# The World Heritage Convention, the Environment, and Compliance

**Dr. Edward J. Goodwin***

## ABSTRACT

This Article highlights a particular strength of the World Heritage Convention within the international environmental law project that enhances conservation of natural areas, flora, and fauna. This strength relates to the World Heritage Convention's ability to pull states towards meaningful compliance with obligations connected to protecting, conserving, presenting, and transferring to future generations the world's natural (and cultural) heritage.

After a general introduction to the World Heritage Convention, Parts III and IV explain how compliance pull is created through institutional arrangements. Those institutional arrangements focus upon devolving ultimate power over implementation from the contracting parties acting collectively to a smaller executive authority—the World Heritage Committee. Significantly, this committee ultimately has the capacity to withhold substantial benefits to contracting parties in the event of non-cooperation or breach of obligations, and to take other measures that impact the contracting parties' self-interest. Thus, even though the dominant and preferred strategy adopted by the committee is rightly one of non-confrontation, cooperation, and support, this sanctioning option remains significant. Ultimately, while it is not denied that compliance can be influenced by extra-convention factors, it is asserted that the system created under the treaty introduces significant factors into a state's logic of consequences, exerting a pull towards action in compliance with obligations.

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* Faculty of Law, University of Leicester, University Road, Leicester LE1 7RH, United Kingdom. Email: edward.goodwin@leicester.ac.uk. The author wishes to thank Jason Beckett who read and commented upon an earlier draft of this Article. The author alone remains responsible for any errors or omissions the Article may contain.

This results in an atypical, multi-lateral environmental agreement under which decisions as to the normative content, access to benefits, meaning and existence of compliance, and threat or imposition of sanctions are beyond the control of an individual state. The atypical nature of the situation is demonstrated in Part V by a comparative analysis with other multi-lateral environmental agreements. The main focus of that comparative analysis is upon those treaties whose non-compliance procedures have received the majority share of academic attention. As will be demonstrated, there is little justification for the current practice of omitting reference to the World Heritage Convention in that compliance discourse.

With extensive power over the normative content of the Convention, and the means to enforce its own interpretation of that normative content, the legitimacy of the World Heritage Committee and its activities is vital. This Article therefore finishes in Part VI by drawing attention to problems of indeterminacy and the composition of the Committee. These are areas requiring action in order to shore-up the legitimacy of the executive body, and thereby ensure continued compliance pull.

## I. INTRODUCTION

On December 17, 1975, the World Heritage Convention ("WHC") entered into force.[1] The text, which had been adopted just over three years previously at the General Assembly of the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), was the result of two international initiatives supported by UNESCO and the International Union for the Conservation of Nature ("IUCN").[2]

In 1960, the construction of the Aswan High Dam threatened a number of important Egyptian monuments including the temple of Ramses II at Abu Simbel.[3] International campaigns organized by UNESCO and others raised enough money to support the now famous relocation and conservation plans which the Egyptian government completed for the Abu Simbel monuments.[4] In light of this and other campaigns to save cultural properties, UNESCO recognized that the

1. *See* UNESCO World Heritage Centre, State Parties: Ratification Status, http://whc.unesco.org/en/statesparties/, note 1 (last visited Mar. 24, 2009). *See also* Convention Concerning the Protection of the World Cultural and Natural Heritage, November 16, 1972, 11 I.L.M. 1358 [hereinafter WHC].

2. Francesco Francioni, *The Preamble*, in THE 1972 WORLD HERITAGE CONVENTION A COMMENTARY 11, 13-15 (Francesco Francioni ed., 2008).

3. *Id.* at 12-13; SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 208 (1985).

4. LYSTER, *supra* note 3, at 208.

future mobilization of international aid for cultural and historic preservation would benefit from a formalized, rather than ad hoc, procedure.[5]

Concurrently, the IUCN was developing the idea that there existed throughout the world natural and cultural areas of such value that they should be held in trust for all humankind.[6] These sites were identified as a part of the heritage of every human, not just the nationals of the endowed states.[7] While work had begun within UNESCO to formulate a convention on cultural heritage, parallel advocacy by IUCN for a natural heritage agreement began to have an impact.[8] Ultimately, this resulted in a compromise text with a dual focus on cultural and natural heritage: what would become the WHC.[9] It also led to a close working relationship between UNESCO and IUCN that continues today.[10]

The inclusion of natural heritage has significantly enhanced the portfolio of international environmental laws. In conjunction with the 1971 Convention on Wetlands of International Importance, Especially as Waterfowl Habitat ("Ramsar," after the Iranian town where the treaty was signed),[11] the 1973 Convention on International Trade in Endangered Species ("CITES"),[12] the 1979 Convention on the Conservation of Migratory Species of Wild Animals,[13] and the 1992

5. *Id.* at 209.

6. The development of this idea is attributed to Russell Train, although Train also gives credit to Dr. Joseph Fisher with whom Train was working in the mid-1960's. Speech of Russell Train, Chairman of the World Wildlife Fund, Remarks Before the International World Heritage Committee Meeting (Dec. 7, 1992), *available at* http://whc.unesco.org/archive/repcom92.htm#inf1 [hereinafter Speech of R. Train]; *See also* D. J. Haigh, *World Heritage – Principle and Practice: A Case for Change* 17(3) ENVTL & PLAN. L. J. 199, 199 (2000).

7. H. K. Eidsvik, *The World Heritage Convention, Yesterday – Today – and Tomorrow: An Overview* in CRITICAL ISSUES FOR PROTECTED AREAS PART 1: WORLD HERITAGE SESSION 15 (Workshop Papers from the 18th General Assembly of IUCN, 1991).

8. Speech of R. Train, *supra* note 6.

9. Francioni, *supra* note 2, at 14-15; WHC, *supra* note 1, at Preamble.

10. *See, e.g.*, Sarah M. Titchen, *Challenging the Spirit: A Brief History*, 2 WORLD CONSERVATION 6, 6 (2001).

11. Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, 11 I.L.M 963 [hereinafter Ramsar]. *See also* The Official Website of the Ramsar Convention on Wetlands, http://www.ramsar.org/ (last visited Mar. 2, 2009).

12. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES]. *See also* The Official Website of CITES, http://www.cites.org/ (last visited Mar. 2, 2009).

13. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15. *See also* The Official Website of the Convention on Migratory Species, http://www.cms.int/ (last visited Mar. 2, 2009).

Convention on Biological Diversity,[14] the WHC is widely regarded as one of the centerpiece multilateral environmental agreements ("MEAs") concerned with wildlife and habitat conservation.[15]

This Article will focus on the way in which the WHC generates "compliance pull,"[16] especially via the institutional mechanisms by which the WHC draws states towards meeting their obligations. The commitments that will be the primary focus of this Article are those that concern protecting, conserving, presenting, and transferring to future generations the cultural and natural heritage within each state's territory.[17] The way compliance pull is exerted distinguishes the WHC from all other MEAs. Indeed, there is little justification for the current practice of omitting reference to the Convention in compliance discourse. The WHC deserves to be considered alongside those non-compliance procedures that have received the majority share of academic attention,[18] such as CITES; the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention");[19] and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol").[20] This Article will illustrate the similarities between the WHC and other MEAs, while maintaining that the WHC remains distinct in the following key respect.

