts which are already reserved for purposes relating to nature conservation cannot be acquired for the purposes of the Act without the consent of the State.[56] However, the bulk of the world heritage property does not fall within this classification. The site is undoubtedly an area of land in respect of which Australia has 'under an agreement between Australia and any other country or countries, obligations relating to wildlife that may appropriately be carried out by the establishment and management of the area as a park or reserve.[57] Thus, the forests could be declared a park or reserve and be managed by the Australian National Parks and Wildlife Service under the Commonwealth legislation. Again, political damage and legal challenges may well result from such a move. Further, it may not be economically viable given the size of the relevant area (approximately 6300 square kilometres), and the fact that under the Constitution the Commonwealth would be obliged to acquire the property on just terms from the State.[58]

Conclusion

The Australian Government has moved a long way towards adopting a general policy which aims to give the cultural and natural heritage a function in the life of the community. In accordance with Article 5 of the *World Heritage Convention*, services for the protection, conservation, protection of the cultural and natural heritage have been established, and appropriate legal and administrative measures necessary for the identification, conservation, presentation and rehabilitation of the heritage have been taken. Further, many of the specific measures in the *Heritage Recommendation* have been adopted into domestic legislation and administrative practices.

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55 See Chapter X.

56 Section 6(2).

57 Section 7(1)(d).

58 Section 51(xxxi).

The process of identifying world heritage properties in Australia has been fraught with political conflict.[59] Political factors have naturally affected the way in which the Convention has been implemented in Australia. Thus, there has been no submission of a tentative list of properties which the Australian Government believes to be suitable for inclusion on the World Heritage List, despite the fact that this is a requirement under the Convention; given the furore which usually accompanies the announcement of a nomination for world heritage listing it would be politically unwise for the Government to assert that a property is of world heritage value without taking the final step of nomination. The usual process for identifying suitable properties for nomination to the World Heritage List has been for it to be done at the administrative level, with Government officials making assessments based on independent advice from national and international experts. However, political factors led to the usual process for identification of world heritage sites being abandoned in relation to the Lemonthyme and Southern Forests in favour of a public inquiry. The saga which marked the hearings of the Inquiry and the release of the report demonstrate quite clearly that the inquiry approach is not appropriate for assessing the world heritage values of Australian sites.

We have seen that once a property has been inscribed on the World Heritage List, it is possible for administrative measures to provide for cooperative management of the site, taking into account all relevant interests. However, this will only be appropriate where existing State legislation provides sufficient protection and for management of the site, as it did in Tasmania. The situation in Queensland is more difficult given that there is no question of the listed areas being proclaimed under the *National Parks and Wildlife Act*. Thus, it has only been necessary for the Commonwealth to invoke its powers under the *World Heritage Properties Conservation Act* to regulate to prohibit activities in world heritage areas in relation to two world heritage properties.[60] Management plans for the Northern Territory world heritage properties are developed and supervised by the Australian National Parks and Wildlife Service. In the Great Barrier Reef, the Marine Park Authority provides ongoing management. In Tasmania, special consultative administrative bodies have been set up to fulfil this function.

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59 See Chapter X.

60 First in relation to the Tasmanian World Heritage Area and later in the Queensland Rainforests - see Chapter X.

CHAPTER IX

MANAGEMENT OF WORLD HERITAGE PROPERTIES: TWO CASE STUDIES

Introduction

The last two chapters examined the legislative and administrative context for the identification and protection of world heritage sites in Australia. It remains to discuss the broad management issues which arise in relation to world heritage properties. What should be the objectives in management? How are these objectives to be achieved? What kind of activities should be allowed to be carried out within world heritage sites? These general management questions are examined in case studies of their application to two world heritage properties: Kakadu National Park and the Great Barrier Reef.

The case of Kakadu National Park, proclaimed under the *National Parks and Wildlife Act*, raises the major issue of appropriate land uses in world heritage areas. Other management issues raised relate to buffer areas, zoning policy, and appropriate ways to achieve input from traditional Aboriginal land owners and other interested parties. An examination of the history of the Kakadu National Park reveals the conflict which exists in Australia between the desire to conserve unique and irreplaceable natural and cultural sites, and the perceived need for a country with a natural resource-based economy to exploit resources which are often found in these sites. The primary objective in this case study is to illustrate relevant principles of management, while the developmentalist/ conservationist controversy is explored in greater detail in Chapter X.

The Great Barrier Reef situation provides an interesting case study for this section because a comprehensive scheme for the protection and management of the property has developed out of the unique *Great Barrier Reef Marine Park Act* 1975. An examination of the Act demonstrates how world heritage areas can be protected using sensible management plans and administered cooperatively by Commonwealth and State authorities, to ensure that they are accessible to the public and that activities not inconsistent with protection can continue.

The case studies are explored against a general discussion of the management issues which arise in relation to world heritage properties. These management issues have affected the schemes for protection of the two world heritage properties discussed.

Management Issues in World Heritage Properties: A General Discussion

In determining how a property which has been set aside for particular purposes should be managed, it is important to identify the relevant management objectives. What is the managing authority seeking to achieve in setting guidelines for management? As was established in the discussion of the *World Heritage Convention*, the Convention seeks to ensure the protection of sites for a whole range of reasons. Some of these reasons are aesthetic, historical or cultural, while others are more directly related to nature conservation, such as the desire to preserve the habitats of threatened species or to protect unique ecosystems.[1]

Defining Management Objectives through Management Plans

The legislation under which protected areas are reserved will generally provide for the establishment of a management plan with regard to the area. The Operational Guidelines of the World Heritage Committee encourage State Parties to prepare such plans of management for each natural site nominated.[2] The Guidelines also recognise that natural world heritage sites may coincide with or constitute part of existing or proposed protected areas such as national parks.[3] Most of the Australian world heritage areas are managed as national parks or other appropriately reserved areas, where management objectives are primarily directed at conservation and protection.

One of the major functions of a management plan is to specify the management objectives for the area concerned. In the case of world heritage properties, these are likely to reflect the different reasons for which the property was listed. For example, the Cradle Mountain-Lake St Clair National Park Management Plan, for one of the three national parks in the existing Tasmanian world heritage area, identifies one of the major objectives of management as conserving the natural, scientific and cultural values of the area.[4] While the cultural and historical reasons for preservation may require the area to be open to tourists and to recreation pursuits, the protection of the scientific values may well entail the exclusion of members of the public.

Having identified the management objectives, the responsible authorities must then establish the means of achieving those objectives. These prescriptions for management may, depending upon the legislation under which the plan is being

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1 Burhenne-Guilmin et al (1986), 200.

2 WHC/2, Para 21.

3 Para 36(b)(vi).

4 Tasmanian Department of Lands, Parks and Wildlife (1988), 42.

established, require the making of regulations to ensure their legal effectiveness.[5] Much of the legislation, however, provides some of the terms of a management plan with direct legal effect. As we have seen in Chapter VII, for example, under the *Lord Howe Island Act* no operations may be carried out on land except in accordance with the plan of management. Further, under the Commonwealth *National Parks and Wildlife Act*, certain activities, such as the establishment of townships, the granting of leases and licences, and carrying our of operations for the recovery of minerals, are only permitted where the plan of management so provides.

The Zoning System

One of the major tools used in the management of protected sites is the zoning system. The appropriateness of this management tool has been recognised internationally.[6] It is likely that within a given national park or nature conservation area a variety of uses will be permitted, in accordance with the different management objectives for the area, and that, to a varying extent, these different land uses will conflict with each other.[7] One way in which this conflict can be resolved is through zoning the area. The existing Tasmanian management plan states, for example:

> It is clear that the whole area is not uniform, in particular there are various levels of development within the Park and some parts have characteristics which require special treatment. Because of these differences and the special requirements for particular parts of the area, it has been subdivided for management purposes into zones. Zoning serves to separate incompatible uses.[8]

These zones have been derived by identifying the character and values of particular areas and matching this with their use capability.[9] For instance, the Cradle Mountain-Lake St Clair National Park has been divided into three zones: Tourist Development, Recreation and Natural. The areas at the points of access for the great majority of visitors to the Park are designated Tourist Development Zones and principal visitor services and management facilities are concentrated in these areas.[10] The Recreation Zone, which encompasses the Overland Track and other established walking tracks, incorporates tracks and public huts. The Natural Zone areas are managed as wilderness with the principal objective of maintaining their natural character.[11]

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5 Australian National Parks and Wildlife Service (1980), 283.

6 See 'Recommendations of the World National Parks Congress' in (1983) 10 *Environmental Policy and Law*, 63.

7 Ulp and Reynolds (1981), 1.

8 *Ibid*, 44.

9 *Ibid*.

10 *Ibid*, 46.

11 *Ibid*.

In using zoning as a management tool, responsible authorities must ensure that zoned areas are large enough such that conflicts are minimised; the provision of buffer zones may be necessary.[12]

One of the major purposes of zoning is to allow multiple land use. A question which inevitably arises is whether exploitative land uses, such as mining and forestry, can be accommodated within such a system in a world heritage area. The argument is that the concept of sustainable development, embodied in international documents and in the Australian National Conservation Strategy requires a policy of 'multiple land use' which would allow for exploration and mining under controlled conditions in a National Park.[13]

The protection of these sites, and particularly world heritage sites, from exploitation of a damaging nature, is in accord with the principles of sustainable development. The concept of sustainable development, as developed in the World Conservation Strategy and the Brundtland Report,[14] involves meeting the needs of the present generation without compromises in the ability of future generations to meet their own needs.[15] It requires a consideration of social and ecological factors as well as economic ones; of the living and non-living resource base; and of the long-term as well as short-term advantages and disadvantages of alternative actions.[16]

Thus, natural world heritage sites in a fully protected state have a crucial role to play in sustainable development. They maintain those essential ecological processes that depend on natural ecosystems; they preserve the diversity of species and the genetic material within them; they maintain the productive capacities of ecosystems and safeguard habitats critical for the sustainable use of species; they provide opportunities for scientific research and for education and training. The social role they play in providing places for recreation and tourism must also be considered. Protected areas make an essential contribution to sustainable development.[17] As the Brundtland Report has pointed out:

> species and their genetic materials promise to play an expanding role in development, and a powerful economic rationale is emerging to bolster the ethical, aesthetic, and scientific cases for preserving them. The genetic variability and germplasm material

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12 *Ibid*, 2.

13 See reference to the submission of the Northern Territory Government to the Senate Standing Committee on Environment, Recreation and Arts (1988), 94.

14 World Commission on Environment and Development (1987), so-called for the Chairperson, Gro Harlem Brundtland, Prime Minister of Norway.

15 World Commission on Environment and Development (1987), 8.

16 World Conservation Strategy (1980), 14.

17 Declaration of the World National Parks Congress' in (1983) *Environmental Policy and Law*, 62.

> of species make contributions to agriculture, medicine, and industry worth many billions of dollars per year. The scientists have intensively investigated only one in every 100 of Earth's plant species, and a far smaller proportion of animal species. If nations can ensure the survival of species, the world can look forward to new and improved foods, new drugs and medicines, and new raw materials for industry. This- the scope for species to make a fast-growing contribution to human welfare in myriad forms- is a major justification for expanded efforts to safeguard Earth's millions of species.[18]

The *World Charter for Nature* (1982)[19] also recognises these principles and states that 'special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species.'

The Department of Arts, Heritage and Environment is of the view that mining is an activity which is not compatible with the national park concept. The Department draws on the IUCN definition of national park as

> a relatively large area... where the highest competent authority of the country has taken steps to prevent or eliminate as soon as possible exploitation or occupation in the whole area and to enforce effectively the respect of ecological, geomorphological or aesthetic features which have led to its establishment.[20]

The argument that exploitative activities are inappropriate in national parks is given weight by the fact that State legislation, combined with State Government policy generally does not allow such activities in nature conservation areas. Under the NSW *National Parks and Wildlife Act*, a mining interest cannot be granted after the proclamation of the national park unless the application has been laid before both House of Parliament and no motion that the application be refused was made, or such motion was defeated.[21] There is a general prohibition that, notwithstanding anything in any other Act, where the Minister has adopted a plan of management for a national park or other area reserved under the Act, no operations shall be undertaken on or in relation to the park, site, reserve, or area unless the operations are in accordance with that plan of management. Under the Tasmanian National Parks legislation exploration or mining may be provided for under a management plan if that plan has been approved by a resolution of both Houses of Parliament.[22] In neither State has any significant mining activity been carried out in national parks. Government policy in New South Wales effectively prohibits all exploration and mining, and in Tasmania no management plan yet approved includes any provision for exploration or mining.[23]

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18 World Commission on Environment and Development (1987), 147.

19 (1983) 22 *I.L.M.* 455.

20 Senate Standing Committee on Environment, Recreation and Arts (1988), 95-96.

21 Section 41(3)

22 Section 21.

23 Senate Standing Committee on Environment, Recreation and the Arts (1988), 96-97.

In any case, world heritage sites are in a different category from ordinary national parks. In his submission to the Senate Standing Committee on Environment, Recreation and Arts' Inquiry into the Potential of the Kakadu National Park Region, Professor J.D. Ovington, Director of the Australian National Parks and Wildlife Service, made the very pertinent point that,

> ...Kakadu was selected as the premier, the first national park, to go on the World Heritage List, because of its outstanding cultural and biological value which are recognised internationally. So we are not talking about mining in a national park, we are talking about mining in the first area that Australia put on the World Heritage List. I think that is a very big difference.[24]

There is little question that for the Australian Government to allow exploitative activities such as mining in world heritage areas would be in breach of its international obligations under the *World Heritage Convention.* It seems unlikely that such activities could be carried out in a way which did not damage some of the qualities for which the property was listed. The delicate ecological balance, or simply the aesthetic values of the sites, are likely to be affected by exploitative activities. It is appropriate for a country as wealthy as Australia to provide full protection for these unique areas, regardless of the resources they contain. Australia cannot ask poorer nations to make sacrifices in the name of environmental protection and international cooperation which it is not prepared to make.

The concept of sustainable development does not allow for resource exploitation which is likely to damage world heritage areas. World heritage forests with their fragile ecosystems and unique beauty are destroyed by logging, even if trees regrow there. Rivers once flooded are lost forever. The rare species of flora and fauna which many of these areas support may well become extinct through even the smallest interferences with their habitats. The loss of the qualities for which these sites are listed will compromise the ability of future generations to meet their own needs, both psychological and practical. Not only do these sites satisfy a yearning for untouched wilderness and enable Humankind to know about and appreciate its cultural and natural history, they are also important for scientific research and knowledge which will help the future generations to meet their needs. For the same reasons, present generations also have a need for these areas to be preserved.

Kakadu: Aboriginal Land, National Park and World Heritage Property

Many of the general management issues outlined above have arisen to be resolved in relation to Kakadu National Park. Kakadu is an area of unique national

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24 *Ibid*, 98.

and international significance. Much of the region is now Aboriginal land, legally owned by the Aboriginal Trusts which hold title to it for the benefit of the Aborigines who would traditionally be entitled to use and live on that land. The rich collection of Aboriginal sacred, cultural and relic sites in Kakadu, along with its special natural features, have resulted in its declaration as a national park managed by the Australian National Parks and Wildlife Service, in cooperation with Aboriginal representatives, for the benefit of all Australians. Kakadu has also been accorded international recognition with its inscription on the World Heritage List.

Background

Prior to 1975 economic considerations were nearly always paramount in any decision with regard to land use regulation in Australia. As the Hope Committee of Inquiry into the National Estate found in 1974:

> National Parks and other large reserves have generally been made only in areas unwanted for any other purpose. Sectional pressures have ensured that other areas, whether their potential is for agriculture, grazing, mining, forestry, water storage or settlement, have largely remained unreserved.[25]

From the time of its election in 1972, in the face of the developing world-wide environmental consciousness, the reforming Federal Government of Prime Minister Whitlam began to challenge the dominance of this developmentalist ideology. One of the major environmental issues which the Government had to deal with was the question of how best to balance the competing claims of conservationists and developers in relation to the Alligator Rivers Region.

The Alligator Rivers region is situated east of Darwin, in the Northern Territory, on the western edge of Arnhem Land, It comprises approximately 19,000 square kilometres.[26] The values of the region from both the environmental and economic points of view have long been recognized.[27] The environmental values, combined with the importance of this region to the Aboriginal people, led to claims by conservationists that the area should be completely protected from exploitation. Developers, on the other hand, have focussed on the wealth of natural resources, including uranium and gold, which exist throughout the region.[28] During the latter part of 1970, companies exploring for uranium in the Northern Territory announced significant new discoveries at Naabarlek, Ranger, and Koongarra in the Alligator

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25 Committee of Inquiry into the National Estate (1975), 77.

26 See Ranger Environmental Inquiry (1977), 15.

27 See the description of the property in Chapter VI.

28 The South Alligator uranium and gold field was discovered in 1953. Until 1965 uranium was mined at a total of 13 mines by two companies, South Alligator Uranium Pty Ltd and United Uranium Pty Ltd - Allen et al (1987), 71.

Rivers region.[29] During the early 1970s mineral prospecting licences covering much of the region were issued.

The Whitlam Government was faced with the need to make a decision about the extent to which these resources should be exploited, in the face of growing sentiment that the region should be protected as a national park.[30]

In 1973 Whitlam announced that Cabinet had agreed to establish a national park in the Alligator Rivers Region, to be given the name "Kakadu" for the Gagadju language group of Aborigines which live in the area.[31] In March 1975 the *National Parks and Wildlife Conservation Act,* providing the legislative framework for the proclamation of such national parks, received royal assent. In May of that year the proposed boundaries of the Kakadu National Park were notified in the Commonwealth Gazette.

The final proclamation of the park was again delayed, this time by a proposal first put forward in 1974 by the Australian Atomic Energy Commission and Ranger Uranium Mines Pty Ltd for a joint venture to mine and mill uranium at a substantial site identified in the Ranger area. By instrument in the Australian Government Gazette dated 16th July, 1975, Whitlam, in his capacity as Minister of State for the Environment, directed that an inquiry into this proposal be conducted in pursuance of section 11(1) of the *Environmental Protection (Impact of Proposals) Act.*[32]

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29 Gilpin *The Australian Environment: 12 Controversial Issues* (1980), 115.

30 The first proposals for a National Park in the Alligator Rivers Region had been put forward in the early 1950s. A major proposal involving the dedication of 638 550 hectares in the region as a national park was released by the Northern Territory Reserves Board in 1965 (Figgis and Mosely (1988), 38). In 1970 a Department of the Interior planning team stated that

> the National Park proposal in the Northern Territory is of national importance to all Australians in the preservation of an area of outstanding natural resources, comparable with any of the great parks in the world. (Meir and Balderstone (1987), 18).

31 *Ibid,*17. There are now only six Gagadju speakers left.

32 Section 11 of the *Environment Protection (Impact of Proposals) Act* 1974 provides that the Minister for the Environment may direct that an inquiry be conducted in respect of all or any of the environmental aspects of any matter referred to in section 5. That section lists the following matters: the formulation of proposals, the carrying out of works and other projects, the negotiation, operation and enforcement of agreements and arrangements, the making of decisions or recommendations and the incurring of expenditure by, or on behalf of, the Australian association with any other government, authority, body or person. Under Section 11 the Minister may, in the face of such matters, appoint a Commissioner or Commissioners to conduct the Inquiry. Under this section Whitlam appointed Mr. Justice R.W. Fox, the Senior Judge of the Australian Capital Territory's Supreme Court as Presiding Commissioner. He was assisted by Mr. G.G. Kelleher, a civil engineer, and Professor C.D. Kerr, Professor of Preventive and Social Medicine at the University of Sydney.

The Inquiry (the Fox Inquiry) released its findings on the project in two separate reports. The first report,[33] which dealt with the general implications of uranium mining from a national and international viewpoint, was tabled in Parliament on 28th October, 1976. The second report,[34] covering the local and national environmental aspects of the Ranger proposal, was presented on 25th May 1977.[35]

The Inquiry recommended the creation, in the Alligator Rivers Region, of a major international park which should include representative samples of all major ecosystems of the Region.[36] It also recommended that provision be made for Aboriginal ownership and management of the park.[37] On the Ranger proposal it found that, if an adverse decision on the Ranger project was not made on the basis of the general dangers of uranium mining and yellowcake export dealt with in a first report, then the project should be allowed to proceed subject to strict environmental safeguards.[38] The Committee found that, 'the economic value and ease of development of the known uranium ore bodies in the Region are strong arguments for exploitation if mining or uranium in Australia is deemed desirable.'[39]

The Fraser Government implemented almost all of the recommendations of the Fox Inquiry. However, rather than declaring the whole area suggested by the Inquiry as a national park at once, a course which the Inquiry had preferred,[40] the Government chose to proclaim only a first stage, consisting of 6144 square kilometres. This so-called "Stage 1" was based on the site which the Whitlam Government had identified for proclamation in 1975, but also included an area surrounding the east bank of the East Alligator River up to the coast and a large parcel of land to the west. This area was proclaimed as a national park under section 7 of the *National Parks and Wildlife Conservation Act* 1975 on 5th April, 1979. The Minister for the Environment, Housing and Community Development, Mr. Groom had earlier stated that stage 2 of the Park, encompassing the rest of the Region recommended for inclusion by the Fox Inquiry, would be proclaimed 'as soon as the mineral resources of the area have been reasonably identified.'[41]

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33 Parliamentary Paper No. 309/1976.

34 Parliamentary Paper No. 117/1977.

35 The Commission heard a total of 303 witnesses, the evidence resulting in 13,425 pages of transcript and 419 exhibits.

36 Ranger Uranium Environmental Inquiry (1977), 206.

37 *Ibid*, 334.

38 *Ibid*, 335.

39 *Ibid*, 289.

40 *Ibid*, 334.

41 Press release, 5th February, 1978.

In accordance with the recommendations of the Fox report, the five areas where there were to be uranium mining activities in the future were excised from the National Park. The areas, which included Ranger, Jabiluka and Koongarra, constituted about 1% of the stage 1 park area.[42] The site for a proposed regional town, Jabiru, was included in the park. The Ranger Uranium project, based on a project area of 78 square kilometres, was authorised under section 41 of the *Atomic Energy Act* 1953, which provides for the mining of prescribed substances, including uranium, to be authorised on behalf of, or in association with, the Commonwealth. The mine commenced exporting uranium oxide (yellowcake) to the United States of America, Japan and Korea in 1979.[43] As yet no uranium mining has been carried out in the other excised areas.

On 3rd November, 1978 the traditional Aboriginal owners, having won rights to much of the region under the *Aboriginal Land Rights (Northern Territory) Act* , had leased it back to the Australian National Parks and Wildlife Service to be used as a national park.

In October 1981 the World Heritage Committee accepted the Australian Government's nomination of Kakadu Stage 1 for inscription on the World Heritage List.[44] At the meeting the Committee noted that the Australian Government intended to proclaim additional areas to the Alligator Rivers Region as part of the Kakadu National Park and recommended that such areas be included in the site inscribed on the World Heritage List and that in the Region the environmental protection measures specified in the relevant legislation continue to be enforced.[45]

On 28th February, 1984 the Hawke Labor Government proclaimed the long-anticipated stage 2 of Kakadu National Park. This stage was slightly larger than stage 1 and filled in a gap between the lower part of the earlier stage and the Northern coast. The Ranger mine and other proposed uranium mines remained excised from the park. In December of that year, a proclamation made by the Governor-General and notified in the Government Gazette, joined stages 1 and 2 in a single park. Title to seven percent of Stage 2 of the National Park has also been granted to the traditional land

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42 See Gilpin *The Australian Environment: 12 Controversial Issues* (1980), 131.

43 Allen and Harris (1987), 73.

44 Along with the Great Barrier Reef, Kakadu was the first Australian site to be accorded this honour.

45 Unesco doc. CC.81/Conf/003/6, para 15.

owners, again under a lease-back arrangement with the National Parks and Wildlife Service.[46]

Stage 2 of the National Park was inscribed on the World Heritage List on 9th December 1987. The nomination had first been considered by the World Heritage Committee in 1986, but a decision had been deferred at the Commonwealth's request, pending judgment in legal action taken by Peko-Wallsend against the decision to nominate.[47] The Government won an appeal in that case and the listing proceeded, despite considerable opposition from the Northern Territory Government and mining groups.[48]

Stage 3 of the Park, consisting of the southern most part of the region made up of sections of the Gimbat and Goodparla Pastoral leases, was proclaimed on 5th June 1988. At the same time a conservation zone, incorporating the rest of the leases and including the highly prospective Coronation Hill site, was proclaimed in the Government Gazette. BHP Gold Ltd and its joint venturers have recently completed an environmental impact statement into the proposed mining of gold, platinum and palladium at the Coronation Hill site. Following the release of this statement, the Government announced its decision to proclaim the majority of the conservation zone as part of Stage 3 of the National Park. The El Sherana and Coronation Hill sites have been left in the conservation zone, pending an investigation by the Resource Assessment Commission into the economic and conservation values of the area. The Government intends to nominate stage 3 of the park for world heritage listing some time in the future.[49] The whole of Stage 3 is now the subject of a land claim by Aborigines.[50]

Management principles and Kakadu National Park

Mineral Exploitation

One of the major management issues with regard to the Kakadu region has been the question of the appropriateness of exploitative land uses, particularly mining,

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46 See Senate Standing Committee on Environment, Recreation and the Arts (1988), 7. The title transfer to this land was delayed by litigation undertaken by mining groups in *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 66 *A.L.R.* 299.

47 *Minister for Arts, Heritage and the Environment v Peko-Wallsend* (1987) 75 *A.L.R.* 218. This decision is discussed in Chapter X.

48 The Northern Territory Government sent its Minister for Mines and Energy, Barry Coulter, to lobby members of the World Heritage Committee in Paris against the listing of stage 2 - House of Representatives Hansard, 8th December, 1987, 2942-3.

49 Senate Hansard, 10th December, 1987, 2883.

50 Senate Standing Committee on Environment, Recreation and the Arts (1988), 7.

in the area.[51] Initially, the land use controversies were with regard to Stage 1 and 2. This issue with regard to the proclaimed national park has now been resolved with the legislative direction under section 10 (1A) of the *National Parks Act* that 'no operations for the recovery of mineral shall be carried out in Kakadu National Park.'

These amendments relating to operations for the recovery of minerals were inserted to implement a cabinet decision not to allow any mining in the National Park. In September 1986, in the course of discussions relating to the plan of management for stage 2 of the National Park, which had originally recognized the pre-existing interests provided for in section 8B, the Cabinet decided not to allow any mining outside pre-existing interests. Subsequently, a new plan of management for stages 1 and 2 together was developed. This plan replaced the previous expired plan which had allowed exploration and mining to take place outside pre-existing leases with the approval of the Governor-General.[52] A later Cabinet decision was taken not to allow any mining in the Kakadu National Park.

The issue now is whether mining should be allowed in other regions, and particularly in the so-called conservation zone.

The amendments to the *National Parks and Wildlife Act* allowing the declaration of conservation zones were accompanied by amendments to the *Environment Protection (Alligator Rivers Region) Act.* This Act implements one of the recommendations of the Ranger Uranium Inquiry by establishing the office of Supervising Scientist for the Alligator Rivers Region,[53] with certain research and reporting roles in relation to the environmental protection of the region. The primary responsibilities of the office are to investigate the effect of uranium mining on the environment of the area and to develop standards, practices and procedures for the protection of the environment from these effects. The Act also establishes the Alligator Rivers Region Research Institute, managed by the Supervising Scientist.[54] The 1987 amendments add to the Supervising Scientist's responsibilities that of providing advice to the Government on the environmental aspects of exploration and mining in the Kakadu conservation zone. In 1987 the Government also amended the

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51 In June 1978, the *Northern Territory (Self-Government) Act* received Royal Assent. The Act vested mineral rights in the Territory with the Northern Territory Government. In the same year, however, pursuant to section 70 of this Act, the Commonwealth acquired from the Northern Territory the area of land corresponding to the planned three stages of the Park and the mineral rights for the area reverted to the Commonwealth- Senate Standing Committee on Environment, Arts and Recreation (1988), 72.

52 *Minister for Arts, Heritage and the Environment v Peko-Wallsend* (1987) 75 *A.L.R.* 218 at 533.

53 By section 4.

54 By section 23.

Aboriginal Land Rights (Northern Territory) Act, including stage 3 of the Park in Schedule 1 to the Act and thus making it readily available for land claim.

Subsection 8 of section 8A of the *National Parks Act* confers the power to make regulations in relation to conservation zones on such subjects as operations for the recovery of minerals, and the carrying on of fishing, pastoral or agricultural activities for commercial purposes, among others. By amendment in 1987, such regulations in relation to operations for the recovery of minerals have effect notwithstanding that they may be inconsistent with interests in respect of land or in respect of minerals on, in or beneath that land. The Government has stated that this regulation-making power will only be used as a last resort if a company does not accept additional terms and conditions which may be required as a result of environmental assessment being attached to their interests.[55]

Although the conservation zone, and even Stage 3 have not yet been formally identified as world heritage areas, the proposed activities in them have implications for the protection of the relevant areas. The South Alligator River has its headwaters in Stage 3 and flows through the Conservation Zone before passing through part of Stage 1.[56] Thus, any pollution of the River as a result of mineral activities, could damage the world heritage area. This highlights the importance, as recognised by the World Heritage Committee, of providing a buffer zone around the nominated area.[57] In order to achieve the result of giving an added layer of protection to the actual world heritage site, there must be appropriate restrictions placed upon land uses in the buffer zone. As a consequence of the potential impact of activities at Coronation Hill on the world heritage area, the Senate Standing Committee has recommended:

> that any proposal for mining activity in the Conservation Zone should be examined very carefully, and that approval should not be given if the proposal has the potential to cause environmental damage within the catchment area of the South Alligator area which might result in damage to areas of the Park[58]

Accommodation of Residents and Tourists

Another management issue in the Kakadu National Park has been how to accommodate residents and tourists. The *National Parks Act* provides for the establishment and development of townships in the region where the plan of management so provides.[59] The section makes necessary the development of a town

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55 House of Representatives Hansard, 18th March, 1987,1061.

56 Senate Standing Committee on Environment, Recreation and the Arts (1988), 99.

57 WHC/2, *Operational Guidelines*, para 17.

58 At 131.

59 Section 8C(1) and (3).

plan. Section 8C also deals with a particular township proposed to be developed at Jabiru in the Kakadu National Park to provide accommodation and services for workers from the Ranger mine, near which it is situated. While the mine is excluded from the National Park, the township of Jabiru was included in stage 1 of the Park. The establishment of such a township is inconsistent with one of the major management objectives with regard to the region, namely, the protection of the natural and cultural values that it possesses. However, another management objective specified by the authorities in relation to the Kakadu National Park is to establish a town pleasant to live in.[60]

A major objective of the Kakadu plan of management is to reconcile the interests of user groups having different interests which may be incompatible.[61] This is achieved through zoning. The factors which have been identified to be taken into account in defining zones include the distribution of flora, fauna and land systems, sensitivity to soil erosion, potential for various types of recreation and land uses, evidence of damage or disturbance by visitor use and significant cultural sites.[62] It is recognised that areas of high nature conservation or cultural value need the greatest protection, sometimes requiring restrictions on visitor use.[63] The management plan implements four types of zones in relation to the Kakadu National Park. These are the intensive management zone, the intermediate management zone, the minimum management zone and the wilderness zone.[64] The town and major tourist facilities are contained in the intensive management zone. There are no permanent facilities in the wilderness zone except those for protective purposes.[65] Within each of the four major management zones restricted access areas may be established for specific purposes such as scientific research and Aboriginal habitation.[66]

Participation of Traditional Land Owners

Apart from the question of appropriate land use and the ways in which conflicting management objectives can be realised, the other major management issue in Kakadu relates to the participation of various parties, and particularly of the traditional Aboriginal land owners in management preparation. The *National Parks Act* allows for the participation by an Aboriginal Board in the preparation process. Boards can be established in relation to *prescribed parks and reserves* by agreement between the relevant Aboriginal Land Council, established under the *Aboriginal Land*

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60 Australian National Parks and Wildlife Service (1980), 260-1.

61 Australian National Parks and Wildlife Service (1986), 27.

62 *Ibid.*

63 *Ibid.*

64 At 28.

65 At 30.

66 *Ibid.*

Rights (Northern Territory) Act, and the Minister. These Boards are to consist of a majority of Aboriginal members. A prescribed reserve is defined in the Act as Uluru National Park, or any other park or reserve declared by regulation to be a prescribed park or reserve. By regulation 79 of 1987, Kakadu National Park is declared to be a prescribed park for the purposes of Part IIA. As yet no such Board has been established.

The question of whether a Board of Management should be established for the National Park was addressed in the recent Senate Standing Committee Report on the Potential of the Kakadu National Park region. There was particular concern to recognise the Northern Territory Government's and local interests groups' legitimate claim to play a role in management of the Park. While the Northern Territory Government made submissions to the Australian National Parks and Wildlife Service on the draft plan of management, it felt that it had not played a sufficient role.[67] The Report concludes that 'consultative mechanisms used in the management of the Park can be improved.'[68] The Report strongly supports the creation of a Board to manage the Park, which could accommodate the interests of government and industry as well as of traditional Aboriginal owners.[69]

The *Aboriginal Land Rights Act* addresses the issue of Aboriginal interests in the Kakadu National Park. The *Act* establishes the administrative machinery to protect the rights of the Aboriginal people in the Northern Territory and to deal with Aboriginal Land, including Aboriginal Land Councils, Land Trusts and an Aboriginal Benefit Trust Account. It provides procedures whereby claims can be made by or on behalf of Aboriginal persons in the Northern Territory that are entitled by tradition to its use or occupation. The Act also addresses particular issues in relation to the granting of land, including restrictions on the granting or new mining interests and the operation of proposed mines, particularly the Ranger Uranium mine.

Kakadu National Park is managed with many different objectives in mind, including, facilitating settlement by traditional Aboriginal owners and their involvement in the Park; improving and developing tourist facilities; establishing a town pleasant to live in; managing ecosystems, plant and animal populations as necessary and especially to control non-native species; and establishing long-term monitoring to safeguard against Park values being affected adversely by Park use and mining in neighbouring areas.[70]

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67 Senate Standing Committee on Environment, Recreation and Arts (1988), 215-216.

68 *Ibid*, 219.

69 *Ibid*, 220.

