

The Peter A. Allard School of Law Allard Research Commons

Faculty Publications

Faculty Scholarship

2009

The Private Life of Environmental Treaties

Natasha Affolder

Allard School of Law at the University of British Columbia, affolder@allard.ubc.ca

Follow this and additional works at: http://commons.allard.ubc.ca/fac_pubs

 Part of the [Environmental Law Commons](#)

Citation Details

Natasha A Affolder, "The Private Life of Environmental Treaties" (2009) 103 Am J Int'l L 510.

This Article is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

NOTES AND COMMENTS

THE PRIVATE LIFE OF ENVIRONMENTAL TREATIES

*By Natasha A. Affolder**

The gravitational pull of environmental treaties is felt not only by states. Yet international lawyers almost exclusively focus on states to explain treaty compliance, measure treaty implementation, and assess treaty effectiveness. This essay draws attention to a phenomenon that falls outside traditional boundaries of treaty analysis: the efforts of private corporations that aim at complying with environmental treaties. Existing models of treaty implementation are inadequate to explain these direct interactions between corporations and treaties.¹ The dominant grammar of treaty “compliance” equally fails to fit.²

This essay uses a little-studied example—the UNESCO World Heritage Convention³—to highlight the phenomenon of corporations’ conforming their behavior to environmental treaty requirements. The World Heritage Convention has become a focal point of a growing range of interactions that do not fit the standard interstate model of treaty engagement. Oil and gas and mining companies claim they are performing aspects of this treaty. Banks and insurance companies are imposing requirements of treaty performance on other corporations. The key treaty body, the World Heritage Committee, has also developed ways to interact directly with corporations, including in situations where state actors have been unwilling or unable to regulate behavior within the state’s borders. Together, these direct interactions between companies and the World Heritage Convention highlight the need to extend our analysis of environmental treaties in new ways.

The interactions documented in this essay challenge the common assumption that private environmental governance relies on sources distinct from public international law. These interactions also suggest the potential value of pursuing various corporate pressure points as

* Assistant Professor, Faculty of Law, University of British Columbia. I wish to thank Neil Craik, Pitman Potter, Margot Young, and the participants in the American Society of International Law’s 2008 Annual Meeting for their stimulating comments and helpful insights on prior drafts. I thank Julie Desbrisay and Shea Coulson for their valuable research and editorial assistance.

¹ Traditional accounts of treaty implementation focus on treaty implementation by nation-states. See, e.g., Catherine Redgwell, *National Implementation*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 922 (Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds., 2007). Scholars of transnational legal process equally articulate how treaty norms are internalized into national domestic structures. Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *YALE L.J.* 2599 (1997).

² Treaty compliance traditionally denotes the degree to which states parties are fulfilling their obligations under a treaty. As nonparties, corporations arguably do not have obligations with which to comply, yet corporations have appropriated the term “compliance” for treaties. I use the term “treaty performance” in this essay to acknowledge that nonparties may also attempt to conform their behavior to environmental treaty requirements.

³ Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 *UST* 37, 1037 *UNTS* 151 [hereinafter *World Heritage Convention*].

one way to promote the goals of environmental treaties. Corporate claims of treaty performance equally shatter the conception of environmental treaties as purely “top down” lists of “oughts” for state action.

Corporations have long been a blind spot in international legal analysis. Perhaps not surprisingly, then, the phenomenon of claims of treaty performance by corporations has gone generally, if not completely, unnoticed in the legal literature. While international legal scholarship is increasingly attentive to corporations, the current scholarly focus on questions of transnational corporate accountability⁴ and corporate standard-setting initiatives⁵ may in fact obscure the influence of treaties over corporate behavior. In entrenching a distinction between the largely “soft law” initiatives directed at companies and treaties directed at states, the emerging literature on private environmental governance also misses this interaction between private governance and public international law.

Following this introduction, part I of this essay presents a detailed study of how major mining and oil and gas companies interact with the World Heritage Convention in recognizing World Heritage sites as “no-go” areas: territory off-limits to mining and oil and gas activity. The evidence set forth in this part of the essay establishes that a notable number of companies are committing themselves to conform their behavior to the requirements of the Convention. Part II supplements this record of corporate documentation by exploring distinct sources of pressure on oil and gas and mining companies to adjust their behavior to conform to the treaty. These sources of pressure include conservation groups, other companies such as financial institutions and insurance companies, shareholders, and the treaty bodies of the Convention. They help explain the uneven contours of corporate engagement with this treaty.

I adopted a dual focus for parts I and II in both documenting internal corporate claims of treaty compliance and assessing evidence of external pressure on these corporations to comply with the Convention. Publicly available transactional documents, corporate annual reports and press releases, and filings with the United States federal Securities and Exchange Commission (SEC) by the twenty largest global mining companies and twenty largest global oil and gas companies yielded information about claims of treaty performance.⁶ I focus on the largest mining and oil and gas companies on the assumption that the legal compliance strategies of these companies will be calibrated not only to domestic legal requirements but also to international standards. The decision to survey the largest companies is also based on the fact that

⁴ See, e.g., ELISA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW (2009); THE NEW CORPORATE ACCOUNTABILITY (Doreen McBarnet, Aurora Voiculescu, & Tom Campbell eds., 2007).

⁵ See, e.g., John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AJIL 819 (2007); David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L L. 373 (2008).

⁶ These corporations were selected on the basis of the Forbes Global 2000 list of the world's largest public companies by sector (April 2008 rankings). Firm-specific results were further cross-referenced with a general search of corporate disclosures for all companies filed with the SEC between the years 1998 and 2008 that referenced “World Heritage.” This search of LEXIS, EDGAR Online used the search term “World Heritage” and the date restriction of July 1, 1998–July 1, 2008. The search yielded 139 such documents, 112 of which were filed by mining or oil and gas companies. This result confirms the significance of oil and gas and mining industry interactions with the World Heritage Convention compared with those of other corporate sectors.

together these companies represent a significant portion of the market share of these industries.⁷

To unearth evidence of the external influences on corporations to comply with the Convention, I analyzed transactional documents and policy statements of financial institutions and insurance companies, as well as shareholder resolutions, and media and advocacy group reports. Finally, I reviewed the decision reports of the World Heritage Committee for the years 1990–2008 for evidence of communication between natural resource companies and the committee. Together, these sources reveal both treaty performance by corporations and the fact that such performance emerges through distinct actors and diverse pressure points.

In part III, I situate the specific example of the Convention within a broader inquiry, by addressing two interrelated questions: Why are companies seeking (or at least claiming) to perform aspects of international environmental treaties? And why does it matter? This last question allows me to address an issue that lurks beneath the surface of the entire discussion: does corporate “colonization” of treaty implementation pose a looming threat for international law? The experience of the World Heritage Convention reveals a definite tension between corporations both as conduits for treaty implementation, and as obstacles to it. A corporate policy that on its face seems or indeed claims to promote treaty implementation can ultimately undermine a treaty’s goals.