The enhanced compliance pull of the WHC is achieved by devolving ultimate power over implementation from the contracting parties to a smaller executive authority. Significantly, as will be explained, this body has the capacity to withhold substantial benefits from contracting parties in the event of non-cooperation or breach of obligations. Consequently, the WHC undermines the claim that strict

14. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818. *See also* The Official Website of the Convention on Biological Diversity, http://www.cbd.int/ (last visited Mar. 2, 2009).

15. PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 672 (3d ed. 2009); LYSTER, *supra* note 3, at 179-181.

16. To adopt Thomas Franck's apt terminology describing the extent to which a rule or set of rules exert a pulling force towards compliance upon those states to which it is addressed. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 25 (1990).

17. WHC, *supra* note 1, at Art. 4.

18. *See, e.g.*, references *infra* note 138.

19. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 [hereinafter the Aarhus Convention]. *See also* The Official Website of the Aarhus Convention, http://www.unece.org/env/pp/ (last visited Mar. 22, 2009).

20. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 [hereinafter Montreal Protocol]. *See also* The Official Website of the Montreal Protocol, http://ozone.unep.org/ (last visited Mar. 22, 2009).

enforcement and deterrence are not possible in an international legal system lacking a hierarchically superior enforcement body.[21]

Employing such an authoritative body to enforce compliance is not without drawbacks. Natasha Affolder notes occasions where the WHC's system has led to "[the] inaccurate but potent image of the U.N.'s 'black helicopters' flying over and policing" the land of states thought to be acting contrary to obligations.[22] Therefore, this Article will also explore some of the current problems with the WHC system that may undermine the legitimacy of its executive body and thus its compliance pull.

## II. AN OVERVIEW OF THE PERTINENT ELEMENTS OF THE WHC

While the phrase "World Heritage Site" might be familiar to students, scholars, and the general public, it seems less likely that this familiarity will extend to the mechanisms which confer this status, or to the obligations relating to such designated areas. Consequently, and as a preliminary to themes to be developed, an account of some key elements of the WHC is required.

### *A. The WHC's Jurisdiction*

The WHC regulates both cultural and natural heritage.[23] Given the environmental focus of this discussion, Article 2 is pertinent since it defines natural heritage as:

> (a) Natural features consisting of physical and biological formations of outstanding universal value scientifically or aesthetically;
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> (b) The habitat (which may be geophysical or physiographical) of threatened species of plants and animals which are of outstanding universal value in terms of science and conservation; and

21. A view noted in D. G. Victor *et al*, *Systems for Implementation Review* in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW: THEORY AND PRACTICE 47, 51 (David G. Victor *et al.* eds., 1998). For further support on the executive role of the World Heritage Committee see Diana Zacharias, *The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution*, 9 GERMAN L. J. 1833, 1840-47 (2008).

22. Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 PACE ENVTL. L. REV. 35, 42 (2007).

23. WHC, *supra* note 1, at Arts. 1, 2.

> (c) Natural sites or areas of outstanding universal value from the point of view of science, conservation or natural beauty.[24]

The authority for identifying and delineating those sites which meet this definition is left to the contracting parties and is limited to areas situated within each state's territory.[25]

Helpfully, the *Operational Guidelines for the Implementation of the World Heritage Convention* ("Guidelines") provide extra guidance for interpreting definitions and key terms.[26] For example, the Guidelines define the phrase "outstanding universal value" as "natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity."[27]

This authoritative interpretation of Article 2 is broad enough to include a wide range of landscape and habitat types, but it also sets a high standard that generates one of the most significant, albeit intentional, limitations of the WHC. Limiting the sites to be protected to the "best of the best" by the outstanding universal value test excludes most areas.[28] The Guidelines confirm that "[t]he Convention is not intended to ensure 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."[29]

The narrow scope of the WHC distinguishes it from other MEAs, such as Ramsar or the Convention on Biological Diversity. However, as will be explained, the WHC's exclusivity goes a long way towards

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24. *Id*. at Art. 2.

25. *Id*. at Art. 3.

26. UN Educ. Scientific & Cultural Org. (UNESCO), OPERATIONAL GUIDELINES FOR THE IMPLEMENTATION OF THE WORLD HERITAGE CONVENTION, WHC 05/2 (Feb. 2, 2005) *available at* http://whc.unesco.org/archive/opguide05-en.pdf [hereinafter Guidelines]. The Guidelines are mainly intended to inform contracting parties about the principles which guide the way the World Heritage Committee and world heritage lists work (both of which are described in detail later). They were created, and have been continually updated, as part of the World Heritage Committee's program of work. They are not legally binding, although their practical importance for implementation, as explained in this Article, should not be underestimated. *See also* Catherine Redgwell, *Article 2 Definition of Natural Heritage* in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 63, 66-67 (Francesco Francioni ed., 2008).

27. Guidelines, *supra* note 26, ¶ 49.

28. *See e.g*. the decision of the World Heritage Committee in relation to the nominated site of Kopacki rit, Croatia which was felt to be of only European scale importance; Report of the 24th Ordinary Session of the World Heritage Committee, 38 WHC-2000/CONF.204/21 (Feb. 2001).

29. Guidelines, *supra* note 26, ¶ 52.

establishing a global brand that can generate benefits for states and parts of the environment.

### *B. The Obligations Imposed*

Identifying a particular area as falling within the definition of "natural heritage" has two consequences. First, the state endowed with the site, and the other contracting parties to the WHC, assume certain obligations with respect to that area.[30] Second, the area can be nominated for recognition as a World Heritage Site. These effects will be discussed in turn.

Under Article 4, a state must protect, conserve, present, and transfer to future generations all sites of natural heritage within its territory.[31] This obligation is to be performed to the utmost of the state's own resources and with any assistance forthcoming from others.[32] This obligation is further elaborated in Article 5, which calls on states to maintain a responsible agency (with appropriate staff and means) to fulfill the duty articulated in Article 4.[33] Further, states shall endeavor to take the appropriate legal, scientific, technical, administrative, and financial measures to identify, protect, conserve, present, and rehabilitate natural heritage areas.[34]

Although this review principally focuses on the inherent propensity of the WHC to generate compliance with these obligations, the commitment under Article 6 of the instrument is also relevant to issues developed later. Article 6 relates to the obligations owed by all contracting parties to the World Heritage Sites situated outside their territories. Thus, Article 6(3) obliges state parties to refrain from measures that might directly or indirectly damage the natural heritage

30. A focus and distinction is deliberately being maintained in this Article between these site-specific obligations, and more general operational or administrative obligations, such as the obligations to file systematic reports or to make the annual contributions to the fund maintained under the WHC.

31. WHC, *supra* note 1, Art. 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 the 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.

32. *Id.*

33. *Id*. at Art. 5(b).