70 Australian National Parks and Wildlife Service (1980), 260-1.

The possibility of conflict between these management objectives means that the development of management policies and strategies is inevitably complex, requiring the resolution of difficult issues and the bringing together of competing interests. It is not just a question of accepting some activities and banning others, either completely or from certain places or at defined times. Even when activities can be geographically segregated, as by banning mining within the Park, their impact may be felt outside the area in which they are taking place... The problem is compounded by the number of groups having an interest in the area and wanting a say in its future.[71]

The Great Barrier Reef

Background

An analysis of the course of events which precipitated the enactment of Commonwealth legislation for the protection and management of the Great Barrier Reef demonstrates the emergence of the management issues which have had to be dealt with in relation to the largest world heritage site. The region was included on the World Heritage List in 1981 when the World Heritage Committee met in Sydney[72] and was found to satisfy all the natural heritage criteria set down in the Operational Guidelines. However the battle for the Great Barrier Reef had been fought and won long before its inclusion on the World Heritage List.

Since the 1960s developers had shown an interest in the Great Barrier Reef for its potential for tourism development,[73] limestone-mining[74] and oil drilling. During the 1960s and early 70s a major conservation campaign to protect the Reef took place.

The natural heritage qualities of the Great Barrier Reef were recognized both within Australia and internationally[75] long before it was proposed for World Heritage listing. Parts of the Reef had been protected under various pieces of legislation prior to the enactment of Commonwealth legislation. The *State Forests and National Parks Act* 1903-1948 (Queensland) enabled national parks to be gazetted

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71 Senate Standing Committee on Environment, Recreation and Arts (1988), 215.

72 See Unesco document CC.81/Conf/003/6.

73 See Wright (1977), 2. Also note the report in *The Australian,* 9th October 1975 regarding the Queensland Government's proposal to develop a $50 million tourist scheme on North-West Island, off Rockhampton, which brought about an outcry from conservation groups and others.

74 See Wright (1977), 6-9.

75 See, for example, Wright's account of a meeting she had with the head of the World Wildlife Fund, whom she said was "frankly horrified" with the threats to the Reef and who offered to write to the Commonwealth Government giving this view and to involve the Fund in a research survey, *ibid,* 28.

and was used until 1959. Under this Act, parts of Green Island and Heron Island were gazetted as national parks.[76] Further national parks in the Reef area were gazetted under the *Forestry Act* 1959-1976 (Queensland). The first marine parks on the Reef - Heron-Wistari and Green Island Marine Parks were also gazetted under this Act in 1974.[77] In 1976 the powers under the *State Forest* and *Forestry Acts* were transferred to the *National Parks and Wildlife Act* 1976 and *Fisheries Act* 1976 respectively.[78]

At various stages during the 1960s and 1970s the Queensland State Government, led by the conservative National Party, pledged to protect the Reef. Despite this pledge, the Government failed to discount drilling for oil on the Reef. From 1967 the Government leased some 80,920 square miles of the Reef for oil exploration.[79] The question of drilling for oil in the Reef Waters was a major issue in both State and Federal elections in Queensland in 1969 when the Labor Party made it a key campaign point after disclosures of shares held by the Premier of Queensland, Mr. Bjelke-Peterson in Exoil. Exoil, renamed Oil Min had hoped to prospect for oil in the Reef Area.[80]

In the face of these proposals for development various conservation groups mounted a campaign to save the Great Barrier Reef. In response to public concerns over the issue of oil drilling the Reef Area and to news that a Japanese mining company, Japex (Aus.) Pty. Ltd., planned to drill for oil in the Repulse Bay Area of Northern Queensland,[81] the Commonwealth and Queensland Governments established separate Royal Commissions into Exploratory and Production Drilling for Petroleum in the Area of the Great Barrier Reef on 5th May, 1970. These Royal Commissions had identical terms of reference involving questions as to the risk of oil or gas leaks if drilling went ahead; the probable effects of such a gas leak; the adequacy of existing safety measures; and the probable benefits of oil drilling on the Reef.[82] The Commissions sat in parallel and the same personnel were appointed to both.[83] The

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76 Great Barrier Reef Marine Park Authority (1980), 4.

77 *Ibid.*

78 *Ibid.*

79 Wright (1977), 32-33 where she quotes a letter from John Busst to the Prime Minister, John Gordon in which he demonstrates the extent of these leases and asks the Commonwealth Government to take "full control of the area now".

80 *Australian* 23.11.74.

81 *Australian*, 23.11.74.

82 Royal Commissions into Exploratory and Production Drilling for Petroleum in the Area of the Great Barrier Reef (vol. 1), 2-3.

83 The three-man Commission was chaired by Sir Gordon Wallace, of Sydney, a former President of the New South Wales Court of Appeal, with Dr. J.E. Smith, Director of the Plymouth Laboratory of the Marine Biological Association of Britain and Mr V.J. Moroney, a consultant petroleum engineer of Calgary, Alberta, Canada.

Commissions sat for two years and two months and produced a single report in November, 1974.[84]

The Commission was unanimous in its view that drilling should not be permitted on any cay, island or reef or national park or marine park when declared.[85] There was, however, a divergence of opinion with regard to the rest of the area. Dr. Smith and Mr. Moroney expressed the opinion that, subject to adoption of the safety precautions, drilling could be permitted in designated areas.[86] The Chairman, on the other hand, was of the view that all drilling throughout the Great Barrier Reef should be postponed and be planned and permitted only after results of research into the short and long-terms effect of such operations on the Reef were known.[87]

Soon after receiving this Report, the Commonwealth Government moved to enact the *Great Barrier Reef Marine Park Act*. There was a clear decision that no part of the park should be subjected to oil drilling, although a decision to prevent oil drilling in the whole area was not taken until 1983.

While mention was made of the possibility of nomination of the Great Barrier Reef for World Heritage Listing (after the Convention was ratified by Australia in 1974), this was not done until 1981. At the time when the Commonwealth Government was seeking some means to protect the Reef, the possibility of listing the site and implementing the *World Heritage Convention* domestically does not seem to have been considered. In any case, it was clear that an on-going management scheme, allowing for cooperation between the State and Federal Governments and for the recognition of competing interests in the Reef, was desirable.

Management of the Reef under the *Great Barrier Reef Marine Park Act*

The major management issues to be resolved were in relation to appropriate land-uses, the ways in which conflicting land uses could be accommodated, and the establishment of suitable management authorities where legitimate interests were represented. These issues are dealt with in the *Great Barrier Reef Marine Park Act*. The Commonwealth's power to enact the *Great Barrier Reef Act* did not derive from the *World Heritage Convention*, but from its legislative powers in the offshore areas.

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84 See vols 1 and 2.

85 Vol. 2, paragraph 3.4.4.

86 *Ibid*, paragraph 3.4.5.

87 *Ibid*, paragraph 3.4.10.

The Commonwealth declared its sovereign rights over the territorial sea and the continental shelf in the *Seas and Submerged Lands Act* 1973.[88] This Act sets out the text of the *Convention on the Territorial Sea and Contiguous Zone* (1958) and the *Convention on the Continental Shelf* (1958) in schedules to the Act. These conventions recognise the rights of sovereignty asserted in the Act as rights which belong to coastal States.

This Act survived a constitutional challenge by all the constituent states of Australia in *New South Wales v Commonwealth*[89] (the *Seas and Submerged Lands Case*). The states argued, firstly, that the legislation was not a valid exercise of the external affairs power; secondly, that the states in 1900 had proprietary rights in and/or legislative power over, the territorial seas adjacent to their coasts to the extent of seaward of three miles and over the continental shelf and incline and; thirdly, that neither the enactment of the Australian Constitution nor the emergence of Australia as a nation state vested in Australia the territorial sea nor the continental shelf.

The High Court found the legislation to be constitutionally valid as an implementation of the two conventions which conferred rights and responsibilities on the nation state.[90] Barwick CJ, Mason and Jacobs J found the legislation valid on the additional ground that any law which related to things external or outside Australia was a law with respect to external affairs, finding that the continent of Australia and the island of Tasmania were bounded by the low water mark on the coasts.[91]

Subsequent to this decision the Commonwealth and the States entered into an agreement under which proprietary rights to the sea-bed and legislative powers over the territorial waters up to a three mile limit from the shores adjacent to the States were surrendered to the States by the Commonwealth.[92] However, the agreement is subject to a number of reservations including, in particular, the continuing operation of the *Great Barrier Reef Marine Park Act* 1975.

Land Use in the Great Barrier Reef

The issue of appropriate land use is dealt with in the provision of the *Great Barrier Reef Marine Park Act* for a marine park, to be known as the Great Barrier Reef Marine Park, consisting of such areas in the Great Barrier Reef Region as are

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88 In sections 6 and 11.

89 (1975) 8 *A.L.R.* 1.

90 Per Barwick CJ, 361.

91 Per Barwick CJ, 360.

92 See the *Coastal Waters (State Title) Act* 1980 (C/W).

declared to be parts of that Park.[93] These areas are to be subject to zoning plans.[94] Areas which are declared by zoning plans to be special zones are managed in accordance with the *National Parks and Wildlife Conservation Act* 1975 as if they were parks or reserves.[95] Section 32(7) of the *Marine Park Act* provides that in preparing zoning plans, regard shall be had to the following:

> (a) the conservation of the Great Barrier Reef;
>
> (b) the regulation of the use of the Marine Park so as to protect the Great Barrier Reef while allowing the reasonable use of the Great Barrier Reef Region;
>
> (c) the regulation of activities that exploit the resources of the great Barrier Reef Region so as to minimise the effect of those activities on the Great Barrier Reef;
>
> (d) the reservation of some areas of the Great Barrier Reef for its appreciation and enjoyment by the public and
>
> (e) the preservation of some areas of the Great Barrier Reef in its natural state undisturbed by man except for the purposes of scientific research.

Zoning plans are to be prepared by the Great Barrier Reef Marine Park Authority after receiving representations from interested persons.[96] Interested persons may make representations in relation to a proposed zoning plan,[97] after which the plan is finalised and submitted to the Minister for the Environment who can then alter it.[98] Finally the plans are submitted to the Federal Parliament.[99]

Operations for the recovery of minerals are prohibited throughout the Marine Park,[100] except where the Authority gives its approval for the purpose of research and investigations relevant to the establishment, care and development of the Marine Park or for scientific research.[101] By regulations made in 1983, drilling for petroleum is also prohibited in any part of the Great Barrier Reef Region that does not for the time being form part of the Marine Park.[102] Thus, it was not until 1983 and a change of Government that the decision was taken to prevent all oil drilling on the Great Barrier Reef. The taking of certain fish, discharge or deposit of waste, littering and spearfishing, are also prohibited by regulation.[103] There is a broad regulation-making

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93 Section 30.

94 Section 32.

95 Section 32(5).

96 Section 32(2).

97 *Ibid.*

98 Section 32(10) and (11).

99 Section 33.

100 Section 38(2). This implements the recommendation of the Royal Commission that no drilling should be allowed in the Marine Park.

101 Section 38(3).

102 Statutory Rules 1983 No. 232, regulation 4.

103 Statutory Rules 1983 No. 262.

power in section 66 of the Act which, inter alia, permits the making of regulations for giving effect to, and enforcing the observance of, zoning plans.[104]

Management authorities for the Park are also created under the Act. The Great Barrier Reef Authority is created by the Act.[105] Membership of the Authority is to consist of a full-time Chairman and two other members appointed in a part-time capacity.[106] These members are to be persons with qualifications or extensive experience in a field related to the functions of the Authority.[107] One of the part-time members is to be appointed by the Governor-General on the nomination of the Queensland Government.[108] Failure of the Queensland Government to nominate a person with the necessary qualifications within 3 months after the invitation to nominate will result in another person being appointed.[109] Thus, the Act seeks to ensure that suitably qualified persons are members of the Authority, while at the same time acknowledging the right of the Queensland Government to have some say in the makeup of the Authority.

The functions of the Great Barrier Reef Authority are provided for in section 7 and include: to make recommendations to the Minister for the Environment in relation to the care and development of the Park; to carry out, and arrange for other institutions or persons to carry out, research and investigations relevant to the Park; to prepare zoning plans for the Park; to provide the Minister with information and advice relating to agreements between the Commonwealth and Queensland on the Park, and relating to financial assistance for the Park and other miscellaneous functions. The authority is advised by a 15-member Consultative Committee,[110] which can also furnish advice direct to the Minister in respect of matters relating to the operation of the Act.[111]

The Committee membership is to consist of a member of the Authority and a minimum of 12 other members, one-third of which shall be nominated by the Queensland Government.[112] There is a proviso that if the Queensland Government

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104 Section 66(1) provides that:

> The Governor-General may make regulations, not inconsistent with this Act or with a zoning plan, prescribing all matters required or permitted by this Act to be prescribed for carrying out or giving effect to this Act.

105 Section 6.

106 Section 10.

107 Section 10(6).

108 Section 10(3).

109 Section 10(4).

110 Sections 20 and 21.

111 Section 21(1).

112 Section 22.

fails to nominate, the Minister may appoint a person or persons not nominated by the Queensland Government. There are no requirements set down for qualifications of members of this Committee. There is therefore room for purely political appointments to be made. The effect of this will be minimal, however, in view of the fact that this is merely an advisory, rather than a decision-making body.

The Great Barrier Reef Ministerial Council coordinates Government policy on the Reef.[113] Day-to-day management of declared sections of the Marine Park is undertaken by officers of the appropriate Queensland authorities who, in discharging these responsibilities, are subject to the Great Barrier Reef Marine Park Authority.[114]

The Implementation of the *Great Barrier Reef Marine Park Act*

There was some considerable delay in the implementation of the *Great Barrier Reef Marine Park Act*, which fuelled speculation that both the Fraser Government and Bjelke-Petersen State Governments did not want to exclude the possibility of oil drilling on the Reef.[115] However, following Australian Conservation Foundation and other conservation groups, the Government Leader in the Senate, Senator Carrick gave an unequivocal assurance that the Government would not permit drilling on the Great Barrier Reef.[116] However, on 4th June 1979, the Prime Minister, Mr. Fraser, left open the possibility of oil drilling when he stated in Parliament that the Government had accepted the recommendation of the Chairman of the Royal Commission that:

> petroleum drilling should be postponed and planned and permitted only in the light of and with the aid of full scientific knowledge of all the effects of oil pollution, direct and indirect, short and long term on the coral and other marine life ... of the Barrier Reef.[117]

The first section of the Great Barrier Reef Marine Park, the Capricornia Section, was proclaimed on 21st October, 1979 thus ensuring that no operations for the recovery of minerals would go ahead in that 12,000 square kilometre southern-most area of the Reef.[118] On 14 June 1979, the Prime Minister of Australia and the Premier of Queensland in establishing the Great Barrier Reef Ministerial Council affirmed that the basic policy intention of both governments was to ensure that the Great Barrier Reef was to be recognized and preserved as an important feature of

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113 This Council was established by the Prime Minister of Australia and the Premier of Queensland on 14th June, 1979.

114 Section 42.

115 See *The Australian* 10.4.78, 21.2.79, 9.5.79 and 17.5.79.

116 *The Australian* 31.5.79.

117 Great Barrier Reef Marine Park Authority *Annual Report 1978-1979*, 1.

118 In accordance with section 38 of the Act.

Queensland's and Australia's heritage.[119] In 1981, the Great Barrier Reef, Stage 1 of the Kakadu National Park and the Willandra Lakes Region of New South Wales became the first Australian sites to be inscribed on the World Heritage List. At that stage, much of the Reef remained to be declared as part of the Park under section 31 of the *Great Barrier Reef Marine Park Act.*

When including the site on the World Heritage List the World Heritage Committee expressed concern that only a small proportion of the area nominated for the World Heritage List had been proclaimed to be within the Great Barrier Reef Region as defined in the Great Barrier Reef Marine Park Act. It requested the Australian Government to take steps to ensure that the whole area was proclaimed under relevant legislation as soon as possible and that the necessary environmental protection measures were taken.[120]

Since listing of the site, four substantial parts of the Reef have been proclaimed as part of the Marine Park. The Cormorant Pass Section was proclaimed on 30th October 1981, the Cairns Section on 19th November 1981, the Far Northern, Central and Southern Sections on 31st August 1983, and the Townsville and Inshore Southern Sections in October 1983.[121] The Southern, Inshore Southern, Central and Townsville sections were later consolidated into two sections - the Central and Capricornia - in order to improve the cost-effectiveness of zoning and management activities.[122] Ninety- eight percent of the Region is now within the Marine Park.[123]

The first zoning plan, for the Capricornia section of the Park, came into effect on 1 July 1981, following extensive research and public comment.[124] The Great Barrier Reef Marine Park Authority has described the zoning system as providing:

> a basis for the management and regulation of usage within the section and defines the range of activities permitted within each zone so they are compatible with each other and with the need to conserve the natural qualities of the Great Barrier Reef.[125]

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119 Great Barrier Reef Marine Park Authority *Annual Report 1979-80,* 1.

120 Unesco document CC.81/Conf/003/6.

121 See regulation 4(1) of the *Great Barrier Reef Marine Park Regulations,* no. 262 of 1983.

122 News Release by Minister for Home Affairs and Environment, Mr. Barry Cohen, M.P., on 16th October, 1984,1133.

123 Department of Arts, Heritage and Environment, *Summary Report and Proceedings of the Conservation and the Economy Conference* (1985), 5.

124 Great Barrier Reef Marine Park Authority *Annual Report 1978-9,* 5. A study group was formed by the Authority to study strategy options in relation to zoning. The Directors of the Queensland National Parks and Wildlife and the Queensland Fisheries Services and technical specialists in the fields of environmental management and planning were invited to join the study group.

125 Great Barrier Reef Marine Park Authority *Annual Report 1979-1980,* 11.

The zoning plans specify six types of zones. These are the General Use `A' and `B' zones, the Marine National Park `A' and `B' zones, the Scientific Research Zone and the Preservation Zone. The General Use Zones permit a wide range of activities including commercial fishing. The Marine National Park Zones provide for recreational and scientific activities with the `B' zone providing unrestricted public access to an area protected from fishing and collecting. The Scientific Research Zone allows approved research to be carried out protected from the influences of recreational activities, fishing and collecting. The Preservation Zone maintains areas undisturbed except for special research.[126] Eighty percent of the Capricornia Section is unrestricted except for the recovery of minerals and commercial spearfishing. Over 70% of the total area of the Cairns section has been similarly zoned as General Use "A". An additional 22% of the section, designated General Use "B" provide areas for reasonable use free from the effects of traveling and commercial shipping. Four reef areas in this section are classified for scientific research and four are preservation areas.[127]

Within certain zones, areas of restricted activity can be established. These areas can be given one of three designations. Replenishment Areas can be closed from time to time to fishing and collecting for a specified period to allow for recovery of fish and any other resource stocks. In Seasonal Closure Areas all activities are restricted on a seasonal basis to protect from human intrusion important bird and turtle nesting sites. Reef Appreciation Areas are small areas provided on reefs subject to heavy usage where fishing and collecting are not allowed so the public can observe and appreciate relatively undisturbed marine life. Finally, Reef Walking Areas, are also small areas subject to heavy usage in which educational reef walking trails are established.[128]

As we have seen, the *Great Barrier Reef Act* requires that the public be given the opportunity of commenting on zoning plans.[129] The Great Barrier Reef Marine Park Authority has taken this obligation very seriously, running public information campaigns designed to get the greatest amount of public input possible. The Authority has generally received an excellent response to these campaigns.[130]

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126 Great Barrier Reef Marine Park Authority *Annual Report 1980-81*, 11.

127 *Australian Foreign Affairs Review*, Nov. 1983, 752.

128 Great Barrier Reef Marine Park Authority *Annual Report 1980-81*, 11.

129 By section 32(8), (9) and (10).

130 Great Barrier Reef Marine Park Authority *Annual Report 1981-2*, 2. The Authority received 200 submissions from the public in relation to the zoning plans for the Cairns and Cormorant Pass sections of the Park and stated that they had received in these representations some very useful information which would not have been available from other sources.

The general regulation-making power in section 66 of the *Great Barrier Reef Marine Park Act* has been noted. Certain provisions of the zoning plan are outlined in more detail by the Regulations. The regulations define certain words and phrases used in the zoning plans,[131] outline procedures for obtaining permits where entry to a zone is restricted,[132] create offences where ones are entered for a purpose other than that permitted under the zoning plan[133] and in relation to taking of certain fish and the discharge or deposit of waste or litter.[134]

An analysis of the management authorities and principles for management under the zoning system established under the *Great Barrier Reef Marine Park Act*, illustrates how management issues in world heritage areas can be resolved. Its central features are: the establishment of joint management and advisory bodies, allowing for cooperation between the State and Federal Governments through persons with relevant expertise; and its provision for the zoning of the Park, allowing for a concept of park administration under which the widest range of human usage is possible, consistent with the conservation of the natural qualities of the Reef.[135] Developments such as operations for the recovery of minerals are inconsistent with the world heritage qualities. Such activities are therefore banned in all zones. But there is no reason why fishing and tourist projects should not proceed in certain areas, and in its allowance for such activities, with considerable public input to aid in determining appropriate zones. The Great Barrier Reef scheme offers an ideal model for effective on-going management of the large Australian natural world heritage sites.

Conclusion

Management objectives for world heritage properties must be established within a framework which has as its primary objective the conservation of the values for which the site was identified as part of the heritage of the world. The conservation of such areas is in accord with the principles of sustainable development, because of both the scientific role they play and the social factor of providing places for recreation and tourism. From the case studies examined in this chapter, certain prescriptions for the management of world heritage properties can be developed.

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131 By Statutory Rules No. 262 of 1983, regulation 6 defines the words "collecting' and "commercial netting" in the zoning plans.

132 *Ibid*, regulation 7.

133 Regulation 13.

134 Regulation 14, 15 and 1.

135 Great Barrier Reef Marine Park Authority *Annual Report 1981-2*, 1.

First, exploitative activities such as mining are inconsistent with the special status of world heritage areas, and should be prohibited. The decisions to prevent exploitative activities in Kakadu and in the Great Barrier Reef must be commended, although there was considerable delay in making them.

Second, effective protection of these areas is not achieved simply by a prohibition on activities within the world heritage site. For example, activities in the "Conservation Zone" have the potential to damage the Kakadu world heritage area. The recent decision of the Federal Government to include most of the Conservation Zone in the National Park and to subject the remainder to a full Inquiry, while generally seen as a political move to placate conservationists, achieves a desirable result. It ensures that issues which will affect the management of the world heritage area will be carefully considered before a project is allowed to proceed which could damage the values for which the region has been listed. The problem of the conservation zone illustrates that the preservation ecological integrity in world heritage area may involve management controls on areas outside the primary site to be protected.

Third, the accommodation of competing interests, and particularly the need to provide facilities for those who seek to enjoy and investigate the very qualities for which these sites have been protected, will inevitably require some compromise. In both case studies we have seen how this has been achieved through a zoning system. Such a zoning system will not only involve the provision of facilities for tourists and residents, but also the complete exclusion of such facilities, and indeed any human activity except scientific research, from some areas. The details of appropriate zones should be worked out by scientists and ecologists to ensure that they are of sufficient size and include buffer zones to protect the ecological integrity of the various areas.

Fourth. competing interests are vested in different groups in the community, and compromise will require the involvement of such groups in decision making. As relevant, representatives of various levels of government, tourist operators, traditional land owners and residents, as well as other interested groups should be able to participate in the development of management objectives and plans for achieving those objectives. Such a broad range of participation will help to prevent, or at least reduce, conflict.

CHAPTER X

CONTROVERSY AND CONFLICT IN THE IMPLEMENTATION OF THE WORLD HERITAGE CONVENTION IN AUSTRALIA

Introduction

The process of the implementation of the *World Heritage Convention* in Australia has been fraught with conflict and controversy. This has reflected the broader conflict between the State and Federal levels of Government (which has both a political and a constitutional aspect), between private land owners and Governments, and between environmentalists and developmentalists. This Chapter thus explores the political context for the controversy over world heritage matters in Australia, the constitutional challenges to attempts to implement the *World Heritage Convention* domestically, the attempt by private land owners to enforce their rights in world heritage properties, the economic context of the debate over world heritage matters and, finally the claims of those who seek to carry out recreational activities in world heritage properties. While these contexts are dealt with separately, it must be remembered that they are inexorably linked. Political factors as well as legal uncertainties have inspired constitutional challenges, and the economic context has had an effect both upon conflict between State and Federal Governments and upon the attempts by private land owners to enforce their rights in world heritage properties. The controversy over recreational land use is in some ways a narrower instance of the more general conflict between conservationists and developmentalists. It is this conflict which lies at the heart of all controversy and conflict over the implementation of the *World Heritage Convention* in Australia.

Australian world heritage sites are generally very large, natural heritage sites, which often contain valuable mineral resources. This fact, combined with the traditional reliance of the Australian economy on the exploitation of natural resources, means that the consequences of restrictions on land use following world heritage listing for those with private interests, for the States, and for the national economy can be significant. In the campaigns over the Great Barrier Reef, Western Tasmania, Kakadu National Park and the Queensland Rainforests, developers have claimed the right to exploit natural resources to the protests of conservationists.

The Political Context

We preceded our discussion of the implementation of the *World Heritage Convention* in Australia with an examination of the constitutional framework for environmental decision making in this country. This complex, pluralistic power system, combined with the centralisation of Government as a natural consequence of improvements in transport and communications and the expansion in areas of "national interest", has created a situation where, particularly in the more conservative, less central States, politicians have been able to gain public support from the rhetoric of "States' Rights".

These politicians emphasise State interests, and the perceived dangers of the erosion of State powers through "interference from Canberra". This political phenomenon is reflected in the fact that at the 1982 Federal election when the Labor Party was voted into office on a platform of Commonwealth intervention to protect the Franklin River from the Gordon below Franklin hydro-electric scheme, the Liberal opposition won all of the five Tasmanian Federal seats. While the Liberal Party opposed the construction of the dam, their policy was not to interfere with decisions which, in that Party's view, were properly made at State level. These political factors, as well as the uncertainty about the extent of the Commonwealth's powers to interfere with State decisions on land use, have spurred State Governments to engage in High Court challenges to Commonwealth attempts to protect the world heritage. The constitutional challenges have been primarily related to the use of the external affairs power. in the implementation of the Convention in Australia.

The Constitutional Context

In Chapter V we noted that the Commonwealth does not have a power with respect to environmental matters but that, nonetheless, it can use its other powers in the Constitution to regulate on these matters, particularly with regard to the protection of the world heritage. Doubts as to the extent of these powers and the operation of both express and implied constitutional protections for the States have resulted in three major legal challenges to Commonwealth attempts to protect the world heritage. These are:

- *Commonwealth v Tasmania* (the *Tasmanian Dam Case*)
- *Richardson v Forestry Commission of Tasmania* (the *Tasmanian Forests Case*)
- *Queensland v Commonwealth.*

An analysis of these cases indicates the extent of controversy over the implementation of the *World Heritage Convention* in Australia.

Commonwealth v Tasmania (The *Tasmanian Dam Case*)[1]

Background

The first such case arose when the Tasmanian Liberal Government, led by Premier Gray, supported the construction of the Gordon below Franklin hydro-electric scheme within an area excised from the Franklin-Lower Gordon Wild Rivers National Park. The attendant construction of the dam would have resulted in the destruction of some of the features of the Tasmanian world heritage area, including the flooding of parts of the unique Franklin River. The Federal Liberal Government of Mr Fraser had nominated the region for listing but refused to interfere with State land-use policies to prevent the dam from going ahead. The Labor Party, led by Mr Hawke, had targeted the conservation vote in the central mainland States by promising to use all its constitutional powers to protect the region from this development.

Following its election in 1982, and in the face of the Tasmanian Government's determination to proceed with the construction of the dam, the Hawke Labor Government purported to stop the scheme from going ahead by enacting the *World Heritage Properties Conservation Act* (discussed in Chapter VII) and adopting two sets of regulations, under the *Heritage Act* and the *National Parks and Wildlife Conservation Act.*

This intervention was vigorously opposed by the State Government, which launched a legal challenge to the constitutional validity of the Act and regulations. While the Act relied in part upon the corporations and people of a particular race powers[2] (see Chapter V), it is the High Court's analysis of the extent of the external affairs power which is crucial for our discussion of the implementation of the *World Heritage Convention* in Australia. It is this power on which the Commonwealth will primarily rely in seeking to regulate State land-use policies with regard to world heritage areas.

The *National Parks and Wildlife Act*[3] was used as an interim measure to provide protection for the Western Tasmanian Wilderness National Parks prior to the first sitting of the Hawke Labor Government. The Act had been in place since 1975 but section 69, enabling regulations to be adopted to implement the *World Heritage Convention*, among other international agreements, had not yet been used.

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1 (1983) 46 *A.L.R.* 625. For analyses of this case see Lane (1983) and Bates (1984).

2 For a discussion of the constitutional framework for environmental decision making in Australia, and a consideration of the extent of the corporations and people of a particular race powers, see Chapter V.

3 This Act is analysed in Chapter VII.

The *World Heritage (Western Tasmania Wilderness) Regulations*[4] which were made under the *National Parks Act*, applied to areas which together formed the subject area of 14,125 hectares.[5] This was the area excised from the National Park and proposed as the site of the dam and associated works and the major part of the water storage area behind the dam. The excised area constituted a small part of the property on the World Heritage List. The protective provisions were contained in regulation 5. This regulation prohibited certain acts within the area to which the regulations applied without the consent of the Minister, including: constructing a dam, or associated works; erecting buildings; killing or cutting down trees; and constructing any road or vehicular track. More generally, the regulation prohibited, without the consent of the Minister, any other act that was likely to adversely affect the conservation or preservation of the area as part of the world cultural or natural heritage. The regulations also imposed liability for such acts on the controller of the relevant area, if the controller failed to take reasonable steps to prevent the doing of the act.[6] Penalties for offences under the regulation were fines of $5 000, and the provision for penalties was specified as not intending to preclude the courts from granting an injunction, declaration or other relief. Provision was made for compensation for acquisition of property, being such amount as was agreed or, failing agreement, as was determined by a court of competent jurisdiction.

When the *World Heritage Properties Conservation Act* was enacted, the Government made regulations under that Act. The first regulations were to declare that relevant parts of the world heritage property formed part of the cultural heritage or natural heritage, thus making it an identified property.[7] The whole of the Parks as they stood before the excision of the HEC land for the purpose of building the dam were "identified property" by virtue of section 3(2)(a)(i) because they had been included on the World Heritage List. However, regulations declared that the Wilderness National Parks and an area adjacent to the Franklin and Gordon Rivers which included the dam site (the Franklin natural area) formed part of the natural heritage. Also, a specific area of the Franklin-Lower Gordon Wild Rivers National Park, including certain caves, were declared part of the cultural heritage (the Franklin cultural area).

The next step was for the making of regulations specifying prescribed acts under sections 9, 10 and 11. This followed the proclamation, on May 26th 1983, of various parts of the site by the Governor-General as a property to which those sections

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4 No. 31 of 1983.

5 Regulation 2.

6 Regulation 5(3).

7 No. 65 of 1983.

applied under section 6(3), 7 and 8(3). The Franklin-Lower Gordon Wild Rivers National Park and the Franklin natural and cultural areas were proclaimed to be properties to which section 9 applied. Under the *World Heritage Properties Conservation Regulations (Amendment)*,[8] a regulation 4 was inserted which provided that for the purposes of paragraphs 9(1)(h) and 10(2)(m) of the Act, each of the following acts is prescribed in relation to each relevant property:

> (a) carrying out works in the course of constructing or continuing to construct a dam that, when constructed, will be capable of causing the inundation of that relevant property or any part of that relevant property;
> (b) carrying out works preparatory to the construction of such a dam;
> (c) carrying out works associated with the construction or continued construction of such a dam.

The Constitutional Challenge

The *World Heritage Properties Conservation Act* and these regulations were challenged by Tasmania. Counsel for Tasmania sought to have some limits set to the kind of treaties which could be implemented under the external affairs power. In the first major case on this point, *R v Burgess*,[9] the possibility of limitations on this power was suggested but not defined. In the second major case, *Koowarta v Bjelke-Petersen*,[10] the *ratio decidendi* was provided by one judge only, Stephen J, who had required the treaty to be of international concern. The other majority judges, Murphy, Brennan and Mason JJ[11] were of the view that it was enough that by entering into a genuine international treaty Australia had assumed an international obligation to enact domestic laws notwithstanding that they were purely domestic in character. The correctness of Koowarta was common ground between the parties.[12] The question then became what was meant by requiring the treaty to be of international concern.

Counsel for Tasmania were particularly concerned to give expression to essential qualifications on the exercise of the external affairs power. They suggested that disruption to the federal balance would result from the Commonwealth Government being able to implement a treaty on any subject matter which was not independently within its legislative competence.[13] It was submitted by counsel for Tasmania that only treaties of special international concern should be able to be implemented under the external affairs power and that the question of what treaties were of international concern could be settled by three tests which must be satisfied in order for the the exercise of the external affairs power to be justified. First, does the enactment of the law constitute an implementation by Australia of an obligation

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8 No. 67 of 1983.
9 (1936) 55 *C.L.R.* 608.
10 (1982) 153 *C.L.R.* 160.
11 At 463-4, 472-3, 486-7.
12 *Dam Case*, 688.
13 On this point see Mason J, 692-695, Murphy J, 727-728, Brennan J, 772-774.

imposed on it by the Convention; in other words, would Australia be in breach of an obligation imposed on it by the Convention if it failed to enact the law or some law substantially to the same effect? Second, does the subject-matter of the Convention to which the law gives effect in the manner in which it is treated, involve in some way a relationship with other countries or with persons or things outside Australia? Third, is the subject-matter of the Convention to which the law gives effect something which, although it related to domestic activity, affects relations between Australia and another or other countries?[14]

The crucial issue on the facts in this case related to the question of obligation under the *World Heritage Convention.* The judges' responses to this question are explored below.

The Question of International Concern

With regard to the question of the necessity for a treaty to create international obligations, the majority judges found that the *World Heritage Convention* did impose obligations, despite its rather non-obligatory language. The judges however expressed the opinion that it was not necessary for an agreement to do so in order for it to be able to be implemented under the external affairs power.[15]

On the specific question of whether the *World Heritage Convention* imposes obligations on States Parties, the Commonwealth relied on Article 5 of the Convention which required each State Party to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.[16] Counsel for Tasmania pointed out, however, that Article 5 provided only that each State Party should 'endeavour, in so far as possible, and as appropriate for each country' to carry out the measures in that Article. Tasmania argued that these qualifications were indications that, in ratifying the Convention, Australia did not undertake international obligations which it should be able to fulfil under the external affairs power.