This focused study of the World Heritage Convention clarifies the existence of theoretical terrain that finds no place in a model that posits public international law and private governance as locked in a zero-sum game. In so doing, this essay lays the groundwork for future research. To date, attempts to better our understanding of how treaties work and of how companies function have been isolated scholarly endeavors. In concluding, I argue that a sophisticated and full analysis of the impact of international treaties demands more nuanced unpacking of the relationship between public international law and private corporate governance.

I. CORPORATE “NO-GO” AREAS AND THE WORLD HERITAGE CONVENTION

The biodiversity-rich areas most coveted by conservationists are often the very same remote sites that oil and gas and mining companies pursue in seeking to exploit valuable deposits. Given the threats that extractive projects pose to environmentally and socially vulnerable areas, companies and governments alike face mounting pressure to acknowledge that certain sensitive areas should be off-limits to extractive activity.

Little agreement has emerged through interstate processes on which areas should and do constitute no-go areas. Some states are unwilling to enter these debates at the international level, arguing that such questions are matters of domestic, not international, law and policy.⁸

⁷ The PriceWaterhouseCoopers 2009 review of global trends in the mining industry states that the four largest global mining companies by revenue (BHP Billiton, Rio Tinto, Vale, and Xstrata) account for 51 percent of the total revenue of the forty largest global mining companies. PRICEWATERHOUSECOOPERS, MINE—WHEN THE GOING GETS TOUGH . . . 7 (2009), available at http://www.pwc.co.uk/pdf/mine_when_the_going_gets_tough.pdf.

⁸ In voting against Recommendation 2.82 (popularly known as the “Amman Declaration”) at the 2000 World Conservation Congress, the United States made a formal Statement for the Record outlining its opposition based on the premise that “[m]ining policy is an internal matter for sovereign states.” TIM JONES, INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, UNION INTERNATIONALE POUR LA CONSERVATION DE LA NATURE ET DE SES RESSOURCES, PROCEEDINGS, WORLD CONSERVATION CONGRESS, 4–11 OCTOBER 2000, AMMAN, JORDAN, para. 2.82 (2001).

At its 2000 World Conservation Congress in Amman, Jordan, the World Conservation Union (IUCN) called for government members to prohibit mining within certain categories of protected areas.⁹ In response to the refusal by some states to endorse the Amman Declaration, and fearing that some governments would further facilitate mining activity within protected areas,¹⁰ nongovernmental organizations (NGOs) redirected their focus to pressure extractive industry corporations to stay out of these categories of protected areas. As a result of this pressure, and the dialogue that emerged between some extractive companies and NGOs, various corporations have made no-go-area commitments. This study focuses on no-go pledges to prohibit exploration or extraction of minerals, metals, and oil and gas from within natural World Heritage sites.

The World Heritage Convention came into force in 1975 to prevent the destruction of culturally and naturally important sites. The treaty provides a defined list of properties of outstanding natural and cultural significance that its 186 states parties¹¹ commit themselves to protect and conserve.¹² Despite these commitments, of the 138 natural World Heritage sites recognized under the Convention, mining or oil and gas development is estimated to threaten more than one-quarter.¹³

Extractive activity in and around World Heritage sites undermines the goals of the treaty. The World Heritage Committee each year, through its decision reports, criticizes those states that allow extractive activity to threaten the heritage values of listed sites. In cases where states have not acted to prevent extractive activity in or near a site, the committee has added the site to the List of World Heritage in Danger, or has threatened to do so. For the first time, the committee in 2007 entirely removed a site from the World Heritage List because the state had failed to protect it from threats, including those posed by oil exploration and extraction.¹⁴

These threats to listed World Heritage sites reveal the limits of relying purely on states to give effect to the Convention. Some states are unwilling to treat World Heritage sites as no-go areas and allow extractive activity to affect such sites.¹⁵ Other states are unable to stop illegal mining

⁹ Recommendation 2.82, Protection and Conservation of Biological Diversity of Protected Areas from the Negative Impacts of Mining and Exploration, IUCN Second World Conservation Congress, Resolutions 89 (Oct. 4–11, 2000), *in* [untitled], *at* http://cmsdata.iucn.org/downloads/resolutions_recommendation_en.pdf (only some individual documents in this pdf source are paginated, but the resolution appears on its p. 540) [Amman Declaration].

¹⁰ For examples of state facilitation of mining in protected areas, see KEVIN BISHOP, NIGEL DUDLEY, ADRIAN PHILLIPS, & SUE STOLTON, SPEAKING A COMMON LANGUAGE: THE USES AND PERFORMANCE OF THE IUCN SYSTEM OF MANAGEMENT CATEGORIES FOR PROTECTED AREAS 152–53 (2004) [hereinafter BISHOP ET AL.].

¹¹ World Heritage Convention, States Parties: Ratification Status (Apr. 16, 2009), *at* <http://whc.unesco.org/en/statesparties/>.

¹² World Heritage Convention, *supra* note 3, Art. 4.

¹³ MARTA MIRANDA ET AL., MINING AND CRITICAL ECOSYSTEMS: MAPPING THE RISKS 17 (2003).

¹⁴ The Arabian Oryx Sanctuary in Oman was deleted from the World Heritage List in 2007. Decision 31 COM 7B.11, para. 13, World Heritage Committee, Decisions Adopted by the Thirty-first Session of the World Heritage Committee 50, 51, WHC-07/31.COM/24 (July 2, 2007) [hereinafter WH Comm. 2007 Report]. Decisions of the committee are available online at <http://whc.unesco.org/en/statutorydoc/>.

¹⁵ The World Heritage Committee has voiced concern about the impact of mining projects on Yellowstone National Park (U.S.), Kakadu National Park (Australia), and Jasper National Park (Canada). See Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 PACE ENVTL. L. REV. 35 (2007). At its June 2009 meeting in Seville, the World Heritage Committee noted with concern the possible threat to the outstanding universal value of the Waterton–Glacier International Peace Park World Heritage Site posed by potential mining operations in the Flathead Valley in British Columbia. Dec. 33 COM 7B.22, World

from taking place in World Heritage sites within their territory.¹⁶ Recognizing that states may be unwilling or unable to protect such sites in this regard, environmental NGOs and the World Heritage Committee have each directly targeted corporate behavior. Against this backdrop of states' failure to prevent mining and oil and gas activity from undermining the integrity of World Heritage sites, and mining and oil and gas companies' efforts to evidence compliance with relevant international standards of environmental behavior, corporate claims of compliance with the Convention have emerged.