34. *Id*. at Art. 5(d).

situated in the territory of another participating state.[35] In addition, Article 6(2) obliges state parties to assist other state parties with sites inscribed in the World Heritage List and the List of World Heritage in Danger.[36]

### *C. The World Heritage Inventories*

For the WHC to act as a formalized system for the mobilization of international responsibility and support for the earth's outstanding heritage, an identification system had to be put in place to determine which sites should benefit from such initiatives. The system employed centers around an official list of sites that have been independently verified as being of outstanding natural value—the World Heritage List. This list is maintained by the Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, commonly known as the World Heritage Committee ("the Committee").[37] There are twenty-one seats on the Committee that are filled by states elected by, and from within, the contracting parties.[38]

The listing mechanism can be viewed in three stages. First, state parties must identify sites they feel fall within the Article 1 and 2 definitions.[39] From these, "Tentative Lists" of sites that a state would like to see included in the World Heritage List are to be produced, "so far as possible," and submitted to the Committee.[40] The state can then elect to begin a nomination process for inscription on the World Heritage List by collecting and submitting all the requisite documentation for any site it wishes to be considered by the Committee in a given year.[41] Thus, the contracting parties control the early stages of the listing process. Sites must be situated in the nominating state's boundaries and it is not in the power of the Committee, nor another state, to require a contracting party to nominate a particular area. As Simon Lyster points out, "however

35. *Id*. at Art. 6(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").

36. The last of these lists is described in more detail in Part II.C.2.

37. The Committee was established under WHC, *supra* note 1, Art. 8.

38. WHC, *supra* note 1, Art. 8(1).

39. *Id*. at Art. 3. This process should involve the production of inventories.

40. *Id*. at Art. 11(1); Guidelines *supra* note 26, ¶¶ 62, 65. The original terminology of inventories as used in the WHC has given way to that of tentative lists. This helps to distinguish this document from the desired preceding step of producing national inventories, which are for information purposes and use at the national level. Further, as to the problems of qualifiers to the effectiveness of duties, see *infra* Part V(B).

41. The details of the nomination process are provided in Part III of the Guidelines.

much the Committee might think a site worthy of inclusion in the List, it only becomes eligible for selection after the Party in whose territory it is situated has made an appropriate proposal."[42]

However, such state focused control stops there. After the nomination process, the treaty introduces a mechanism that emphasizes the executive authority of the Committee over the World Heritage List. This is important since the principal benefits to be derived under the treaty flow from inscription on this list, not from nomination. The Committee therefore has control over: (1) initial admittance to the inventory; (2) officially declaring that an area of world heritage is in danger; and (3) the deletion of a site from the World Heritage List. These steps will be considered in turn.

*1. Inscription*

The WHC stipulates that it is for the Committee to "establish, keep up to date and publish" the World Heritage List.[43] It is the Committee that must agree to inscribe a site, pursuant to an objective scientific procedure.[44] Nominated sites are first assessed by the international organizations that have been retained to assist in the operation of the WHC.[45] This function is performed by IUCN for natural heritage nominees.[46] Following this assessment, a report is prepared by IUCN for the Committee. The Committee then decides, by a two-thirds majority of the members present and voting, whether the property should be inscribed on the list.[47] Only then can a state call a site within its territory a World Heritage Site.[48] This approach is in contrast to other regimes that also seek to recognize important habitat areas. Ramsar, for example, allows states to unilaterally inscribe sites on its List of Wetlands of International Importance and therefore has no independent approval body.[49]

42. LYSTER, *supra* note 3, at 211.

43. WHC, *supra* note 1, at Art. 11(2).

44. Guidelines, *supra* note 26, ¶ 23.

45. *Id*. ¶¶ 143-151.

46. *Id*. ¶ 145.

47. WHC, *supra* note 1, at Art. 13(8).

48. At the time of writing, there were 878 world heritage sites located in the territory of 145 contracting parties, representing both natural and cultural heritage. UNESCO, World Heritage List, http://whc.unesco.org/en/list (last visited Mar. 2, 2009). Some sites contain a mixture of cultural and natural heritage. *Id*.

49. Ramsar, *supra* note 11, at Art. 2(1).

*2. Sites in Danger*

Article 11(4) states that 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. . . . The list may only include such property . . . as is threatened by serious and specific dangers. . . .

The dangers faced by natural properties may be either "ascertained," that is, "specific and proven imminent danger," or "potential," meaning there are "major threats which could have deleterious effects on its inherent characteristics."[50] Further, the danger must be one that can be corrected by human action.[51]

Inclusion of a property on the List of World Heritage in Danger ("Danger List") is a formal recognition of a state of affairs that calls for safeguarding measures, and also is a way to secure resources.[52] Listed sites therefore enjoy a degree of priority when it comes to allocating funds under the WHC.[53]

*3. Deleting Sites*

In the same way that the Committee independently controls which sites are inscribed on the list, it alone determines when a property should be removed.[54] This is permitted in two situations, namely:

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50. Guidelines, *supra* note 26, ¶ 180.

51. ,*Id.* ¶ 181.

52. 1992 *Strategic Orientations* adopted at the 16th Ordinary Session of the World Heritage Committee, ¶ 23 (the adoption and text of the Strategic Orientations are recorded in the Report of the 16th Ordinary Sessions of the World Heritage Committee, part VII and Annex II respectively).

53. Guidelines, *supra* note 26, ¶ 236. The funding stream set up by the WHC is discussed in more detail in Part III.A of this Article.

54. *Id.* ¶¶ 192-98. Tullio Scovazzi observes that even "if the Convention does not explicitly deal with the question, it seems implied in its competences that the WHC, which can inscribe properties on the World Heritage List, can also delete them from the same List." *Articles 8-11 World Heritage Committee and World Heritage List*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 147, 169 (Francesco Francioni ed., 2008). Gionata P. Buzzini and Luigi Condorelli derive the implication that sites may be deleted from the World Heritage List from Article 11(2), which calls for the list to be updated every two years. *Article 11 List of World Heritage in Danger and Deletion of a Property from the World Heritage List*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 175, 197 (Francesco Francioni ed., 2008).

> a) where the property has deteriorated to the extent that it has lost the characteristics which merited its inclusion in the first place; or
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> b) where the intrinsic characteristics were already threatened by man at the time of listing and where corrective measures outlined by the proposing state at the time of listing have not been taken within the proposed time.[55]

Information on this state of affairs should come from the relevant contracting party. Where the relevant contracting party is not the originating source, that source and the information presented must be verified in consultation with the state concerned.[56] IUCN is also requested to comment on the information. Ultimately, the Committee can then order that the site be removed from the list. Crucially, the Guidelines do not require consent from the relevant contracting party prior to deletion, only prior consultation.[57] While deletion is a very rare event,[58] the procedure confirms the executive authority of the Committee, rather than the individual contracting parties, over the content of the World Heritage List.

## III. THE BENEFITS OF PARTICIPATION AND COOPERATION

The WHC offers contracting parties a range of benefits in return for responsible management of World Heritage Sites in accordance with the obligations described. Some benefits are financial and developmental, while others are political. Although many benefits are similarly available under other MEAs, there are some distinguishing features of those available under the world heritage regime worth noting.

### *A. Economic Gain and Capacity Building*

The inscription of a site onto the World Heritage List is generally perceived to bring with it a number of financial advantages. As Jim Thorsell noted in his experience as Senior Advisor on Natural Heritage

55. Guidelines, *supra* note 26, ¶ 192.

56. *Id.* ¶¶ 193, 194.