The majority gave several different reasons for reaching their conclusion that Australia was subject to obligations under the Convention. The major reasons given were that:

- Article 5 was expressed as a command. and that the discretion in the section was as to the manner of performance and not as to whether to perform or not.[17]

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14 At 690.
15 Mason J, 690, Murphy J, 734.
16 Article 5(d).
17 Per Mason J , 698.

- Unesco had adopted a recommendation at the same time as the Convention. This implied that the subject of world heritage was considered sufficiently important to deal with it in a convention, creating obligations, as contrasted to the subject of the national heritage, which need only to be dealt with in a recommendation, which did not create obligations.[18]

- Treaty obligations will necessarily not be as defined as contractual obligation in municipal law and that 'taking into account the imprecise standards of obligations under international law, for the purposes of the external affairs power, the Convention, in particular Article 5, imposes a real obligation.'[19]

- An obligation for the purposes of section 51(xxix) can be regarded as such if failure to act in conformity with it is likely to affect Australia's relations with other nations.[20] and that, therefore, 'there is a clear obligation upon Australia to act under Articles 4 and 5, though the extent of that obligation may be affected by decisions taken in good faith.'[21]

- Finally, 'unless one is to take the view that over 70 nations have engaged in the solemn and cynical farce of using words such as "obligation" and "duty" where neither was intended or undertaken, the provision of the Convention impose real and identifiable obligations.'[22]

Another matter raised by Tasmania in relation to the question of obligation was the existence of a so-called "federal clause" in Article 34 of the Convention. For the majority the existence of this clause was not material.[23] In the words of Mason J:

> Paragraph (a) of the article makes it clear that in the case of a central legislative power possessing legal jurisdiction to implement the provisions of the Convention, the State Party to the Convention has an obligation to implement the provisions of the Convention. It is otherwise where the central legislative power has no jurisdiction to implement the provisions. Then the obligation of the State party to the Convention is to inform the constituent organs in the federation and makes recommendations for the adoption of the provisions. The existence of the power conferred by section 51 (xxxix) has the consequence that para (a) of art. 34 imposes an obligation on the Commonwealth of Australia to implement the provisions of the Convention by legislation enacted by the Commonwealth Parliament.[24]

For the minority, on the other hand, who concluded that the Commonwealth had no power to implement the provisions of the Convention, the clause was of no importance.[25]

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18 At 699.
19 Per Murphy J , 735.
20 Per Brennan J , 777.
21 *Ibid.*
22 Per Deane J , 808.
23 Murphy J, 735, Mason J, 700, Brennan J, 779, Deane J, 808-809.
24 At 700.
25 Per Gibbs CJ, 674.

In summary, then, the majority judges rejected the need for there to be more evidence of international concern than simply the fact that the Convention had been entered into.[26]

The minority judges argued that if there were no obligations in the treaty then that was evidence that the matter dealt with was not of sufficient international concern to justify implementation under the external affairs power. Concluding that there were no obligations in the *World Heritage Convention*, and that its terms were merely recommendatory, the minority found that there was not sufficient international concern with regard to the protection of the world heritage for the Commonwealth Government to be able to implement it under the external affairs power.[27]

Even should one accept the view that the Convention does not create obligations it can be seen that in measuring international concern the minority judges are taking account only of the document itself which, in my view, is insufficient to show the degree of international concern about the matter and particularly to show whether or not Australia's international relations are going to be damaged by a failure to comply. For example, they took no notice of the fact that, after the National Parks had been accepted for listing there had been considerable concern expressed by the international community about the dangers to it and that the Commonwealth Government had been asked by the World Heritage Committee to place the property on the List of World Heritage in Danger.[28] Also, the minority did not take account of the pressure from the international community, inspired by the involvement of such people as the Duke of Edinburgh and world-renowned botanist David Bellamy as well as news of the Franklin Blockade, on the government to protect the area. It would not have been possible for the court to take account of these factors and assess their importance objectively, and that is the essential flaw of the "international concern test".

The only real limitation which the majority judges imposed on the sorts of treaties which can be brought within Commonwealth power was that the treaty must be *bona fide*, or not entered into as a `mere device'.[29] In other words, legislation purportedly enacted under the external affairs power would be *ultra vires* if it could be shown that the Government only entered into the treaty which is allegedly implemented by the legislation in order to bring some subject matter within its domestic legislative competence. Clearly there are unlikely to be circumstances where the evidence of *mala*

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26 Per Mason J, 692, Murphy J, 729, Brennan J, 771 and Deane J, 804.
27 See 671.
28 As we have seen in Chapter III, this List is provided for in Article 11.4 of the Convention and is seen to be a List that includes only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers.
29 See Brennan J, 79, Deane J, 805.

fides would be clear enough for the Court to invalidate the implementation of the treaty. It would also be extremely difficult to establish that the only reason for entry into a treaty was to enable the Federal Government to legislate on a topic.

The Validity of the Regulations and the Act

Given the majority view that the *World Heritage Convention* could be legitimately implemented in Australia using the external affairs power, the question remained as to what type of domestic legislative measures were justified by the power. The case turned on the question of whether the regulations under the *National Parks and Wildlife Act*, those under the *World Heritage Properties Conservation Act* and the Act itself were valid exercises of the Commonwealth's external affairs power. On this point, Murphy J stated:

> The fact that a subject becomes part of external affairs does not mean that the subject becomes, as it were, a separate, plenary head of legislative power. If the only basis upon which a subject becomes part of external affairs is a treaty, then the legislative power is confined to what may reasonably be regarded as appropriate for implementation of the provisions of the treaty.[30]

The first question related to the validity of section 9 of the *World Heritage Properties Conservation Act*. This section prohibited a series of acts without ministerial consent within an area to which the section was proclaimed to apply, and also enabled the making of regulations to prohibit further acts. Mason and Murphy JJ were of the view that this section was valid in its entirety as being appropriate for the implementation of the provisions of the *World Heritage Convention*. This was because of the fact that by section 13(1) of the *World Heritage Properties Conservation Act* the Minister, in determining whether or not to give a consent pursuant to section 9, is to have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property.[31] Tasmania had argued that in so limiting the Minister's discretion, the legislation was not appropriate to the implementation of the treaty. Counsel referred to the fact that the regulations under the *National Parks and Wildlife Act* enable the Minister to take into account and balance considerations which compete against the protection and conservation of the property. On this, Mason J concluded that:

> The discretion which it (section 13(1)) confers on the Minister gives emphasis to the protection, conservation and presentation of the property. As such, it is the central element in a regime of control which is reasonable and falls well within the area of judgment left to Australia by Article 5(d) of the Convention.[32]

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30 At 730.
31 See Mason J, 706.
32 At 707.

Brennan and Deane JJ joined the minority judges in invalidating section 9(1)(a)-(g) of the *World Heritage Properties Conservation Act.* The argument of Brennan and Deane JJ was that it was impossible to conclude that these prohibitions in their application to all protected properties at all times would contribute to the protection and conservation of those properties, as required by the Convention.[33] Thus, the provisions were too wide. Further, the Act failed to provide sufficiently to ensure that the exercise of the ministerial discretion to permit the activities would pursue the objects of the Convention and no other purposes.[34] In addition, section 13(1) does not give the Minister any power to delegate his consent nor does the Act make provision for an administrative system for the reception and disposition of applications for consent.[35] Thus, there was no real attempt to set up a licensing system and this was fatal to the bulk of section 9 of the Act. Deane J placed emphasis upon the lack of proportionality between the provisions of section 9(1)(a) to (g) and the purpose of protecting and conserving the relevant property.[36]

Section 9(1)(h) of the Act was found to be valid by all the majority judges. This was because that subsection permits the prescription of an act in relation to a particular property and thus authorizes the making of a regulation which is conducive to the protection and conservation of the property.[37] As Deane J found:

> the power to prescribe an act for the purposes of para (h) is limited by the purpose for which it exists, namely, the purpose of preventing or avoiding damage or further damage to or destruction of the particular property, and is exercisable only in relation to an act which could reasonably be considered to be a possible cause of, or contributing factor to, such damage or further damage or destruction.[38]

The validity of the regulations made under section 9 will then depend upon the terms of those regulations.

Section 9(2) was found to be invalid by Brennan J because it contains a general prohibition against damage of or destruction to "any property to which the section applies", which could be seen as protecting the property as a whole. Thus, a particular act which, though damaging to or destructive of a part of the property, is beneficial to the whole would nevertheless fall within the prohibition.[39] For example, it may have been necessary to create a fire break in order to protect the world heritage property. Such an act would be prohibited under the section because it would be damaging to the particular area involved, although beneficial to the protection of the

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33 See Brennan J, 786.
34 See 786-787.
35 Per Brennan J , 787.
36 At 811.
37 Per Brennan J, 787.
38 At 812.
39 At 787.

rest of the property. Brennan therefore argued that section 9(2) was not an appropriate implementation of the Convention. This approach ignores the reality that, in such a situation, Ministerial consent would undoubtedly be given for the creation of a fire break. For Deane J, section 9(2) was an appropriate implementation of the Convention because the prohibited act must be such as to damage or destroy the property.[40]

In summary, Justices Mason and Murphy found the whole of section 9 of the *World Heritage Properties Conservation Act* to be valid. Justices Brennan and Deane found section 9(1)(a)-(g) to be invalid, but 9(1)(h) to be valid and severable from the rest of the section under section 15A of the *Acts Interpretation Act* 1901.[41] While Deane J agreed with Mason and Murphy JJ that section 9(2) was valid, Brennan J found it to be too broad. Thus, a majority of judges found section 9(1)(a)-(g) and 9(2) to be invalid.

So far as the regulations under section 9(1)(h) were concerned, a majority of judges found these to be valid. Brennan J concluded that the facts prescribed to each relevant property were conducive to the performance of the obligation under Articles 4 and 5 of the Convention. Deane J agreed.[42]

A majority of judges found the regulations under the *National Parks and Wildlife Act* to be invalid. Deane J found the regulations *prima facie* valid because, although the limitations imposed were very wide, they were limited in their application to the HEC area.[43] However, he found that in relation to these Regulations the Commonwealth had brought about a position where the HEC land is effectively frozen unless the Minister consents to the development of it.[44] He thus concluded that the making of these regulations amounted to an acquisition of land. Deane J concluded that the compensation which would represent "just terms" for this acquisition of property would be the difference between the value of the HEC land without and with the restrictions.[45] His Honour concluded that the compensation provisions of the *World Heritage Properties Conservation Act* did not provide for just terms because they

> in effect, ensure that, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can authoritatively determine the amount of compensation which the Commonwealth must pay.[46]

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40 At 812.
41 *Ibid.*
42 At 823.
43 At 821.
44 At 823.
45 At 829.
46 At 832.

He also pointed to the fact that no provision was made for the payment of interest during the period between the acquisition and the time at which the person can make a claim for compensation.[47] Deane J thus joined the minority judges in finding the regulations under the *National Parks and Wildlife Act* to be invalid.

The *Tasmanian Dam Case* has great significance for Australian constitutional law. It is also of significance so far as the international community is concerned. As was pointed out to the World Heritage Bureau by the Australian authorities, the decision of the Australian High Court was of importance for two reasons:

> First, the decision constitutes the first test of the application of the *World Heritage Convention* in a court of law. Secondly, most of the judges were of the clear view that each Party to the Convention has an obligation to do all it can to protect sites on the World Heritage List which are situated within its own national boundaries. Although decisions of the High Court of Australia are not, of course, binding on other countries, it is certain that the Tasmanian Dam Case and judgement will be of considerable importance and relevance as and when other Parties to the Convention encounter a similar problem.[48]

Richardson v the Tasmanian Forestry Commission (the *Tasmanian Forests Case*[49]

The decision in favour of the Federal Government in the *Dams Case* did not put an end to constitutional challenges by the States in relation to legislative measures implementing the *World Heritage Convention*. The second such constitutional challenge arose regarding the preservation and conservation of the Lemonthyme and Southern Forests region of the State of Tasmania. The region contains extensive tracts of eucalypt forests which are accessible for harvesting as commercial timber. For some time before 1987 the Tasmanian Forestry Commission (a statutory commission) had proposed and in fact commenced exploitation of the timber in the Lemonthyme and Southern Forests. Logging in these forests was opposed by conservationist groups and the Federal Government on environmental grounds.

After unsuccessful attempts to satisfactorily agree on the future management plan for the forests, the Federal Government enacted the *Lemonthyme and Southern Forests (Commission of Inquiry) Act,* which has been examined in some detail in Chapter VII. As we have seen, the Act, *inter alia*, established a Commission of Inquiry (the Helsham Inquiry) to advise the Federal Government whether or not there were any world heritage areas, or areas which needed to be protected to preserve existing world heritage areas, within the Lemonthyme and Southern Forests. The

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47 *Ibid.*

48 Unesco Doc. SC.84/Conf.004/7, 3.

49 (1988) 62 *A.L.J.R.* 158. For analyses of this case see Tsamenyi and Bedding (1988); Starke (1988); and Boer (1988).

legislation also made it unlawful to continue forestry operations in the forests pending the findings of the Commission of Inquiry.

The Tasmanian Forestry Commission ignored the legislation and logging operations continued. To prevent the destruction of likely world heritage areas in the forests pending the determination of the Helsham Inquiry, the Federal Minister for the Environment, Arts and Heritage brought an action against the Tasmanian Forestry Commission, with the support of the Tasmanian Government, challenged the constitutional validity of the legislation.

The first issue before the High Court related to the terms of reference of the Helsham Inquiry. The defendants did not question the constitutionality of the Commonwealth decision to establish the Commission of Inquiry into the Lemonthyme and Southern Forests. They argued, however, that the terms of reference of the Commission were broader than was justified under the *World Heritage Convention* in that, in addition to inquiring into potential world heritage values, it was also charged with evaluating the forest industry in Tasmania to establish whether there were viable economic alternatives to exploitation of the disputed forests.

On this point, four Justices expressed an opinion. In a joint judgment, Mason CJ and Brennan J held that:

> the scope of the inquiry which the Commission is undertaking is desired to inform the Executive government so that it may determine the course which it is to take with respect to the areas in question, having regard to its obligations under the Convention.[50]

What this means is that it is relevant to Australia's international obligations for the Commonwealth Government to be informed as to the economic consequences of any actions it may take with respect to fulfilling its obligations under the *World Heritage Convention.*

The second fundamental issue in the case before the Full Court was whether the provision for interim protection of an area not yet identified as part of the world heritage or integral to the protection of any world heritage area, was a lawful exercise of the Commonwealth power under section 51(xxix) of the Constitution of the Commonwealth of Australia (the external affairs power). In other words, the issue was whether the obligations of Australia under the *World Heritage Convention* extended to items not yet identified as having world heritage values.

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50 (1988) 62 *A.L.J.R.* 158, 161. Wilson and Dawson JJ expressly agreed.

The question whether the *World Heritage Convention* imposes an obligation on Australia to take measures to protect the cultural and natural heritage was posed in the *Tasmanian Dam Case* and was answered in the affirmative. However, in that case the dispute concerned the Western Tasmanian Wilderness Parks which had been included on the World Heritage List in 1982, well before Commonwealth legislative action was taken. In the present case, not only had the areas not been listed, but they had also not yet been identified as possessing world heritage characteristics. In fact, the whole purpose of establishing the Helsham Inquiry was to advise the Government whether the whole or parts of the Lemonthyme and Southern Forests areas were of world heritage value.

In relation to this issue, the defendants submitted that the Commonwealth Government had no obligations in relation to the Lemonthyme and Southern Forests because they had not yet been identified as world heritage areas. Further, they argued that there was no reasonable basis on which the Government could conclude that there may be world heritage values in the forests.

All seven Justices, either expressly or impliedly, recognised that the Commonwealth Government has a constitutional right to protect potential world heritage areas on an interim basis pending identification, where there is a reasonable basis for supposing that obligations may arise. This is because the taking of such action is incidental to the State's duty to ensure the protection of the heritage and the attainment of the objects of the Convention. A submission by counsel for the Attorney-General for Queensland (an intervener) that the Convention posed a sequential order of obligation - that is, that without identification there was no obligation of protection, was rejected by Mason CJ and Brennan J on the grounds that the absence of such action by way of interim protection would expose the property to the possibility of irreparable damage.[51] This is a practical approach. There may not be a specific obligation in the *World Heritage Convention* to protect areas prior to identification (although there is a duty to identify) but, if the ultimate aim of the Convention is to be realised, it is necessary for the Commonwealth Government to take legislative action to provide for interim protection.

With regard to the defendants' submission that there was no reasonable basis on which the Commonwealth Government could say that there was a possibility of the existence of world heritage values in the Lemonthyme and Southern Forests, the majority Judges found it a necessary limitation on interim protection that there be a reasonable foundation for the decision that the property has likely world heritage

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51 *Ibid*, 13.

values. They concluded that, on the strength of affidavit evidence submitted by the plaintiff when seeking an injunction in the earlier case, there was sufficient ground for the legislature to make a judgment that obligations could arise in relation to the Lemonthyme and Southern Forests under the *World Heritage Convention.*

The Court had also to determine whether the legislation relied on, particularly section 16 of the Act, was appropriate and adapted to the implementation of the *World Heritage Convention.* The significant differences between the Judges in the *Tasmanian Forests Case* arose over this question of limitations on the implementation of the treaty in a domestic legislative form. The defendants attacked the validity of section 16 on the ground that it went beyond the legitimate implementation of the *World Heritage Convention.* Counsel for the defendants sought to draw an analogy between section 9(1)(a)-(g) of the *World Heritage Properties Conservation Act*, which was declared invalid in the *Tasmanian Dam Case* and section 16 of the *Lemonthyme and Southern Forests Act.*

The majority Judges found section 16 of the *Lemonthyme and Southern Forests Act* to be wholly valid because the proscribed activities were both more circumscribed than in the *Tasmanian Dam Case* and also applied only in the particular protected area. The Judges found the kinds of forestry activities prohibited to be, generally speaking, acts involving a potential risk of injury to any qualifying area.[52] Although their Honours admitted that some acts prohibited may be so trivial that they did not present a significant risk to world heritage values and, further, that some acts (such as the building of a fire-break) could be of positive benefit to the area, nevertheless the legislation was still "a means for effectuating a desired end which is within power, namely, ensuring the protection of land which may be identified as part of the World Heritage".[53]

Section 18 and the compensation provisions noted in chapter 3 were crucial in the decision of the majority Judges that the legislation was proportionate to the obligations of Australia under the *World Heritage Convention.* Section 18 provided that in determining whether or not to give consent under section 16 the Minister shall have regard only to Australia's international obligations under the Convention. Mason CJ and Brennan J. were of the view that the provision allowing the Minister to give his consent to any of the prohibited activities, along with the instruction that in making a decision he was to have regard only to Australia's international obligations, should be understood as disentitling the Minister to refuse consent except when refusal was

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52 *Ibid.*

53 See Mason CJ and Brennan J, Wilson J, 169 and Toohey J, 183.

necessary for the protection of the heritage or otherwise for the satisfaction of Australia's obligations under the Convention.[54]

The minority Judges (Deane and Gaudron JJ) dissented on this point. Deane J invalidated the proscription of all activities except active logging, which he said was severable from the others and therefore valid. Deane J's decision was based on the view that only logging would in all circumstances present a real risk to any world heritage values in the Lemonthyme and Southern Forests.

Six of the seven Judges therefore upheld the particular prohibition on logging in the area. Gaudron J was in dissent. She attacked the lack of proportionality in the size of the area and the measures taken to protect it. As the protected area included private farm and grazing land, Gaudron J was of the view that section (1)(a)(b) and (c) must, 'be viewed as operating to protect the general environment of the area, and not merely the features which may be of outstanding universal value within the contemplation of the Convention.[55] That section, according to Gaudron, J. 'is not, on the material before the Court, reasonably capable of being viewed as appropriate or adapted to the circumstances that the areas may be or contain areas constituting part of the World Heritage."[56]

By so deciding, Gaudron J. ignored a crucial point for which the *Tasmanian Dam Case* is authority; that when the Parliament exercises the external affairs power so as to carry into effect or given effect to a treaty, it is for the Parliament to choose the means by which this is to be achieved, provided the means are capable of being reasonably considered appropriate and adapted to that end.

Since it was not known whether any parts of the Lemonthyme and Southern Forests were world heritage areas, or whether any areas needed protecting as a buffer zone to world heritage areas, the Commonwealth Government could not have further restricted the area in which the activities were prohibited.

It should also be borne in mind that section 8(5) of the Act instructed the Commission to give priority to identifying areas which were definitely not qualifying areas, and to notifying the Minister so that any such areas could be excluded from protection. Further, the prohibited activities of section 16 were generally of a kind which were likely to damage any world heritage areas and if, in a particular circumstance, they were not likely to do so, then the Minister would be obliged to give

54 *Ibid*, 164.
55 *Ibid*, 189.
56 *Ibid.*

his consent to their performance. A decision not to give consent would be judicially reviewable under the *Administrative Decisions (Judicial Review) Act* 1977. The *Lemonthyme and Southern Forests (Commission of Inquiry) Act* was therefore reasonably capable of being considered appropriate and adapted to the circumstances existing in relation to the protected area. In fact, both Deane and Gaudron JJ stated that if the Commonwealth had presented evidence that the other proscribed activities posed a real threat to possible world heritage values, they may well have been prepared to uphold their prohibition.[57]

The *Tasmanian Forests Case* is a progression from the *Tasmanian Dam Case*. Counsel for the defendants in the *Tasmanian Forests Case* did not seek leave to re-argue the decisions in the earlier case because the facts were significantly different. Wilson J correctly stated the differences in the two cases as follows:

> The striking feature which serves to distinguish the facts for the present case from those of the *Tasmanian Dam Case* is that no provision of the Act applies to any area which is known to form part of the World Heritage. There is no suggestion that the provisions of the *World Heritage Properties Conservation Act* 1983, which apply to property forming part of the World Heritage, have any application. Indeed, the primary task of the Commission of Inquiry into the Lemonthyme and Southern Forests established by the Act is to inquire into and report whether there are any qualifying areas.[58]

Despite these significant differences, the *Tasmanian Dam Case* has certainly become further entrenched in Australian constitutional law as a result of its application as precedent in the High Court.

The decision in the *Tasmanian Forests Case* is also a significant addition to environmental law in Australia. The *Tasmanian Dam Case* is authority for the proposition that the Commonwealth Government is entitled to enact legislation to protect properties inscribed on the World Heritage List so long as that legislation is reasonably capable of being regarded as appropriate and adapted to the purposes of the *World Heritage Convention*. The decision in the *Tasmanian Forests Case* is further authority that Commonwealth legislation to provide interim protection for areas in relation to which there has been a legislative judgment that obligations may arise under the *World Heritage Convention* will also be declared *intra vires*, provided again that the legislation is appropriate and adapted. The decisions in the two cases provide a comprehensive legal framework for the implementation of the *World Heritage Convention* in Australia.

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57 Per Gaudron J, 189 and Deane J, 176.
58 *Ibid*, 17.

Queensland v The Commonwealth[59]

The most recent challenge to the implementation of the *World Heritage Convention* arose in relation to the Queensland world heritage rainforests. In July 1983 the Douglas Shire Council announced its intention of bulldozing a road north from the Daintree River towards Cape Tribulation and Bloomfield. This would have had a considerable detrimental effect on the rainforest of North-Eastern Queensland.[60] After some attempts at negotiation and compromise on the part of the Commonwealth Government, the Prime Minister and the Minister for Environment announced on 5 June 1987 that the Commonwealth would nominate the forests for World Heritage Listing and use its external affairs power to protect the area. This was despite bitter opposition from the Queensland State Government. It became necessary to use the *World Heritage Properties Conservation Act* to ensure protection for this site, which was included on the World Heritage List in December 1988.

Following the proclamation of the site as a property to which section 9 of the Act applied in January 1988, regulations were made to prohibit activities under section 9(1)(h) of the Act.[61] Regulation 3A(2) provided that for the purposes of paragraph 9(1)(h) of the Act, each of the following acts is prescribed in relation to the relevant property:

> (a) for the purposes of, or in the course of carrying out, forestry operations:
> (i) killing, cutting down or damaging a tree in, or removing a tree or part of a tree from, the property;
> (ii) constructing or establishing a road or vehicular track within the property; or
> (iii) carrying out any excavation works within the property;
> (b) permitting, authorising, directing or ordering, or purporting to permit, authorise, direct or order, the doing of an act of a kind referred to in paragraph (a).

Following the amendment of section 9 by the *Conservation Legislation Amendment Act* 1988, new regulations were made[62] which prescribed the same acts for the purposes of section 9(1). In April of 1988 further acts were prescribed by regulation 3B.[63] The regulations were designed to prevent continuation of work on the Daintree Road and prohibited constructing, establishing, or continuing to construct or establish a road; carrying out work preparatory to an act referred to in paragraph (a) (quoted above); and carrying out work associated with an act referred to in paragraph (a) (quoted above).[64] Following the inclusion of the Queensland Wet Tropical Rainforests on the World Heritage List in December 1988, another proclamation and new regulations, prohibiting the same acts were made.

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59 Unreported Decision of the High Court of Australia, no. 29/1989.
60 For an analysis of the background to the dispute see Davis (1984), 71-73; Lipman (1985).
61 No. 2 of 1988.
62 No. 47 of 1988.
63 No. 68 of 1988.
64 "Road" is defined to cover only any road or vehicular track in either of two parishes which would connect the Captain Cook Highway and the Peninsula Developmental Road.

Prior to the inclusion of the Rainforests on the World Heritage List Queensland took action before Mason CJ for interlocutory injunctions to restrain the submission of the property for World Heritage Listing and to prevent the making of relevant proclamations and regulations.[65] This application was refused on four grounds. The first was that given the nature of the decision to nominate, the court would require the plaintiff to make out a clear, if not a strong, case for relief before granting an interlocutory injunction.[66] The second ground for the refusal to grant the application was that the courts generally do not restrain the Executive Government from making regulations as if a plaintiff's case is well-founded the regulation is invalid and should be challenged after the exercise of the power.[67] Third, the issue of whether the High Court needed to be independently satisfied of the world heritage qualities of the property before declaring an exercise of the external affairs power *intra vires*, was said to be appropriate to be decided after the lodgment of the submission.[68] Finally, there had been delay in making the application for interlocutory relief.

Following the making of proclamations and regulations under the *World Heritage Properties Conservation Act*, the Queensland Government sought a declaration of invalidity of the proclamation of the property.[69] The proclamation which was challenged was made under section 6(3) of the *World Heritage Properties Conservation Act* . Such a proclamation, as we have seen in Chapter VII, enables the Governor-General to declare a site to be a property which is being or is likely to be damaged or destroyed. In order to enable the Governor-General to make the proclamation, the property must be an identified property under section 3A (about which there was no doubt as the property had been listed). In addition, one of the situations listed in section 6(2) must be satisfied; that is, the protection of the property must be a matter of international obligation; or be necessary or desirable for the purpose of giving effect to a treaty; or be a matter of international concern. This requirement ensures that a situation justifying the exercise of the external affairs power exists.

The argument of counsel for Queensland was that the fact that the property had been listed was not conclusive evidence of it being cultural or natural heritage and that the court must be independently satisfied of the site's qualities in order for the proclamation to be valid. This was in view of the fact that the duty under Articles 4 and 5 of the *World Heritage Convention* is to protect the natural and cultural heritage

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65 See *State of Queensland v. The Commonwealth* (1988) 77 ALR 291.
66 At 295.
67 *Ibid.*
68 At 294.
69 High Court Unreported Decision, no. 29/1989.

and not listed items as such. This issue had not been addressed in the *Dam Case*. In that case, counsel for Tasmania did not attempt to argue that because the obligation was to protect the cultural and natural heritage and not listed items as such, the High Court had to be independently satisfied that the Wilderness National Parks did constitute a part of the world heritage, thereby justifying the exercise of the external affairs power. The High Court in the *Dam Case* seemed prepared to accept the fact of world heritage qualities from the listing of the property.

Counsel for the Commonwealth submitted that the inscription of the property in the World Heritage List by the World Heritage Committee is sufficient and conclusive to establish that there is an international duty to protect and conserve it.

The plaintiffs' application was unanimously rejected by the High Court. Mason CJ., Brennan, Deane, Toohey, Gaudron and McHugh JJ, in a joint judgment, emphasized the role which nomination for listing plays:

> Although the status of property as part of the cultural heritage or natural heritage follows from its qualities rather than from their evaluation either by the relevant State Party or by the World Heritage Committee, a State Party which evaluates a property as part of the cultural and natural heritage and submits it to the Committee for listing thereby furnishes the international community with evidence of that status.[70]

Dawson J, while agreeing with the rest of the court that the proclamation was valid, took a different line of reasoning. He concluded from examining the Convention that it is for a State Party to identify for itself the cultural and natural heritage on its territory[71] and that this is not a matter for the World Heritage Committee. He based this reasoning particularly on Article 12 of the Convention which states that the fact that a property belonging to the cultural or natural heritage has not been included in either the World Heritage List or the List of World Heritage in Danger shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists. Given that the obligation is to protect the cultural and natural heritage and not listed items as such: 'Once identified, even if there is a refusal to enter such a property in the World Heritage List, it does not cease to be part of the cultural or natural heritage and the obligations imposed by the Convention in relation to it remain in force.[72] He concluded that once a property has been identified as part of the cultural or natural heritage, then for the purpose of section 6(2) of the Act there is an international obligation requiring its protection or conservation and conservation of the property will

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70 At 10.
71 At 17.
72 *Ibid.*

be necessary to give effect to the Convention. Other paragraphs of section 6(2) may also apply.[73]

The High Court was right in dismissing the plaintiffs' application. Once a property is listed there is an international obligation to protect it.[74] In acting under the *Heritage Act* to achieve that protection, the Commonwealth is acting within its external affairs power. The issue of whether or not the High Court believes a property to be of world heritage value is irrelevant to Australia's international obligations and therefore irrelevant to the validity of any proclamation made in pursuance of these obligations.

Following the decision in *Queensland v the Commonwealth* there is now no room for challenges to any protective measures on the basis that a site nominated for listing or inscribed in the List is not in fact part of the cultural or natural heritage. However, as we have seen, in the *Tasmanian Forests Case* it was made clear by the High Court that some limited inquiries will take place where challenges are made to interim protection provided for a site subject to an inquiry into its world heritage values. The Court stated that such protection would only be within power if the legislature had made a reasonable judgment that world heritage values may exist in the protected area. Should the Government seek to rely on that part of section 3A which requires that the property be part of the cultural and natural heritage and be declared by regulations to be such, then there would be an obligation upon the court to hear and decide challenges based on the site's actual qualities.

Private Interests in World Heritage Properties

The most publicized of the conflicts over the implementation of the *World Heritage Convention* have involved issues of constitutional law. Recently, however, the issue of the rights of those with private interests in property proposed for world heritage nomination, which they wish to develop, has become the subject of litigation in *Peko-Wallsend v Cohen.*[75]

The case arose when the applicants challenged a Cabinet decision to nominate Stage II of the Kakadu National Park for World Heritage Listing. The nomination was submitted to the World Heritage Committee in accordance with Article 11 of the *World Heritage Convention.*

The applicants had been accumulating mining interests in some 30 small areas of Stage II of the Kakadu National Park, making up about one percent of the total

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73 At 22.
74 At 11.
75 (1986) 70 *A.L.R.* 523.

area of that stage, since the early 1970s.[76] They feared that a consequence of listing of the property would be to render those interests liable to be extinguished under the *World Heritage Properties Conservation Act* 1983. They argued that, in view of the potential effect of nomination, making the property an identified property under the *World Heritage Properties Conservation Act*, on their private interests in Kakadu Stage II, the rules of natural justice or procedural fairness required that they be given an adequate opportunity to be heard before a decision to nominate was made.

An interlocutory mandatory injunction was granted to the applicants on 24th November 1986. Beaumont J ordered that the respondents should inform the World Heritage Committee that the Federal Court had directed them to inform the Committee of the following:

> (a) that the applicants claim to be entitled to certain mining rights over an area of approximately 65 square kilometers situated within the boundaries of the Stage II extension which area is described in the schedule hereto;
>
> (b) that the applicants have recently commenced proceedings in the Federal Court of Australia seeking to restrain the consent of the Commonwealth of Australia to the listing and to require that consent be withdrawn;
>
> (c) that the proceedings have been fixed for a final hearing to commence on 8 December 1986;
>
> (d) that it is anticipated that the proceedings will conclude on 12 December 1986 and that the judgment of the Court will be given shortly thereafter;
>
> (e) that with a view to preserving the status quo until judgment in the proceedings in respect only of the area described in the schedule (and not otherwise), the Federal Court of Australia has directed the respondents to request the World Heritage Committee to defer until further notice its consideration of so much of the application for listing as includes the area described in the schedule.[77]

An appeal to the Full court against these orders failed and special leave to appeal was refused by the High Court of Australia.[78] The Australian Government thus asked the World Heritage Committee to defer until its 1987 meeting the application in respect of Stage II, a request which was acceded to.

Final judgment in the case was handed down on 22 December 1986 when Beaumont J. made a final declaration that the decision of the Executive to nominate Stage II of the Kakadu National Park for inclusion on the World Heritage List was void. The issues in the case related to the nature of the decision made by the Cabinet, the effect of that decision on the applicants and to whether such a decision was judicially reviewable generally, and subject to natural justice in particular. Amongst

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76 *Ibid*, 527.
77 See (1986) 68 *A.L.R.* 394.
78 *Ibid.*

the specific issues raised by the case were two important questions which have not been previously litigated: whether a decision of a Westminster-style Cabinet may be the subject of judicial review and whether there exists any obligation to afford natural justice to persons whose interests are likely to be affected adversely by a proposed Cabinet decision.[79]

In refuting the applicants' claim that the decision to nominate was judicially reviewable, the respondents argued that the decision in question involved the royal prerogative to make and implement treaties and therefore was not susceptible to any kind of judicial review. Justice Beaumont rejected this suggestion, finding that the source of the power to nominate was multiple: first, the common law prerogative; second, the executive powers conferred by section 61 of the Constitution; third, the provisions of the *World Heritage Properties Conservation Act* so far as they pick up the process of submission under Article 11 of the Convention.[80] He found that even if the decision to nominate had its sole source in the prerogative, it would not follow that the decision would thereby be immune from judicial review.[81] Citing authority in support of the view that the exercise of statutory and even executive power by representatives of the Crown was judicially reviewable, Beaumont J. concluded that:

> Assuming for the purposes of the argument that the decision to nominate Kakadu Stage II for listing was derived solely from the prerogative, it would not follow that such an exercise of executive power could not be subject of judicial review on the grounds of procedural impropriety, at least where private property rights or privileges of the kind held by the applicants are involved.[82]

Justice Beaumont then considered the question of whether it could be said that the applicants would be prejudiced in relation to their property or privileges by reason of the decision to submit Kakadu Stage II for inclusion of the World Heritage List and whether they were thus entitled to natural justice in the making of the decision. Looking at the nomination in the context of the *World Heritage Properties Conservation Act*, Beaumont J found that the nomination of a site has an international aspect in terms of the provisions of the Convention and a municipal aspect as a condition precedent to the availability to the Government of the provisions of the Heritage Act.[83] It was only reasonable to suppose that the Government would seek to invoke any power conferred upon it under the municipal law with a view to

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79 See Wilson J. in *Minister for Arts, Heritage and Environment v. Peko-Wallsend* (1987) 75 *A.L.R.* 218, 229.