Industry-Level Pledges

Critical to explaining corporate engagement with the World Heritage Convention is an appreciation of the growing global scrutiny of the environmental and social impacts of mining and oil and gas projects. Through a variety of initiatives since the 1990s, the oil and gas and mining industries have sought to address the negative public perceptions of their industries.¹⁷ In addition, several global mining and oil and gas companies have joined in collective responses to the issue of establishing no-go areas. The two key initiatives in this area are the "No-Go Pledge" of the International Council on Mining and Metals (ICMM) and the Energy and Biodiversity Initiative (EBI).

On August 20, 2003, the ICMM issued its Position Statement on Mining and Protected Areas. In the statement, its fifteen corporate members undertook not to explore or mine in World Heritage properties and to ensure that "existing operations in World Heritage properties as well as existing and future operations adjacent to World Heritage properties, are not incompatible with the outstanding universal value for which these properties are listed and do not put the integrity of these properties at risk."¹⁸

The ICMM position statement listed among the requirements for international systems designated as protected areas that they should be "transparent, rigorous, based on scientific and cultural understanding, backed by legal controls, and should contribute to the equitable resolution of different land-use, conservation and development objectives."¹⁹ The position statement further declared that of the systems that have been so designated, "only that of the World Heritage Convention and its Operational Guidelines currently meet all of these requirements sufficiently for ICMM member companies to recognise existing World Heritage properties as 'No-go' areas."²⁰

Heritage Comm., Decisions Adopted by the Thirty-third Session of the World Heritage Committee 71, 72, WHC-09/33.COM/20 (July 20, 2009).

¹⁶ Illegal mining continues to plague the World Heritage sites in the Democratic Republic of the Congo. See Dec. 30 COM 7A.6, para. 4(a), & 7A.8, para. 6(b), World Heritage Comm., Decisions Adopted by the Thirtieth Session of the World Heritage Committee 16–17, 19, WHC-06/30.COM/19 (Aug. 23, 2006).

¹⁷ These initiatives include a major, industry-led review of sustainability issues affecting the mining industry and a dialogue between the IUCN and the International Council on Mining and Metals on mining and biodiversity. INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, BREAKING NEW GROUND: MINING, MINERALS AND SUSTAINABLE DEVELOPMENT (2002); IUCN ET AL., PROCEEDINGS OF THE TECHNICAL WORKSHOP ON WORLD HERITAGE AND MINING, GLAND, SWITZERLAND (Sept. 21–23, 2000) (2001).

¹⁸ International Council on Mining and Metals, *Position Statement: Mining and Protected Areas*, Commitment 2 (Aug. 20, 2003), at <http://www.icmm.com/document/43>.

¹⁹ *Id.*, Recognition Statement 7.

²⁰ *Id.*, Recognition Statement 10.

The ICMM pledge is significant for the purposes of this discussion, as it demonstrates a commitment by certain mining companies to respect World Heritage sites that is neither mediated by state legislation nor tied to state compliance with the Convention. That is, even though the host state may permit mining within a World Heritage site, the affected mining company, if it is a signatory to the ICMM pledge, has now assumed a separate source of obligation not to proceed with the project.

The mining industry's ICMM pledge has not been matched by collective action by oil and gas companies. The most significant collective action on World Heritage by members of the oil and gas industry is the EBI.²¹ The EBI operated between 2001 and 2007 as a partnership of large energy companies²² and conservation organizations²³ focused on producing practical guidelines and tools for improving the environmental performance of energy operations and limiting harm to biodiversity. The EBI "decision-support framework" did not lead to the energy industry's automatic recognition of World Heritage sites as no-go areas,²⁴ but it did acknowledge the special status of international environmental agreements:

[I]nternational agreements—*particularly the World Heritage Convention*—are on the "radar screen" of the conservation community. Were companies to operate without due regard for these designations, there would be potential for communication campaigns that could damage the reputation of companies interested in operating at such sites. Acting in a way consistent with such agreements will therefore help to enhance the reputation of the company with the conservation community and with funding sources that are particularly committed to biodiversity conservation goals.²⁵

The EBI framework further encouraged corporations to be aware of the guidelines and procedures of the Convention and counseled companies contemplating operations in and around World Heritage sites not only to contact the relevant government ministry, but also to get in touch directly with the World Heritage Centre.²⁶ The EBI framework, like the ICMM pledge, had a significant normative dimension, and directly influenced the environmental policies of individual firms.

Firm-Specific Policies

Of the twenty largest mining companies, eleven now recognize World Heritage sites as no-go areas.²⁷ In contrast, of the twenty largest oil and gas companies, only Royal Dutch Shell

²¹ The Energy and Biodiversity Initiative (EBI), at <http://www.theebi.org/>. Although the EBI ceased operating in 2007, its Web site remained accessible at the time of this publication in July 2009.

²² The companies are BP, ChevronTexaco, Shell, and Statoil.

²³ The organizations are the Center for Environmental Leadership in Business, Conservation International, Fauna and Flora International, the IUCN, the Nature Conservancy, and the Smithsonian Institute.

²⁴ EBI, FRAMEWORK FOR INTEGRATING BIODIVERSITY INTO THE SITE SELECTION PROCESS 16, at <http://www.theebi.org/pdfs/selection.pdf> ("Whether industrial activities are allowed in a World Heritage site depends on the legal and administrative structures relevant to the site, such as national legislation, any regional or local regulations and the site management plan. But generally speaking, industrial activities are viewed by the Convention as incompatible with World Heritage status and mining is specifically named as an activity that may lead to a natural or mixed World Heritage site being listed 'in danger' (July 2002 Operational Guidelines). Therefore, avoiding World Heritage sites would be the best option in terms of easier reputation management . . .").

²⁵ *Id.* at 10 (emphasis added).

²⁶ *Id.* at 16.

²⁷ The companies are Alcoa, Anglo American, Barrick Gold, BHP Billiton, Freeport Copper, Mitsubishi Materials, Rio Tinto, Sumitomo Metal Mining, Teck Cominco, Vale, and Xstrata. These companies are either original

(Shell) has committed itself not to explore or develop oil and gas resources within any natural World Heritage site. But focusing only on the number of pledges may obscure the more important point that emerges once these corporate claims are examined individually: the Convention is being internalized by corporations as a standard of appropriate environmental behavior. This development is evident in at least four ways.