57. *Id.* ¶ 196.

58. To date, just one site has been deleted, namely the Arabian Oryx Sanctuary in Oman in 2007. World Heritage Committee Decision 31 COM 7B.11, State of Conservation of World Heritage Properties - Arabian Oryx Sanctuary, *available at* http://whc.unesco.org/en/decisions/1392/.

to IUCN, "inherently, World Heritage is a saleable popular commodity. . . . brisk sales of the National Geographic book, Our World's Heritage, and forecasts for a new Harper-McCrae venture, Masterworks of Man and Nature, reflect popular interest in World Heritage sites."[59]

The most obvious economic benefit to be derived from such popular interest is income from visitors.[60] By creating a world heritage "brand" for sites—highlighting them as "the best of the best" cultural and natural landscapes—states are given special opportunities for promoting tourism.[61] This benefits both local and national economies and goes beyond what is available under other MEAs.[62]

In addition, the WHC offers other avenues for building capacity. There are opportunities for cross-border cooperation between heritage managers and stakeholders, and means of obtaining financing for heritage projects from other contracting parties. Thus while the option to pursue bi-lateral funding streams through links fostered under the WHC is, naturally, ever present, the agreement also provides for multi-lateral funding distributed from the World Heritage Fund.[63]

Lyster has highlighted the existence of the World Heritage Fund as one of the WHC's key features.[64] This fund is constituted from money collected through compulsory and voluntary contributions from the state

59. Jim Thorsell, *The World Heritage Convention After 20 Years: Achievements and Challenges*, *in* TOWARDS GREATER UNDERSTANDING AND USE OF THE WORLD HERITAGE CONVENTION 25 (Heritage Resources Centre University of Waterloo Occasional Papers Series #22, 1992). The second book referenced in the quote, *Masterworks of Men and Nature*, was duly published in 1993.

60. REPORT OF THE INTERNATIONAL WORKSHOP, MANAGING TOURISM IN NATURAL HERITAGE SITES, 13 (1993). For an illustration of this phenomenon see Tracey L-D. Lu, *The Management of Two World Heritage Sites: Xidi and Hongcun in Anhui, China*, *in* WORLD HERITAGE: GLOBAL CHALLENGES, LOCAL SOLUTIONS 87 (Roger White & John Carmen eds., 2007). That recognition of a site can bring increased tourism revenues has been questioned in Clem Tisdell & Clevo Wilson, *World Heritage Listing of Australian Natural Sites: Tourism Stimulus and its Economic Value* 32(2) ECON. ANALYSIS & POL'Y 27 (2002).

61. For an illustration of branding in operation, see J. Rodger, *World Heritage Site Branding – The Blaenavon Experience*, in WORLD HERITAGE: GLOBAL CHALLENGES, LOCAL SOLUTIONS 13 (R. White & J. Carmen eds., 2007).

62. Other MEAs "brand" areas protected under their auspices, e.g. Ramsar Wetlands, but these are less exclusive and may be harder to market as they do not explicitly suggest an exceptional experience for visitors.

63. WHC, *supra* note 1, at Art. 15.

64. LYSTER, *supra* note 3, at 229. Although writing at a time when establishing a funding stream was rarely given due consideration under MEAs as they then operated, the WHC's arrangements remain important to the system.

parties, supplemented by gifts from other states,[65] private parties or UNEP bodies, and cash from fundraising activities.[66] The contributions of the contracting parties are compulsory under Article 16(1) except where a party declares at the time of ratification, accession, or acceptance, that it shall not be bound by that obligation.[67] However, where such a declaration has been made, the relevant state party is still expected to make voluntary contributions equivalent to those the state would have been obligated to make had no declaration been made.[68] In practice, equal pressure is brought to bear on states that are late making their payments, whether voluntary or obligatory.[69] The total income generated according to this method is around US$4 million per year.[70]

The purpose of the World Heritage Fund is to support applications made by state parties for assistance under Article 13(1). Applications are submitted to the Committee and may be made with respect to listed sites, or to those sites that will potentially be included in either the World Heritage List or the Danger List.[71] The assistance granted may support preparatory measures (such as preparing tentative lists), training, technical help, or emergency action.[72] For example, at the 2007 General Session of the Committee, US$59,600 was allocated to India for a regional training workshop on the conservation and management of Central-Asian and Mogul architecture.[73] During the same session, US$65,780 was awarded to Vietnam to help build management capacity within the Ha Long Bay World Heritage Site.[74]

Access to assistance through the fund is an incentive for developing states to seek inscription of properties in the World Heritage List. The

65. For example, Austria made a number of voluntary contributions before becoming a state party.

66. WHC, *supra* note 1, at Art. 15(3).

67. *Id*. at Arts. 16(1), 16(2).

68. *Id*. at Art. 16(4).

69. *See, e.g.*, Report of the 8th Ordinary Session of the World Heritage Committee, ¶¶ 28-31.

70. UNESCO, *Benefits of Ratification*, http://whc.unesco.org/en/164 (last visited Mar. 2, 2009). Ideally, the fund benefits most when there are a large number of developed nations involved as contracting parties who can be called upon to make contributions. These will be substantial when set at one percent of their compulsory UNESCO contribution. Conversely, they in turn are less likely to draw upon the fund themselves.

71. WHC, *supra* note 1, at Art. 13(1).

72. WHC, *supra* note 1, at Art. 15(4); Guidelines, *supra* note 26, ¶¶ 236-241.

73. Decisions Adopted at the 31st Session of the World Heritage Committee, Decision 31COM18A (Christchurch 2007), *available at* http://whc.unesco.org/en/sessions/31COM > page 197.

74. *Id*.

assistance they receive is likely to be greater in value than the contribution they are expected to make to the fund.[75] In turn, developed states, which bear the main burden of sustaining the fund, are assured that the distribution of support is conducted in an independent and transparent manner by the elected Committee.

Thus, WHC membership provides not only esteem and tourism opportunities, but also capacity building options via appeals to the World Heritage Fund. Further, like admittance to the World Heritage List, the allocation of those funds is controlled by the Committee.

### *B. Political Benefits*

The heightened status of a site that has been inscribed on the World Heritage List not only helps in terms of national esteem and visitor perception, but can also be utilized at the governmental level. The position of environmental ministries in intra-governmental policy deliberations can be strengthened through listing, particularly when the Committee considers a property to be in danger. In 2000, the Ecuadorian Minister for the Environment noted the significance of such political benefits in consideration of the state of conservation for Sangay National Park:

> the inclusion of the Sangay National Park in the List of World Heritage in Danger had helped the Ministry of Environment in negotiations with the Ministry [of] Public Works and other Government bodies to obtain resources to evaluate environmental impacts of the Guamote Macas Road and plan mitigation measures.[76]

In development-versus-nature protection debates, international listing and recognition of a natural area may tip the balance in favor of protection. Conceivably, such recognition might also help environmental ministries annex a greater share of government spending. In both instances, the favoring of environmental policies seems more likely where the alternative might expose the government to critical comment from the international community. Indeed, the possibility of such exposure is heightened by listing.