80 See *Peko-Wallsend v. Minister for Arts, Heritage and Environment* (1986) 70 *A.L.R.* 523, 548. The *Heritage Act* in fact makes no mention of any Cabinet power to nominate a property for listing in accordance with Article 11.

81 *Ibid*, 549.

82 At 550-551.

83 At 546.

eliminating, so far as possible, any mining activity in Stage II.[84] Beaumont J further noted that the Government is obligated under the Convention to take all appropriate steps to procure the listing of the site and thereafter to take appropriate steps to secure its protection while there is no obligation on the Commonwealth enforceable under domestic law to provide protection for property rights.[85] Referring to the fact that property rights and privileges have traditionally been regarded as a class of case which attracts the protection of natural justice, Beaumont J concluded that the probability that the applicants' interests would be affected in this way meant that they could challenge the decision to nominate and they were entitled to be accorded natural justice.

The judge rejected the argument of the respondents that the applicants had in fact been given adequate opportunities to be heard and had availed themselves of these opportunities. The respondents pointed to the fact that the applicants had known for years of the proposal to nominate the area and had been making submissions to the Government on the issue over many years.[86] Beaumont J was of the view that fairness required that the applicants be given reasonable notice of the proposal to nominate Kakadu Stage II and be given an opportunity to present a submission to Cabinet as a body in support of their case.[87] On the basis of these findings, Beaumont J. declared the Cabinet decision void. The Commonwealth appealed this decision.

In *Minister for Arts, Heritage and the Environment v. Peko-Wallsend* the Full Court of the Federal Court of Australia overturned the decision of Beaumont J. All the appeal judges found that the decision to nominate was made under the prerogative and that such decisions may, in some circumstances, be open to judicial review. However, Bowen CJ was of the view that the whole subject-matter of the decision involved complex policy questions relating to the environment, the rights of Aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the respondents to the appeal.[88] His Honour concluded that this put the decision beyond review by the court.

Sheppard and Wilcox JJ expressly stated that the case was not based on the exercise by Cabinet of any statutory power, but rather was an exercise of prerogative power.[89] Sheppard J. was of the view that the Cabinet being essentially a political organization not specifically referred to in the Constitution and not usually referred to

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84 *Ibid.*
85 *Ibid.*
86 At 551.
87 At 552.
88 At 224.
89 At 247.

in any statute, there is much to be said for the view that the sanctions which bind it to act in accordance with the law and in a rational manner are political ones with the consequence that it would be inappropriate for the court to interfere with what it does.[90] In any case, Sheppard J along with Wilcox J, was of the view that the respondents had been given an adequate opportunity to put their case, through their various communications with the individual Ministers.[91]

The main judgment was delivered by Wilcox J. While recognising the difficulties in cases involving a challenge to a Cabinet decision, including difficulties of determining the motives and matters which were taken into account by a multi-member decision-maker and the confidentiality of Cabinet proceedings, Wilcox J was of the view that there is no reason of principle to deny relief where the case can be made out.[92] Wilcox J found, however, that the decision was not justiciable, not having deprived or altered any of the mining rights or obligations of Peko.[93] Nor did the decision attract the principles of natural justice, Peko having no "legitimate expectation", as was required by Mason J. in *Kioa v. West*.[94] The decision to nominate Kakadu Stage II had no effect on the respondents' mining interests whatsoever; the only effect it had was the indirect one of making it possible that they could be affected at some time, if the government chose so to act.[95] As Wilcox J. found, "it is not enough that the subject decision might create a climate conducive to a subsequent decision adverse to the interests or expectations of some person".[96] An additional argument against justiciability was the fact that the decision primarily involved Australia's international relations. Just as the court would not review a decision to enter into a treaty, so it would not review the decision to nominate Kakadu Stage II for recognition and better protection under the existing Convention.[97]

The appeal was thus allowed and the orders made by the learned primary judge were set aside. The Kakadu National Park Stage II was included with Stage I on the World Heritage List at the World Heritage Committee's meeting in November 1987.

Had Justice Beaumont's decision not been overturned on appeal, the implications would have been drastic. Any person with private proprietary rights or privileges in property proposed for world heritage nomination would have been entitled to a hearing in the making of a decision to nominate. This would clearly be

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90 At 227.
91 At 228 and 254.
92 At 247.
93 At 252.
94 (1985) 159 *C.L.R.* 550, 582-3.
95 At 252.
96 *Ibid.*
97 At 253.

inappropriate as such decisions are made by a political entity (the Federal Cabinet) in fulfilment of the Commonwealth Government's international legal obligations under the *World Heritage Convention.*

Where the prohibitions under the *World Heritage Properties Conservation Act* amount to an acquisition of land, then the interested party will be entitled to just compensation.[98] Otherwise, the only redress for the person whose interests have been affected is political. It is clear following the decision in *Minister for the Environment v. Peko-Wallsend* that legal challenges seeking judicial review of a decision to nominate a property for listing are unlikely to succeed.

The Economic Context

Both the constitutional disputes surrounding the implementation of the *World Heritage Convention,* and the dispute over the rights of those with private interests in world heritage properties, must be understood in their economic context. As with most environmental issues, the implementation of the *World Heritage Convention* in Australia has led to a clash between two dominant ideologies. On the one hand there are the developmentalists who are largely concerned with the economic advantages to society resulting from the exploitation of the earth's natural resources. They are opposed to "locking up" resources in world heritage areas. On the other hand there are the environmentalists who are dedicated to the preservation of the environment for posterity. They see the *World Heritage Convention* as a unique tool for achieving total protection for areas of very special natural or cultural values. So far, all Australian properties inscribed on the World Heritage List or being considered for world heritage listing are predominantly natural sites which contain valuable reserves of natural resources such as timber, hydro-electricity and minerals. Thus, a decision to nominate a site can have drastic economic consequences for the State in which the site is situated, and indeed for the national economy.

A situation has developed whereby the States, which have traditionally had responsibility for the environment, have fought for development within the State as a means of achieving some measure of economic vitality in the face of recession and declining federal grants. For the States, economic self-sufficiency promises a bulwark against the erosion of State power. This economic development has concentrated mainly on the exploitation of natural resources in areas which have until recently been inaccessible. It is these very areas, by virtue of the fact that their remoteness has preserved them in often pristine natural condition, which tend to exhibit the qualities

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98 The compensation provisions of this act were amended by the *Conservation Legislation Amendment Act* of 1988. See section 17 of the amended Act.

required for identification as "natural" and often "cultural" heritage. It is the fact that such areas are, or are likely to come within the ambit of Australia's international obligations to protect the World Heritage that has led to the head-on collisions between States asserting their economic rights based on the rhetoric of "states rights" under the Constitution to oppose locking up of State resources and the Federal Government carrying out its international obligations. Even in situations not involving States' Rights issues, such as that which exists in the Kakaku National Park, in the Northern Territory, the developmentalist/conservationist conflict is evident. These conflicts have been fought between corporate developers and the Commonwealth.

There have been full resource inquiries into three of the sites nominated for world heritage listing. The extent of the effect of nature conservation policies on development projects has been exaggerated, with mining interests claiming that more than 23 percent of Australia has been "locked away".[99] In fact less than 5 per cent of Australia is contained in National Parks, nature reserves and conservation areas.[100] Even some of those regions are accessible for mining exploration.[101]

Nevertheless, one must recognise the importance of mining, forestry and hydro-electric development to the Australian economy. The Gross Domestic Product (GDP) of Australia in 1984-5 was $196, 581 million, of which an estimated $11, 300 million was generated by the mineral industry, excluding smelting and refining[102]. If smelting and refining were included, an estimated $2,500 million could be added to this figure, thus making the mineral industry the largest primary sector contributor to the GDP[103]. The major minerals mined are bauxite, alumina and aluminium, copper, iron, silver, lead and zinc, black coal, petroleum, nickel, mineral sands, diamonds and uranium[104]. Forestry is a major Australian industry, through woodchipping, saw milling and the manufacture of ply, veneer, reconstituted board, pulp and paper[105].

The economic potentials of some of Australia's world heritage areas underscore the development issues involved in world heritage protection. The sections below outline the resource potentials of the Great Barrier Reef, the Tasmanian world heritage area, the Queensland Rainforest and Kakadu region.

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99 Richardson (1989), 12.
100 *Ibid.*
101 *Ibid.*
102 Castles (1986), 383.
103 *Ibid.*
104 *Ibid.*
105 Castles (1986), 328.

Oil and the Great Barrier Reef

An examination of the background to Commonwealth protection for the Great Barrier Reef provides the first example of the conflict which exists in Australia between conservation and development in relation to world heritage properties. Despite a general recognition that the Reef was of great international natural significance, there was a general reluctance on the part of the State Government to prevent the exploitation of petroleum resources in the region. When the Commonwealth finally took the decision to protect the Reef, there were delays in the implementation of the *Great Barrier Reef Marine Park Act* while the Federal Government of Mr Fraser considered the possibility of allowing its exploitation. A final decision to protect the whole of the Reef from drilling was not taken until the Labor Party regained office in 1983.

The adoption of a legislative scheme for the protection of the Great Barrier Reef was preceded by Queensland and Commonwealth inquiries, with one of the terms of reference being "what are the probable benefits accruing to the State of Queensland and other parts of the Commonwealth from exploration or drilling for petroleum in the Area of the Great Barrier Reef and the extent of those benefits?"[106]

The Area was found to contain seven sedimentary basins, with one, the Papua Basin in the far North classified as having good petroleum potential.[107] In its report the Commission of Inquiry made the point that national monetary wealth accruing from exploitation of this resource would depend upon reservoir sizes of discovered fields, costs of finding and development, and the proportion of Australian ownership of explorer and producer.[108] However, substantial discoveries of oil would be likely to lead to a lower price for petroleum products to the Australian consumer, and national benefits from income tax and royalties, particularly to the State of Queensland.[109] Further, the discovery of crude oil would assist in saving import expenditure with consequential effect on the trading deficit and current account.[110] Other potential benefits would be contributions to foreign exchange reserves, promotion of self sufficiency, increase in industrial development and the promotion of decentralisation.[111] These economic benefits had to be balanced against the consumption of irreplaceable resources, interference with the environment, risk of damage to corals, and so on, with consequent hazards to the tourist industry.[112] In the

106 Royal Commissions into Exploratory and Production Drilling for Petroleum in the Area of the Great Barrier Reef (1975).
107 *Ibid*, 67.
108 *Ibid*, 987.
109 *Ibid*, 987-989.
110 *Ibid*, 990-991.
111 *Ibid*, 991-992.
112 *Ibid*, 993-994.

event the decision was taken not to allow operations for the recovery of minerals to be allowed in the proclaimed Marine Park, but the delay in the declaration of the various stages of the Park can be explained in part by a reluctance to prevent mineral exploration on the Reef. It was not until 1983 that regulations were made prohibiting the drilling for petroleum in any part of the Great Barrier Reef Region.[113]

The Economic Potential of the Tasmanian World Heritage Area

The conflict over the implementation of the *World Heritage Convention* in Tasmania illustrates the point that economic issues have largely shaped the constitutional conflicts over this implementation. The production of hydro-electric power has long played a major role in Tasmania's economy. Because of its rainfall which is distributed fairly evenly throughout the year with comparatively small yearly variations, the State is the source of the major hydro-electric potential in Australia.[114] In 1984-85 about thirty five percent of the energy sources for Tasmania were supplied by hydro-electricity.[115] In the Tasmanian dam dispute, the scheme proposed by the Hydro-Electric Commission would have dammed the waters of the Gordon River, raising the levels of the Franklin River and other tributaries, which would have had a storage capacity of about 2700 million cubic metres. The power station would have added about 180 megawatts on average to the capacity of the Tasmanian generating system, with an installed generator capacity of about 300 megawatts.[116] It was the Tasmanian Government's view that the ability to generate electricity at low cost by this means was necessary to enable the State to achieve economic growth and to increase opportunities for employment.[117]

Development issues are also relevant in the extended nomination to the Tasmanian world heritage area. From December 1989, with the acceptance of this new nomination, 581,000 hectares, or nearly 20 percent of Tasmania is now included on the World Heritage List.[118] This will undoubtedly have consequences for the State's economic development. It has been claimed, for example, that 200 megawatts of potential hydro power have been locked away mainly in the Denison Spires region.[119]

The newly nominated areas are also rich in forest and mineral resources. Tasmania is unique amongst Australian States in its concentration of forest resources. Of the total land area in Australia, approximately 5% is covered by forest. By contrast, 44% of the land area of Tasmania is forested, with 33% of the island being native forest

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113 See Chapter IX.
114 Castles (1986), 420-426.
115 Jackson (1987), 179.
116 The *Tasmanian Dam Case* (1983) 46 *A.L.R.* 625, 633.
117 *Ibid.*
118 Hobart *Mercury*, 7.9.89.
119 Hobart *Mercury*, 6.9.89.

with potential commercial value.[120] In Tasmania primary industry is the dominant contributing sector to the State's economy. Agriculture and mining, with forestry through the manufactured value of paper, paper pulp, woodchips and sawn timber and the developing fishing industry provide in excess of 75% of the State's economic base.[121] Tasmanian forests have been supplying woodchips for export under licence (mainly to Japan) since 1971.[122] In 1972-3, 1.4 million tonnes of chips were exported and by 1986-7 the figure was approximately 2.9 million tonnes.[123]

The nominated area is also rich in mineral resources. Western Tasmania is one of the most mineralised regions in the world.[124] Although the South West conservation area has not been explored to the same extent as the rest of the west coast, 'it is highly likely that major mineral discoveries will be made in the South West which will form an important contribution to the dwindling mineral resources of this State.'[125] In 1987, mining and mineral processing in Tasmania generated income of more than $900 million per year, 55 per cent of the State's exports, and 10 percent of its GDP.[126]

The economic potential, particularly for forestry and mining, of parts of the proposed nomination in Tasmania, was part of the reason for the establishment of the Helsham Inquiry and the political furore that followed the handing down of the Commission's report.[127] In coming to an agreement, first with the Liberal Government of Mr Gray, and later with the Independent Green-supported Labor Government of Mr Field, it was necessary for the Commonwealth Government to take account of the resource potential of the areas being considered. Resource-rich parts of the Southern Forests and parts of the Mount Read volcanic belt, described by the Director of the National Key Centre for Ore Deposits and Exploration Studies at the University of Tasmania as forming 'a unique mineralised geological terrain that had produced some of the world's major mines,'[128] were left out of the recent nomination, despite the push by the conservationists to have them listed.

Kakadu Uranium and Precious Metals

An examination in Chapter IX of the management of Kakadu National Park has revealed the conflict which exists in Australia between the desire to conserve unique and irreplaceable natural and cultural sites, and the perceived need for a country

120 Commission of Inquiry into the Lemonthyme and Southern Forests (vol.2), 284.
121 Jackson (1987), 167.
122 *Ibid*, 170.
123 *Ibid.*
124 Large (1987), 1.
125 *Ibid.*
126 *Ibid.*
127 See Chapter VIII.
128 Hobart *Mercury*, 7.9.89.

with a natural resource based economy to exploit resources which are often found in these sites. Attempts to compromise these two seemingly irreconcilable positions have marked decisions made in relation to Kakadu by three successive Governments. The issue has really been whether the national economy can afford a Government decision to forego the opportunities for mineral developments which exist in the Kakadu region.

Uranium was found and mined at El Sherana, in the Kakadu region, in 1953. Extensive geological studies and mineral exploration since then have lead to the discovery of four uranium ore body sites of international significance- at Jabiru (Ranger), Jabiluka, Koongarra, and Nabarlek.[129] We have seen that only the Ranger mine has been allowed to proceed, with the site excised from the Park. The economic benefits of this development can hardly be questioned. Between 1981 and June 1987, the Ranger uranium mine resulted in royalty payments to the Commonwealth of $19 000 000, while $270 000 000 was paid in income tax and $65 000 000 to Aboriginal interests.[130] There is continuing controversy over whether the remaining sites should be allowed to be developed. In February 1985, the Northern Territory Chamber of Mines released a paper on the mineral potential of the Kakadu region. Among its findings were that the Kakadu region is the most prospective area in the world for very low-cost uranium deposits, with $40 billion worth of proven uranium reserves.[131] The Chamber also argued that, if permitted to go ahead, Kakadu uranium could earn Australia $1.3 billion (1985 dollars) in export income annually.[132]

Recently, the issue of whether mining developments in other parts of the region, including the so-called 'conservation zone', should be allowed to proceed has surfaced. Within the conservation zone are Coronation Hill and El Sherana, where Australian mining giant BHP is heading a joint venture to mine gold, platinum and palladium. In 1988 the Senate Standing Committee on the Environment, Recreation and the Arts, released a report entitled "The Potential of the Kakadu National Park Region". According to this report, there are major deposits of uranium and gold in stages 1 and 2 of the Park, while in Stage 3, the mineralisation located to date occurs principally in a series of rocks known as the El Sherana Group and includes gold, platinum and minor deposits of uranium.[133]

In March 1988 BHP Gold advised the Committee that at the present stage of exploration an *in situ* resource of approximately 650, 000 ounces (20217 kg) of gold was indicated at Coronation Hill which, at 1988 prices would have a value of about

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129 Ranger Uranium Environmental Inquiry (1977), 19-20.
130 Senate Standing Committee on Environment, Recreation and the Arts (1988), 85.
131 *Weekend Australian*, April 15-16 1989.
132 *Ibid.*
133 Senate Standing Committee on the Environment, Recreation and the Arts (1988), 69.

$394 million.[134] There were further indications that there are 40,000 ounces (1244 kg) of platinum and 100,000 ounces (3110 kg) of palladium in the area, with values of $28 million and over $16 million respectively at current prices.[135] The Joint Venturers maintain that the Coronation Hill site is one of 'national economic importance' and believe the gold retrieval from this area will help remedy Australia's balance of payments figure. The Coronation Hill project has the potential to benefit Australia's balance of payments, both in exports and import-substitution. Along with the gold is enough platinum to satisfy 45 per cent of Australia's needs and 100 percent of its palladium requirements: import substitutes which could save the nation more than $40 million a year.[136] Katherine and Darwin will furnish development infrastructure and employees with the operating workforce growing to more than 200,[137] while the Commonwealth and Northern Territory governments will each benefit from royalties and taxation. These development values have to be weighed against the conservation values and the danger to the environment, particularly of the nearby world heritage area.

World Heritage and Recreational Land Use

Another conflict which has arisen lately has been over recreational uses in world heritage areas. In particular, there has been recent controversy over the effect which world heritage nomination of the Central Plateau protected area in Tasmania will have on horse-riding, shack ownership and fishing in the area.[138] There seems to be a great deal of public uncertainty about the effect of world heritage listing on such activities, with some members of the public even believing that listing results in international interference in management of sites.[139] It is clear that additional public education campaigns publicizing the fact that the decision to nominate an Australian property for the World Heritage List does not somehow extinguish all private interests in that land, nor prevent all public use of it. As Barry Cohen, former Minister for the Environment has pointed out, 'there is...a popular misconception fostered by some in the environment movement that listed areas pass into Federal ownership and assume sacred site status, prohibiting almost all human activity. That is nonsense.'[140] What listing, or nomination for listing, does mean for those with private interests in the land is that any activity which is likely to damage the world heritage values of the property can be prohibited under the *World Heritage Properties Conservation Act.* Activities which are consistent with the protection, conservation and presentation of the world heritage values of the property to the public can continue, subject to management plans

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134 *Ibid*, 81.
135 *Ibid*, 83.
136 Hobart *Mercury*, 28.10.89.
137 *Weekend Australian*, October 14-15, 1989.
138 See Hobart *Mercury*, 11.9.89, 25.9.89
139 Author's own experience in discussions with members of the public, particularly through the Fly-fishers' Club of Tasmania.
140 *Bulletin*, 24.5.88, 53.

and regulations under State legislation. Indeed, the Commonwealth does not have the constitutional power to prohibit such activities

There are large private land holdings in the Willandra Lakes World Heritage Region, where some farming activities take place; in the Great Barrier Reef a zoning system operates by which some areas are maintained in their pristine condition for scientific research, while tourist and fishing activities are encouraged in other zones; the tourist developments in the Uluru National Park and on the Lord Howe Island Group are testament to the fact that economic activity does not cease with world heritage listing. Certainly, in areas which have been listed for their natural wilderness values, such as Tasmania's Western National Parks, the level of activity which is consistent with the world heritage status of the area may be less. Even so, it is simply not true to say that world heritage areas are "locked up".

Conclusion

The conflict and controversy over the implementation of the *World Heritage Convention* in Australia has manifested itself in both constitutional and private legal challenges. A number of factors explain the conflict. First, there is the political capital to be made by State politicians in emphasising the desirability of decentralised government. This has also been exploited by conservative Federal politicians in the context of the implementation of the *World Heritage Convention*. This factor has created the climate for legal challenges to Federal actions to protect the world heritage. Second, uncertainties over the constitutional powers of the Commonwealth in the area have formed the basis for such legal challenges. Third, the reliance of the Australian economy on natural resource exploitation and the fact that the areas concerned are often rich in such resources has resulted in challenges to the restrictions which inevitably result from world heritage listing.

These conflicts have been resolved in favour of the Commonwealth but not before very time-consuming and expensive litigation which has, in addition, had damaging consequences for Federal-State relations. The political rhetoric and controversy over appropriate land uses in world heritage areas has been bitter and divisive. The use of the *World Heritage Convention* in internal political battles certainly does not enhance Australia's international reputation. If the laudable aims of the Convention with regard to the creation of a sense of a world heritage and the protection of that heritage area are to be realised in Australia, it is crucial that appropriate future directions for its implementation are examined.

CHAPTER XI

THE FUTURE OF THE WORLD HERITAGE CONVENTION IN AUSTRALIA

Introduction

This chapter explores the future of the *World Heritage Convention* in Australia. The question of the extent of the Commonwealth's powers to interfere in State land use decisions has resulted in several bitter and divisive constitutional conflicts over the issue of the implementation of the *World Heritage Convention* in Australia. These conflicts have polarised much of the Australian community such that the Convention has been discredited in some quarters. Some members of the public and a number of politicians no longer see the *World Heritage Convention* as a unique and important international environmental instrument, but as a tool of radical conservationists to be used in any conflict over land use. This prevents the realisation of one of the fundamental aims of the Convention, which is to create a sense of a world heritage, an understanding that 'deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.'[1] This can be called the "psychological aim" of the *World Heritage Convention.* The other fundamental aim of the Convention is to establish the practical mechanisms for ensuring the protection of the world heritage. The absence of an acceptance of the rationale of the *World Heritage Convention* among particular sections of the community is likely to result in lack of political motivation to achieve the practical aims of the Convention in those who aspire to represent those sections. Thus, the importance of promoting the psychological goal cannot be underestimated.

In examining future directions, the argument that the Constitution should be amended in an attempt to avoid legal challenges must be examined. There are some good reasons for taking such a step. Amendment of the Constitution alone, however, ignores the other aspects of the conflict and controversy over the implementation of the *World Heritage Convention* in Australia, and particularly the political and economic factors which lie behind legal challenges. These factors can only be addressed through the adoption of attitudes of negotiation and public education which encourage the practice of cooperative federalism. This in turn will help to restore the credibility of the *World Heritage Convention* and promote the creation of a sense of the importance of the cultural and natural heritage of the world.

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1 Preamble to the *World Heritage Convention.*

Constitutional Reform

We noted in Chapter V that the failure to include a Federal power over the environment in the Constitution could in part be explained by the historical fact that "the environment" was not an issue when the Constitution was drafted. It has thus recently been mooted that the Constitution should be amended to redress this omission. The inclusion of a relevant environmental power would recognise the appropriateness of Federal Government playing a significant role in proscription of uniform national standards for the protection of the environment. In particular, it would ensure that the Commonwealth Government would be able, if the need arose, to institute greater management controls over world heritage areas than it is able to do using the external affairs power.

The question of the appropriateness of including in the Constitution a power over the environment was recently considered by the Constitutional Commission.[2] This Commission was established in 1985 by the Federal Government with terms of reference which required it to report on the revision of the Constitution to:

> (a) adequately reflect Australia's status as an independent nation and a Federal Parliamentary democracy;
> (b) provide the most suitable framework for the economic, social and political development of Australia as a federation;
> (c) recognise an appropriate division of responsibilities between the Commonwealth, the States, self-governing Territories and local government; and
> (d) ensure that democratic rights are guaranteed.[3]

The Constitutional Commission reported in June 1988.[4] The Commission's Advisory Committees on the Distribution of Power and on Trade and Economic Management made recommendations upon the environment issue.[5] Given that this would be a very broad power, the Environmental Law Commission in its submission to the Committees was concerned to stress the practical and political limits on the exercise of the power by the Commonwealth, pointing to the fact that no national government would ever be remotely inclined to cover the environmental field.[6] The Distribution of Powers Committee, although disposed to the Commonwealth having some specific power in respect of environmental protection and conservation, rejected the suggestion of a specific constitutional power concerning environmental and conservation matters as:

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2 *Ibid*, vol. 2, 757-766.

3 See Constitutional Commission (1988), vol.1, 1. The Commission sought to ensure that any proposals for change would preserve the framework and principles contained in the Constitution.

4 *Ibid*, vols. 1 and 2.

5 On this point see Boer (1989), 138-139.

6 *Ibid*, 139.

> it would not be possible to formulate an appropriate phrase or expression to restrict the otherwise sweeping scope of such a power so as to confine its exercise to environmental matters of national concern. The concept of 'national concern' in itself is too vague and subjective to form the basis of an appropriate constitutional criterion which could be used to test the legal validity of legislation enacted in the exercise of the power.[7]

The Trade and National Economic Management Committee examined the development of Australia's resources and recommended that for historical, technical, geographical and geological reasons, resource development is most appropriately the responsibility of State or local Governments, or both, rather than of the Federal Parliament.[8] The Committee did, however, recommend that resource development should be subject to the concurrent authority of the national Parliament to enact laws concerning matters that affect the national economy, which it recommended be included as a new concurrent power in section 51(1A).[9]

There is clearly an argument that the Commonwealth Parliament should be endowed with a comprehensive power to protect the national environment, to enable the proscription of uniform standards. Further, it is clear that there would be practical and political restraints on the exercise of any such power by the Commonwealth.[10]

Against this are the arguments that the Commonwealth lacks detailed expertise in environmental control matters developed in State authorities, that consideration of local conditions is important and that, because of the difficulty of defining the environment, the environmental power could lead the Commonwealth to intrude upon many aspects of State responsibility.[11]

The Commission concluded that while there are environmental matters of inter-State and even international significance, and while there are circumstances in which the Commonwealth cannot take action, there is considerable scope for federal action, particularly in cooperation with the States and Territories.[12] Further, many

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7 Constitutional Commission (1988), vol. 2, 760

8 *Ibid.* Two members of the Committee (Associate Professor Coper and Ms Phillipa Smith) dissented because, in their view, it would be appropriate to include an express concurrent federal power in relation to the conservation of natural resources.

9 *Ibid.*

10 The Environmental Law Commission argued that enormous resources would be required for the Commonwealth to take over the entire field and that no national government would ever be remotely inclined to do so. Further, political resistance by the States to 'excessive' intrusion by the Commonwealth into areas of traditional environmental regulation would also influence the behaviour of the Commonwealth- *ibid*, 761.

11 *Ibid*, 762.

12 *Ibid*, 765.

environmental problems are local and thus should be dealt with by local bodies.[13] There was also reference to the difficulty in restricting the scope of any power with respect to the environment,[14] and that a broad power would involve the Commonwealth too greatly in areas traditionally of State concern.

One of the aims of the inclusion of an appropriate power over the environment in section 51 of the Constitution would be to reduce the potential for constitutional challenges to the exercise of other powers to regulate the national environment. However, the exercise of an environment power would undoubtedly also be the subject of numerous State Government challenges, and given the expense of such challenges and the detrimental effect of them on Federal-State relations, it is probably not desirable for a power of this nature to be given to the Commonwealth. In any case it is now evident that State challenges, particularly to the exercise of the external affairs power to protect the world heritage, are very unlikely to succeed.

Further, one must recognise that while the centrally governed state seems to enjoy all the advantages of strictness, uniformity of administration and the right of the central authority to put measures directly into effect, there are advantages of pluralism, division of work and capacity for cooperation and integration which are a part of federalism.[15] While federal standardization on technical industry requirements is desirable because of the need to avoid distortions of competition, where nature conservation is concerned, it is arguable that nationwide formalism is inappropriate.[16] It is desirable, for example, that Tasmania's national parks, even those which are of world heritage quality, are managed, at least primarily, at the State level, where greater account can be taken of public concerns and local conditions. The expertise which is developed at State level in each of the National Parks and Wildlife Services with regard to nature conservation in that particular state is important in ensuring technical knowledge and competence in management. Certainly, the Commonwealth Government and agencies have a role to play, but management at local level is highly desirable.

In any case, it is unlikely that an amendment to the Constitution to bring this about would pass through the referendum procedure outlined in section 128. Only South Australian Premier Mr Bannon and Victorian Minister for the Environment, Mr Roper, have expressed sympathy with the national approach and even Bannon said,

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13 *Ibid.*

14 *Ibid.*

15 Streibl (1975), 138.

16 *Ibid.*

'we would have to see more details of how such legislation would work.'[17] Referendum proposals have a history of rejection and, in the face of State Government opposition, the chances of obtaining the constitutional requirement of approval from a majority of the electors in a majority of States are virtually non-existent.

Cooperative Federalism

A far preferable approach than the amendment of the Constitution would be the adoption of attitudes and procedures which encourage the realisation of cooperative federalism.

It is only to be expected that State Governments will be more concerned with the economic consequences of "locking up" areas with potentially valuable resources than with the international obligations of the Australian Government to protect their world heritage values. There is no doubt that State Governments in this situation should be adequately compensated for any loss of potential development in the area, as should any other parties which suffer directly. Because the benefit of protection accrues to the whole of Australia, the Australian Government should be willing to pay for it.

There is no reason for the Governments or the residents of a State where a world heritage site is situated to feel threatened. Subject to the Government's responsibility to ensure that the area's world heritage values are protected, listing is not necessarily inconsistent with private land ownership nor with the State Governments having a valuable role to play in the management of the region. Indeed, as we have seen, the *World Heritage Properties Conservation Act* only justifies the Commonwealth in taking reasonable and appropriate steps to prevent those activities which are likely to damage the world heritage values of a particular site.

It would be an indication of cooperative federalism working in a practical way if the relevant State Governments supported the nomination and protection of sites within their boundaries, recognising the benefits which they can bring for the economy through tourism and encouraging their populations to be proud of the international status of the property. The States should be aware of the fact that the High Court has supported the Commonwealth in all its attempts to protect world heritage properties and that, given circumscribed drafting of relevant proclamations and regulations, there is virtually no scope for further constitutional challenges to protective measures preventing the damage or destruction of world heritage qualities.

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17 O'Reilly (1989), 49.

On the other hand, the Federal Government should not be too eager to threaten the States with unilateral action now that it knows that there are very few legal impediments to it taking such action. Identification, conservation and presentation of Australia's unique sites of world heritage value should be a cooperative effort whenever possible. As was suggested in Chapter VIII, it may be necessary for the Commonwealth to compromise with respect to the nomination of sites of marginal significance if such cooperation is to be achieved.

Given the growing environmental awareness of the population and with greater education of the public about the real consequences and potential benefits for the State of world heritage listing, the political motivations for State Governments to confront the Commonwealth on these issues will disappear. State Governments will come to realise that it is in their interests to participate in the decision-making process and develop effective management plans allowing appropriate developments consistent with the world heritage values of the given area.

If there were agreed procedures for negotiating appropriate compensation for State Governments, taking into account the existing resources of the areas and the potential for the State to benefit economically from consistent developments in the listed site, the economic motivation for these battles would no longer exist.

There are indications of growing cooperation between State and Federal Governments on world heritage matters. This is particularly evident in the State where there had previously been a great deal of conflict over the implementation of the *World Heritage Convention.*

The problems in identifying world heritage areas, and the disastrous political reaction to the Helsham Inquiry resulted in the abandonment of the Inquiry approach to identification of world heritage values, and the adoption of the first formal compromise between State and Federal Government on world heritage matters. The Tasmanian and Commonwealth Governments were equipped with information as to world heritage qualities from their own departments, and agencies such as the Australian Heritage Commission. On this basis they sought to achieve an appropriate compromise nomination and settle issues such as compensation. It would have been far preferable if this approach had been adopted prior to the establishment of the Helsham Commission.

The result of negotiations between the two Governments was announced at the end of November, 1988, just before the Australian delegation was due to depart for Brasilia for a meeting of the World Heritage Committee which would consider the

Australian nomination of the North-East Tropical Rainforests for world heritage listing.[18] The agreement had a number of facets.[19] There was to be joint nomination of the area proposed by the Commonwealth Government for protection, or nearly 80% of the inquiry area, except for the Denison Spires region, which was to be made into a State national park. While the region to be nominated was a substantial percentage of the total inquiry area, many of the tall tree stands were excluded from protection. The Commonwealth also undertook not to hold any further inquiries into the world heritage values of Tasmanian sites, nor to unilaterally propose any nominations within the State without the cooperation of the Tasmanian Government. While accepting that cooperation is desirable, in agreeing not to make any unilateral nominations, the Australian Government was flouting its international obligations under the *World Heritage Convention* to identify and protect sites of outstanding universal value within its territory.

Nomination of these areas under the agreement would not necessarily ensure their protection. The Commonwealth promised to allow quarrying to continue in the Exit cave area and not to regulate to prevent the issuing and maintenance of mining and exploration titles in the world heritage area. The agreement stated that limits must be set to the scale and development of the Exit Cave operation and that mining development from an existing or future leaseholder in an area nominated for world heritage listing would be subject to a judgment from the State and the Commonwealth that the planned operation was compatible with the world heritage values of the area. However, it has been argued in Chapter IX that, particularly where there are compromises in relation to nomination of areas, those areas should be managed so as to exclude all resource-exploitative activities.