First, some corporations are making individual or collective pledges not to explore or extract within World Heritage sites. The most extensive commitments by an oil company were made by Shell, which was the first energy company to announce publicly that it would not explore for or develop oil and gas resources within any natural World Heritage site.²⁸ Shell's chief of operations, Sir Philip Watts, points to the company's decision against exploring in the World Heritage sites in Oman and the Sundarbans Forest in Bangladesh as evidence that the company is complying with this commitment.²⁹ Cairn India's Guiding Principles commit that company "not [to] conduct exploration or production operations in World Heritage Sites . . . or environmentally sensitive areas."³⁰ In 2004 the company signed an agreement with the government of Nepal to explore new drilling areas along its border with India. As part of the arrangement, "Cairn relinquished exploration rights for over 2,700 square kilometres of designated national park and wildlife areas," which, it stated, "was in line with company policy of sparing World Heritage Sites or those areas deemed environmentally sensitive."³¹

Second, these firm-specific and collective pledges are implemented in individual projects through private contractual agreements. Project-specific transactional documents constitute a window into how industry-wide or corporate-level policies can be made legally effective in individual project transactions. As this excerpt from a credit agreement reveals, compliance with the ICMM's no-go pledge may be required by a lender as a condition in a credit agreement:

SECTION 5.10. Compliance with Laws; Environmental Reports. (a) The Borrower will, and will cause each of its Subsidiaries to, comply with all laws, rules, regulations and orders of any Governmental Authority applicable to it or its property, except where the failure to do so, individually or in the aggregate, would not reasonably be expected to result in a Material Adverse Effect. . . . *In addition, the Borrower will cause PTFI to conduct its operations in accordance with the current International Council on Mining and Metals (ICMM) principles referenced in Schedule 5.10A, and adhere to ICMM current commitments on World Heritage properties included in Schedule 5.10B.*³²

signatories to the 2003 ICMM pledge or have since become members of the ICMM, and are thus committed to complying with the ICMM position statement.

²⁸ SHELL, THE SHELL REPORT 2003, at 14, available at http://www.shell.com/static/gr-el/downloads/climate_change/shell_report_2003.pdf.

²⁹ Jonathan Fowler, *Shell Chief: Protected Sites "No-Go" Zone for Oil, Gas Prospecting*, AP WORLDSTREAM, Aug. 27, 2003, available in LEXIS Academic.

³⁰ Cairn India, *Environmental and Social Review Summary* (Sept. 26, 2006), at <http://www.ifc.org/ifcext/spiwebsite1.nsf/DocsByUNIDForPrint/2D345F7A6F0A3A73852571F50067DA2D?opendocument>.

³¹ *Cairn Energy Takes Drill to Nepal*, BBC ONLINE, Aug. 12, 2004, at <http://news.bbc.co.uk/2/hi/business/3557996.stm>.

³² Amendment Agreement dated as of July 3, 2007, in respect of the Credit Agreement dated as of March 19, 2007, among Freeport-McMoran Copper & Gold, Inc., the Lenders party thereto, the Issuing Banks party thereto, and JPMorgan Chase Bank, N.A., as Administrative Agent and as Collateral Agent, and Merrill Lynch, Pierce, Fenner & Smith Incorporated, as Syndication Agent §5.10 (filed July 11, 2007) (emphasis added), available in LEXIS, EDGAR Online File. Schedule 5.10B reproduces the ICMM position statement.

In this way, a credit agreement provides a mechanism for private enforcement of corporate pledges and a means of holding a corporation to standards of behavior consistent with international treaty norms. Compliance-with-laws clauses offer an opportunity to define relevant law expansively to include international treaty provisions. But further empirical work is needed to measure the frequency with which lenders actually enforce these clauses.

Third, companies are mapping World Heritage sites and disclosing the proximity of their operations to them, framing such sites as a risk factor. These sites are gaining a place in the “environmental considerations” or risk-factor analysis of individual project reports.³³ The data sheets of Newmont Mining, for example, contain a column entitled “Area of Total Owned Operated and Non-operated Assets Which Occur Within World Heritage Properties.”³⁴ Barrick Gold’s Web site indicates that it does not operate in World Heritage areas but discloses that it is conducting three operations near World Heritage sites.³⁵ Gold Fields states in the Environmental Performance Indicators section of its 2003 Sustainable Development Report that it closely monitors compliance with “relevant legislation at international, regional and national levels, including . . . the World Heritage Convention.”³⁶ These corporations are now mindful of World Heritage sites and corporate processes have been put in place to collect information on the proximity of operations to such sites.

Fourth, corporations are demonstrating internalization of the Convention by claiming, in a number of projects, that they have altered their proposed operations to avoid World Heritage sites. BHP Billiton, for example, makes several claims that it has changed its investment plans to comply with the Convention.³⁷ These include its proposed developments in the following locations.

Gag Island, West Papua, Indonesia. BHP Billiton reports that PT Gag Nickel, a joint venture between BHP Billiton and Indonesia’s state-owned mining company, conducted exploration and evaluation activity in the late 1990s at the Gag Island site. In late 1999, however, the Indonesian government reclassified the forest on the island as a “Protection Forest” where open-cast mining would be prohibited. Later, a presidential decree, confirmed by the legislature, reinstated the right to mine in the area to thirteen mining companies, including BHP Billiton.³⁸ While BHP Billiton reported that it had not yet decided on the future of the project, the company clarified in a response to shareholders that it would not seek to continue the undertaking

³³ For example, Energy Resources of Australia (which is partially owned by Rio Tinto) discloses that its Ranger open-pit mine and Jabiluka mineral lease in Australia “are surrounded by, but remain separate from, World Heritage listed Kakadu National Park, and especially stringent environmental requirements and governmental oversight apply.” RIO TINTO, 2006 ANNUAL REPORT AND FINANCIAL STATEMENTS 18, available at http://www.riotinto.com/documents/FinancialResults/riotinto_2006_annualreport.pdf.

³⁴ Newmont Mining, *Data Sheets* (2006), at <http://www.beyondthemine.com/2006/?l=2&pid=5&parent=20&id=358> (disclosing no acres owned or operated within World Heritage sites).

³⁵ Barrick Gold, Corp., *Biodiversity Management and Protection* (2007), at <http://www.barrick.com/default.aspx?SectionId=5f187b4e-b5a1-4597-895d-c43041a753f7&LanguageId=1>.

³⁶ Gold Fields, *Sustainable Development Report 2003*, at http://www.goldfields.co.za/reports/annual_report_2003/sd_03/performance/enviro_perf.htm.

³⁷ BHP Billiton was created in 2001 by the merger of the Australia-based Broken Hill Proprietary Co. (BHP) and the United Kingdom-based Billiton.

³⁸ See Oxfam Australia, *Mining Ombudsman Annual Report 2004*, at 9, at <http://www.oxfam.org.au/campaigns/mining/>.

if the site, which was reportedly under consideration as a World Heritage site, was added to the World Heritage list.³⁹

Sarek National Park, Sweden. BHP announced in 2000 that it would surrender its license to explore for metals in a region of northern Sweden following consultation with the indigenous Sami people, “despite believing that there is excellent potential for an economic mineral deposit within the area.”⁴⁰ The company attributed its decision in some degree to the location of the permit area four kilometers from Sarek National Park, which forms part of the Lapponia World Heritage Site.