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75. The amounts due have always been set at one percent of a state's regular contributions to the budget of UNESCO, which is in turn set according to a scale where the developed states pay more.

76. 24th Ordinary Session of the World Heritage Committee, ¶ VIII.7, *available at* http://whc.unesco.org/archive/2000/whc-00-conf204-21e.pdf. Also see LYSTER, *supra* note 3, at 216, for a discussion of the political benefits gained by Darien National Park in Panama when it was awarded World Heritage status.

## IV. THE COMMITTEE, SELF-INTEREST, AND COMPLIANCE PULL

On their own, it is unlikely that these benefits would exert a strong pull towards compliance; in other words, these benefits would not limit states' freedom to choose between compliance and non-compliance. Admittedly, channeling increased tourist revenues back into the running of heritage sites, or availing financial resources offered via the World Heritage Fund, might improve or help to maintain the condition of an area through increased management capacity. In both cases, the benefits should increase compliance with the obligations contained in Article 4. However, in isolation there can be no suggestion that the election to apply for such assistance or to reinvest revenue is in any way involuntary.

In contrast, this Article argues that states electing to take measures that bring them into compliance are doing so partly because the Convention generates a force that pulls them towards that decision.[77] That force flows from the WHC's allocation of control over access to benefits. More particularly, the executive powers over initial access to benefits, the award of grants from the fund, and the power to remove access to benefits altogether lie with the Committee rather than with the state parties. This has led to the WHC being able to set up a system for drawing states into compliance by encouraging either a real or perceived association between cooperation, performance of obligations, and furthering one's own national interests. These treaty-generated forces undermine the notion of unfettered freedom in decision making and suggest a sense of coercion based upon self-interest.

77. Mitchell notes that disagreements exist between "realists" and "institutionalists" as to whether or not nations and their citizens adjust their behavior to comply with environmental obligations simply because of the convention concluded. Indeed, the realists suggest that only considerations of state power (rather than law) determine the degree of compliance by a contracting party. The institutionalists, while still accepting that outside factors can affect compliance, insist that a treaty can also influence behavior. They therefore seek to identify the features of a norm or process which generate such an effect. R. B. Mitchell, *Compliance Theory: An Overview*, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 3, 4, and 16 (J. Cameron *et al.* eds., 1996). Space dictates that this is a debate that should be noted, rather than explored in full; however, it is at least necessary to acknowledge that it is to the latter philosophy that this Article belongs. The stated aim from the outset has been to identify, highlight, and critique those features of the WHC which generate a pull towards compliance. This implicitly accepts that the existence of treaty induced compliance phenomena is at least possible.

### *A. Self-Interest and International Environmental Law*

Appealing to states' desires to further their own interests plays an important part in a number of MEAs. This commonality takes a number of forms. One of the main techniques promotes openness as to the activities of contracting parties under the particular MEA. This can be achieved through monitoring or by maintaining a publicly available inventory of sites regulated under an MEA. Activity or inactivity, as exposed by monitoring or lists, can then be discussed in meetings of the parties or highlighted in local media. As Ronald Mitchell recognizes, states "may fear adverse public opinion, domestically or internationally."[78] These mechanisms can compel states to comply with their obligations as a defense to any possible condemnation. In other words, compliance can be brought about by actions motivated by the desire to maintain a positive public perception.

While the WHC ultimately goes further with the pull of self-interest than other MEAs, this instrument also incorporates mechanisms to increase transparency, such as the World Heritage List.[79] Monitoring is also conducted in two ways: institutional reporting and reactive monitoring. The latter is particularly interesting in the context of this Article.[80] Reactive monitoring has been encouraged since the seventh meeting of the Committee in 1983.[81] With respect to natural properties, reactive monitoring includes the creation of reports by IUCN (as the competent advisory body to the WHC on natural heritage) on specific

78. *Id*. at 8. *See generally* LYSTER, *supra* note 3, at 12-13; PHILLIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 181 (2d ed. 2003).

79. As entry to the World Heritage List is controlled by an independent screening process, this inventory is not a perfect gauge of the level of commitment from contracting parties. The tentative lists are far more useful in this regard, but there has been varied success in relation to their appropriate completion and submission.

80. As to the former, since 1982, the Committee sought to introduce systematic (institutionalized) forms of reporting and, after initial resistance, its wishes were finally satisfied in 1999. Summary Report of the 11th General Assembly of States Parties to the Convention, ¶¶ 22-25, Doc. WHC-97/CONF.205/7 (Dec. 18, 1997). Institutional reporting initially concerns national measures. These involve frequent and regular monitoring of individual sites by heritage managers, with the information on all sites in turn collected and processed by a centralized administrative body at the national level. Report of the 17th Ordinary Session of the World Heritage Committee, ¶ 2, Doc. WHC-93/CONF.002/14 (Dec. 1993). This data can then also feed into periodic reports submitted by states to the Committee. Guidelines, *supra* note 26, ¶ 203. These are gathered on a regional basis and have so far been collated for the Latin American, Arabic, Asian and African, and European and North American contracting parties. However, the institutional reporting program under the WHC is in its infancy and is somewhat over-shadowed by the way in which reactive monitoring is employed.

81. Report of the 7th Ordinary Session of the World Heritage Committee, ¶ 41, Doc. SC/83/CONF.009/8 (Jan. 1984).

dangers to World Heritage Sites.[82] These reports can be thought of as reactive since they are the response to alerts about developments within the contracting party states, conveyed to IUCN or convention bodies by individuals. For example, IUCN has volunteers across the globe who monitor national developments and pass on information to the organization's central staff. As the organization pointed out in 1985, its capacity to monitor is significant and stems from over 4,000 voluntary correspondents located in 126 states.[83]

### *B. The Committee and Self-Interest*

The Committee stands in an atypical position when compared to institutional arrangements under other MEAs. Much of the coordination and significant administration of other MEAs is conducted through conferences of all the contracting parties ("COPs"). Such COPs may have authority to approve work programs, monitor implementation, and issue recommendations or resolutions. Executive power under these conventions therefore lies collectively with all of the contracting parties.

On the other hand, under the WHC, the Committee (comprised of only twenty-one members)[84] possesses executive power. Under the Convention, COPs do still occur (every two years during UNESCO General Conferences) but these are separate and principally concerned with setting the level of contributions to the fund, and electing new members to vacant seats on the Committee.[85] This leaves the Committee with the majority of the responsibility for operating the Convention, which includes reviewing implementation, allocating funds, updating the Guidelines, formulating strategic objectives, and maintaining the various lists.[86] The legal advisor to UNESCO recognized the distinctiveness of this delegation of power in 2000 when he advised that the World Heritage Convention is different from many other international conventions in that all the substantive powers are designated to the Committee and not to the General Assembly.[87]

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82. As envisaged in the Guidelines, *supra* note 26, ¶¶ 169-176.