There is room under compromise agreements for the inclusion of provisions relevant to the protection of the environment which are related to world heritage matters. Such a provision was made under this first compromise agreement in relation to the expanded Tasmanian world heritage area. It provided for a new Tasmanian Forests Agreement to replace the Memorandum of Understanding which had been breached by the Tasmanian Government in the lead up to the dispute over the Lemonthyme and Southern Forests. The adoption of the new agreement was with a view to increasing industry efficiency, moving towards improving forest practices, including forest plantation, training and research. Such an agreement can only have benefits for effective environmental protection in Tasmania.

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18 The World Heritage Committee inscribed the region at that meeting - see Unesco doc. SC.88/CONF.001/13.

19 The information on the contents of this agreement is from press releases dated 29th November, 1988 from the Prime Minister's Office and the Office of the Minister for Resources, Senator Peter Cook and from the Autumn 1989 edition of Ecofile.

These agreements can also provide the basis of compensation for work already carried out by State authorities, and for developing new economic directions for the State concerned. In the original agreement, there was provision for funding for the rationalisation and reconstruction of the forest industry; the payment of bounties for veneer logs produced and delivered to Tasmanian veneer mills, so as to encourage the identification, segregation and recovery of such logs; and a package totalling $50 million for things such as expenditure on plantations and other suitable developments, timber industry training, development, marketing and design. Compensation to offset sunk costs of forest roading and management planning incurred by the Tasmanian Forestry Commission was also agreed. Another economic concession in the agreement was the invitation by the Prime Minister to the State to submit a list of proposals identifying activities with substantial ongoing Commonwealth employment which the State considered to be capable of being moved to Tasmania. Under the agreement, if the proposals were practicable, the Prime Minister would take them up with the relevant Ministries.

Following the establishment in Tasmania of the Labor Minority Government of Premier Field, supported by the Green Independents, agreement was negotiated with the Commonwealth which went beyond the earlier agreement in terms of nomination and protection of world heritage areas. The Green/Labor Accord[20], which forms the basis of the effective coalition between the parties, makes several references to world heritage matters[21]. There was an agreement to add to the joint nomination of the Gray and Commonwealth Governments, the Denison Spires area, Hartz Mountain National Park and Little Fisher Valley, and to gazette the Denison Spires and Little Fisher Valley as National Parks. Several other areas were to be considered for listing as a matter of priority.

It is not, as has been suggested in the media from time to time, a term of the agreement between the parties that mining and mineral exploration will not be permitted in any national park or nature reserve, nor that any existing licences within world heritage areas or national parks will be revoked and the areas re-habilitated. The prohibition on mining in national parks is, however, included in Appendix 1

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20 The Accord is contained in a formal document, signed by the Leader of the Opposition, Michael Field, Dr Bob Brown (independent member for Denison), Dr Gerry Bates (Member for Franklin), Mrs Christine Milne (Member for Lyons), Rev. Lance Armstrong (Member for Bass) and Mrs Di Hollister (Member for Braddon), at the Tasmanian House of Assembly on 29th May, 1989.

21 Significantly, the Accord sought to establish an inquiry to address one of the important issues which was not resolved by the Helsham Inquiry , namely, the question of the economic effects of protecting national estate forests.

which outlines the Labor Partys' agenda for reform. While the Independents' direction statement provides that all of the Western Tasmanian wilderness region should be nominated for inclusion on the World Heritage List, there is no specific provision in that statement requiring the prevention of exploitative activities in world heritage areas.

This Accord was followed by negotiations between the State Government, conservation groups and the forests industry, in an attempt to reach an agreement acceptable to all groups. This negotiation resulted in the so-called "Salamanca Agreement", which was signed by representatives of the Forestry Industry, trade unions, conservation groups and officers from the Ministry for Forestry on 31st August, 1989. The parties agreed to recommend to the Minister for Forests some significant forested areas for inclusion in the joint nomination for world heritage listing; the Weld, Tiger Range, Eldon Range and Lower Gordon Catchment, though the latter nomination was to be subject to a long-term plan to maintain Huon pine supply to the existing industry. The conservation groups accepted that some areas would not be included in the 1989 nomination because of their forestry value, although they retained the right to pursue calls for these areas to be included in a future nomination. Concessions were made to industry and trade union groups through the recognition that some access to the National Estate forests will be necessary. Access was not to include areas already nominated for world heritage. A consultation process for achieving a sustainable forest industry with appropriate conservation strategies was proposed.

The Salamanca Agreement provides a model basis for future negotiations on resource rich areas proposed for world heritage nominations. There should, however, also be consultation with representatives of the Commonwealth Government, which has assumed international obligations in relation to world heritage areas and which is ultimately responsible for any nomination. The fact that the Commonwealth Government was not included in the Salamanca discussions caused some problems. Senator Richardson objected to the State Government announcement of the world heritage listing[22] and ultimately the Federal Cabinet included some additional areas to those proposed by the State Government[23].

The Tourism Potential of World Heritage Areas

One particular strategy for encouraging the cooperative federalism in world heritage matters will be the development of world heritage sites to fully realise their

22 Hobart Mercury, 6.9.89.
23 Hobart Mercury, 13.9.89.

tourism potential. Tourism in Australia is now fully recognised as an industry and an area of Government policy concern in its own right. It is estimated that tourism accounts for 4.8 % of Australia's G.D.P. and is responsible for employing 5.2 % of the workforce.[24] It is of interest that this figure is equivalent to that for the mining industry.[25]

Apart from the economic benefits, tourism will lead to the partial development of the aims of the *World Heritage Convention* by fostering international cooperation. As Unesco has pointed out, the ultimate purpose of protecting, conserving and preserving the cultural and natural heritage is the development of human society as a whole and therefore should not be regarded as a check on national development but as a determining factor in such development.[26] Indeed, given Australia's obligation in Article 5 of the *World Heritage Convention* to "present" the natural and cultural heritage, it could well be argued that the Commonwealth Government should be encouraging appropriate tourism developments in world heritage areas.

There is evidence that Australia's world heritage areas are already an important attraction for tourists. For example, Kakadu National Park hosts a quarter of a million visitors each year.[27] It is seen by the Australian National Parks and Wildlife Service as an important component in the development of the Northern Territory and Australian tourist industries.[28] In fact, "interest in Kakadu as a tourist destination increased following the proclamation of the Park in 1979 and again after its inclusion on the World Heritage List. A continuing increase in tourist numbers seems inevitable with improved access and as Kakadu becomes better known."[29]

In recent years the tourism industry has become a significant part of the Tasmanian economy, contributing more than 9% of the State's employment.[30] Significantly, the Gordon River and Cradle Mountain, both part of nominated world heritage area, are the attractions which have increased most in popularity in recent years.[31] On 1986 figures, the Gordon River was visited by 31% of all visitors to the State, Lake St Clair by 20.9% and Cradle Mountain by 16.1%.[32] In 1986, 31.1% of

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24 Castles (1986), 686.
25 *Ibid.*
26 *Unesco Recommendation Concerning the Protection, at the National Level, of the Cultural and Natural Heritage*, para. 7.
27 Hobart *Mercury*, 28.10.89.
28 Australian National Parks and Wildlife Service (1986), 22.
29 *Ibid*, 22.
30 Jackson (1988), 97.
31 *Ibid*, 98.
32 *Ibid*, 98.

tourists in Tasmania went bushwalking or climbing (up from 22.4% in 1981).[33] "It is becoming increasingly obvious that Tasmania's renowned wilderness areas hold enormous tourism potential. They could become multi-million dollar attractions to interstate and overseas visitors alike, it developed carefully in harmony with the environment."[34]

There are indications that the tourist potential of world heritage areas is beginning to figure significantly in government policy. The World Heritage Council is currently considering expressions of interest to provide environmentally compatible tourist accommodation facilities at Warner's Landing on the Gordon River.[35] Recently a $4 million development to be Australia's first wilderness resort was announced, for Derwent Bridge, bordering on the Cradle Moutain-Lake St Clair National Park and the Wild Rivers National Park, providing luxury cabins and upgraded backpackers' cottages as a base for people to enjoy the world heritage area.[36]

The problem of course is that tourism can also have adverse effects upon world heritage areas.[37] It has to be recognised that finding ways to maximise the benefits of recreation and tourism while minimising their adverse effects on the environment will involve many inter-disciplinary studies.. Clearly active physical pursuits such as bushwalking and climbing can have detrimental effects and enjoyment of scenery, which is a more passive recreational pursuit, can also represent a source of environmental disturbance.[38] Zoning and other tools of wilderness management will allow for appropriate protection for particularly sensitive areas while an ecological approach can succeed in minimising other effects. Davis considered when he noted that:

> The primary role of Australian national parks services is to conserve and interpret the areas under their jurisdiction, for the general benefit of the entire community. While this includes the provision of some tourist facilities, it does not and should not mean the opening up of core wilderness areas to attrition through roads, vehicles or human impact upon the terrain. It is particularly noticeable that although close cooperation exists between tourism organizations and national parks services in overseas countries, the increasing tendency is to locate accommodation and facilities outside the parks or just within their boundaries, while providing interpretative services further inside the conserved areas. Where tourism might have a significant impact upon the landscape, severe restrictions are applied[39]

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33 *Ibid.*
34 Article by Gordon Dean, Director of Tourism Tasmania entitled "New Directions in Tourism" in the *Advocate*, 25.8.87.
35 *Ibid.*
36 Hobart *Mercury*, 12.11.89.
37 As to the environmental impacts of travel and tourism see Industries Assistance Comission Inquiry into Travel and Tourism (1989).
38 *Ibid*, 77.
39 Davis (1980), 16.

Conclusion

The adoption of new directions in the implementation of the *World Heritage Convention* in Australia is crucial. To date conflicts have been expensive, time-consuming, divisive and damaging to Federal-State relations. Acceptance of the Convention in the community could undoubtedly be increased if conflict and controversy were reduced. Further, the use of the *World Heritage Convention* in internal political battles certainly does not enhance Australia's international reputation. The recent moves of State and Territory Governments to send groups to Unesco meetings to lobby against nominations by the Federal Government have the potential to seriously damage this reputation.[40] As Davis has pointed out:

> Representatives of many foreign governments simply cannot understand why Australian regional politicians are permitted to oppose the national will and tend to regard such actions as outright subversion; equally they are at a loss to understand why Australia has not yet sorted out this matter internally.[41]

The potential for the conflicts to damage Australia's international relations is exacerbated by the anti-internationalistic feeling which has accompanied the "States' Rights" rhetoric of many conservative Australian politicians. Such rhetoric marked the Opposition's debate on the *World Heritage Properties Conservation Bill.* The speech of Senator Crichton-Browne illustrates this point:[42]

> To give force to the legislation before us countries such as Bulgaria, Iraq, Libya, Zaire and Panama all sit in judgment on whether our recommendations might be accepted. Let us just look at some of the signatories to this wonderful United Nations Convention for the Protection of the World Cultural and Natural Heritage. They are: Iraq, Iran, Yugoslavia, Poland, Ethiopia, Nicaragua, the Seychelles, Cuba - just to name a few. Can honourable Senators not imagine these countries with undying dedication and enthusiasm for ensuring that there is no destruction of their environments or their culture? ... Imagine also their compassion and understanding in protecting their cultural and environmental heritages for the benefit of all mankind so as to ensure that tourists and future generations can look with wonder upon their achievements which they have retained as a result of being signatories to this Convention.[43]

Thus far Australia has maintained a high reputation in world heritage matters which has resulted in its continual participation in the decision-making bodies established under the *World Heritage Convention.* There is no doubt, however, that continuing internal political conflicts over the protection of the world heritage may damage this

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40 The Northern Territory sent its Minster for Mines and Energy, Barry Cutler to lobby members of the World Heritage Committee in Paris against the listing of Stage II of the Kakadu National Park - House of Representatives Hansard, 8th December 1987, 2942-3.

41 Davis (1989), 72.

42 Senate Hansard, 12th May, 1983, 416.

43 See also Senate Hansard 17th May, 1983, 472 and 475 and Senate Hansard 18th May, 1983, 572.

reputation and hence affect Australia's influence on matters which arise under the Convention.

The conflict and controversy over the implementation of the *World Heritage Convention* have affected the realisation, not only of the "psychological aims" of the Convention, but also of the practical aims. Domestic legal and political constraints which arise by reason of the nature of the Australian Federal system and economic factors have resulted in the government compromising its international obligations under the Convention. Political restraints affected the Commonwealth's realisation of its responsibilities in relation to the Lemonthyme and Southern Forests in Tasmania.[44] Political factors have also influenced the Commonwealth's nomination of world heritage properties; there is a clear reluctance to suggest properties which may satisfy the Convention's criteria unless there is a clear indication that it would be politically expedient to do so. As we have seen in Chapter VI, the IUCN is of the view that there are several properties of world heritage quality in Australia which have not yet been nominated.

In the aftermath of the constitutional legal battles, the arrangements for ongoing management and protection of world heritage sites, and particularly the Tasmanian Wilderness National Parks and the Queensland Rainforests have been somewhat *ad hoc*.[45] The process of deciding on nominations and protection for sites of world heritage value has largely been one of political expediency. As Davis has suggested: 'Australian environmental management is often as cynical and unsophisticated as that found in any third world nation.'[46]

The obligations in changing this situation lie with both State and Federal Governments. The State Governments must accept the responsibilities which the Australian Government has taken on in ratifying the *World Heritage Convention* and seek to play a meaningful role in the implementation of the Convention, through suggestions of sites for nomination, the protection of world heritage properties under appropriate State legislation, and the adoption of legislation and administrative measures which ensure appropriate ongoing management of the cultural and natural heritage. The Federal Government must likewise recognise the important role the States have to play.

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44 See Tsamenyi, Bedding and Wall (1989), 90-91.

45 Davis (1989), 70 where he suggests that the administrative arrangements for the management of the Tasmanian World Heritage Area are "somewhat cumbersome" and that membership of the Council, Standing Committee and Consultative Committee was decided "seemingly more on representation of interests and which was judged acceptable to both governments, than any knowledge of or sympathy for the region in question".

46 *Ibid*, 76.

GENERAL CONCLUSION

The *World Heritage Convention* was conceived with the aim of bringing about international cooperation to promote the ideal of a heritage of Mankind, and the protection of such heritage. The importance of this international cooperation is best summed up by the late Lionel Murphy, Justice of the High Court of Australia:

> The preservation of the world's heritage must not be looked at in isolation but as part of the cooperation between nations which is calculated to achieve intellectual and moral solidarity of mankind and so reinforce the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war....
>
> Through bodies such as the United Nations Educational, Scientific and Cultural Organization, under whose auspices the convention was created, the United Nations has attempted to educate the people of the world to think of themselves as one, to break down the intense nationalistic attitudes which lead to war. The encouragement of people to think internationally, to regard the culture of their own country as part of the world culture, to conceive a physical, spiritual and intellectual world heritage, is important in the endeavour to avoid the destruction of humanity.
>
> Protecting the world's cultural and natural heritage and thus fostering the intellectual and moral solidarity of mankind, in promoting the elimination of war, advances the foremost object of international relations.[1]

Environmental problems were among the most important issues addressed in the new range of international measures adopted since the establishment of the United Nations. The growth of international environmental law poses challenges to traditional concepts of State sovereignty. Sovereignty over resources has long been recognised as a fundamental right of States. This right is particularly important in ensuring the development of third world nations. The challenge of international environmental law is to develop appropriate qualifications to the rights of States to exploit their resources in recognition of an international interest in the preservation of the world environment. The international community has shown increasing willingness to adopt international measures for the protection of the environment. This began with early agreements related to the prevention of the pollution of shared waterways, and the destruction of migratory wildlife. It has now moved to the stage where States are willing to adopt conventions such as the *World Heritage Convention*, which contemplate an international interest in aspects of the environment within the exclusive territory of states.

The developing world's acceptance of international environmental regulation has depended upon the adoption of agreements and standards which take account of its special circumstances. In this respect, the role of the *World Heritage Convention* in providing an institutional framework for ensuring international

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1 The *Tasmanian Dam Case*, 733-734.

cooperation on the protection of special sites, such that States which do not have the resources for protection are able to call upon the assistance of the international community is important.

There are various rationales for the protection of particular special sites under the *World Heritage Convention*, a fact which is reflected in the following comment:

> Some places have special importance for people. They have inspired us by their beauty, given us insights into the history of life on our planet, taught us about the functions of natural ecosystems, informed us about the evolution of our own species and culture, enthralled us with wildlife spectacles, saved species of outstanding interest, and provided us with examples of how man can live in harmonious balance with his environment. Many such places are so valuable that they form part of the heritage of all mankind.[2]

Thus, the world heritage has been defined to consist of natural and cultural parts of outstanding universal value. It is essential in any discussion of world heritage matters to keep in mind the quality and importance of the properties involved. In terms of the *World Heritage Convention*, the heritage of mankind consists of the most unique and irreplaceable sites in the world. Thus far, only 300 sites have been formally identified.

The *World Heritage Convention* is a significant progression from the earlier international environmental agreements. The concept on which it is based, the opportunities for attaining international assistance from the World Heritage Fund, for obtaining special recognition for unique sites, and for being a part of a support network for dealing with management and protection problems have inspired the international community. This is evident in the fact that two-thirds of the total State membership of Unesco has now ratified the Convention. Further, while the World Heritage Fund is admittedly inadequate, there is no question that the Convention has, apart from creating and supporting the political will to protect and properly manage relevant areas, also provided invaluable financial and technical assistance in many cases.

Australia has taken a high profile on environmental issues, and has demonstrated considerable commitment to the aims and ideals of the *World Heritage Convention*. However, the process of the implementation of the Convention into domestic law has not been without problems and controversy. Debate over the sovereignty issue in the context of the *World Heritage Convention* has been particularly rife in Australia. It is easy for Australians, geographically isolated from the rest of the world, to lose sight of the global dimension of some international

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2 IUCN's Commission on National Parks and Protected Areas (1982), 3.

environmental problems. Australia does not have the history of cooperation over issues such as preventing transboundary pollution and protecting migratory wildlife and common waterways which is very much a part of the European experience. Further, this geographical isolation tends to lead to a certain insularity. An even greater parochialism is encouraged by Australia's Federal system, which has tended to result in loyalty at the State level. Against this is the developing domestic environmental consciousness, given impetus by such controversies as that over Lake Pedder, the Great Barrier Reef, and the Tasmanian world heritage area. This consciousness is particularly strong with regard to the importance of the preservation of unique natural sites.

In the face of this environmental consciousness, Australian Governments have enacted legislation and adopted administrative measures in fulfilment of Australia's obligations under the *World Heritage Convention.* The primary enactment is the *World Heritage Properties Conservation Act* 1983. by which the Commonwealth Government adopts the legal measures necessary for the protection of the heritage, in accordance with its obligations under Article 5 of the Convention. Addressing the obligation of identification and protection, the *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1987 provided for a Commission of Inquiry to perform the function of identifying any world heritage qualities in a given area, as well as for interim protection for that area. On the other hand, the *Australian Heritage Commission Act* 1975, and the *National Parks and Wildlife Conservation Act* 1975, are not exclusively concerned with world heritage matters. They are, however, an important part of the legislative scheme which attempts to bring about the realisation of the aims of the Convention and the *Heritage Recommendation.* In particular, the *National Parks Act* has enabled the declaration and management of the two Northern Territory world heritage areas- Kakadu and Uluru- as national parks. A further legislative enactment relevant to world heritage matters is the unique *Great Barrier Reef Marine Park Act,* which establishes a unique management scheme for the Great Barrier Reef. These Acts, and the role they play in promoting the goals of the *World Heritage Convention* and *Heritage Recommendation,* have been examined.

We have also seen that, while the obligations assumed under the *World Heritage Convention* are the responsibility of the Commonwealth Government, the constitution of Australia gives States primarily responsibility for land management and conservation legislation. Thus, state legislation is important in allowing for the ongoing management of the sites outside the Northern Territory. It has been stressed that, given the conservation objects of the *World Heritage Convention,* the appropriate State legislation for world heritage sites to be managed under is that which provides for the management of proclaimed sites primarily as conservation areas,

rather than, as is the case in parts of some world heritage areas, having them managed under resource exploitation legislation.

Federal involvement in the identification and ongoing management of sites takes place at the administrative level. The question of the appropriate process for identifying world heritage properties has been explored. The public inquiry approach adopted in relation to the Tasmanian forests has been rejected as a failure. Preferably the Government departments and agencies should be equipped to fully advise Federal Cabinet on nominations. Should it be necessary to have an inquiry to establish the values of the region, this should take place in a less heightened political atmosphere than existed with the Helsham Inquiry. Ultimately, the Federal Government must accept responsibility for the nomination.

The Federal Government can also play a role in administrative arrangements for ongoing management of world heritage areas through the establishment of cooperative bodies responsible for important management issues and for allocating Federal funding. Careful consideration should be given to appointing representatives with appropriate skills and experience, rather than simply ensuring particular parties are represented. Such bodies should be streamlined, and their roles carefully delineated.

The case studies of management of Kakadu National Park and the Great Barrier Reef have illustrated that there will inevitably need to be decisions made about the sorts of activities which are appropriate in world heritage areas. The zoning system offers the potential for reconciling conflicting management objectives. Encouraging appropriate developments, such as tourist and recreation facilities, in certain zones is an effective way of reducing the economic pressure on State Governments to object to world heritage listing and protection. The concept of multiple land use should not, however, be used as a basis for allowing exploitative uses such as mining and forestry activities which will endanger those very qualities for which the site was included on the World Heritage List. The sites in their protected form have an important role to play in sustainable development. In particular, we have noted the social role they play in providing places for tourism and recreation, and their importance in protecting species and ecosystems for scientific research.

As demonstrated, the implementation process has been affected by legal, political and economic factors which have resulted in constitutional and private legal challenges to attempts by the Federal Government to use the legal and administrative framework to regulate inappropriate activities in world heritage areas. The very nature of Australian world heritage sites in part explains the conflict which forms the

basis of these legal challenges.. They are typically very large, natural heritage sites, which often contain valuable natural resources. Their size means that a decision to protect them may well have important implications for the State where they are situated, the national economy, or for those with private interests in the sites. This is particularly the case in Australia, where the economy relies very heavily upon the exploitation of natural resources, which are often still to be found in the pristine sites which have been included on the World Heritage List. This factor, as well as the political realities of State loyalty in the Australian Federal system, and the lack of a Federal constitutional power over the environment, have resulted in three major constitutional challenges to attempts to implement the *World Heritage Convention* in Australia.

Reform of the Constitution to provide the Commonwealth with a clear power over the environment may seem an appropriate way to address this conflict. Such a step would not, however, ensure the reduction of conflict over the implementation of the Convention in Australia. The move should rather be towards encouraging cooperative federalism with regard to the implementation of international environmental law generally, and the *World Heritage Convention* in particular. Reducing conflict and controversy will depend in part upon education about the effects and potential benefits of world heritage listing. Lack of understanding and misconceptions among politicians and members of the public about the concept of a world heritage, and about the consequences of such a designation for Australian properties are widespread. It is important that there is more public education about the Convention and the concepts behind it so that there can be informed debate about how Australia should protect its world heritage sites. Establishing the sorts of management authorities which allow both the members of the public and representatives of State Governments and other interested groups to play a significant part in decision making in relation to the area will help to reduce conflict.

Given some appropriate means of calculating the loss to the State Government which results from world heritage protection, compensation should be paid by the Federal Australian Government to the States. The Commonwealth is fulfilling its international obligations and protecting the area for the entire nation and for future generations. It is unfair that the burden should rest solely with the State where the site is situated. Further, the payment of compensation will be a means of reducing conflict. This amount could be reduced significantly, however, by taking into account the economic benefits to the State arising from the tourism industry, which should be directly increased by the fact of world heritage listing. Compensation could in turn be directed at promoting consistent economic developments, such as tourist facilities, in and around world heritage areas.

The need for cooperation and some compromise in world heritage matters has been emphasised throughout this work. There are four main reasons for this. Firstly, conflict over the *World Heritage Convention* has the potential to damage Australia's international reputation. Second, it is divisive in the domestic context, and particularly damaging to Federal/State relations. Third, the resolution of difficulties through litigation is costly. Fourth, given the constitutional reality of the Australian system, ongoing management of world heritage properties must primarily take place under State nature conservation legislation. In order for appropriate protection to be ensured, and particularly, for the Commonwealth Government to be able to play a role in decisions relevant to management, cooperation with the relevant State authorities at the stage of nomination will be crucial. The importance of this is well illustrated by the protracted Queensland Rainforest dispute. Ultimately, however, if a State Government remains intransigent, the Commonwealth Government must accept its international responsibilities and nominate an appropriate area.

Compromise between State and Federal Governments, and, where relevant, between the conservationist and developmentalist lobby is desirable in the implementation of the *World Heritage Convention* in Australia.. The negotiations which have recently taken place in Tasmania provide some sort of model for future action. Compromises on nominations are inevitable. Any nomination which results from such a process should be guaranteed appropriate protection, free from exploitative land uses.

It is hoped that the effort of analysing the Australian experience in implementation of the *World Heritage Convention* will encourage other scholars of international environmental law to undertake similar studies of their own nations' experiences. Such studies will not only provide valuable information to environmentalists and policy makers throughout the world in their efforts to protect the heritage of Mankind but also will enable us to examine the extent to which the *World Heritage Convention* has promoted the international cooperation in environmental protection as envisaged by the framers of the Convention.

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APPENDICES

Appendix A- text of the Unesco *Convention for the Protection of the World Cultural and Natural Heritage* reprinted from (1972) 11 *International Legal Materials*, 1358.

Appendix B- text of the Unesco *Recommendation Concerning the Protection at a National Level, of the Cultural and Natural Heritage*, reprinted from (1972) 11 *I.L.M.*, 1367.

Appendix C- text of the *Operational Guidelines for the Implementation of the World Heritage Convention*- Unesco Document WHC/2, Revised December 1988.

Appendix D- The World Heritage List as at 9th December, 1988.

Appendix E- List of States Parties to the *World Heritage Convention* as at 12th December, 1988.

APPENDIX A

UNESCO CONVENTION FOR THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE*

[Adopted on November 16, 1972]

CONVENTION FOR THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE

The General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris from to 1972, at its seventeenth session,

Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction,

Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world,

Considering that protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technical resources of the country where the property to be protected is situated,

Recalling that the Constitution of the Organization provides that it will maintain, increase and diffuse knowledge, by assuring the conservation and protection of the world's heritage, and recommending to the nations concerned the necessary international conventions,

Considering that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong,

Considering that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole,

Considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an effective complement thereto,

Considering that it is essential for this purpose to adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods,

Having decided, at its seventeenth session, that this question should be made the subject of an international convention,

Adopts this day of 1972 this Convention.

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*[Reproduced from UNESCO Document 17 C/106 of November 15, 1972.

[The Convention was adopted by the Seventeenth Session of the UNESCO General Conference (October 17-November 18, 1972) by a vote of 75 to 1, with 17 abstentions. The Report of the Special Committee of Government Experts on the Convention is contained in UNESCO Document 17 C/18 of June 15, 1972.

[The UNESCO recommendation concerning protection at a national level appears at page 1367.]

I. DEFINITIONS OF THE CULTURAL AND THE NATURAL HERITAGE

Article 1

For the purposes of this Convention, the following shall be considered as "cultural heritage":

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Article 2

For the purposes of this Convention, the following shall be considered as "natural heritage":

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Article 3

It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above.

II. NATIONAL PROTECTION AND INTERNATIONAL PROTECTION OF THE CULTURAL AND NATURAL HERITAGE

Article 4

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Article 6

1. 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.

2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and preservation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

Article 7

For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.

III. INTERGOVERNMENTAL COMMITTEE FOR THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE

Article 8

1. An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called "the World Heritage Committee", is hereby established within the United Nations Educational, Scientific and Cultural Organization. It shall be composed of 15 States Parties to the Convention, elected by States Parties to the Convention meeting in general assembly during the ordinary session of the General Conference of the United Nations Educational, Scientific and Cultural Organization. The number of States members of the Committee shall be increased to 21 as from the date of the ordinary session of the General Conference following the entry into force of this Convention for at least 40 States.

2. Election of members of the Committee shall ensure an equitable representation of the different regions and cultures of the world.

3. A representative of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre), a representative of the International Council of Monuments and Sites (ICOMOS) and a representative of the International Union for Conservation of Nature and Natural Resources (IUCN), to whom may be added, at the request of States Parties to the Convention meeting in general assembly during the ordinary sessions of the General Conference of the United Nations Educational, Scientific and Cultural Organization, representatives of other intergovernmental or non-governmental organizations, with similar objectives, may attend the meetings of the Committee in an advisory capacity.

Article 9

1. The term of office of States members of the World Heritage Committee shall extend from the end of the ordinary session of the General Conference during which they are elected until the end of its third subsequent ordinary session.

2. The term of office of one-third of the members designated at the time of the first election shall, however, cease at the end of the first ordinary session of the General Conference following that at which they were elected; and the term of office of a further third of the members designated at the same time shall cease at the end of the second ordinary session of the General Conference following that at which they were elected. The names of these members shall be chosen by lot by the President of the General Conference of the United Nations Educational, Scientific and Cultural Organization after the first election.

3. States members of the Committee shall choose as their representatives persons qualified in the field of the cultural or natural heritage.

Article 10

1. The World Heritage Committee shall adopt its Rules of Procedure.

2. The Committee may at any time invite public or private organizations or individuals to participate in its meetings for consultation on particular problems.

3. The Committee may create such consultative bodies as it deems necessary for the performance of its functions.

Article 11

1. Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.

2. On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List, a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years.

3. The inclusion of a property in the World Heritage List requires the consent of the State concerned. The inclusion of a property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State shall in no way prejudice the rights of the parties to the dispute.

4. The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of "List of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions, changes in water level, floods, and tidal waves. The 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.

5. The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this article.

6. Before refusing a request for inclusion in one of the two lists mentioned in paragraphs 2 and 4 of this article, the Committee shall consult the State Party in whose territory the cultural or natural property in question is situated.

7. The Committee shall, with the agreement of the States concerned, co-ordinate and encourage the studies and research needed for the drawing up of the lists referred to in paragraphs 2 and 4 of this article.

Article 12

The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.

Article 13

1. The World Heritage Committee shall receive and study requests for international assistance formulated by States Parties to this Convention with respect to property forming part of the cultural or natural heritage, situated in their territories, and included or potentially suitable for inclusion in the lists referred to in paragraphs 2 and 4 of Article 11. The purpose of such requests may be to secure the protection, conservation, presentation or rehabilitation of such property.

2. Requests for international assistance under paragraph 1 of this article may also be concerned with identification of cultural or natural property defined in Articles 1 and 2, when preliminary investigations have shown that further inquiries would be justified.

3. The Committee shall decide on the action to be taken with regard to these requests, determine where appropriate, the nature and extent of its assistance, and authorize the conclusion, on its behalf, of the necessary arrangements with the government concerned.

4. The Committee shall determine an order of priorities for its operations. It shall in so doing bear in mind the respective importance for the world cultural and natural heritage of the property requiring protection, the need to give international assistance to the property most representative of a natural environment or of the genius and the history of the peoples of the world, the urgency of the work to be done, the resources available to the states on whose territory the threatened property is situated and in particular the extent to which they are able to safeguard such property by their own means.

5. The Committee shall draw up, keep up to date and publicize a list of property for which international assistance has been granted.

6. The Committee shall decide on the use of the resources of the Fund established under Article 15 of this Convention. It shall seek ways of increasing these resources and shall take all useful steps to this end.

7. The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of this Convention. For the implementation of its programmes and projects, the Committee may call on such organizations, particularly the International Centre for the Study of the Preservation and Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN), as well as on public and private bodies and individuals.

8. Decisions of the Committee shall be taken by a majority of two-thirds of its members present and voting. A majority of the members of the Committee shall constitute a quorum.

Article 14

1. The World Heritage Committee shall be assisted by a Secretariat appointed by the Director-General of the United Nations Educational, Scientific and Cultural Organization.

2. The Director-General of the United Nations Educational, Scientific and Cultural Organization, utilizing to the fullest extent possible the services of the International Centre for the Study of the Preservation and the Restoration of Cultural Property (the Rome Centre), the International Council of Monuments and Sites (ICOMOS) and the International Union for Conservation of Nature and Natural Resources (IUCN) in their respective areas of competence and capability, shall prepare the Committee's documentation and the agenda of its meetings and shall have the responsibility for the implementation of its decisions.

IV. FUND FOR THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE

Article 15

1. A Fund for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value, called "the World Heritage Fund", is hereby established.

2. The Fund shall constitute a trust fund, in conformity with the provisions of the Financial Regulations of the United Nations Educational, Scientific and Cultural Organization.

3. The resources of the Fund shall consist of:

   (a) compulsory and voluntary contributions made by the States Parties to this Convention,

   (b) contributions, gifts or bequests which may be made by:

      (i) other States;

      (ii) the United Nations Educational, Scientific and Cultural Organization, other organizations of the United Nations system, particularly the United Nations Development Programme or other intergovernmental organizations;

      (iii) public or private bodies or individuals;

   (c) any interest due on the resources of the Fund;

   (d) funds raised by collections and receipts from events organized for the benefit of the Fund; and

   (e) all other resources authorized by the Fund's regulations, as drawn up by the World Heritage Committee.

4. Contributions to the Fund and other forms of assistance made available to the Committee may be used only for such purposes as the Committee shall define. The Committee may accept contributions to be used only for a certain programme or project, provided that the Committee shall have decided on the implementation of such programme or project. No political conditions may be attached to contributions made to the Fund.

Article 16

1. Without prejudice to any supplementary voluntary contribution, the States Parties to this Convention undertake to pay regularly, every two years, to the World Heritage Fund, contributions, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly of States Parties to the Convention, meeting during the sessions of the General Conference of the United Nations Educational, Scientific and Cultural Organization. This decision of the General Assembly requires the majority of the States Parties present and voting, which have not made the declaration referred to in paragraph 2 of this Article. In no case shall the compulsory contribution of States Parties to the Convention exceed 1% of the contribution to the Regular Budget of the United Nations Educational, Scientific and Cultural Organization.