Pilbara Coast, Western Australia. As part of BHP Billiton’s prefeasibility study into the possible development of a land-based liquid natural gas plant and export facilities on the Pilbara Coast of Western Australia, all locations on the Exmouth Peninsula were excluded because of a proposal for World Heritage listing of the area. The study rated several other sites as having a “major disadvantage” because of their proximity to areas proposed for nomination as World Heritage sites.⁴¹

Large oil and gas companies have made fewer commitments to avoid World Heritage areas than large mining companies. But corporate documents still reveal evidence that some oil and gas corporations are making project-specific decisions that aim at respecting the Convention. BP, at the urging of Conservation International, claims that it will reroute its tankers in a liquid natural gas project in Indonesia, taking a 550-kilometer detour, to avoid the ecologically sensitive area of Raja Ampat, which is likely to be designated a World Heritage site.⁴² Finally, other energy companies, while falling short of declaring World Heritage sites off-limits, have promised to use higher environmental standards in operations adjacent to such sites.⁴³

II. SOURCES OF PRESSURE FOR CORPORATE TREATY PERFORMANCE

Why has the World Heritage Convention captured a place on the environmental policy agenda of certain large mining and oil and gas companies? The answer to this question lies in part in the advocacy efforts of the conservation community, in particular the IUCN, which has helped put the Convention on the radar of companies, including banks and insurance companies. Corporate dialogue on the Convention is also being initiated by shareholders. Finally, the World Heritage Committee itself has developed ways to interact directly with these companies. In this section, I purposely do not isolate NGO activism as just one more source of pressure, since this activism is implicated in each of the other sources of pressure on corporations to comply with the Convention.

³⁹ BHP Billiton, *Questions from Shareholders* 4 (2004), at <http://www.bhpbilliton.com/bbContentRepository/Events/QuestionsfromShareholders.pdf>; see also BHP BILLITON, HEALTH SAFETY ENVIRONMENT AND COMMUNITY REPORT 130 (2004), available at http://www.bhpbilliton.com/bbContentRepository/Reports/bhpb_full_hsec_report_04.pdf [hereinafter BHP BILLITON HSE REPORT].

⁴⁰ BHP, ENVIRONMENT AND COMMUNITY REPORT 2000, at 63, at <http://www.bhpbilliton.com/bbContentRepository/Reports/BHPEnvCommReport2000.pdf>.

⁴¹ BHP BILLITON, PILBARA LNG PROJECT: SITE SELECTION STUDY 18, 30, 31 (May 2003), at <http://www.bhpbilliton.com/bbContentRepository/docs/OurBusiness/Petroleum/PilbaraReport.pdf>.

⁴² Kate Barrett & Linda Yun, *BP, Cruise Lines Make Business Decisions with Earth in Mind* (Feb. 26, 2007), at http://www.conservation.org/FMG/Articles/Pages/BP_cruises_business_caribbean.aspx.

⁴³ For example, Energy Resources of Australia “recognises that the natural and cultural values of the company’s mineral leases and the surrounding World Heritage-listed Kakadu National Park must continue to be protected,” and bases a number of environmental commitments on this policy. ENERGY RESOURCES OF AUSTRALIA, LTD., SOCIAL AND ENVIRONMENTAL REPORT 15 (2005), at http://energyres.com.au/media_centre/reports/.

Banks and Insurance Companies

Campaigns to convince corporations to avoid ecologically sensitive areas have often failed to produce the change in behavior that pressure groups seek to secure. These groups thus increasingly address the financial sponsors that make extractive projects possible.⁴⁴ By securing commitments from banks, pension funds, and insurance providers, NGOs can attempt to prevent destructive developments from gaining financing. Consequently, financiers and insurers channel environmental norms to industry, just as they channel funds there.

It is in the policies of major banks that one finds specific prohibitions against the financing of extractive activity in World Heritage sites.⁴⁵ The policies of four of the twenty largest global banks now prohibit the funding of projects in World Heritage sites.⁴⁶ Goldman Sachs, one of the twenty largest, provides, for example, in its Environmental Policy Framework that the bank “will not knowingly finance extractive projects or commercial logging in World Heritage sites.”⁴⁷

Outside the world of banking, some insurance companies have also acknowledged that a project’s proximity to a World Heritage site is an environmental risk factor to consider in providing and pricing insurance products.⁴⁸ In 2004 the U.S. government’s Overseas Private Investment Corporation (OPIC) introduced a policy categorically prohibiting the provision of insurance products to infrastructure or raw material extraction projects in World Heritage sites.⁴⁹ This change of position resulted from significant pressure NGOs had exerted on OPIC over projects affecting World Heritage sites.⁵⁰

Shareholder Resolutions

Another source of pressure on corporations to adopt international environmental standards comes from shareholders. Particularly in the wake of threats to open the Arctic National Wildlife Refuge to oil and gas extraction, shareholders introduced a series of resolutions at the annual meetings of oil and gas companies and financial institutions to force these companies to adopt no-go policies for certain sensitive ecosystems. For example, in May 2005, shareholders of the

⁴⁴ For example, WestLB announced in December 2008 that it would not renew its agreement to finance the controversial gold mine at Toka Tindung in Indonesia. The bank was subject to a high-profile campaign against the project led by a German NGO. The proposed project would involve open-pit mines in an area close to a proposed World Heritage site. John Helmer, *Another Miner Going Nowhere in Indonesia*, ASIA TIMES ONLINE, Apr. 4, 2008, at http://www.atimes.com/atimes/Southeast_Asia/JD04Ae01.html.

⁴⁵ See, for example, HSBC Holdings’ Energy Sector Policy, published in 2006, which prohibits the provision of financial services for operations in World Heritage sites. HSBC HOLDINGS PLC, 2006 CORPORATE RESPONSIBILITY REPORT 18, at http://www.hsbc.com/1/PA_1_1_S5/content/assets/csr/2006_hsbc_cr_report.pdf.

⁴⁶ HSBC Holdings, JP Morgan Chase, Wachovia, and Royal Bank of Canada. This calculation of size is based on the Forbes 2000 list of the world’s biggest companies, by sector. Using 2008 figures, I measured size by the composite value of sales, assets, profits, and market value.

⁴⁷ Goldman Sachs, *Goldman Sachs Environmental Policy Framework* 6, at <http://www2.goldmansachs.com/citizenship/environment/index.html>.

⁴⁸ UNEP FI AUSTRALASIAN ADVISORY COMMITTEE ON INSURANCE, RISK, THE ENVIRONMENT AND THE ROLE OF THE INSURANCE INDUSTRY 7 (Jan. 2003).