83. Report of the 9th Ordinary Session of the World Heritage Committee, ¶ 16, Doc. SC-85/CONF.008/9 (Dec. 1985).

84. WHC, *supra* note 1, Art. 8(1).

85. *Id.*

86. For a more detailed list see Scovazzi, *supra* note 54, at 150.

87. Report of the 24th Session of the Bureau to the World Heritage Committee, VI.7(1.1) Doc. WHC-2000/CONF.202/17 (Aug. 2000). For a detailed account of the power politics between the COP and the Committee, see Zacharias, *supra* note 21, 1841-1842.

This independence generates interesting possibilities for the capacity of the WHC to pull states towards compliance with its obligations. The Committee has a significant impact upon the interests of states in a situation where the latter ultimately have no control over their own treatment. This set-up gives the Committee the capacity to apply pressure in order to enforce commitments.

To explain this phenomenon, it is first apt to reemphasize the extent to which the Committee controls access to the benefits under the WHC. This is either through initial approval of a contracting party's application for a site to be inscribed on the World Heritage List, or through the power to unilaterally delete a site from the list and therefore withdraw those benefits. Further, the Committee approves funding applications made by contracting parties.

Secondly, the Committee also has significant opportunities to take steps that might politically embarrass states. At the extreme, this would take the form of striking a site from the list. More commonly, this involves listing a site on the Danger List. While inclusion on the Danger List is supposed to be a step towards securing priority in receiving assistance rather than a sanction, in practice inclusion has had a mixed reception. Some states willingly seek listing in order to obtain such assistance and priority attention. Others are less receptive to the list largely because they perceive listing as humiliating and contrary to their best interest.[88]

Given the latter factor, the question of whether a site may be listed against the wishes of a state party has been debated.[89] Although the matter has not been conclusively determined, the UNESCO legal advisor to the 26th Ordinary Session of the World Heritage Committee provided advice on the matter in 2002. The advisor's opinion suggested that the interpretation that accords best with the WHC's text is that, in the ordinary course of affairs, inclusion should be initiated by the contracting party.[90] However, in the case of urgent need, a property can be included based on a decision of the World Heritage Committee alone.[91] This is because the concluding sentence of Article 11(4) states that the

88. T. Atherton & T. C. Atherton, *The Power and the Glory: National Sovereignty and the World Heritage Convention* 69 AUSTRALIAN L. J. 631, 640 (1995); Jane. R. Vernhes, *Implementation of the World Heritage Convention in South East Asia and the Pacific*, in CRITICAL ISSUES FOR PROTECTED AREAS PART 1: WORLD HERITAGE SESSION 26 (Workshop Papers from the 18th General Assembly of IUCN, 1991).

89. The debate is important since the preservation of honor may be at the expense of mobilizing international assistance to the detriment of the site concerned. It also, of course, has a large bearing on the degree of power invested in the Committee.

90. Summary Record of the 26th Ordinary Session of the World Heritage Committee, ¶ 12.1 Doc.WHC-02/CONF.202/INF.15 (June 2002).

91. *Id.*

"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."[92] Indeed, non-consensual listings have been made in the past. For example, following unanswered calls for information to the Indian Government, the Manas Nature Reserve was included in the Danger List in 1992.[93]

The Committee therefore exists as an authoritative and independent body with the ability to make significant decisions affecting the interests of the state parties. Given these powers, states are understandably cautious about possible public withdrawal or withholding of future benefits should they act inconsistently with their obligations under the WHC.[94] Consequently, by exploiting such associations, the WHC and its Committee can exert a pull towards compliance. This may often take place without any noticeable intervention from the Committee. Nevertheless, where states appear to be erring in their management of heritage sites, the Committee's position allows it to be proactive in placing demands upon contracting parties. If these demands are duly complied with, the level of protection a site under threat enjoys should increase. This will then draw the state back into compliance. This combination of executive authority and state caution which promotes and supports the Committee's active intervention highlights one of the strongest aspects of the WHC, and is best illustrated by the following examples.

### *C. Intervention and Compliance Pull in Action*

On April 8, 2007, a delegation from the Committee visited the Galapagos Islands, a World Heritage Site since 1978.[95] This visit was further evidence of a step-change in the nature of the over-seeing of the

92. The Guidelines seem to widen the interpretation of UNESCO's legal advisor. They confirm the view that the Committee may inscribe a property on the Danger List when four requirements are met, with one of the requirements being that assistance has been requested. However, that "assistance may be requested by any Committee member or the Secretariat." Guidelines, *supra* note 26, at ¶ 177(d). For full debate on the issue see Buzzini and Condorelli, *supra* note 54, at 195-96, who reach the same conclusion as UNESCO's legal advisor.

93. Report of the 16th Ordinary Session of the World Heritage Committee, ¶¶ VIII.13, X.1.E.A., Doc.WHC.92/CONF.002/12 (Dec. 1992).

94. In the context of fears about "free-riding" by states under a convention, Mitchell asserts that this can be overcome "if states view the benefits they derive in other existing and future international agreements as conditional upon a record of compliance." Mitchell, *supra* note 77, at 11.

95. The decision to inscribe is recorded in Report of the 2nd Ordinary Session of the World Heritage Committee, ¶ 38, Doc. CC-78/CONF.010/10 Rev. (Oct. 1978).

islands by the Committee; a change that had begun the previous year.[96] Although the islands had long been designated as a World Heritage Site under the WHC, threats to the conservation of the islands had been growing. Once an isolated realm rich in endemic species, the islands have increasingly shown worrying signs of ecosystem mutation caused by the introduction of alien species.[97] Further stress is being placed upon the islands by an expanding tourist industry and a boom in the size of the resident human population.[98]

Since the mid-1990's, the leadership of the WHC had been aware of these issues via reactive monitoring reports. The islands were regularly considered for inclusion in the Danger List, but the Ecuadorian Government tended to resist this step.[99] Such a move was initially delayed in 1998 with the enactment by the state of a special law on the preservation and sustainable use of the Galapagos.[100] However, the 2005 reactive monitoring reports indicated that the special law was proving hard to implement mainly due to difficulties in appointing a long-term park director.[101] In addition, immigration continued subject only to weak controls, and there were tensions undermining what should have been a

96. Report of the 19th Ordinary Session of the World Heritage Committee, ¶ VII.13, Doc. WHC-95/CONF.203/16 (Dec. 1995).

97. By way of illustration, scientists have observed the presence of non-indigenous parasitic fly larvae in nests of the various species of Darwin finches on the islands, which also have human habitation. *See* Birgit Fessl & Sabine Tebbich, Philornis Downsi – *a Recently Discovered Parasite on the Galápagos Archipelago – a Threat for Darwin's Finches?* 144 IBIS 445, 450 (2002). The threat from these larvae may, in combination with predation from another alien species (the black rat) and habitat destruction by the human population, result in one species of this iconic bird species becoming extinct, namely the Mangrove Finch. *See* Jonathan Amos, *Darwin Finches at Risk*, BBC NEWS ONLINE, November 8, 2002, http://news.bbc.co.uk/2/hi/science/nature/2415261.stm (quoting Nigel Collar of Birdlife International).

98. It has been estimated that the number of tourists has increased by 100,000 over the last 30 years to 120,000, while the local population has increased by 14,500 from a figure of 3,500 over the same time period. Tom Leonard, *Race to Protect the Galapagos Islands*, THE DAILY TELEGRAPH, Apr. 12, 2007, *available at* http://www.telegraph.co.uk/news/worldnews/1548411/Race-to-protect-the-Galapagos-islands.html.