2. However, each State referred to in Article 31 or in Article 32 of this Convention may declare, at the time of the deposit of its instruments of ratification, acceptance or accession, that it shall not be bound by the provisions of paragraph 1 of this Article.

3. A State Party to the Convention which has made the declaration referred to in paragraph 2 of this Article may at any time withdraw the said declaration by notifying the Director-General of the United Nations Educational, Scientific and Cultural Organization. However, the withdrawal of the declaration shall not take effect in regard to the compulsory contribution due by the State until the date of the subsequent General Assembly of States Parties to the Convention.

4. In order that the Committee may be able to plan its operations effectively, the contributions of States Parties to this Convention which have made the declaration referred to in paragraph 2 of this Article, shall be paid on a regular basis, at least every two years, and should not be less than the contributions which they should have paid if they had been bound by the provisions of paragraph 1 of this Article.

5. Any State Party to the Convention which is in arrears with the payment of its compulsory or voluntary contribution for the current year and the calendar year immediately preceding it shall not be eligible as a Member of the World Heritage Committee, although this provision shall not apply to the first election.

The terms of office of any such State which is already a member of the Committee shall terminate at the time of the elections provided for in Article 8, paragraph 1 of this Convention.

NOTE: The addition of the above Article implies a change in the numbering of all succeeding Articles (16-37 become 17-38), and in all Articles in which reference is made to the original Articles 16-37 (new articles: 19, 20, 36 and the concluding clause of the Convention).

Article 17

The States Parties to this Convention shall consider or encourage the establishment of national, public and private foundations or associations whose purpose is to invite donations for the protection of the cultural and natural heritage as defined in Articles 1 and 2 of this Convention.

Article 18

The States Parties to this Convention shall give their assistance to international fund-raising campaigns organized for the World Heritage Fund under the auspices of the United Nations Educational, Scientific and Cultural Organization. They shall facilitate collections made by the bodies mentioned in paragraph 3 of Article 15 for this purpose.

V. CONDITIONS AND ARRANGEMENTS FOR INTERNATIONAL ASSISTANCE

Article 19

Any State Party to this Convention may request international assistance for property forming part of the cultural or natural heritage of outstanding universal value situated within its territory. It shall submit with its request such information and documentation provided for in Article 21 as it has in its possession and as will enable the Committee to come to a decision.

Article 20

Subject to the provisions of paragraph 2 of Article 13, sub-paragraph (c) of Article 22 and Article 23, international assistance provided for by this Convention may be granted only to property forming part of the cultural and natural heritage which the World Heritage Committee has decided, or may decide, to enter in one of the lists mentioned in paragraphs 2 and 4 of Article 11.

Article 21

1. The World Heritage Committee shall define the procedure by which requests to it for international assistance shall be considered and shall specify the content of the request, which should define the operation contemplated, the work that is necessary, the expected cost thereof, the degree of urgency and the reasons why the resources of the State requesting assistance do not allow it to meet all the expenses. Such requests must be supported by experts' reports whenever possible.

2. Requests based upon disasters or natural calamities should, by reasons of the urgent work which they may involve, be given immediate, priority consideration by the Committee, which should have a reserve fund at its disposal against such contingencies.

3. Before coming to a decision, the Committee shall carry out such studies and consultations as it deems necessary.

Article 22

Assistance granted by the World Heritage Committee may take the following forms:

(a) studies concerning the artistic, scientific and technical problems raised by the protection, conservation, presentation and rehabilitation of the cultural and natural heritage, as defined in paragraphs 2 and 4 of Article 11 of this Convention;

(b) provision of experts, technicians and skilled labour to ensure that the approved work is correctly carried out;

(c) training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage;

(d) supply of equipment which the State concerned does not possess or is not in a position to acquire;

(e) low-interest or interest-free loans which might be repayable on a long-term basis;

(f) the granting, in exceptional cases and for special reasons, of non-repayable subsidies.

Article 23

The World Heritage Committee may also provide international assistance to national or regional centres for the training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage.

Article 24

International assistance on a large scale shall be preceded by detailed scientific, economic and technical studies. These studies shall draw upon the most advanced techniques for the protection, conservation, presentation and rehabilitation of the natural and cultural heritage and shall be consistent with the objectives of this Convention. The studies shall also seek means of making rational use of the resources available in the State concerned.

Article 25

As a general rule, only part of the cost of work necessary shall be borne by the international community. The contribution of the State benefiting from international assistance shall constitute a substantial share of the resources devoted to each programme or project, unless its resources do not permit this.

Article 26

The World Heritage Committee and the recipient State shall define in the agreement they conclude the conditions in which a programme or project for which international assistance under the terms of this Convention is provided, shall be carried out. It shall be the responsibility of the State receiving such international assistance to continue to protect, conserve and present the property so safeguarded, in observance of the conditions laid down by the agreement.

VI. EDUCATIONAL PROGRAMMES

Article 27

1. The States Parties to this Convention shall endeavour by all appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage defined in Articles 1 and 2 of the Convention.

2. They shall undertake to keep the public broadly informed of the dangers threatening this heritage and of activities carried on in pursuance of this Convention.

Article 28

States Parties to this Convention which receive international assistance under the Convention shall take appropriate measures to make known the importance of the property for which assistance has been received and the rôle played by such assistance.

VII. REPORTS

Article 29

1. The States Parties to this Convention shall, in the reports which they submit to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.

2. These reports shall be brought to the attention of the World Heritage Committee.

3. The Committee shall submit a report on its activities at each of the ordinary sessions of the General Conference of the United Nations Educational, Scientific and Cultural Organization.

VIII. FINAL CLAUSES

Article 30

This Convention is drawn up in Arabic, English, French, Russian and Spanish, the five texts being equally authoritative.

Article 31

1. This Convention shall be subject to ratification or acceptance by States members of the United Nations Educational, Scientific and Cultural Organization in accordance with their respective constitutional procedures.

2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 32

1. This Convention shall be open to accession by all States not members of the United Nations Educational, Scientific and Cultural Organization which are invited by the General Conference of the Organization to accede to it.

2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 33

This Convention shall enter into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments of ratification, acceptance or accession on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

Article 34

The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system:

(a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;

(b) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

Article 35

1. Each State Party to this Convention may denounce the Convention.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

3. The denunciation shall take effect twelve months after the receipt of the instrument of denunciation. It shall not affect the financial obligations of the denouncing State until the date on which the withdrawal takes effect.

Article 36

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall inform the States members of the Organization, the States not members of the Organization which are referred to in Article 32, as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, or accession provided for in Articles 31 and 32, and of the denunciations provided for in Article 35.

Article 37

1. This Convention may be revised by the General Conference of the United Nations Educational, Scientific and Cultural Organization. Any such revision shall, however, bind only the States which shall become Parties to the revising convention.

2. If the General Conference should adopt a new convention revising this Convention in whole or in part, then, unless the new convention otherwise provides, this Convention shall cease to be open to ratification, acceptance or accession, as from the date on which the new revising convention enters into force.

Article 38

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Done in Paris, this twenty-third day of November 1972, in two authentic copies bearing the signature of the President of the seventeenth session of the General Conference and of the Director-General of the United Nations Educational, Scientific and Cultural Organization, which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in Articles 31 and 32 as well as to the United Nations.

APPENDIX B

UNESCO RECOMMENDATION CONCERNING THE PROTECTION, AT A NATIONAL LEVEL, OF THE CULTURAL AND NATURAL HERITAGE*
[Adopted on November 16, 1972]

RECOMMENDATION CONCERNING THE PROTECTION, AT NATIONAL LEVEL, OF THE CULTURAL AND NATURAL HERITAGE

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris, at its seventeenth session, from to 1972,

Considering that, in a society where living conditions are changing at an accelerated pace, it is essential for man's equilibrium and development to preserve for him a fitting setting in which to live, where he will remain in contact with nature and the evidences of civilization bequeathed by past generations, and that, to this end, it is appropriate to give the cultural and natural heritage an active function in community life and to integrate into an overall policy the achievements of our time, the values of the past and the beauty of nature,

Considering that such integration into social and economic life must be one of the fundamental aspects of regional development and national planning at every level,

Considering that particularly serious dangers engendered by new phenomena peculiar to our times are threatening the cultural and natural heritage, which constitute an essential feature of mankind's heritage and a source of enrichment and harmonious development for present and future civilization,

Considering that each item of the cultural and natural heritage is unique and that the disappearance of any one item constitutes a definite loss and an irreversible impoverishment of that heritage,

Considering that every country in whose territory there are components of the cultural and natural heritage has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations,

Considering that the study, knowledge and protection of the cultural and natural heritage in the various countries of the world are conducive to mutual understanding among the peoples,

Considering that the cultural and natural heritage forms an harmonious whole, the components of which are indissociable,

Considering that a policy for the protection of the cultural and natural heritage, thought out and formulated in common, is likely to bring about a continuing interaction among Member States and to have a decisive effect on the activities of the United Nations Educational, Scientific and Cultural Organization in this field,

Noting that the General Conference has already adopted international instruments for the protection of the cultural and natural heritage, such as the Recommendation on International Principles Applicable to Archaeological Excavations (1956), the Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites (1962) and the Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (1968),

Desiring to supplement and extend the application of the standards and principles laid down in such recommendations,

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*[Reproduced from UNESCO Document 17 C/107 of November 15, 1972. [The Recommendation was unanimously adopted by the Seventeenth Session of the UNESCO General Conference (October 17-November 18, 1972).]

Having before it proposals concerning the protection of the cultural and natural heritage, which question appears on the agenda of the session as item

Having decided, at its sixteenth session, that this question should be made the subject of international regulations, to take the form of a recommendation to Member States,

Adopts this day of 1972, this Recommendation.

I. DEFINITIONS OF THE CULTURAL AND THE NATURAL HERITAGE

1. For the purposes of this Recommendation, the following shall be considered as "cultural heritage":

monuments: architectural works, works of monumental sculpture and painting, including cave dwellings and inscriptions, and elements, groups of elements or structures of special value from the point of view of archaeology, history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of special value from the point of view of history, art or science;

sites: topographical areas, the combined works of man and of nature, which are of special value by reason of their beauty or their interest from the archaeological, historical, ethnological or anthropological points of view.

2. For the purposes of this Recommendation, the following shall be considered as "natural heritage":

natural features consisting of physical and biological formations or groups of such formations, which are of special value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of species of animals and plants, valuable or threatened, of special value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of special value from the point of view of science, conservation or natural beauty, or in their relation to the combined works of man and of nature.

II. NATIONAL POLICY

3. In conformity with their jurisdictional and legislative requirements, each State should formulate, develop and apply as far as possible a policy whose principal aim should be to co-ordinate and make use of all scientific, technical, cultural and other resources available to secure the effective protection, conservation and presentation of the cultural and natural heritage.

III. GENERAL PRINCIPLES

4. The cultural and natural heritage represents wealth, the protection, conservation and presentation of which impose responsibilities on the States in whose territory it is situated, both vis-a-vis their own nationals and vis-a-vis the international community as a whole; Member States should take such action as may be necessary to meet these responsibilities.

5. The cultural or natural heritage should be considered in its entirety as a homogeneous whole, comprising not only works of great intrinsic value, but also more modest items that have, with the passage of time, acquired cultural or natural value.

6. None of these works and none of these items should, as a general rule, be dissociated from its environment.

7. As the ultimate purpose of protecting, conserving and presenting the cultural and natural heritage is the development of man, Member States should, as far as possible, direct their work

in this field in such a way that the cultural and natural heritage may no longer be regarded as a check on national development but as a determining factor in such development.

8. The protection, conservation and effective presentation of the cultural and natural heritage should be considered as one of the essential aspects of regional development plans, and planning in general, at the national, regional or local level.

9. An active policy for the conservation of the cultural and natural heritage and for giving it a place in community life should be developed. Member States should arrange for concerted action by all the public and private services concerned, with a view to drawing up and applying such a policy. Preventive and corrective measures relating to the cultural and natural heritage should be supplemented by others, designed to give each of the components of this heritage a function which will make it a part of the nation's social, economic, scientific and cultural life for the present and future, compatible with the cultural or natural character of the item in question. Action for the protection of the cultural and natural heritage should take advantage of scientific and technical advances in all branches of study involved in the protection, conservation and presentation of the cultural or natural heritage.

10. Increasingly significant financial resources should, as far as possible, be made available by the public authorities for the safeguarding and presentation of the cultural and natural heritage.

11. The general public of the area should be associated with the measures to be taken for protection and conservation and should be called on for suggestions and help, with particular reference to regard for and surveillance of the cultural and natural heritage. Consideration might also be given to the possibility of financial support from the private sector.

IV. ORGANIZATION OF SERVICES

12. Although their diversity makes it impossible for all Member States to adopt a standard form of organization, certain common criteria should nevertheless be observed.

Specialized public services

13. With due regard for the conditions appropriate to each country, Member States should set up in their territory, wherever they do not already exist, one or more specialized public services to be responsible for the efficient discharge of the following functions:

(a) developing and putting into effect measures of all kinds designed for the protection, conservation and presentation of the country's cultural and natural heritage and for making it an active factor in the life of the community; and primarily, compiling an inventory of the cultural and natural heritage and establishing appropriate documentation services;

(b) training and recruiting scientific, technical and administrative staff as required, to be responsible for working out identification, protection, conservation and integration programmes and directing their execution;

(c) organizing close co-operation among specialists of various disciplines to study the technical conservation problems of the cultural and natural heritage;

(d) using or creating laboratories for the study of all the scientific problems arising in connexion with the conservation of the cultural and natural heritage;

(e) ensuring that owners or tenants carry out the necessary restoration work and provide for the upkeep of the buildings in the best artistic and technical conditions.

Advisory bodies

14. The specialized services should work with bodies of experts responsible for giving advice on the preparation of measures relating to the cultural and natural heritage. Such bodies should include experts, representatives of the major preservation societies, and representatives of the administrations concerned.

Co-operation among the various bodies

15. The specialized services dealing with the protection, conservation and presentation of the cultural and natural heritage should carry out their work in liaison and on an equal footing with other public services, more particularly those responsible for regional development planning, major public works, the environment, and economic and social planning. Tourist development programmes involving the cultural and natural heritage should be carefully drawn up so as not to impair the intrinsic character and importance of that heritage, and steps should be taken to establish appropriate liaison between the authorities concerned.

16. Continuing co-operation at all levels should be organized among the specialized services whenever large-scale projects are involved, and appropriate co-ordinating arrangements made so that decisions may be taken in concert, taking account of the various interests involved. Provision should be made for joint planning from the start of the studies and machinery developed for the settlement of conflicts.

Competence of central, federal, regional and local bodies

17. Considering the fact that the problems involved in the protection, conservation and presentation of the cultural and natural heritage are difficult to deal with, calling for special knowledge and sometimes entailing hard choices, and that there are not enough specialized staff available in this field, responsibilities in all matters concerning the devising and execution of protective measures in general should be divided among central or federal and regional or local authorities on the basis of a judicious balance adapted to the situation that exists in each State.

V. PROTECTIVE MEASURES

18. Member States should, as far as possible, take all necessary scientific, technical and administrative, legal and financial measures to ensure the protection of the cultural and natural heritage in their territories. Such measures should be determined in accordance with the legislation and organization of the State.

Scientific and technical measures

19. Member States should arrange for careful and constant maintenance of their cultural and natural heritage in order to avoid having to undertake the costly operations necessitated by its deterioration; for this purpose, they should provide for regular surveillance of the components of their heritage by means of periodic inspections. They should also draw up carefully planned programmes of conservation and presentation work, gradually taking in all the cultural and natural heritage, depending upon the scientific, technical and financial means at their disposal.

20. Any work required should be preceded and accompanied by such thorough studies as its importance may necessitate. Such studies should be carried out in co-operation with or by specialists in all related fields.

21. Member States should investigate effective methods of affording added protection to those components of the cultural and natural heritage that are threatened by unusually serious dangers. Such methods should take account of the interrelated scientific, technical and artistic problems involved and make it possible to determine the treatment to be applied.

22. These components of the cultural and natural heritage should, in addition, be restored, wherever appropriate, to their former use or given a new and more suitable function, provided that their cultural value is not thereby diminished.

23. Any work done on the cultural heritage should aim at preserving its traditional appearance, and protecting it from any new construction or remodelling which might impair the relations of mass or colour between it and its surroundings.

24. The harmony established by time and man between a monument and its surroundings is of the greatest importance and should not, as a general rule, be disturbed or destroyed. The isolation of a monument by demolishing its surroundings should not, as a general rule, be authorized; nor should the moving of a monument be contemplated save as an exceptional means of dealing with a problem, justified by pressing considerations.

25. Member States should take measures to protect their cultural and natural heritage against the possible harmful effects of the technological developments characteristic of modern civilization. Such measures should be designed to counter the effects of shocks and vibrations caused by machines and vehicles. Measures should also be taken to prevent pollution and guard against natural disasters and calamities, and to provide for the repair of damage to the cultural and natural heritage.

26. Since the circumstances governing the rehabilitation of groups of buildings are not everywhere identical, Member States should provide for a social science inquiry in appropriate cases, in order to ascertain precisely what are the social and cultural needs of the community in which the group of buildings concerned is situated. Any rehabilitation operation should pay special attention to enabling man to work, to develop and to achieve fulfilment in the restored setting.

27. Member States should undertake studies and research on the geology and ecology of items of the natural heritage, such as park, wildlife, refuge or recreation areas, or other equivalent reserves, in order to appreciate their scientific value, to determine the impact of visitor use and to monitor interrelationships so as to avoid serious damage to the heritage and to provide adequate background for the management of the fauna and flora.

28. Member States should keep abreast of advances in transportation, communication, audio-visual techniques, automatic data-processing and other appropriate technology, and of cultural and recreational trends, so that the best possible facilities and services can be provided for scientific study and the enjoyment of the public, appropriate to the purpose of each area, without deterioration of the natural resources.

Administrative measures

29. Each Member State should draw up, as soon as possible, an inventory for the protection of its cultural and natural heritage, including items which, without being of outstanding importance, are inseparable from their environment and contribute to its character.

30. The information obtained by such surveys of the cultural and natural heritage should be collected in a suitable form and regularly brought up to date.

31. To ensure that the cultural and natural heritage is effectively recognized at all levels of planning, Member States should prepare maps and the fullest possible documentation covering the cultural and natural property in question.

32. Member States should give thought to finding suitable uses for groups of historic buildings no longer serving their original purpose.

33. A plan should be prepared for the protection, conservation, presentation and rehabilitation of groups of buildings of historic and artistic interest. It should include peripheral protection belts, lay down the conditions for land use, and specify the buildings to be preserved and the conditions for their preservation. This plan should be incorporated into the overall town and country planning policy for the areas concerned.

34. Rehabilitation plans should specify the uses to which historic buildings are to be put, and the links there are to be between the rehabilitation area and the surrounding urban development. When the designation of a rehabilitation area is under consideration, the local authorities and representatives of the residents of the area should be consulted.

35. Any work that might result in changing the existing state of the buildings in a protected area should be subject to prior authorization by the town and country planning authorities, on the advice of the specialized services responsible for the protection of the cultural and natural heritage.

36. Internal alterations to groups of buildings and the installation of modern conveniences should be allowed if they are needed for the well-being of their occupants and provided they do not drastically alter the real characteristic features of ancient dwellings.

37. Member States should develop short- and long-range plans, based on inventories of their natural heritage, to achieve a system of conservation to meet the needs of their countries.

38. Member States should provide an advisory service to guide non-governmental organizations and owners of land on national conservation policies consistent with the productive use of the land.

39. Member States should develop policies and programmes for restoration of natural areas made derelict by industry, or otherwise despoiled by man's activities.

Legal measures

40. Depending upon their importance, the components of the cultural and natural heritage should be protected, individually or collectively, by legislation or regulations in conformity with the competence and the legal procedures of each country.

41. Measures for protection should be supplemented to the extent necessary by new provisions to promote the conservation of the cultural or natural heritage and to facilitate the presentation of its components. To that end, enforcement of protective measures should apply to individual owners and to public authorities when they are the owners of components of the cultural and natural heritage.

42. No new building should be erected, and no demolition, transformation, modification or deforestation carried out, on any property situated on or in the vicinity of a protected site, if it is likely to affect its appearance, without authorization by the specialized services.

43. Planning legislation to permit industrial development, or public and private works should take into account existing legislation on conservation. The authorities responsible for the protection of the cultural and natural heritage might take steps to expedite the necessary conservation work, either by making financial assistance available to the owner, or by acting in the owner's place and exercising their powers to have the work done, with the possibility of their obtaining reimbursement of that share of the costs which the owner would normally have paid.

44. Where required for the preservation of the property, the public authorities might be empowered to expropriate a protected building or natural site subject to the terms and conditions of domestic legislation.

45. Member States should establish regulations to control bill-posting, neon signs and other kinds of advertisement, commercial signs, camping, the erection of poles, pylons and electricity or telephone cables, the placing of television aerials, all types of vehicular traffic and parking, the placing of indicator panels, street furniture, etc., and, in general, everything connected with the equipment or occupation of property forming part of the cultural and natural heritage.

46. The effects of the measures taken to protect any element of the cultural or natural heritage should continue regardless of changes of ownership. If a protected building or natural site is sold, the purchaser should be informed that it is under protection.

47. Penalties or administrative sanctions should be applicable, in accordance with the laws and constitutional competence of each State, to anyone who wilfully destroys, mutilates or defaces a protected monument, group of buildings or site, or one which is of archaeological, historical or artistic interest. In addition, equipment used in illicit excavation might be subject to confiscation.

48. Penalties or administrative sanctions should be imposed upon those responsible for any other action detrimental to the protection, conservation or presentation of a protected component of the cultural or natural heritage, and should include provision for the restoration of an affected site to its original state in accordance with established scientific and technical standards.

Financial measures

49. Central and local authorities should, as far as possible, appropriate, in their budgets, a certain percentage of funds, proportionate to the importance of the protected property forming part of their cultural or natural heritage, for the purposes of maintaining, conserving and presenting protected property of which they are the owners, and of contributing financially to such work carried out on other protected property by the owners, whether public bodies or private persons.

50. The expenditure incurred in protecting, conserving and presenting items of the privately-owned cultural and natural heritage should, so far as possible, be borne by their owners or users.

51. Tax concessions on such expenditures, or grants or loans on favourable terms, could be granted to private owners of protected properties, on condition that they carry out work for the protection, conservation, presentation and rehabilitation of their properties in accordance with approved standards.

52. Consideration should be given to indemnifying, if necessary, owners of protected cultural and natural areas for losses they might suffer as a consequence of protective programmes.

53. The financial advantages accorded to private owners should, where appropriate, be dependent on their observance of certain conditions laid down for the benefit of the public, such as their allowing access to parks, gardens and sites, tours through all or parts of natural sites, monuments or groups of buildings, the taking of photographs, etc.

54. Special funds should be set aside in the budgets of public authorities for the protection of the cultural and natural heritage endangered by large-scale public or private works.

55. To increase the financial resources available to them, Member States may set up one or more "Cultural and Natural Heritage Funds", as legally established public agencies, entitled to receive private gifts, donations and bequests, particularly from industrial and commercial firms.

56. Tax concessions could also be granted to those making gifts, donations or bequests for the acquisition, restoration or maintenance of specific components of the cultural and natural heritage.

57. In order to facilitate operations for the rehabilitation of the natural and cultural heritage, Member States might make special arrangements, particularly by way of loans for renovation and restoration work, and might also make the necessary regulations to avoid price rises caused by real-estate speculation in the areas under consideration.

58. To avoid hardship to the poorer inhabitants consequent on their having to move from rehabilitated buildings or groups of buildings, compensation for rises in rent might be contemplated so as to enable them to keep their accommodation. Such compensation should be temporary and determined on the basis of the income of the parties concerned, so as to enable them to meet the increased costs occasioned by the work carried out.

59. Member States might facilitate the financing of work of any description for the benefit of the cultural and natural heritage, by instituting "Loan Funds", supported by public institutions and private credit establishments, which would be responsible for granting loans to owners at low interest rates and with repayment spread out over a long period.

VI. EDUCATIONAL AND CULTURAL ACTION

60. Universities, educational establishments at all levels and life-long education establishments should organize regular courses, lectures, seminars, etc., on the history of art, architecture, the environment and town planning.

61. Member States should undertake educational campaigns to arouse widespread public interest in, and respect for, the cultural and natural heritage. Continuing efforts should be made to inform the public about what is being and can be done to protect the cultural or natural heritage and to inculcate appreciation and respect for the values it enshrines. For this purpose, all media of information should be employed as required.

62. Without overlooking the great economic and social value of the cultural and natural heritage, measures should be taken to promote and reinforce the eminent cultural and educational value of that heritage, furnishing as it does the fundamental motive for protecting, conserving and presenting it.

63. All efforts on behalf of components of the cultural and natural heritage should take account of the cultural and educational value inherent in them as representative of an environment, a form of architecture or urban design commensurate with man and on his scale.

64. Voluntary organizations should be set up to encourage national and local authorities to make full use of their powers with regard to protection, to afford them support and, if necessary, to obtain funds for them; these bodies should keep in touch with local historical societies, amenity improvement societies, local development committees and agencies concerned with tourism, etc., and might also organize visits to, and guided tours of, different items of the cultural and natural heritage for their members.

65. Information centres, museums or exhibitions might be set up to explain the work being carried out on components of the cultural and natural heritage scheduled for rehabilitation.

VII. INTERNATIONAL CO-OPERATION

66. Member States should co-operate with regard to the protection, conservation and presentation of the cultural and natural heritage, seeking aid, if it seems desirable, from international organizations, both intergovernmental and non-governmental. Such multilateral or bilateral co-operation should be carefully co-ordinated and should take the form of measures such as the following:

(a) exchange of information and of scientific and technical publications;

(b) organization of seminars and working parties on particular subjects;

(c) provision of study and travel fellowships, and of scientific, technical and administrative staff, and equipment;

(d) provision of facilities for scientific and technical training abroad, by allowing young research workers and technicians to take part in architectural projects, archaeological excavations and the conservation of natural sites;

(e) co-ordination, within a group of Member States, of large-scale projects involving conservation, excavations, restoration and rehabilitation work, with the object of making the experience gained generally available.

APPENDIX C

WHC/2/Revised
December 1988

UNITED NATIONS EDUCATIONAL, SCIENTIFIC
AND CULTURAL ORGANIZATION

INTERGOVERNMENTAL COMMITTEE FOR THE PROTECTION
OF THE WORLD CULTURAL AND NATURAL HERITAGE

Operational Guidelines for the implementation of the World Heritage Convention

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INTRODUCTION

1. The cultural heritage and the natural heritage are among the priceless and irreplaceable possessions, not only of each nation, but of mankind as a whole. The loss, through deterioration or disappearance, of any of these most prized possessions constitutes an impoverishment of the heritage of all the peoples in the world. Parts of that heritage, because of their exceptional qualities, can be considered to be of outstanding universal value and as such worthy of special protection against the dangers which increasingly threaten them.

2. In an attempt to remedy this perilous situation and to ensure, as far as possible, the proper identification, protection, conservation and presentation of the world's irreplaceable heritage, the Member States of Unesco adopted in 1972 the Convention concerning the Protection of the World Cultural and Natural Heritage, hereinafter referred to as "the Convention". The Convention complements heritage conservation programmes at the national level and provides for the establishment of a "World Heritage Committee" and a "World Heritage Fund". Both the Committee and the Fund have been in operation since 1976.

3. The World Heritage Committee, hereinafter referred to as "the Committee", has three essential functions:

(i) to identify, on the basis of nominations submitted by States Parties, cultural and natural properties of outstanding universal value which are to be protected under the Convention and to list those properties on the "World Heritage List";

(ii) to decide which properties included in the World Heritage List are to be inscribed on the "List of World Heritage in Danger" (only properties which require for their conservation major operations and for which assistance has been requested under the Convention can be considered);

(iii) to determine in what way and under what conditions the resources in the World Heritage Fund can most advantageously be used to assist States Parties, as far as possible, in the Protection of their properties of outstanding universal value.

4. The operational guidelines which are set out below have been prepared for the purpose of informing States Parties to the Convention of the principles which guide the work of the Committee in establishing the World Heritage List and the List of World Heritage in Danger and in granting international assistance under the World Heritage Fund. These guidelines also provide details on other questions, mainly of a procedural nature, which relate to the implementation of the Convention.

5. The Committee is fully aware that its decisions must be based on considerations which are as objective and scientific as possible, and that any appraisal made on its behalf must be thoroughly and responsibly carried out. It recognizes that objective and well considered decisions depend upon:

- carefully prepared criteria,
- thorough procedures,
- evaluation by qualified experts and the use of expert referees.

The operational guidelines have been prepared with these objectives in mind.

I. ESTABLISHMENT OF THE WORLD HERITAGE LIST

A. General Principles

6. The Committee agreed that the following general principles would guide its work in establishing the World Heritage List:

(i) The Convention provides for the protection of those cultural and natural properties (1) deemed to be of outstanding universal value. It is not intended to provide for the protection of all properties of great interest, importance or value, but only for a select list of the most outstanding of these from an international viewpoint. The outstanding universal value of cultural and natural properties is defined by Articles 1 and 2 of the Convention. These definitions are interpreted by the Committee by using two sets of criteria: one set for cultural property and another set for natural property. The criteria and the conditions of authenticity or integrity adopted by the Committee for this purpose are set out in paragraphs 24 and 36 below.

(ii) The criteria for the inclusion of properties in the World Heritage List have been elaborated to enable the Committee to act with full independence in evaluating the intrinsic merit of property, without regard to any other consideration (including the need for technical co-operation support).

(iii) Efforts will be made to maintain a reasonable balance between the numbers of cultural heritage and the natural heritage properties entered on the List.

(iv) Cultural and natural properties are included in the World Heritage List according to a gradual process and no formal limit is imposed either on the total number of properties included in the List or on the number of properties any individual State can submit at successive stages for inclusion therein. In view of the difficulty in handling the large numbers of cultural nominations now being received, however, the Committee invites States Parties to consider whether their cultural heritage is already well represented on the List and if so to slow down voluntarily their rate of submission of further nominations. This would help in making it possible for the List to become more universally representative. By the same token, the Committee calls on States Parties whose cultural heritage is not yet adequately represented on the List and who might need assistance in preparing nominations of cultural properties to seek such assistance from the Committee.

(v) When a property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List, the procedure concerning the possible deletion from the List will be applied. This procedure is set out in paragraphs 37 to 45 below.

B. Indications to States Parties concerning nominations to the List

7. The Committee requests each State Party to submit to it a tentative list of properties which it intends to nominate for inscription to the World Heritage List during the following five to ten years. This tentative list will constitute the "inventory" (provided for in Article 11

(1) cf. definitions of "cultural heritage" and "natural heritage" in articles 1 and 2 of the Convention set out in paragraphs 23 and 35 below.

of the Convention) of the cultural and natural properties situated within the territory of each State Party and which it considers suitable for inclusion in the World Heritage List. The purpose of these tentative lists is to enable the Committee to evaluate within the widest possible context the "outstanding universal value" of each property nominated to the List. The Committee hopes that States Parties that have not yet submitted a tentative list will do so as early as possible. States Parties are reminded of the Committee's earlier decision not to consider cultural nominations unless such a list of cultural properties has been submitted. As concerns natural nominations, priority will be given to the consideration of nominations from States Parties which have submitted a tentative list, unless the State party has given a specific explanation why it cannot be provided.

8. In order to facilitate the work of all concerned, the Committee requests States Parties to submit their tentative lists in a standard format (see Annex I) which provides for information under the following headings:

- the name of the property;
- the geographical location of the property;
- a brief description of the property;
- a justification of the "outstanding universal value" of the property in accordance with the criteria and conditions of authenticity or integrity set out in paragraphs 24 and 36 below, taking account of similar properties both inside and outside the boundaries of the State concerned.

Natural properties should be grouped according to biogeographical provinces and cultural properties should be grouped according to cultural periods or areas. The order in which the properties listed would be presented for inscription should also be indicated, if possible.

9. The fundamental principle stipulated in the Convention is that properties nominated must be of outstanding universal value and the properties nominated therefore should be carefully selected. The criteria and conditions of authenticity or integrity against which the Committee will evaluate properties are set out in paragraphs 24 and 36 below. Within a given geo-cultural region, it may be desirable for States Parties to make comparative assessments for the harmonization of tentative lists and nominations of cultural properties. Support for the organization of meetings for this purpose may be requested under the World Heritage Fund.

10. Each nomination should be presented in the form of a well-argued case. It should be submitted on the appropriate form (see paragraph 52 below) and should provide all the information to demonstrate that the property nominated is truly of "outstanding universal value". Each nomination should be supported by all the necessary documentation, including suitable slides and maps and other material. With regard to cultural properties, States Parties are invited to attach to the nomination forms a brief analysis of references in world literature (e.g. reference works such as general or specialized encyclopaedias, histories of art or architecture, records of voyages and explorations, scientific reports, guidebooks, etc.) along with a comprehensive bibliography. With regard to newly-discovered properties, evidence of the attention which the discovery has received internationally would be equally helpful.

11. Under the "Juridical data" section of the nomination form States Parties should provide, in addition to the legal texts protecting the property being nominated, an explanation of the way in which these laws actually operate. Such an analysis is preferable to a mere enumeration or compilation of the legal texts themselves.

12. When nominating properties belonging to certain well-represented categories of cultural property the nominating State Party should provide a comparative evaluation of the

property in relation to other properties of a similar type, as already required in paragraph 7 with regard to the tentative lists.

13. In certain cases it may be necessary for States Parties to consult the Secretariat and the specialized NGO concerned informally before submitting nomination forms. The Committee reminds States Parties that assistance for the purpose of preparing comprehensive and sound nominations is available to them at their request under the World Heritage Fund.

14. In all cases, so as to maintain the objectivity of the evaluation process and to avoid possible embarrassment to those concerned, States Parties should refrain from giving undue publicity to the fact that a property has been nominated for inscription pending the final decision of the Committee on the nomination in question.

15. In nominating properties to the List, States Parties are invited to keep in mind the desirability of achieving a reasonable balance between the numbers of cultural heritage and natural heritage properties included in the World Heritage List.

16. In cases where a cultural and/or natural property which fulfils the criteria adopted by the Committee extends beyond national borders the States Parties concerned are encouraged to submit a joint nomination.

17. Whenever necessary for the proper conservation of a cultural or natural property nominated, an adequate "buffer zone" around a property should be provided and should be afforded the necessary protection. A buffer zone can be defined as an area surrounding the property which has restrictions placed on its use to give an added layer of protection; the area constituting the buffer zone should be determined in each case through technical studies. Details on the size, characteristics and authorized uses of a buffer zone, as well as a map indicating its precise boundaries, should be provided in the nomination file relating to the property in question.