⁴⁹ OPIC, OPIC ENVIRONMENTAL HANDBOOK 8 (Feb. 2004), available at <http://www.opic.gov/doing-business/investment/environment/>.

⁵⁰ For example, Russian and U.S. environmental groups pressured OPIC to deny investment finance and insurance for the Aginskoe gold-mining project near the Volcanoes of Kamchatka World Heritage Site in Russia. Berne Declaration–Switzerland, et al., *A Race to the Bottom: Creating Risk, Generating Debt and Guaranteeing Environmental Destruction* 11–12, Mar. 1999, at http://www.edf.org/documents/480_ecareport.pdf.

Exxon Mobil Corporation filed a proposal requesting that the company consider a policy of respecting certain protected areas, including World Heritage sites, as no-go areas.⁵¹ Similarly worded shareholder resolutions were introduced at the annual meetings of other energy firms, including BP and Conoco Phillips.⁵² Financial firms also faced shareholder resolutions calling on them to prohibit the backing of projects in environmentally sensitive areas, including World Heritage sites.⁵³ These resolutions mark an attempt by activist shareholders and the environmental NGOs working with them to initiate a dialogue on treaty norms, using corporate reputation as a pressure point.

Activism from International Institutions

The interactions of companies, activist organizations, lenders, insurers, and shareholders do not exist in isolation from the interstate architecture introduced to implement the Convention. Many of the initiatives described above, including the ICMM position statement, grew out of the mutual activities of private firms and the institutions tasked with implementing the Convention. The World Heritage Committee, the World Heritage Bureau, and the IUCN⁵⁴ have approached companies directly about their operations in World Heritage sites and the impact of the work on those sites. The IUCN, for example, appealed to corporations to stop buying the mineral coltan extracted from mines within two World Heritage sites in the Democratic Republic of the Congo.⁵⁵

The IUCN has played a critical role in establishing dialogues with both the ICMM and Shell, resulting in no-go commitments.⁵⁶ In 2007 the IUCN and Shell further institutionalized this dialogue, signing an agreement for additional strategic collaboration.⁵⁷ The IUCN has also encouraged the World Heritage Committee and Bureau to commend corporations that indicate they will comply with the Convention. When Shell publicly declared in 2001 that it had no plans for exploration activities in the special reserved forest of the Sundarbans in Bangladesh, the World Heritage Bureau applauded "Shell's careful and transparent planning of its hydro-carbon exploration activities."⁵⁸

⁵¹ See Exxon Mobil Corp., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, item 8 (May 25, 2005), available in LEXIS, EDGAR Online File.

⁵² Special Resolution 17, in BP p.l.c., *Notice of Meeting: Annual General Meeting 2004*, at 3, available at <http://www.bp.com/>; Green Century Funds et al., *Drilling in Protected/Sensitive Areas* (2005), at http://www.iccr.org/shareholder/proxy_book05/05statuschart.php (Conoco Phillips).

⁵³ See Shareholder resolution [on operations in protected and sensitive areas], in Citistreet Funds, Inc., Annual Report [to SEC] of Proxy Voting Record of Registered Management (2004); and in Loomis Sayles Funds II, Annual Report [to SEC] of Proxy Voting Record of Registered Management Investment Company (June 30, 2004), both available in LEXIS, EDGAR Online File.

⁵⁴ The committee consists of twenty-one elected states parties and is the key decision-making body of the Convention regime. The bureau coordinates the work of the committee. It consists of seven states parties elected annually by the committee, a chairperson, five vice chairpersons, and a rapporteur. The IUCN has special status under the Convention as an advisory body, and routinely provides information and advice to the bureau and the committee.

⁵⁵ *Coltan Mining Threatens the Congo*, ARBOR VITAE (IUCN/WWF Forest Conservation Newsletter), Mar. 19, 2001, at 11.

⁵⁶ See BISHOP ET AL., *supra* note 10, at 155.

⁵⁷ *Conserving Biodiversity Is a Business Opportunity*, Say IUCN and Shell, Shell News and Media Release (Mar. 27, 2008), at <http://www.shell.com/>.

⁵⁸ World Heritage Comm., Report of the Twenty-fifth Session (2001), Annex IX, at 111, 111–12, paras. III.44, III.49, WHC-01/CONF.208/24 (2002) [hereinafter WH Comm. 2001 Report].

The World Heritage Committee, at its annual meetings in both 2006 and 2007, directly addressed corporate conduct regarding issues of land access. In considering the Rwenzori Mountains National Park in Uganda, the committee strongly requested that Kilembe Mines Ltd. respect international standards on mining in World Heritage properties, as set forth in the ICMM position statement.⁵⁹ In addressing exploratory mining concessions that were granted by the Democratic Republic of the Congo inside two national parks,⁶⁰ the committee not only urged the state party to revoke these concessions as incompatible with the World Heritage status of the property, but also called on the “holders of any concessions to respect international standards with respect to mining in World Heritage properties, as outlined in the International Council on Mining and Metals Position Statement.”⁶¹

In noting the impacts of mining on the Mount Nimba biosphere reserve, a World Heritage site that straddles the Guinea/Côte d’Ivoire border, the committee requested information and action specifically from the Société des mines de fer de Guinée (the mining company) and not just the relevant states parties.⁶² The committee further worked with other UN agencies and NGOs to conclude memorandums of understanding with mining companies that set out environmental standards applicable to this site.⁶³

Thus far this essay has explored the extensive range of mechanisms used by nonstate actors to self-regulate or claim to self-regulate their international treaty performance, by directly engaging with World Heritage norms. This behavior functions outside traditional state mechanisms. Furthermore, the evidence presented above reveals that corporations not only are integrating international treaty norms into their own corporate governance, but also are imposing such norms on other corporations. Banks are prohibiting the financing of projects in World Heritage sites and insurance companies are denying coverage to extractive projects within these sites. Is this phenomenon somehow unique, or more pronounced, with respect to the World Heritage Convention than other environmental treaties? This question can be answered only by further comparative research that maps the unexplored terrain at the interface of corporate decision making and international treaty law.

III. THE PRIVATE LIFE OF TREATY LAW

Explaining Treaty Performance

From this study of the World Heritage Convention, we can begin to hypothesize certain factors that explain treaty performance. Reputational concerns are critically important to the mining and oil and gas companies discussed here: very large and visible transnational corporations that are competing for access to a limited resource base and need to overcome negative public perceptions.⁶⁴ The creators of the EBI, for example, advise that treaty performance in

⁵⁹ Dec. 31 COM 7B.9, para. 5, WH Comm. 2007 Report, *supra* note 14, at 49, 50.