99. See Report of 19th Ordinary Session, *supra* note 96, ¶ VII.13, for early appreciation of the problems and an initial call for recognition that the islands were in danger.

100. Special Regime Law for the Preservation and Sustainable Development of the Province of Galapagos, Law No. 278 (Official Registry of Ecuador) which entered into force on March 18, 1998.

101. The position of Park Director has caused serious conflict between fishermen and park wardens, with the government being accused by conservationists of removing one director in favor of a pro-fishermen office holder. *See Strike Forces Galapagos Boss Out*, BBC NEWS ONLINE, Sept. 28, 2004, http://news.bbc.co.uk/2/hi/americas/3696376.stm.

cooperative relationship between the fishing community, non-governmental organizations, and other local stakeholders.[102] This led to a request by the Committee for Ecuador to host a mission to the islands to assess the problem, which took place in March 2006.[103]

At the subsequent Committee meeting in Vilnius, the Ecuadorian Government was made the subject of onerous requests due to the concerns within the Committee about the islands. The Committee requested that, in cooperation with IUCN and the World Heritage Centre (the secretariat to the WHC), Ecuador organize a multi-stakeholder meeting to develop a program for the future of the islands.[104] The purpose of the meeting was to agree to targets and timeframes for addressing the problems against which progress could be measured.[105] Naturally, such targets could also be monitored by the international community, although no such monitoring was explicitly referenced. The decision went on to catalog in detail the failings in the current administration of the islands that would need to be addressed.[106] Finally, a request was made for Ecuador to invite a joint IUCN/World Heritage Committee mission to participate in the meeting, which would cover the issues listed.[107] No doubt involvement with this joint mission would give the two bodies the opportunity to check that such discussions actually occurred and to learn more about the situation on the ground.

The joint mission took place in April 2007 and the Ecuadorian Government duly organized the stakeholder meetings requested on the islands.[108] Simultaneously, the President of Ecuador declared that the island was at risk, a priority for national action, and that among a number of remedial measures, he was considering the suspension of some tourism permits.[109] This move may have been an attempt to portray the Ecuadorian Government as acting on its own initiative, rather than being

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102. *Id. See also* Decisions Adopted at the 30th Session of the World Heritage Committee, ¶ 29, Doc. WHC-06/30.COM/19 (July 2006).

103. *See* Summary Record of the 30th Session of the World Heritage Committee, at 95, Doc. WHC-06/30.COM/INF.19 (July 2006).

104. World Heritage Committee Decision, ¶ 8, 30COM7B.29, *State of Conservation (Galápagos Islands), available at* http://whc.unesco.org/en/decisions/1114/.

105. *Id.*

106. These failings include the increasing number of access points to the islands by air and sea, the ongoing presence of illegal immigrants, fishing in "a regulatory vacuum," uncontrolled tourist access, and inadequate control and inspection at island entry points. *Id*. ¶¶ 8(a), (d), (e), (f) and (k), respectively.

107. *Id.* ¶ 9.

108. Press Release, UNESCO World Heritage Centre, *UNESCO Mission Confirms Threat to the Galapagos Islands,* No. 2007-38 *(*Apr. 17, 2007).

109. Leonard, *supra* note 98.

forced into this position. After all, it was becoming increasingly clear that the Committee would make a decision confirming the perilous state of the islands following the visit.[110] Indeed, just over two months later, at the 31st Session of the World Heritage Committee in Christchurch, the islands were recorded as being officially in danger under the WHC.[111]

The Galapagos example illustrates the level of pro-active and intrusive intervention the Committee is comfortable making, and the willingness of countries like Ecuador to cooperate with this external body. It is contended that this is in part generated by the careful balance of power over access to, and potential public withdrawal of, the benefits mentioned above. However, this is not an isolated example.

In 1999, IUCN reported that Komodo National Park in Indonesia was subject to increases in illegal dynamite and cyanide fishing causing damage to the coral reefs in the World Heritage Site. The Committee requested the Indonesians permit a monitoring mission to the park in order to assess the damage and to review current management of the site.[112] Although the Indonesian government initially proposed sending their own mission to study the problem,[113] a joint IUCN/UNESCO mission was ultimately given access to the park to conduct its own assessment.[114]

Some of the Committee's requests might also amount to strict ultimatums. For example, the City of Dresden and Elbe Valley was recognized as a World Heritage Site in 2004 in light of its cultural value.[115] However, just two years later the Committee issued a warning to Germany that if the city municipality continued with plans to build a motorway bridge over the river and into the heart of the city, the site would become the first in the history of the WHC to be struck from the World Heritage List. Just ten days later, the city council voted to stop imminent construction and review the project.[116]

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110. *Id*. (quoting President Rafael Correa: "We do not need studies from some international organisation. We are declaring the Galapagos at risk").

111. World Heritage Committee Decision 31COM7B.35 – *Galapagos Islands (Ecuador)*, *available at* http://whc.unesco.org/en/decisions/1416/.

112. The Report of the Bureau to the World Heritage Committee, 23rd Sess., ¶ IV.34, Doc. WHC-99/CONF.204/15 (July 1999).

113. Report of the 23rd Extraordinary Session of the Bureau to the World Heritage Committee, Natural Heritage, pt.(iii), Doc. WHC-99/CONF.208/8 (Nov. 1999) (the Committee responded by requesting that their findings be forwarded to it).

114. As recorded in the Report of the 24th Ordinary Session of the World Heritage Committee, Annex X, Doc. WHC-2000/CONF.204/21 (Dec. 2000).

115. Decision 28COM14B.40, *Nominations of Properties to the World Heritage List*, adopted at the 28th Session of the World Heritage Committee, Doc. WHC-04/28.COM/26 (July 2004).

116. Press Release, UNESCO World Heritage Centre, *Dresden City Council Votes*

In addition, the Committee has been willing to make recommendations outside of its monitoring functions. For example, when the Great Barrier Reef was inscribed on the World Heritage List, the Committee noted that only a small portion of the area nominated for protection under the WHC was included within the Great Barrier Reef Region for purposes of Australia's Great Barrier Reef Marine Park Act.[117] Consequently, the Committee requested that Australia ensure that the whole area to be inscribed on the World Heritage List also be protected by the Great Barrier Reef Marine Park Act.[118] As Lyster notes:

> Undoubtedly stimulated by the new international status to be given to the [Great] Barrier Reef, the Prime Minister of Australia assured the 1981 meeting of the World Heritage Committee that the "Great Barrier Reef Marine Park will be progressively extended. The question is not whether but when."[119]

### *D. Summary*

The fact that the Committee can make such onerous and intrusive demands without being roundly ignored by the contracting parties raises two points. First, such requests can stop activities that threaten heritage sites, thereby halting a state's descent into breach of obligations and non-compliance.