18. In keeping with the spirit of the Convention, States Parties should as far as possible endeavour to include in their submissions properties which derive their outstanding universal value from a particularly significant combination of cultural and natural features.

19. States Parties may propose in a single nomination a series of cultural or natural properties in different geographical locations, provided that they are related because they belong to:

(i) the same historico-cultural group or

(ii) the same type of property which is characteristic of the geographical zone

(iii) the same physiographic formation, the same biogeographic province, or the same ecosystem type

and provided that it is the series as such, and not its components taken individually, which is of outstanding universal value.

20. When a series of cultural or natural properties, as defined in paragraph 19 above, consists of properties situated in the territory of more than one State Party to the Convention, the States Parties concerned are encouraged to jointly submit a single nomination.

21. States Parties are encouraged to prepare plans for the management of each natural site nominated and for the safeguarding of each cultural property nominated. All information concerning these plans should be made available when technical co-operation is requested.

22. Where the intrinsic qualities of a property nominated are threatened by action of man and yet meet the criteria and the conditions of authenticity or integrity set out in paragraphs 24 and 36, an action plan outlining the corrective measures required should be submitted with the nomination file. Should the corrective measures submitted by the nominating State not be taken within the time proposed by the State, the property will be considered by the Committee for delisting in accordance with the procedure adopted by the Committee.

C. Criteria for the inclusion of cultural properties in the World Heritage List

23. The criteria for the inclusion of cultural properties in the World Heritage List should always be seen in relation to one another and should be considered in the context of the definition set out in Article 1 of the Convention which is reproduced below:

> "monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."

24. A monument, group of buildings or site - as defined above - which is nominated for inclusion in the World Heritage List will be considered to be of outstanding universal value for the purposes of the Convention when the Committee finds that it meets one or more of the following criteria and the test of authenticity. Each property nominated should therefore:

(a) (i) represent a unique artistic achievement, a masterpiece of the creative genius; or

(ii) have exerted great influence, over a span of time or within a cultural area of the world, on developments in architecture, monumental arts or town-planning and landscaping; or

(iii) bear a unique or at least exceptional testimony to a civilization which has disappeared; or

(iv) be an outstanding example of a type of building or architectural ensemble which illustrates a significant stage in history; or

(v) be an outstanding example of a traditional human settlement which is representative of a culture and which has become vulnerable under the impact of irreversible change; or

(vi) be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance (the Committee considers that this criterion should justify inclusion in the List only in exceptional circumstances or in conjunction with other criteria);

and

(b) (i) meet the test of authenticity in design, materials, workmanship or setting (the Committee stressed that reconstruction is only acceptable if it is carried out on the basis of complete and detailed documentation on the original and to no extent on conjecture).

(ii) have adequate legal protection and management mechanisms to ensure the conservation of the nominated cultural property. The existence of protective legislation at the national, provincial or municipal level is therefore essential and must be stated clearly on the nomination form. Assurances of the effective implementation of these laws are also expected. Furthermore, in order to preserve the integrity of cultural sites, particularly those open to large numbers of visitors, the State Party concerned should be able to provide evidence of suitable administrative arrangements to cover the management of the property, its conservation and its accessibility to the public.

25. Nominations of immovable property which are likely to become movable will not be considered.

26. With respect to groups of urban buildings, the Committee has furthermore adopted the following guidelines concerning their inclusion in the World Heritage List.

27. Groups of urban buildings eligible for inclusion in the World Heritage List fall into three main categories, namely:

(i) towns which are no longer inhabited but which provide unchanged archaeological evidence of the past; these generally satisfy the criterion of authenticity and their state of conservation can be relatively easily controlled;

(ii) historic towns which are still inhabited and which, by their very nature, have developed and will continue to develop under the influence of socio-economic and cultural change, a situation that renders the assessment of their authenticity more difficult and any conservation policy more problematical;

(iii) new towns of the twentieth century which paradoxically have something in common with both the aforementioned categories: while their original urban organization is clearly recognizable and their authenticity is undeniable, their future is unclear because their development is largely uncontrollable.

28. The evaluation of towns that are no longer inhabited does not raise any special difficulties other than those related to archaeological sites in general: the criteria which call for uniqueness or exemplary character have led to the choice of groups of buildings noteworthy for their purity of style, for the concentrations of monuments they contain and sometimes for their important historical associations. It is important for urban archaeological sites to be listed as integral units. A cluster of monuments or a small group of buildings is not adequate to suggest the multiple and complex functions of a city which has disappeared; remains of such a city should be preserved in their entirety together with their natural surroundings whenever possible.

29. In the case of inhabited historic towns the difficulties are numerous, largely owing to the fragility of their urban fabric (which has in many cases been seriously disrupted since the advent of the industrial era) and the runaway speed with which their surroundings have been urbanized. To qualify for inclusion, towns should compel recognition because of their architectural interest and should not be considered only on the intellectual grounds of the role they may have played in the past or their value as historical symbols under criterion (vi) for the inclusion of cultural properties in the World Heritage List (see paragraph 24 above). To be eligible for inclusion in the List, the spatial organization, structure, materials,

forms and, where possible, functions of a group of buildings should essentially reflect the civilization or succession of civilizations which have prompted the nomination of the property. Four categories can be distinguished:

(i) Towns which are typical of a specific period or culture, which have been almost wholly preserved and which have remained largely unaffected by subsequent developments. Here the property to be listed is the entire town together with its surroundings, which must also be protected;

(ii) Towns that have evolved along characteristic lines and have preserved, sometimes in the midst of exceptional natural surroundings, spatial arrangements and structures that are typical of the successive stages in their history. Here the clearly defined historic part takes precedence over the contemporary environment;

(iii) "Historic centres" that cover exactly the same area as ancient towns and are now enclosed within modern cities. Here it is necessary to determine the precise limits of the property in its widest historical dimensions and to make appropriate provision for its immediate surroundings;

(iv) Sectors, areas or isolated units which, even in the residual state in which they have survived, provide coherent evidence of the character of a historic town which has disappeared. In such cases surviving areas and buildings should bear sufficient testimony to the former whole.

30. Historic centres and historic areas should be listed only where they contain a large number of ancient buildings of monumental importance which provide a direct indication of the characteristic features of a town of exceptional interest. Nominations of several isolated and unrelated buildings which allegedly represent, in themselves, a town whose urban fabric has ceased to be discernible, should not be encouraged.

31. However, nominations could be made regarding properties that occupy a limited space but have had a major influence on the history of town planning. In such cases, the nomination should make it clear that it is the monumental group that is to be listed and that the town is mentioned only incidentally as the place where the property is located. Similarly, if a building of clearly universal significance is located in severely degraded or insufficiently representative urban surroundings, it should, of course, be listed without any special reference to the town.

32. It is difficult to assess the quality of new towns of the twentieth century. History alone will tell which of them will best serve as examples of contemporary town planning. The examination of the files on these towns should be deferred, save under exceptional circumstances.

33. Under present conditions, preference should be given to the inclusion in the World Heritage List of small or medium-sized urban areas which are in a position to manage any potential growth, rather than the great metropolises, on which sufficiently complete information and documentation cannot readily be provided that would serve as a satisfactory basis for their inclusion in their entirety.In view of the effects which the entry of a town in the World Heritage List could have on its future, such entries should be exceptional. Inclusion in the List implies that legislative and administrative measures have already been taken to ensure the protection of the group of buildings and its environment. Informed awareness on the part of the population concerned, without whose active participation any conservation scheme would be impractical, is also essential.

34. With respect to rural landscapes, traditional villages and contemporary architecture, the Committee has recommended further study so as to help develop guidelines for

determining which properties in these categories may be considered of "outstanding universal value".

D. Criteria for the inclusion of natural properties in the World Heritage List

35. In accordance with Article 2 of the Convention, the following is considered as "natural heritage":

> "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
>
> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."

36. A natural heritage property - as defined above - which is submitted for inclusion in the World Heritage List will be considered to be of outstanding universal value for the purposes of the Convention when the Committee finds that it meets one or more of the following criteria and fulfils the conditions of integrity set out below. Sites nominated should therefore:

(a) (i) be outstanding examples representing the major stages of the earth's evolutionary history; or

(ii) be outstanding examples representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment; as distinct from the periods of the earth's development, this focuses upon ongoing processes in the development of communities of plants and animals, landforms and marine areas and fresh water bodies; or

(iii) contain superlative natural phenomena, formations or features, for instance, outstanding examples of the most important ecosystems, areas of exceptional natural beauty or exceptional combinations of natural and cultural elements; or

(iv) contain the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation still survive;

and

(b) also fulfil the following conditions of integrity:

(i) the sites described in 36 (a) (i) should contain all or most of the key interrelated and interdependent elements in their natural relationships; for example, an "ice age" area would be expected to include the snow field, the glacier itself and samples of cutting patterns, deposition and colonization (striations, moraines, pioneer stages of plant succession, etc.).

(ii) The sites described in 36 (a) (ii) should have sufficient size and contain the necessary elements to demonstrate the key aspects of the

process and to be self-perpetuating. For example, an area of tropical rain forest may be expected to include some variation in elevation above sea level, changes in topography and soil types, river banks or oxbow lakes, to demonstrate the diversity and complexity of the system.

(iii) The sites described in 36 (a) (iii) should contain those ecosystem components required for the continuity of the species or of the other natural elements or processes to be conserved. This will vary according to individual cases; for example, the protected area of a waterfall would include all, or as much as possible, of the supporting catchment area; or a coral reef area would include the zone necessary to control siltation or pollution through the stream flow or ocean currents which provide its nutrients.

(iv) The area containing threatened species as described in 36 (a) (iv) should be of sufficient size and contain necessary habitat requirements for the survival of the species.

(v) In the case of migratory species, seasonable sites necessary for their survival, wherever they are located, should be adequately protected. Agreements made in this connection, either through adherence to international conventions or in the form of other multilateral or bilateral arrangements would provide this assurance.

(vi) The sites described in paragraph 36 (a) should have adequate long-term legislative, regulatory or institutional protection. They may coincide with or constitute part of existing or proposed protected areas such as national parks. If not already available, a management plan should be prepared and implemented to ensure the integrity of the natural values of the site in accordance with the Convention.

E. Procedure for the eventual deletion of properties from the World Heritage List

37. The Committee adopted the following procedure for the deletion of properties from the World Heritage List in cases:

(a) where the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List; and

(b) where the intrinsic qualities of a world heritage site were already threatened at the time of its nomination by action of man and where the necessary corrective measures as outlined by the State Party at the time, have not been taken within the time proposed.

38. When a property inscribed on the World Heritage List has seriously deteriorated, or when the necessary corrective measures have not been taken within the time proposed, the State Party on whose territory the property is situated should so inform the Secretariat of the Committee.

39. When the Secretariat receives such information from a source other than the State Party concerned, it will, as far as possible, verify the source and the contents of the information in consultation with the State Party concerned and request its comments. The Secretariat will inform the Bureau of the results of its investigations and the Bureau will decide whether the information is to be acted upon. If the Bureau decides that the information is not to be acted upon, no action will be taken.

40. In all cases except those on which the Chairman decided that no further action should be taken, the Secretariat will request the competent advisory organization(s) (ICOMOS, IUCN or ICCROM) to forward comments on the information received.

41. The information received, together with the comments of the State Party and the advisory organization(s), will be brought to the attention of the Bureau of the Committee. The Bureau may take one of the following steps:

(a) it may decide that the property has not seriously deteriorated and that no further action should be taken;

(b) when the Bureau considers that the property has seriously deteriorated, but not to the extent that its restoration is impossible, it may recommend to the Committee that the property be maintained on the List, provided that the State Party takes the necessary measures to restore the property within a reasonable period of time. The Bureau may also recommend that technical co-operation be provided under the World Heritage Fund for work connected with the restoration of the property, if the State Party so requests;

(c) when there is evidence that the property has deteriorated to the point where it has irretrievably lost those characteristics which determined its inclusion in the List, the Bureau may recommend that the Committee delete the property from the List; before any such recommendation is submitted to the Committee, the Secretariat will inform the State Party concerned of the Bureau's recommendation; any comments which the State Party may make with respect to the recommendation of the Bureau will be brought to the attention of the Committee, together with the Bureau's recommendation;

(d) when the information available is not sufficient to enable the Bureau to take one of the measures described in (a), (b) or (c) above, the Bureau may recommend to the Committee that the Secretariat be authorized to take the necessary action to ascertain, in consultation with the State Party concerned, the present condition of the property, the dangers to the property and the feasibility of adequately restoring the property, and to report to the Bureau on the results of its action; such measures may include the sending of a fact-finding mission or the consultation of specialists. In cases where emergency action is required, the Bureau may itself authorize the financing from the World Heritage Fund of the emergency assistance that is required.

42. The Committee will examine the recommendation of the Bureau and all the information available and will take a decision. Any such decision shall, in accordance with Article 13 (8) of the Convention, be taken by a majority of two-thirds of its members present and voting. The Committee shall not decide to delete any property unless the State Party has been consulted on the question.

43. The State Party will be informed of the Committee's decision.

44. If the Committee's decision entails any modification to the World Heritage List, this modification will be reflected in the next updated list that is published.

45. In adopting the above procedure, the Committee was particularly concerned that all possible measures should be taken to prevent the deletion of any property from the List and was ready to offer technical co-operation as far as possible to States Parties in this connection. Furthermore, the Committee wishes to draw the attention of States Parties to the stipulations of Article 4 of the Convention which reads as follows:

"Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State...".

In this connection, the Committee recommends that States Parties co-operate with IUCN which has been asked by the Committee to continue monitoring on its behalf the progress of work undertaken for the preservation of natural heritage properties inscribed on the World Heritage List. With regard to cultural properties, the Committee has adopted, on a trial basis, a system by which each year the Secretariat sends out questionnaires to the States Parties concerned for fifty World Heritage properties, starting with the properties first inscribed on the List. States Parties are requested to complete the questionnaires with the utmost care and to return them to the Secretariat by the date indicated. Copies of the questionnaire can be obtained for consultation by States Parties from the Secretariat.

F. Guidelines for the evaluation and examination of nominations

46. The World Heritage List should be as representative as possible of all cultural and natural properties which meet the Convention's requirement of outstanding universal value and the cultural and natural criteria and the conditions of authenticity or integrity adopted by the Committee (see paragraphs 24 to 36 above).

47. Each cultural property, including its state of preservation, should be evaluated relatively, that is, it should be compared with that of other property of the same type dating from the same period, both inside and outside the State Party's borders.

48. Each natural site should be evaluated relatively, that is, it should be compared with other sites of the same type, both inside and outside the State Party's borders, within a biogeographic province or migratory pattern.

49. Furthermore ICOMOS and IUCN should pay particular attention to the following points which relate to the evaluation and examination of nominations :

(a) both NGOs are encouraged to be as strict as possible in their evaluations;

(b) the manner of the professional evaluation carried out by ICOMOS and IUCN should be fully described when each nomination is presented;

(c) ICOMOS is requested to make comparative evaluations of properties belonging to the same type of cultural property;

(d) IUCN is requested to make comments and recommendations on the integrity and future management of each property recommended by the Bureau, during its presentation to the Committee;

(e) the NGO concerned is encouraged to present slides on the properties recommended for the World Heritage List during the preliminary discussions which take place prior to the examination of individual proposals for inscription on the List.

50. Representatives of a State Party, whether or not a member of the Committee, should not speak to advocate the inclusion in the List of a property nominated by that State, but only to deal with a point of information in answer to a question.

51. The criteria for which a specific property is included in the World Heritage List will be set out by the Committee in its reports.

G. Format and content of nominations

52. The same printed form approved by the Committee is used for the submission of nominations of cultural and natural properties. The following information and documentation is to be provided: (For the nominations of groups of buildings or sites the specific documentation to be provided is listed in sub-paragraph (f) below.)

(a) Specific location

Country
State, province or region
Name of property
Maps and plans with indications of location of property and of geographical co-ordinates

(b) Juridical data

Owner
Legal status:
- category of ownership (public or private)
- details of legal and administrative provisions for the protection of the property. The nature of the legal texts as well as their conditions of implementation should be clearly specified
- state of occupancy and accessibility to the general public

Responsible administration
- details should be given of the mechanism or body already set up or intended to be established in order to ensure the proper management of the property

(c) Identification

Description and inventory
Photographic and cinematographic documentation
History
Bibliography

(d) State of preservation/conservation

Diagnosis
Agent responsible for preservation/conservation
History of preservation/conservation
Measures for preservation/conservation (including management plans or proposals for such plans)
Development plans for the region

(e) Justification for inclusion in the World Heritage List

Information should be provided under three separate headings as follows: i) the reasons for which the property is considered to meet one or more of the criteria set out under paragraphs 24 and 36 above; ii) an evaluation of the property's present state of preservation as compared with similar properties elsewhere; iii) indications as to the authenticity of the property.

(f) Specific documentation to be provided with nominations of groups of buildings or sites

If the nomination concerns a group of buildings or site as described in paragraph 23 above (1) specific documentation and juridical data are to be provided:

(i) Maps and plans

Three maps are to be provided:

- one map which shows the exact location of the property and its immediate natural and built environment (with, if necessary in annex, a series of topographical plans).

  Scale: between 1/50.000 and 1/100.000

  Date of publication: not more than one year prior to presentation of the nomination

- one map which precisely delimits the perimeter of the nominated area and which clearly indicates the location of each monument listed in the nomination. The nominated property can be one uninterrupted area or composed of several separate areas. In the latter case, the perimeter of each of these areas must be indicated and the nature of protection of the intermediate zones must also be described.

  Scale: between 1/5.000 and 1/25.000

- one map indicating the zones of different degrees of legal protection which might exist

  - inside the perimeter of the nominated property
  - outside the perimeter of the nominated property

Scale: between 1/5.000 and 1/25.000. This map should be of a size that lends itself to easy reproduction.

(ii) Photographic documentation (2)

This documentation should include:

- an aerial view

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(1) For example:

- a town centre, a village, a street, a square or other urban or rural archaeological site or

- a series of cultural properties which are geographically dispersed but are representative of a specific type of property as described in paragraph 19 above.

(2) All photographs must be recent, i.e. taken not more than one year prior to presentation of the nomination file.

- views of the monuments listed in the nomination (interior and exterior)

- panoramic views taken in different directions from outside the proposed perimeter (skyline)

- views taken inside the proposed perimeter which give an exact idea of the urban landscape (townscape)

- a selection of original colour slides preferably 35 mm slides film for which the non-exclusive reproduction rights are granted to Unesco on the form provided for this purpose. It should be noted that colour slides are absolutely necessary for the presentation of the property to the Bureau and to the Committee.

Audio-visual documents, where applicable.

(iii) Supplementary documentation

Information on institutions or associations concerned with the study or safeguard of the site

- within the country
- abroad.

(iv) Legal information

- laws or decrees which govern the protection of monuments and sites (date and text)

- decrees or orders which protect the nominated property (date and text)

- master plan for historic preservation land-use plan, urban development plan, regional development plan or other infrastructure projects

- town planning regulations and orders issued in application of these plans.

Indications should be given as to whether these various juridical provisions prevent:

- uncontrolled exploitation of the ground below the property

- the demolition and reconstruction of buildings situated within the protected zones

- the raising of the height of buildings

- the transformation of the urban fabric

What are the penalties foreseen in case of a contravention of these juridical provisions ?

What, if any, juridical or other measures exist which encourage the revitalization of the property concerned in full respect of its historic authenticity and its social diversity ?

(v) Administrative framework

- Responsible administration:
  - at the national or federal level
  - at the level of federated States or provinces
  - at the regional level
  - at the local level.

H. Procedure and timetable for the processing of nominations

53. The annual schedule set out below has been fixed for the receipt and processing of nominations to the World Heritage List. It should be emphasized, however, that the process of nominating properties to the World Heritage List is an ongoing one. Nominations to the List can be submitted at any time during the year. Those received by 1 October of a given year will be considered during the following year. Those received after 1 October of a given year can only be considered in the second subsequent year. Despite the inconvenience it may cause certain States Parties, the Committee has decided to bring forward the deadline for submission of nominations in order to ensure that all working documents can be made available to the Bureau as well as States members of the Committee no later than 6 weeks before the start of the sessions of the Bureau and the Committee. This will also enable the Committee at its annual December session to be made aware of the number and nature of nominations to be examined at its next session the following year.

1 October

Deadline for receipt by the Secretariat of nominations to be considered by the Committee the following year.

By 1 November

The Secretariat:

(1) registers each nomination and thoroughly verifies its contents and accompanying documentation. In the case of incomplete nominations, the Secretariat must immediately request the missing information from States Parties.

(2) transmits nominations, provided they are complete, to the appropriate international non-governmental organization (ICOMOS, IUCN or both), which:

(3) Immediately examines each nomination to ascertain those cases in which additional information is required and takes the necessary steps, in co-operation with the Secretariat, to obtain the complementary data.

By 1 April

The appropriate non-governmental organization undertakes a professional evaluation of each nomination according to the criteria adopted by the Committee. It transmits these evaluations to the Secretariat under three categories:

(a) properties which are recommended for inscription without reservation;

(b) properties which are not recommended for inscription;

(c) properties whose eligibility for inscription is not considered absolutely clear.

During April

The Secretariat checks the evaluations of the non-governmental organizations and ensures that States members of the Bureau receive them by 1 May.

June

The Bureau examines the nominations and makes its recommendations thereon to the Committee under the following four categories:

(a) properties which it recommends for inscription without reservation;

(b) properties which it does not recommend for inscription;

(c) properties that need to be referred back to the nominating State for further information/documentation;

(d) properties whose examination should be deferred on the ground that a more in-depth assessment or study is needed.

July-November

The report of the Bureau is transmitted by the Secretariat as soon as possible to all States Parties. The Secretariat endeavours to obtain from the States Parties concerned the additional information requested on properties under category c) above. This information, which should be sent to the Secretariat at the latest 9 weeks before the meeting of the Committee, is sent by the Secretariat to ICOMOS, IUCN and States members of the Committee.

December

The Committee examines the nominations on the basis of the Bureau's recommendations, together with any additional information provided by the States Parties concerned as well as the comments thereon of ICOMOS and IUCN. It classifies its decisions on nominated properties in the following three categories:

(a) properties which it inscribes on the World Heritage List;

(b) properties which it decides not to inscribe on the List.

(c) properties whose consideration is deferred.

January

The Secretariat forwards the report of the December session of the World Heritage Committee, which contains all the decisions taken by the Committee, to all States Parties.

54. In the event that a State Party wishes to nominate an extension to a property already inscribed on the World Heritage List, the same documentation should be provided and the same procedure shall apply as for new nominations, set out in paragraph 53 above. This provision will not apply for extensions which are simple modifications of these limits of the

property in question: in this case, the request for modification of these limits is submitted directly to the Bureau which will examine in particular the relevant maps and plans. The Bureau can approve such modifications, or it may consider that the change is sufficiently important to constitute an extension of the property, in which case the procedure for new nominations will apply.

55. The normal deadlines for the submission and processing of nominations will not apply in the case of properties which, in the opinion of the Bureau, after consultation with the competent international non-governmental organization, would unquestionably meet the criteria for inclusion in the World Heritage List and which have suffered damage from disaster caused by natural events or by human activities. Such nominations will be processed on an emergency basis.

II. ESTABLISHMENT OF THE LIST OF WORLD HERITAGE IN DANGER

A. Guidelines for the inclusion of properties in the List of World Heritage in Danger

56. In accordance with Article 11, paragraph 4 of the Convention, the Committee may include a property in the List of World Heritage in Danger when the following requirements are met:

(i) the property under consideration is on the World Heritage List;

(ii) the property is threatened by serious and specific danger;

(iii) major operations are necessary for the conservation of the property;

(iv) assistance under the Convention has been requested for the property;

(v) an estimate of the cost of such operations has been submitted.

B. Criteria for the inclusion of properties in the List of World Heritage in Danger

57. A World Heritage property - as defined in Articles 1 and 2 of the Convention - can be entered on the List of World Heritage in Danger by the Committee when it finds that the condition of the property corresponds to at least one of the criteria in either of the two cases described below.

58. In the case of cultural properties:

(i) ASCERTAINED DANGER - The property is faced with specific and proven imminent danger, such as:

(a) serious deterioration of materials;

(b) serious deterioration of structure and/or ornamental features;

(c) serious deterioration of architectural or town-planning coherence;

(d) serious deterioration of urban or rural space, or the natural environment;

(e) significant loss of historical authenticity;

(f) important loss of cultural significance.

(ii) POTENTIAL DANGER - The property is faced with threats which could have deleterious effects on its inherent characteristics. Such threats are, for example:

(a) modification of juridical status of the property diminishing the degree of its protection;

(b) lack of conservation policy;

(c) threatening effects of regional planning projects;

(d) threatening effects of town planning;

(e) outbreak or threat of armed conflict;

(f) gradual changes due to geological, climatic or other environmental factors.

59. In the case of natural properties:

(i) ASCERTAINED DANGER - The property is faced with specific and proven imminent danger, such as:

(a) A serious decline in the population of the endangered species or the other species of outstanding universal value which the property was legally established to protect, either by natural factors such as disease or by man-made factors such as poaching.

(b) Severe deterioration of the natural beauty or scientific value of the property, as by human settlement, construction of reservoirs which flood important parts of the property, industrial and agricultural development including use of pesticides and fertilizers, major public works, mining, pollution, logging, firewood collection, etc.

(c) Human encroachment on boundaries or in upstream areas which threaten the integrity of the property.

(ii) POTENTIAL DANGER - The property is faced with major threats which could have deleterious effects on its inherent characteristics. Such threats are, for example:

(a) a modification of the legal protective status of the area;

(b) planned resettlement or development projects within the property or so situated that the impacts threaten the property;

(c) outbreak or threat of armed conflict;

(d) the management plan is lacking or inadequate, or not fully implemented.

60. In addition, the factor or factors which are threatening the integrity of the property must be those which are amenable to correction by human action. In the case of cultural properties, both natural factors and man-made factors may be threatening, while in the case of natural properties, most threats will be man-made and only very rarely with a natural

factor (such as an epidemic disease) be threatening to the integrity of the property. In some cases, the factors threatening the integrity of a property may be corrected by administrative or legislative action, such as the cancelling of a major public works project or the improvement of legal status.

61. The Committee may wish to bear in mind the following supplementary factors when considering the inclusion of a cultural or natural property in the List of World Heritage in Danger:

(a) Decisions which affect World Heritage properties are taken by Governments after balancing all factors. The advice of the World Heritage Committee can often be decisive if it can be given before the property becomes threatened.

(b) Particularly in the case of ascertained danger, the physical or cultural deteriorations to which a property has been subjected should be judged according to the intensity of its effects and analyzed case by case.

(c) Above all in the case of potential danger to a property, one should consider that:

- the threat should be appraised according to the normal evolution of the social and economic framework in which the property is situated;

- it is often impossible to assess certain threats - such as the threat of armed conflict - as to their effect on cultural or natural properties;

- some threats are not imminent in nature, but can only be anticipated, such as demographic growth.

(d) Finally, in its appraisal the Committee should take into account any cause of unknown or unexpected origin which endangers a cultural or natural property.

C. Procedure for the inclusion of properties in the List of World Heritage in Danger

62. When considering the inclusion of a property in the List of World Heritage in Danger, the Committee shall develop, and adopt in consultation with the State Party concerned, a programme for corrective measures.

63. In order to develop the programme referred to in the previous paragraph, the Committee shall request the Secretariat to ascertain, in cooperation with the State Party concerned, the present condition of the property, the dangers to the property and the feasibility of undertaking corrective measures. The Committee may further decide to send a mission of qualified observers from IUCN, ICOMOS, ICCROM or other organizations to visit the property, evaluate the nature and extent of the threats and propose the measures to be taken.

64. The information received, together with the comments of the State Party and the advisory organization(s) shall be brought to the attention of the Committee by the Secretariat.

65. The Committee shall examine the information available and take a decision. Any such decision shall be taken by a majority of two-thirds of the Committee members present and voting.

66. The State Party concerned shall be informed of the Committee's decision.

67. The Committee shall allocate a specific, significant portion of the World Heritage Fund to meeting funding requests for assistance to World Heritage properties inscribed on the List of World Heritage in Danger.

68. The Committee shall review at regular intervals the state of property on the List of World Heritage in Danger. This review shall include such monitoring procedures and expert missions as might be determined necessary by the Committee.

69. On the basis of these regular reviews, the Committee shall decide, in consultation with the State Party concerned whether:

(i) additional measures are required to conserve the property;

(ii) to delete the property from the List of World Heritage in Danger if the property is no longer under threat;

(iii) to consider the deletion of the property from both the List of World Heritage in Danger and the World Heritage List if the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List, in accordance with the procedure set out in paragraphs 37 to 45 above.

III. INTERNATIONAL ASSISTANCE

A. Different forms of assistance available under the World Heritage Fund

(i) Preparatory assistance

70. Assistance is available to States Parties for the purpose of:

(a) preparing tentative lists of cultural and/or natural properties suitable for inclusion in the World Heritage List;

(b) organizing meetings for the harmonization of tentative lists within the same geo-cultural area;

(c) preparing nominations of cultural and natural properties to the World Heritage List; and

(d) preparing requests for technical co-operation, including requests relating to the organization of training courses.

This type of assistance, known as "preparatory assistance", can take the form of consultant services, equipment or, in exceptional cases, financial grants. The budgetary ceiling for each preparatory assistance project is fixed at $ 15,000.

71. Requests for preparatory assistance should be forwarded to the Secretariat which will transmit them to the Chairman, who will decide on the assistance to be granted. Request forms (reference WHC/5) can be obtained from the Secretariat.

(ii) Emergency assistance

72. States Parties may request emergency assistance for work in connection with cultural and natural properties included or suitable for inclusion in the World Heritage List and which have suffered severe damage due to sudden, unexpected phenomena (such as sudden

land subsidence, serious fires or explosions, flooding) or are in imminent danger of severe damage. Emergency assistance does not concern cases of damage or deterioration that has been caused by gradual processes such as decay, pollution, erosion, etc. Such assistance may be made available for the following purposes:

(a) to prepare urgent nominations of properties for the World Heritage List in conformity with paragraph 55 of these guidelines;

(b) to draw up an emergency plan to safeguard properties inscribed on or nominated to the World Heritage List;

(c) to undertake emergency measures for the safeguarding of a property inscribed on or nominated to the World Heritage List.

73. Requests for emergency assistance may be sent to the Secretariat, at any time in the year, using form WHC/5. The Secretariat shall submit these requests to the Chairman to approve amounts up to $ 20,000. For requests above $ 20,000, the Chairman should consult the other members of the Bureau by telex/telegram before taking a decision.

(iii) Training

74. States Parties may request support for the training of specialised staff at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the cultural and natural heritage. The training must be related to the implementation of the World Heritage Convention.

75. Priority in training activities will be given to group training at the local or regional levels, particularly at national or regional centres in accordance with article 23 of the Convention. The training of individual persons will be essentially limited to short term refresher programmes and exchanges of experience.

76. Requests for the training of specialised staff at the national or regional level should contain the following information:

(i) details on the training course concerned (courses offered, level of instruction, teaching staff, number of students and country of origin, date, place and duration, etc.);

(ii) type of assistance requested (financial contribution to costs of training, provision of specialised teaching staff, provision of equipment, books and educational materials for training courses);

(iii) approximate cost of support requested, including as appropriate tuition fees, daily subsistence allowance, allocation for purchase of educational material, travel costs to and from training centre, etc.

(iv) other contributions: national financing, received or anticipated multilateral or bilateral contributions.

77. Requests for support for individual training courses should be submitted on the standard "Application for Fellowship" form used for all fellowships administered by Unesco and which can be obtained from Unesco National Commissions, Unesco offices and the offices of the United Nations Development Programme in Member States, as well as from the Secretariat. Each request should be accompanied by a statement indicating the relationship of the proposed study plan to the implementation of the World Heritage Convention within the State Party submitting the request.

78. All requests for support for training activities should be transmitted to the Secretariat which will ensure that the information is complete and forward these requests along with an estimation of the costs to the Chairman for his approval. In this regard the Chairman can approve amounts up to $20,000. Requests for sums above this amount follow the same procedure for approval as for requests for technical cooperation set out in paragraphs 82 to 86.

(iv) Technical co-operation

79. States Parties can request technical co-operation for work foreseen in safeguarding projects for properties included in the World Heritage List. This assistance can take the forms outlined in paragraph 22 of the Convention for World Heritage properties.

80. The following information should be provided in requests for technical co-operation:

(i) details of property

- date of inscription in the World Heritage List,
- description of property and of dangers to property,
- legal status of property;

(ii) details of request

- scientific and technical information on the work to be undertaken,
- detailed description of equipment requested (notably make, type, voltage, etc.) and of required personnel (specialists and workmen), etc.,
- if appropriate, details on the "training" component of the project,
- schedule indicating when the project activities will take place;

(iii) Cost of proposed activities

- paid nationally,
- requested under the Convention,
- other multilateral or bilateral contributions received or expected, indicating how each contribution will be used;

(iv) national body responsible for the project and details of project administration.

81. The Secretariat, if necessary, will request the State Party concerned to provide further information. The Secretariat can also ask for expert advice from the appropriate organization (ICOMOS, IUCN, ICCROM).

82. Large-scale technical cooperation requests (that is those exceeding $ 30,000) should be submitted to the Secretariat as early as possible each year. Those received before 31 August will be dealt with by the Committee the same year. Those received after 31 August will be processed by the Secretariat in the order in which they are received and will be considered by the Committee the same year if it has been possible to complete their processing in time. All large-scale requests will be considered by the Bureau which will make recommendations on them to the Committee.

83. The Bureau will consider the requests which are presented at its meetings and will make recommendations thereon to the Committee. The Secretariat will forward the Bureau's recommendation to all the States members of the Committee.

84. If the recommendation is positive, the Secretariat will proceed with all the preparatory work necessary for implementing the technical co-operation immediately after the Committee has decided to approve the project.

85. At the Committee meeting, the Committee will make a decision on each request for technical co-operation taking account of the Bureau's recommendation. The Committee's decisions will be forwarded to the States Parties and the Secretariat will proceed to implement the project.