⁶⁰ Dec. 31 COM 7A.4 & 7A.5, *id.* at 11, 12. The parks in issue, both World Heritage sites, are the Kahuzi-Biega and Virunga National Parks.

⁶¹ Dec. 31 COM 7A.4, *supra* note 60, para. 8, & 7A.5, *supra* note 60, para. 11, *id.* at 11, 13.

⁶² See Dec. 31 COM 7A.3, paras. 5–7, *id.* at 9, 9.

⁶³ Mount Nimba Strict Nature Reserve, para. VIII.38, WH Comm. 2001 Report, *supra* note 58, at 20, 21.

⁶⁴ Thomas W. Wälde, *International Standards: A Professional Challenge for Natural Resources & Energy Lawyers*, in INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY 219, 221 (Elizabeth Bastida, Thomas Wälde, & Janeth Warden-Fernández eds., 2005) (“Natural resources and energy are perhaps more sensitive to

a manner consistent with instruments such as the World Heritage Convention “will help to enhance the reputation of the company with the conservation community and with funding sources that are particularly committed to biodiversity conservation goals.”⁶⁵ This statement reveals that corporate reputation matters in this regard, as it goes both to the ability to raise capital and to reducing opposition from the conservation community. That corporations disclose their policies on World Heritage in SEC filings also suggests that reputation in this area involves risk management.

Yet reputational pressures only partially explain why companies integrate World Heritage norms into their corporate policies and investment decisions. Companies would probably gain reputational benefits from engaging with most, if not all, environmental treaties. The special attraction of the World Heritage Convention may lie in its structure: it is a list-based treaty.

Companies, industry associations, investors, and watchdogs alike are all searching for new metrics for evaluating the environmental performance of firms. Demand for reporting standards continues to increase.⁶⁶ The absence of globally applicable environmental standards and clear metrics for such monitoring, measuring, and ranking creates a market opportunity for international legal instruments.

The nature of the World Heritage List as a concrete list, a fixed metric, makes it easy to use and apply. World Heritage sites are easy to identify and locate, with finite geographical boundaries, inviting a check-the-box approach. Both the ICMM and Shell single out the specificity of the World Heritage standard as an important factor in explaining their decisions to adopt no-go policies for World Heritage areas, but not for other protected areas.⁶⁷

The fact that since Shell announced its no-go commitment in 2003, none of the other twenty largest oil and gas companies have adopted similar policies raises the larger question: why are some corporations engaging with the World Heritage Convention as a no-go standard and others not? This study reveals that seven of the ten largest mining companies have made no-go commitments.⁶⁸ The three that have not (China Shenhua Energy, MMC Norilsk Nickel, and Severstal) are all based in Russia or China. The seven that have made such commitments are all based in Europe or North America, with one exception.⁶⁹ The significance of the home state can also be seen in the fact that the four largest banks that have adopted no-go policies are all based in Canada, the United Kingdom, or the United States.⁷⁰ This study thus

modern global standards. These industries are among the most globalised industries, but also the most politically vulnerable ones. The industry social and political ‘license to operate’ depends to an increasing degree on compliance with such standards.”)

⁶⁵ EBI, *supra* note 24, at 10.

⁶⁶ The 2006 Companies Act in Britain, for example, introduced a requirement of social and environmental reporting for public companies. Companies Act, 2006, c. 46, §417 (Eng.). In Canada, the Ontario Securities Commission has called for more robust environmental reporting. OSC Staff Notice 51-716, Environmental Reporting (Feb. 29, 2008), available at http://www.osc.gov.on.ca/Regulation/Rulemaking/Current/Part5/sn_20080229_51-716_enviro-rpt.pdf.

⁶⁷ Sir Philip Watts, chairman of Shell’s Committee of Managing Directors, explains: “The clear systems, rules and processes which support these sites provide a strong model of good practice and I hope that this kind of clarity can be developed for other protected areas.” UN News Centre, UNESCO Welcomes Shell’s Pledge Not to Seek Oil or Gas in World Heritage Sites (Aug. 27, 2003), available at <http://www.un.org/apps/news/printnewsAr.asp?nid=8084>. On the ICMM position statement, see text at notes 18–20 *supra*.

⁶⁸ These companies are Alcoa, Anglo American, BHP Billiton, Freeport Copper, Rio Tinto, and Xstrata.

⁶⁹ The exception is Brazil-based Vale. In 2007 Vale acquired Inco, a large Canadian subsidiary.

⁷⁰ Two of these banks are in the United States (JPMorgan Chase and Wachovia), one is in the United Kingdom (HSBC Holdings), and one is in Canada (Royal Bank of Canada).

preliminarily suggests that the “compliance pull” of environmental treaty norms may be stronger for corporations based in states particularly sensitive to NGO pressure, such as the countries of Europe and North America. A full and rich empirical testing of this hypothesis, and the others advanced here, awaits a wider comparative evaluation of corporate treaty performance across a larger sample of treaty regimes.

Why Does Treaty Performance Matter?

Ultimately, why does it matter that corporate policies now reference the World Heritage Convention and that some corporations claim and indeed seek to perform aspects of this treaty? What impact has the private sector’s translation of these treaty norms had on the underlying norms?

A close examination of the experience concerning the World Heritage Convention invites a cautious response to the phenomenon of corporate treaty performance. A real tension emerges between the efforts certain corporations are making that foster treaty implementation and raise corporate environmental standards, and other corporate activities that undermine and obfuscate the effectiveness of the same treaty regime.

The experience of the World Heritage no-go pledges is instructive in revealing tensions inherent in the corporate translation of treaty standards. As noted above, the ICMM position statement defined the relevant standard for member companies as requiring a commitment not only not to explore or extract within natural World Heritage sites, but also to ensure that their operations in or adjacent to World Heritage properties, and future operations adjacent to such properties, are not “incompatible” with the universal value of these properties and do not threaten their integrity.⁷¹

The translation of this requirement into subsequent corporate policies and practice has had mixed results. Although the Brazilian mining company Vale is a signatory to the ICMM charter, it does not reference the no-go pledge in its sustainability reports.⁷² BHP Billiton, however, integrated the pledge into its 2007 biodiversity position and robustly interprets it as “an undertaking not to explore or mine in World Heritage properties and a commitment to take all possible steps to ensure that operations are not incompatible with the outstanding universal values of World Heritage properties.”⁷³ Evidence that BHP Billiton has internalized this commitment can be found in specific actions that the company has taken at projects adjacent to World Heritage sites. For example, at the Bakhuis bauxite concession, which is located next to a World Heritage site—the Central Suriname Nature Reserve—BHP Billiton has undertaken social and environmental assessments to establish the impact that its operations would have on the site.⁷⁴ But other evidence suggests that the company has not fully internalized the commitment to protect World Heritage values. For example, it has disclosed its continuing operation of two

⁷¹ See text at note 18 *supra*.

⁷² See, e.g., VALE, SUSTAINABILITY REPORT 2007, available at <http://www.vale.com/>.

⁷³ BHP BILLITON, HSE REPORT, *supra* note 39, at 18.

⁷⁴ IAN WOOD, BHP BILLITON: ENVIRONMENTAL CONSIDERATIONS IN GAINING AND MAINTAINING OUR LICENCE TO OPERATE 22 (June 15, 2007), at <http://www.bhpbilliton.com/bbContentRepository/acsiPresentationJune2007.pdf>.

export coal terminals within the Great Barrier Reef World Heritage Area, which may impair the environmental integrity of this site.⁷⁵

Other mining companies simply translate their commitment pursuant to the ICMM position statement as a promise not to mine within World Heritage sites, ignoring the more onerous requirements of the pledge, namely, to ensure that all operations do not threaten the sites themselves. Xstrata thus includes the commitment “not [to] explore or mine in World Heritage listed sites” in its sustainability reports.⁷⁶ It declares that “[n]o Xstrata operations are located adjacent to World Heritage designated areas” rather than stating that it will ensure that all operations do not undermine the integrity of adjacent World Heritage sites.⁷⁷ Alcoa also translates its commitment as one “not to explore or mine in World Heritage Sites.”⁷⁸

These limited and partial translations of the full ICMM position statement raise the concern that corporate translation of both this pledge and the underlying treaty commitment is conceived of by some companies as simply a form of signaling their environmental responsibility, a way of gaining reputational advantage for very little cost. Such partial translations can result in a restrictive interpretation of the position statement that does not effectively implement the treaty’s requirement of ensuring that activities surrounding World Heritage sites are not incompatible with the outstanding universal value for which these properties are listed, and do not put the integrity of these properties at risk. These examples point to a corporate preoccupation with appearances (the signing of the pledge), and valuation of the symbolic over the actual implementation of their commitments.

In vowing to stay out of World Heritage sites, private firms are also signaling greater industry engagement with future developments regarding the Convention, as they anticipate having more at stake. This perception may manifest itself in demands for greater corporate participation in both international treaty processes and national site nominations.⁷⁹ Increased corporate engagement with the Convention may ultimately make it harder for areas with potential natural resource deposits to be named as natural World Heritage sites. For example, NGOs expressed fear that France had withdrawn the nomination of the New Caledonian Reefs World Heritage site in 2002 in deference to the mining companies.⁸⁰

One concern arising from this study, then, is that greater corporate engagement in treaty processes may ultimately lead to weaker treaties. Corporate cherry-picking of treaties, and of specific provisions within treaties, is also easy to predict, as from the public’s standpoint the reputational value of being associated with a treaty is likely the same whether an entity adheres to the treaty in whole or in part. Some scholars also fear that as corporations take on increasingly

⁷⁵ BHP Billiton, *Hay Point Services HSEC Report 2002*, at 2, available at <http://www.bhpbilliton.com/bbContentRepository/Reports/HayPoint2002PublicHSECReport.pdf>.

⁷⁶ E.g., XSTRATA, *SUSTAINABILITY REPORT 2008*, at 64, available at http://www.xstrata.com/assets/pdf/x_sustainability_2008.pdf.

⁷⁷ *Id.*

⁷⁸ ALCOA, *2007 SUSTAINABILITY HIGHLIGHTS 18*, available at <http://www.alcoa.com/>.

⁷⁹ The national nomination of World Heritage sites can already be fiercely contentious. In Australia, the contested Daintree rain forest nomination led to litigation between the Commonwealth and Queensland. Acrimony over the nomination of the Tasmanian Dam and Tasmanian Wilderness area became a federal election issue in the 1983 federal election. BEN BOER & GRAEME WIFFEN, *HERITAGE LAW IN AUSTRALIA* 91–103 (2006).

⁸⁰ Mining Watch, *World Heritage Site Application for New Caledonia Reefs Cancelled* (Sept. 18, 2002), at http://www.miningwatch.ca/index.php?/New_Caledonia/World_Heritage_Site_.

dominant roles in interpreting and applying international treaty norms, states will retreat.⁸¹ But corporations have long influenced treaty implementation, just as international treaties have long had a practical impact on corporate behavior. This essay argues that it is time to make these processes as visible in theory as they are functional in practice.

IV. CONCLUSION

The aim of this essay is to serve as a preview, not a substitute, for deeper and broader comparative work on treaty performance by private actors. By documenting how companies have directly engaged with the World Heritage Convention, and drawing some cautious lessons from that experience, I provide an example of the phenomenon of treaty performance, and signal the need for further research. The wider significance of this case study is that it tantalizes with its prospects for rethinking the way we conceptualize environmental treaties, and indeed other international treaties.

This study draws attention to the little-explored relationship between private environmental governance and intergovernmental environmental law.⁸² Corporate interaction with the World Heritage Convention is visible both as an element of collective standard setting at the industry level, and unilateral policymaking by individual firms. The pervasiveness and diversity of entry points through which corporations are being pulled into an implementation role in the Convention, combined with the unresponsiveness of some state actors, means that we can no longer speak of environmental treaties as the privilege only of states parties.

Initiatives aimed at articulating international standards of environmental and social behavior for corporations are proliferating. And demand for such international standards shows no sign of abating. The Global Compact, the Global Reporting Initiative,⁸³ and the International Standards Organization's emerging guidance standards on corporate social responsibility (ISO 26000)⁸⁴ are but a few examples. These initiatives are often framed and even defined by the ways they differ from "traditional" international law such as treaty law.⁸⁵ It is time to resist this knee-jerk reaction and to understand how such initiatives draw upon and interact with treaty norms. This account of the private life of one environmental treaty thus reminds us of a lesson we seem destined to need to relearn—the futility of drawing boundaries between public and private law.

⁸¹ See generally PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler, & Tony Porter eds., 1999).

⁸² Edith Brown Weiss observes: "In international environmental law, the most important development for the next century may be the emerging interaction of intergovernmental environmental law with transnational environmental law developed primarily by the private sector and by institutions such as the International Standards Organization . . ." Edith Brown Weiss, *The Rise or the Fall of International Law?* 69 FORDHAM L. REV. 345, 353 (2000).

⁸³ See UN Global Compact, at <http://www.unglobalcompact.org>; The Global Reporting Initiative, at <http://www.globalreporting.org/Home>.

⁸⁴ The standards are expected to be published in 2010. International Organization for Standardization, *Guidance on Social Responsibility*, ISO/TMB/WG SR N55, ISO/WD 26000 (Mar. 28, 2006), available at http://innipacinst.org/innil/corporate_social_responsibility/N055WD1_26000.pdf.

⁸⁵ See Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 505 (2009).