86. The above schedule does not apply, however, to projects the cost of which does not exceed a ceiling of $ 30,000 for which the following simplified procedure will be applied. In the case of requests not exceeding $ 20,000 the Secretariat after examining the dossier and receiving the advice of ICCROM, ICOMOS or IUCN, as appropriate, will forward the request accompanied by all other relevant documents directly to the Chairman, who is authorized to take decisions on the financing of such projects up to the total amount set aside for this purpose in the annual allocation from the World Heritage Fund; the Chairman is not authorized to approve requests submitted by his own country. The Bureau is authorized to approve requests up to a maximum of $ 30,000 except for requests from States members of the Bureau; in such cases, the Bureau can only make recommendations to the Committee.

(v) Assistance for promotional activities

87. (a) at the regional and international levels:

The Committee has agreed to support the holding of meetings which could:

- help to create interest in the Convention within the countries of a given region;
- create a greater awareness of the different issues related to the implementation of the Convention to promote more active involvement in its application;
- be a means of exchanging experiences;
- stimulate joint promotional activities.

(b) at the national level:

The Committee felt that requests concerning national activities for promoting the Convention could be considered only when they concern:

- meetings specifically organised to make the Convention better known or for the creation of national World Heritage associations, in accordance with Article 17 of the Convention;
- preparation of information material for the general promotion of the Convention and not for the promotion of a particular site;

The World Heritage Fund shall provide only small contributions towards national promotional activities on a selective basis and for a maximum amount of $5,000. However, requests for sums above this amount could exceptionally be approved for projects which are of special interest: the Chairman's agreement would be required and the maximum amount approved would be $10,000.

B. Order of priorities for the granting of international assistance

88. Without prejudicing the provisions of the Convention, which shall always prevail, the Committee agreed on the following order of priorities with respect to the type of activities to be assisted under the Convention:

- emergency measures to save property included, or nominated for inclusion, in the World Heritage List (see paragraph 72 above);

- preparatory assistance for drawing up tentative lists of cultural and/or natural properties suitable for inclusion in the World Heritage List as well as nominations of types of properties underrepresented on the list and requests for technical co-operation;

- projects which are likely to have a multiplier effet ("seed money") because they:

  . stimulate general interest in conservation;
    contribute to the advancement of scientific research;
  . contribute to the training of specialized personnel;
  . generate contributions from other sources.

89. The Committee also agreed that the following factors would in principle govern its decisions in granting assistance under the Convention:

(i) the urgency of the work and of the protective measures to be taken;

(ii) the legislative, administrative and financial commitment of the recipient State to protect and preserve the property;

(iii) the cost of the project;

(iv) the interest for, and exemplary value of, the project in respect of scientific research and the development of cost/effective conservation techniques;

(v) the educational value both for the training of local experts and for the general public;

(vi) the cultural and ecological benefits accruing from the project, and

(vii) the social and economic consequences.

90. Properties included in the World Heritage List are considered to be equal in value. For this reason, the criteria proposed above make no reference to the relative value of the properties. A balance will be maintained between funds allocated to projects for the preservation of the cultural heritage on the one hand and projects for the conservation of the natural heritage on the other hand.

C. Agreement to be concluded with States receiving international assistance

91. In accordance with Article 26 of the Convention, when technical co-operation on a large scale is granted to a State Party, an agreement will be concluded between the Committee and the State concerned in which will be set out:

(a) the scope and nature of the technical co-operation granted;

(b) the obligations of the Government;

(c) the facilities, privileges and immunities to be applied by the Government to the Committee and/or Unesco, to the property, funds and assets allocated to the project as well as to the officials and other persons performing services on behalf of the Committee and/or Unesco in connection with the project.

(d) the obligation of the recipient State Party to mark all equipment and all products arising from technical assistance provided under the Fund with the World Heritage name and emblem (see Annex 2) (stickers for this purpose are available from the Secretariat).

92. The text of a standard agreement has been adopted by the Committee.

93. The Committee decided to delegate authority to the Chairman to sign such agreements on its behalf. In exceptional circumstances, or when necessary for practical purposes, the Chairman may delegate authority to a member of the Secretariat whom he will designate.

D. Implementation of projects

94. In order to ensure the efficient implementation of a project for which technical co-operation has been granted under the World Heritage Fund, the Committee recommends that a single body - whether national, regional, local, public or private - should be entrusted with the responsibility of executing the project in the State Party concerned.

IV. WORLD HERITAGE FUND

95. The Committee decided that contributions offered to the World Heritage Fund for international assistance campaigns and other Unesco projects for any property inscribed on the World Heritage List shall be accepted and used as international assistance pursuant to Section V of the Convention, and in conformity with the modalities established for carrying out the campaign or project.

96. States Parties to the Convention who anticipate making contributions towards international assistance campaigns or other Unesco projects for any property inscribed on the List are encouraged to make their contributions through the World Heritage Fund.

97. The financial regulations for the Fund are set out in document WHC/7.

98. The Bureau shall function as the financial committee of the World Heritage Committee and shall make recommendations to the Committee on the budget for the following year.

V. BALANCE BETWEEN THE CULTURAL AND THE NATURAL HERITAGE IN THE IMPLEMENTATION OF THE CONVENTION

99. In order to improve the balance between the cultural and natural heritage in the implementation of the Convention, the Committee has recommended that the following

measures be taken:

(a) Preparatory assistance to States Parties should be granted on a priority basis for:

(i) the establishment of tentative lists of cultural and natural properties situated in their territories and suitable for inclusion in the World Heritage List;

(ii) the preparation of nominations of types of properties underrepresented in the World Heritage List.

(b) States Parties to the Convention should provide the Secretariat with the name and address of the governmental organization(s) primarily responsible for cultural and natural properties, so that copies of all official correspondence and documents can be sent by the Secretariat to these focal points as appropriate.

(c) States Parties to the Convention should convene at regular intervals at the national level a joint meeting of those persons responsible for natural and cultural heritage in order that they may discuss matters pertaining to the implementation of the Convention. This does not apply to States Parties where one single organization is dealing with both cultural and natural heritage.

(d) The Committee, deeply concerned with maintaining a balance in the number of experts from the natural and cultural fields represented on the Bureau, urges that every effort be made in future elections in order to ensure that:

(i) the chair is not held by persons with expertise in the same field, either cultural or natural, for more than two successive years;

(ii) at least two "cultural" and at least two "natural" experts are present at Bureau meetings to ensure balance and credibility in reviewing nominations to the World Heritage List.

(e) States Parties to the Convention should choose as their representatives persons qualified in the field of natural and cultural heritage, thus complying with Article 9, paragraph 3, of the Convention.

VI. OTHER MATTERS

A. Use of the World Heritage Emblem and the name, symbol or depiction of World Heritage sites

100. At its second session, the Committee adopted the World Heritage Emblem which had been designed by Mr. Michel Olyff. This emblem symbolizes the interdependence of cultural and natural properties: the central square is a form created by man and the circle represents nature, the two being intimately linked. The emblem is round, like the world, but at the same time it is a symbol of protection. The Committee decided that the two versions proposed by the artist (see Annex 2) could be used, in any colour, depending on the use, the technical possibilities and considerations of an artistic nature. In practice however, the second version is usually preferred by States Parties and has been used by the Secretariat for promotional activities.

101. Properties included in the World Heritage List should be marked with the emblem which should, however, be placed in such a way that it does not visually impair the property in question.

102. States Parties to the Convention should take all possible measures to prevent the use of the emblem of the Convention and the use of the name of the Committee and the Convention in their respective countries by any group or for any purpose not explicitly recognized and approved by the Committee. The World Heritage emblem should, in particular, not be used for any commercial purposes unless specific authorization is obtained from the Committee.

103. The name, symbol or depiction of a World Heritage site, or of any element thereof, should not be used for commercial purposes unless written authorization has been obtained from the State concerned on the principles of using the said name, symbol or depiction, and unless the exact text or display has been approved by that State and, as far as possible, by the national authority specifically concerned with the protection of the site. Any such utilization should be in conformity with the reasons for which the property has been placed on the World Heritage List.

B. Production of plaques to commemorate the inclusion of properties in the World Heritage List

104. These plaques are designed to inform the public of the country concerned and foreign visitors, that the site visited has a particular value which has been recognized by the international community. In other words, the site is exceptional, of interest not only to one nation, but also to the whole world. However, these plaques have an additional function which is to inform the general public about the World Heritage Convention or at least about the World Heritage concept and the World Heritage List.

105. The Committee has adopted the following guidelines for the production of these plaques:

- the plaque should be so placed that it can easily be seen by visitors, without disfiguring the site;
- the World Heritage symbol should appear on the plaque;
- the text should mention the site's exceptional universal value; in this regard it might be useful to give a short description of the site's outstanding characteristics. States may, if they wish, use the descriptions appearing in the various World Heritage publications or in the World Heritage exhibit, and which may be obtained from the Secretariat;
- the text should make reference to the World Heritage Convention and particularly to the World Heritage List and to the international recognition conferred by inscription on this List (however, it is not necessary to mention at which session of the Committee the site was inscribed);
- it may be appropriate to produce the text in several languages for sites which receive many foreign visitors.

106. The Committee proposed the following text as an example:

"(Name of site) has been inscribed upon the World Heritage List of the Convention concerning the Protection of the World Cultural and Natural Heritage. Inscription on

this List confirms the exceptional universal value of a cultural or natural site which deserves protection for the benefit of all humanity."

This text could be then followed by a brief description of the site concerned.

C. Rules of Procedure of the Committee

107. The Rules of Procedure of the Committee, adopted by the Committee at its first session and amended at its second and third sessions, are to be found in document WHC/1.

D. Meetings of the World Heritage Committee

108. In years when the General Assembly of States Parties is held, the ordinary session of the World Heritage Committee will take place as soon as possible after the Assembly.

E. Meetings of the Bureau of the World Heritage Committee

109. The Bureau shall meet twice a year, once in May/June and a second time during the Committee session.

F. Publication of the World Heritage List

110. An up-to-date version of the World Heritage List and the List of the World Heritage in Danger will be published every year.

111. The name of the States having nominated the properties inscribed on the World Heritage List will be presented in the published form of the List under the following heading: "Contracting State having submitted the nomination of the property in accordance with the Convention".

G. Action at the national level to promote a greater awareness of the activities undertaken under the Convention

112. States Parties are reminded of Articles 17 and 27 of the Convention concerning the establishment of national, public and private foundations or associations whose purpose is to invite donations for the protection of the world heritage and the organization of educational and information programmes to strengthen appreciation and respect by their peoples of this heritage.

Annex 1

MODEL FOR PRESENTING A TENTATIVE LIST

Name of country _____

Drawn up by _____

Date _____

1.* NAME OF PROPERTY	GEOGRAPHICAL LOCATION

DESCRIPTION

JUSTIFICATION OF "OUTSTANDING UNIVERSAL VALUE"

. Criteria met :

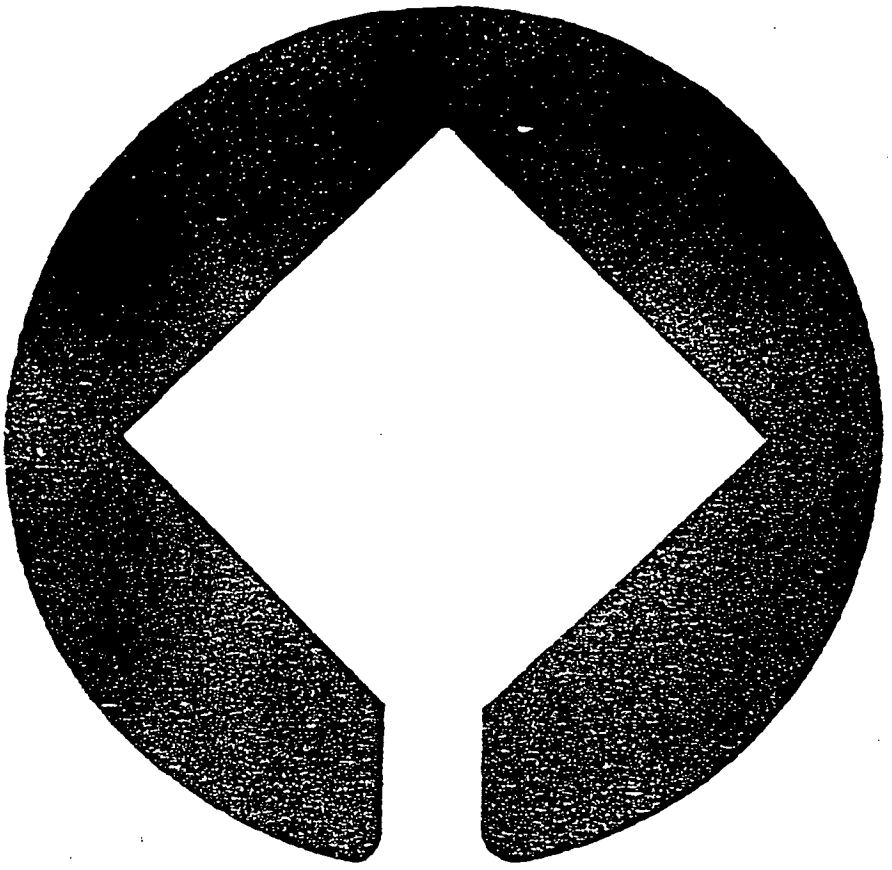
. Assurances of authenticity or integrity :

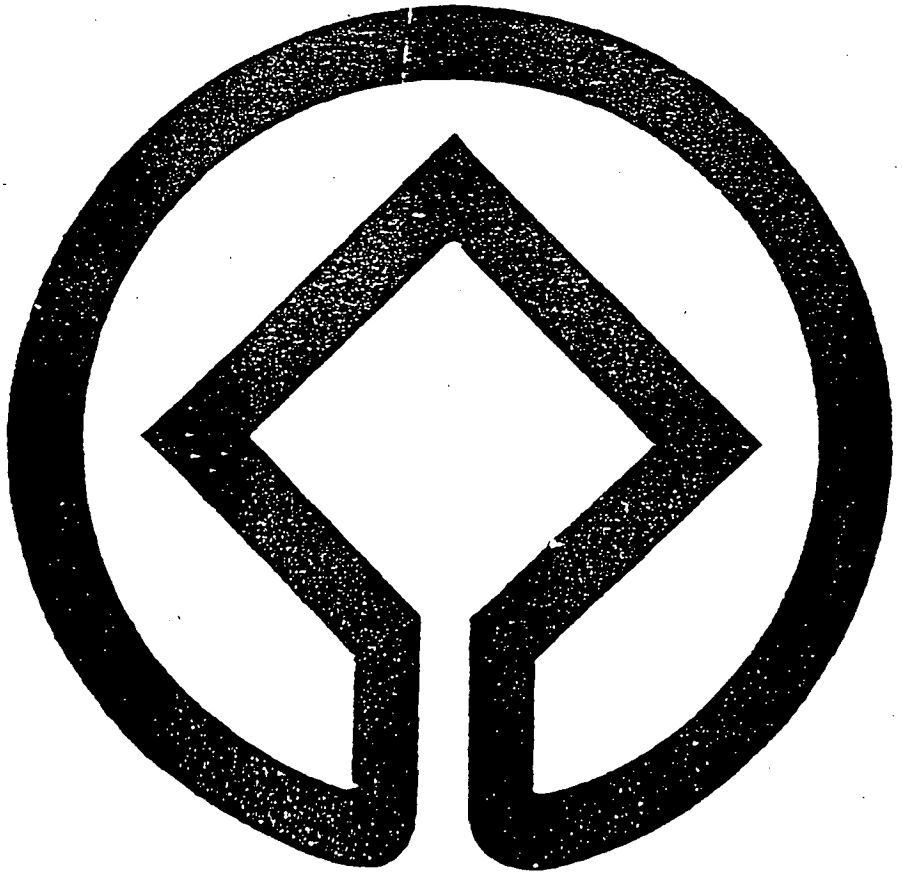
. Comparison with other similar properties :

* Please present, if possible, in the order to be nominated

WORLD HERITAGE EMBLEM / EMBLEME DU PATRIMOINE MONDIAL

(adopted by the World Heritage Committee at its second session /
adopté par le Comité du patrimoine mondial lors de sa deuxième session)





January 1989

The 315 properties which the World Heritage Committee has included in the World Heritage List

(as at 9 December 1988)

Contracting State having submitted the nomination of the property in accordance with the Convention	Name of property
Algeria	Al Qal'a of Beni Hammad
"	Tassili n'Ajjer
"	M'Zab Valley
"	Djemila
"	Tipasa
"	Timgad
Argentina	Los Glaciares
"	Iguacu National Park
Argentina and Brazil	Jesuit Missions of the Guaranis: San Ignacio Mi Santa Ana, Nuestra Senora de Loreto and Santa Maria Mayor (Argentina), Ruins of Sao Miguel das Missoes (Brazil)
Australia	Kakadu National Park
"	Great Barrier Reef
"	Willandra Lakes Region
"	Western Tasmania Wilderness National Parks
"	Lord Howe Island Group
"	Australian East Coast Temperate and Sub-Tropical Rainforest Parks
"	Uluru National Park
"	Wet Tropics of Queensland
Bangladesh	The historic mosque city of Bagerhat
"	Ruins of the Buddhist Vihara at Paharpur
Benin	Royal Palaces of Abomey
Bolivia	City of Potosi
Brazil	Historic town of Ouro Preto
"	Historic Centre of the town of Olinda
"	Historic Centre of Salvador de Bahia
"	Sanctuary of Bom Jesus do Congonhas
"	Iguaçu National Park
"	Brasilia

Bulgaria	Boyana Church
"	Madara Rider
"	Thracian tomb of Kazanlak
"	Rock-hewn churches of Ivanovo
"	Ancient City of Nessebar
"	Rila Monastery
"	Srebarna Nature Reserve
"	Pirin National Park
"	Thracian tomb of Sveshtari
Cameroon	Dja Faunal Reserve
Canada	L'Anse aux Meadows National Historic Park
"	Nahanni National Park
"	Dinosaur Provincial Park
"	Anthony Island
"	Head-Smashed-In Bison Jump Complex
"	Wood Buffalo National Park
"	Canadian Rocky Mountain Parks*
"	Quebec (Historic area)
"	Gros Morne National Park
Canada and United States of America	Kluane National Park/Wrangell-St. Elias National Park and Preserve
Central African Republic	Parc national du Manovo-Gounda St. Floris
China (People's Rep. of)	Mount Taishan
"	The Great Wall
	Imperial Palace of the Ming and Qing Dynasties
"	Mogao Caves
"	The Mausoleum of the First Qin Emperor
"	Peking Man Site at Zhoukoudian
Colombia	Port, Fortresses and Group of Monuments, Carthagena
Costa Rica	Talamanca Range-La Amistad Reserves
Côte d'Ivoire	Tai National Park
"	Comoé National Park
Cuba	Old Havana and its Fortifications
"	Trinidad and the Valley de los Ingenios
Cyprus	Paphos
"	Painted churches in the Troodos region
Democratic Yemen	Old walled City of Shibam

Ecuador	Galapagos Islands
"	City of Quito
"	Sangay National Park
Egypt	Memphis and its Necropolis - the Pyramid fields from Giza to Dahshur
"	Ancient Thebes with its Necropolis
"	Nubian monuments from Abu Simbel to Philae
"	Islamic Cairo
"	Abu Mena
Ethiopia	Simen National Park
"	Rock-hewn Churches, Lalibela
"	Fasil Ghebbi, Gondar Region
"	Lower Valley of the Awash
"	Tiya
"	Aksum
"	Lower Valley of the Omo
France	Mont-Saint-Michel and its Bay
"	Chartres Cathedral
"	Palace and Park of Versailles
"	Vézelay, Church and Hill
"	Decorated Grottoes of the Vézère Valley
"	Palace and Park of Fontainebleau
"	Chateau and Estate of Chambord
"	Amiens Cathedral
"	The Roman Theatre and its surroundings and the "Triumphal Arch" of Orange
"	Roman and Romanesque Monuments of Arles
"	Cistercian Abbey of Fontenay
"	Royal Saltworks of Arc-et-Senans
"	Place Stanislas, Place de la Carrière and Place d'Alliance in Nancy
"	Church of Saint-Savin sur Gartempe
"	Cape Girolata, Cape Porto and Scandola Nature Reserve in Corsica
"	Pont du Gard (Roman aqueduct)
"	Strasbourg - Grande Ile
Germany (Federal Republic of)	Aachen Cathedral
"	Speyer Cathedral
"	Würzburg Residence with the Court Gardens and Residence Square
"	Pilgrimage Church of Wies
"	The Castles of Augustusburg and Falkenlust at Brühl
"	St. Mary's Cathedral and St. Michael's Church at Hildesheim
"	Roman Monuments, Cathedral and Liebfrauen-Church in Trier
"	Hanseatic City of Lübeck

Ghana	Forts and castles, Volta Greater Accra, Central and Western Regions
"	Ashante Traditional Buildings
Greece	Temple of Apollo Epicurius at Bassae
"	Archaeological Site of Delphi
"	The Acropolis, Athens
"	Mount Athos
"	Meteora
"	Paleochristian and Byzantine Monuments of Thessalonika
"	Archaeological site of Epidaurus
"	Medieval City of Rhodes
Guatemala	Tikal National Park
"	Antigua Guatemala
"	Archaeological Park and Ruins of Quirigua
Guinea and Côte d'Ivoire	Mount Nimba Strict Nature Reserve
Haiti	National History Park - Citadel, Sans Souci, Ramiers
Holy See	Vatican City
Honduras	Maya Site of Copan
"	Rio Platano Biosphere Reserve
Hungary	Budapest, the banks of the Danube with the district of Buda Castle
"	Hollokö
India	Ajanta Caves
"	Ellora Caves
"	Agra Fort
"	Taj Mahal
"	The Sun Temple, Konarak
"	Group of Monuments at Mahabalipuram
"	Kaziranga National Park
"	Manas Wildlife Sanctuary
"	Keoladeo National Park
"	Churches and convents of Goa
"	Khajuraho group of monuments
"	Group of monuments at Hampi
"	Fatehpur Sikri
"	Group of monuments at Pattadakal
"	Elephanta Caves
"	Brihadisvara Temple, Thanjavur
"	Sundarbans National Park
"	Nanda Devi National Park

Iran	Tchogha Zanbil
"	Persepolis
"	Meidan Emam, Esfahan
Iraq	Hatra
Italy	Rock drawings in Valcamonica
"	Historic Centre of Rome
"	The Church and Dominican Convent of Santa Maria delle Grazie with "The Last Supper" by Leonardo da Vinci
"	Historic Centre of Florence
"	Venice and its lagoon
"	Piazza del Duomo, Pisa
Jordan	Old City of Jerusalem and its Walls
"	Petra
"	Quseir Amra
Lebanon	Anjar
"	Baalbek
"	Byblos
"	Tyr
Libyan Arab Jamahiriya	Archaeological Site of Leptis Magna
"	Archaeological Site of Sabratha
"	Archaeological Site of Cyrene
"	Rock-art sites of Tadrart Acacus
"	Old Town of Ghadamès
Malawi	Lake Malawi National Park
Mali	Old Towns of Djenné
	Timbuktu
Malta	Hal Saflieni Hypogeum
"	City of Valetta
"	Ggantija Temples
Mexico	Sian Ka'an
"	Pre-Hispanic City and National Park of Palenque
"	Historic Centre of Mexico City and Xochimilco
"	Pre-Hispanic City of Teotihuacan
"	Historic Centre of Oaxaca and archaeological site of Monte Alban
"	Historic Centre of Puebla
"	Historic Town of Guanajuato and adjacent mines
"	Pre-Hispanic City of Chichen-Itza

Morocco	Medina of Fez
"	Medina of Marrakesh
"	Ksar of Ait-Ben-Haddou
Nepal	Sagarmatha National Park
"	Kathmandu Valley
"	Royal Chitwan National Park
New Zealand	Westland and Mount Cook National Park
"	Fiordland National Park
Norway	Urnes Stave Church
"	Bryggen
"	Roros
"	Rock drawings of Alta
Oman	Bahla Fort
"	Archaeological sites of Bat, Al-Khutm and Al-Ayn
Pakistan	Archaeological ruins at Moenjodaro
"	Taxila
"	Buddhist ruins of Takht-i-Bahi and neighbouring city remains at Sahr-i-Bahlol
"	Historical Monuments of Thatta
"	Fort and Shalamar Gardens in Lahore
Panama	The fortifications on the Caribbean side of Portobelo-San Lorenzo
"	Darien National Park
Peru	City of Cuzco
"	Historic Sanctuary of Machu Picchu
"	Chavin (Archaeological site)
"	Huascaran National Park
"	Chan Chan archaeological zone
"	Manu National Park
"	Convent Ensemble of San Francisco de Lima
Poland	Cracow's Historic Centre
"	Wieliczka Salt Mine
"	Auschwitz Concentration Camp
"	Bialowieza National Park
"	Historic Centre of Warsaw
Portugal	Central Zone of the Town of Angra do Heroismo in the Azores
"	Monastery of the Hieronymites and Tower of Belem in Lisbon
"	Monastery of Batalha
"	Convent of Christ in Tomar
"	Historic Centre of Evora

Senegal	Island of Gorée
"	Niokolo-Koba National Park
"	Djoudj National Bird Sanctuary
Seychelles	Aldabra Atoll
"	Vallée de Mai Nature Reserve
Spain	The Mosque of Cordoba
"	The Alhambra and the Generalife, Granada
"	Burgos Cathedral
"	Monastery and site of the Escurial, Madrid
"	Parque Güell, Palacio Güell and Casa Mila, in Barcelona
"	Altamira Cave
"	Old town of Segovia and its aqueduct
"	Churches of the Kingdom of the Asturias
"	Santiago de Compostela (Old town)
"	Old town of Avila with its extra-muros churches
"	Mudejar Architecture of Teruel
"	Historic City of Toledo
"	Garajonay National Park
"	Old Town of Caceres
"	The Cathedral, the Alcazar and the Archivo de Indias in Seville
"	Old City of Salamanca
Sri Lanka	Sacred City of Anuradhapura
"	Ancient City of Polonnaruva
"	Ancient City of Sigiriya
"	Sinharaja Forest Reserve
"	Sacred City of Kandy
"	Old Town of Galle and its fortifications
Switzerland	Convent of St. Gall
"	Benedictine Convent of St. John at Müstair
"	Old City of Berne
Syrian Arab Republic	Ancient City of Damascus
"	Ancient City of Bosra
"	Site of Palmyra
"	Ancient City of Aleppo
Tunisia	Medina of Tunis
"	Site of Carthage
"	Amphitheatre of El Djem
"	Ichkeul National Park
"	Punic town of Kerkuane and its Necropolis
"	Medina of Sousse
"	Kairouan

Turkey	Historic areas of Istanbul
"	Göreme National Park and the rock sites of Cappadocia
"	Great Mosque and Hospital of Divrigi
"	Hattusha
"	Nemrut Dag
"	Xanthos-Letoon
"	Hierapolis-Pamukkale
United Kingdom	The Giant's Causeway and causeway coast
"	Durham Castle and Cathedral
"	Ironbridge Gorge
"	Studley Royal Park including the ruins of Fountains Abbey
"	Stonehenge, Avebury and associated sites
"	The Castles and Town Walls of King Edward in Gwynedd
"	St. Kilda
"	Blenheim Palace
"	City of Bath
"	Hadrian's Wall
"	Palace of Westminster Abbey of Westminster and Saint Margaret's Church
"	Henderson Island
"	The Tower of London
"	Canterbury Cathedral, St. Augustine's Abbey and St. Martin's Church
United Republic of Tanzania	Ngorongoro Conservation Area
"	Ruins of Kilwa Kisiwani and Ruins of Songo Mnara
"	Serengeti National Park
"	Selous Game Reserve
"	Kilimanjaro National Park
United States of America	Mesa Verde
"	Yellowstone
"	Grand Canyon National Park
"	Everglades National Park
"	Independence Hall
"	Redwood National Park
"	Mammoth Cave National Park
"	Olympic National Park
"	Cahokia Mounds State Historic Site
"	Great Smoky Mountains National Park
"	La Fortaleza and San Juan Historic Site in Puerto Rico
"	The Statue of Liberty
"	Yosemite National Park
"	Chaco Culture National Historical Park
"	Monticello and University of Virginia in Charlottesville
"	Hawai Volcanoes National Park

Yemen	Old City of Sana'a
Yugoslavia	Old City of Dubrovnik
"	Stari Ras and Sopocani
"	Historical complex of Split with the Palace of Diocletian
"	Plitvice Lakes National Park
"	Ohrid region with its cultural and historical aspect and its natural environment
"	Natural and Culturo-Historical Region of Kotor
"	Durmitor National Park
"	Studenica Monastery
"	Skocjan Caves
Zaire	Virunga National Park
"	Garamba National Park
"	Kahuzi-Biega National Park
"	Salonga National Park
Zimbabwe	Mana Pools National Park, Sapi and Chewore Safari Areas
"	Great Zimbabwe National Monument
"	Khami Ruins National Monument

(230 cultural sites, 73 natural sites and 12 mixed sites)

* The Burgess Shale Site, which was previously inscribed on the World Heritage List, is part of the Canadian Rocky Mountain Parks.

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE

(1972)

LIST OF THE 108 STATES HAVING DEPOSITED AN INSTRUMENT OF RATIFICATION, ACCEPTANCE OR ACCESSION
as at 12 December 1988

STATES	*Date of deposit of ratification (R) acceptance (Ac) or accession (A)*
AFGHANISTAN	*20. 3.79 R*
ALGERIA	*24. 6.74 R*
ANTIGUA AND BARBUDA	*1.11.83 Ac*
ARGENTINA	*23. 8.78 Ac*
AUSTRALIA	*22. 8.74 R*
BANGLADESH	*3. 8.83 Ac*
BENIN	*14. 6.82 R*
BOLIVIA	*4.10.76 R*
BRAZIL	*1. 9.77 Ac*
BULGARIA	*7. 3.74 Ac*
BURKINA FASO	*2. 4.87 R*
BURUNDI	*19. 5.82 R*
BYELORUSSIAN SSR	*12.10.88 R*
CAMEROON	*7.12.82 R*
CANADA	*23. 7.76 Ac*
CAPE VERDE (Rep. of)	*28. 4.88 Ac*
CENTRAL AFRICAN REPUBLIC	*22.12.80 R*
CHILE	*20. 2.80 R*
CHINA (People's Rep. of)	*12.12.85 R*
COLOMBIA	*24. 5.83 Ac*
CONGO (People's Rep. of)	*10.12.87 R*
COSTA RICA	*23. 8.77 R*
COTE D'IVOIRE	*9. 1.81 R*
CUBA	*24. 3.81 R*
CYPRUS	*14. 8.75 Ac*
DEMOCRATIC YEMEN	*7.10.80 Ac*
DENMARK	*25. 7.79 R*
DOMINICAN REPUBLIC	*12. 2.85 R*
ECUADOR	*16. 6.75 Ac*

EGYPT	*7. 2.74 R*
ETHIOPIA	*6. 7.77 R*
FINLAND	*4. 3.87 R*
FRANCE	*27. 6.75 Ac*
GABON	*30.12.86 R*
GAMBIA	*1. 7.87 R*
GERMAN DEMOCRATIC REPUBLIC	*12.12.88 Ac*
GERMANY (Fed. Rep. of)	*23. 8.76 R*
GHANA	*4. 7.75 R*
GREECE	*17. 7.81 R*
GUATEMALA	*16. 1.79 R*
GUINEA	*18. 3.79 R*
GUYANA	*20. 6.77 Ac*
HAITI	*18. 1.80 R*
HOLY SEE	*7.10.82 A*
HONDURAS	*8. 6.79 R*
HUNGARY	*15. 7.85 Ac*
INDIA	*14.11.77 R*
IRAN (Islamic Rep. of)	*26. 2.75 Ac*
IRAQ	*5. 3.74 Ac*
ITALY	*23. 6.78 R*
JAMAICA	*14. 6.83 Ac*
JORDAN	*5. 5.75 R*
LAO PEOPLE'S DEMOCRATIC REPUBLIC	*20. 3.87 R*
LEBANON	*3. 2.83 R*
LIBYAN ARAB JAMAHIRIYA	*13.10.78 R*
LUXEMBOURG	*28. 9.83 R*
MADAGASCAR	*19. 7.83 R*
MALAWI	*5. 1.82 R*
MALAYSIA	*7.12.88 R*
MALDIVES	*22. 5.86 Ac*
MALI	*5. 4.77 Ac*
MALTA	*14.11.78 Ac*
MAURITANIA	*2. 3.81 R*
MEXICO	*23. 2.84 Ac*
MONACO	*7.11.78 R*
MOROCCO	*28.10.75 R*
MOZAMBIQUE	*27.11.82 R*
NEPAL	*20. 6.78 Ac*
NEW ZEALAND	*22.11.84 R*
NICARAGUA	*17.12.79 Ac*

NIGER	*23.12.74 Ac*
NIGERIA	*23.10.74 R*
NORWAY	*12. 5.77 R*
OMAN	*6.10.81 Ac*
PAKISTAN	*23. 7.76 R*
PANAMA	*3. 3.78 R*
PARAGUAY	*28. 4.88 R*
PERU	*24. 2.82 R*
PHILIPPINES	*19. 9.85 R*
POLAND	*29. 6.76 R*
PORTUGAL	*30. 9.80 R*
QATAR	*12. 9.84 Ac*
REPUBLIC OF KOREA	*14. 9.88 Ac*
SAINT CHRISTOPHER AND NEVIS	*10. 7.86 Ac*
SAUDI ARABIA	*7. 8.78 Ac*
SENEGAL	*13. 2.76 R*
SEYCHELLES	*9. 4.80 Ac*
SOCIALIST REPUBLIC OF VIETNAM	*19.10.87 Ac*
SPAIN	*4. 5.82 Ac*
SRI LANKA	*6. 6.80 Ac*
SUDAN	*6. 6.74 R*
SWEDEN	*22. 1.85 R*
SWITZERLAND	*17. 9.75 R*
SYRIAN ARAB REPUBLIC	*13. 8.75 Ac*
THAILAND	*17. 9.87 Ac*
TUNISIA	*10. 3.75 Ac*
TURKEY	*16. 3.83 R*
UGANDA	*20.11.87 Ac*
UKRAINIAN SSR	*12.10.88 R*
USSR	*12.10.88 R*
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	*29. 5.84 R*
UNITED REPUBLIC OF TANZANIA	*2. 8.77 R*
UNITED STATES OF AMERICA	*7.12.73 R*
YEMEN	*25. 1.84 R*
YUGOSLAVIA	*26. 5.75 R*
ZAIRE	*23. 9.74 R*
ZAMBIA	*4. 6.84 R*
ZIMBABWE	*16. 8.82 R*