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*Against Bridge Construction at World Heritage Site* (July 21, 2006). No alternative plans have yet been produced and the regional government has begun construction. This is in apparent discordance with the national government's wishes given that there is some evidence the national government would be happy to meet the costs of a tunnel option. Giovanni Boccardi & Jaroslav Kilian, Report: Reinforced Monitoring Mission to the Dresden Elbe Valley World Heritage Property, 11- 12 (Feb. 2008). The issue has therefore exposed problems with the implementation of the convention within the federal system. Nevertheless, the Committee issued a further ultimatum in July 2008 that unless construction is halted and remedial action taken, the site will be delisted in 2009. Decision 32COM7A.26 adopted at the 32nd Session of the World Heritage Committee, Doc. WHC-08/32.COM/24 (July 2008). On a recent visit to the site in November 2008, the author observed continuing construction, indicating that the most likely outcome will be delisting, and thus (in the author's opinion) placing the state in apparent breach of Article 4.

117. The Great Barrier Reef Marine Park Act, 1975, No. 85 (Austl.).

118. Report of the 5th Ordinary Session of the World Heritage Committee, ¶ VIII.15, Doc. CC-81/CONF/003/6 (Oct 1981).

119. LYSTER, *supra* note 3, at 217. New sections were added to the marine park in the 1980s, thus meeting the Committee's request. REVIEW OF THE GREAT BARRIER REEF MARINE PARK ACT 1975, 28-29 (2006), *available at* http://www.environment.gov.au/coasts/publications/pubs/gbr-marine-park-act.pdf.

Second, the phenomenon reflects the "gatekeeper" functions of the Committee,[120] which can be used to exert a force upon state parties, pulling them towards compliance. Part of the origin of this force is the fact that the Committee is an independent, limited membership, executive body with real powers of control. Its powers can affect the contracting states' abilities to advance their own self-interest in a myriad of ways, ranging from the Committee's authority over initial availability of the substantial benefits offered by the World Heritage brand to the threat of danger listing and de-listing with their attendant negative publicity.

Exploiting such self-interest can be a powerful tool. Mitchell notes that treaty influenced behavior is dominated by a logic of consequences.[121] This logic describes instrumental calculations by states as to how their possible actions will help or harm their interests.[122] The WHC has therefore inserted itself into the logic of consequences for conserving and protecting the world's heritage in a powerful way.

## V. THE SIGNIFICANCE OF THESE OBSERVATIONS

So far this Article has focused upon the manner in which the WHC can pull states towards compliance. In summary, it has been argued that this is achieved via the Convention's devolution to the limited membership Committee of power over access to benefits, and over sanctions that bring real economic and political consequences. What is then surprising is that the WHC is rarely featured in academic writing on non-compliance systems employed under MEAs. Tullio Scovazzi, Gionata Buzzini, and Luigi Condorelli have recently provided excellent descriptions of the functioning of the Convention and the Committee;[123] however, they do not explore the effects of this upon state compliance. This might be assumed to be because such a structure is not unusual, but the following comparative analysis in Subpart A below demonstrates the opposite, namely that the devolution of power over compliance review and sanctions to the Committee is very unusual.

Nevertheless, once this comparative analysis has revealed that the WHC is atypical in the technique it employs to further compliance, the utility of this fact might still be questioned. This is because it has been

120. Metaphor adopted from Affolder, *supra* note 22, at 38.

121. Ronald B. Mitchell, *Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 893, 901 (Daniel Bodansky *et al.* eds., 2007).

122. *Id.*

123. Scovazzi, *supra* note 54; Buzzini & Condorelli, *supra* note 54.

suggested that full compliance does not necessarily equate to effective action.[124] Consequently, in Subpart B to this Part of the Article, it will be argued that the devolution of powers to the Committee, and the nature of those powers, goes some way to ensuring that compliant action is also effective in meeting the Convention's objectives.

### *A. Comparison to Other MEAs*

Because recourse to international courts is often an unsatisfactory option for breach of international environmental laws in general, and MEAs in particular,[125] Lyster notes that administrative and non-judicial mechanisms can be more effective for ensuring compliance.[126] He goes on to observe that even a simple measure providing for regular COPs can prevent an MEA from being neglected by state parties and thus being reduced to a "sleeping treaty."[127] More sophisticated supervisory techniques have also been developed over the last half-century[128] and are commonly employed to ensure compliance. These include monitoring and reporting, data collection and verification, and inspection.[129] Indeed, many of these techniques can be found under the WHC as described in Part IV.A. above.

Less frequently encountered are mechanisms for resolving instances of non-compliance under regularized procedures—termed "non-compliance procedures" ("NCPs").[130] Ideally, NCPs comprise the latter stage of a compliance continuum, with supervisory techniques feeding into an institutional structure designed to control implementation and compliance.[131] As described earlier in the Article, through the marriage

124. *See* D. G. Victor *et al*, *Introduction and Overview* in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 1, 7 (DAVID G. VICTOR *et al.* eds., 1998).

125. BIRNIE *et al.*, *supra* note 15, at 237-239.

126. LYSTER, *supra* note 3, at 12.

127. *Id.*

128. Kal Raustiala & David G. Victor, *Conclusions*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659, 679 (David G. Victor *et al.* eds., 1998).

129. BIRNIE *et al.*, *supra* note 15, 242-245.

130. Seven NCPs have been agreed upon since 1990, and another three are currently under negotiation. Jutta Brunnée, *Enforcement Mechanisms in International Law and International Environmental Law*, in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 1, 18 (Ulrich Beyerlin *et al*. eds., 2006).

131. M. A. Fitzmaurice & C. Redgwell, *Environmental Non-Compliance Procedures and International Law*, XXXI NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 35, 42 (2000).

of reactive monitoring and the allocation of powers and time to the Committee to adjudicate at their annual sessions upon conservation reports produced by the IUCN, the WHC has adopted a very proactive NCP. Nevertheless, the following comparison to other MEAs that have adopted NCPs of their own will serve to underline the atypical nature of the WHC arrangements. This comparative analysis will begin by describing three commonalities relating to devolution, favoring management over sanctions, and using economic sanctions if needed. The comparative analysis then concludes by highlighting one key distinction between the WHC and these MEAs.

### *1. Similarity: Devolved Responsibility to Limited Membership Body*

As mentioned, NCPs have been incorporated into a number of MEA systems for reviewing implementation.[132] Nevertheless, only a handful of these share a significant feature with the WHC by having devolved responsibility for their operation to subsidiary bodies outside of the COP. The five instances are:

(1) the Implementation Committee to the Montreal Protocol[133]

(2) the Implementation Committee to the 1979 Convention on Long Range Transboundary Air Pollution ("LRTAP")[134]

(3) the Compliance Committee to the Protocol to the Framework Convention on Climate Change ("Kyoto Protocol")[135]

(4) the Standing Committee to CITES[136]

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132. Brunnée, *supra* note 130, at 17-18.

133. Montreal Protocol, *supra* note 20, Art. 8; the committee being established under the non-compliance procedure devised under Decision III/20 and amended under Decision X/10.

134. Convention on Long Range Transboundary Air Pollution, November 13, 1979, 18 I.L.M. 1442 (entered into force 16 Mar. 1983) [hereinafter LRTAP]. The committee was created pursuant to Decision 1997/2 of the Executive Body to the convention.

135. Protocol to the Framework Convention on Climate Change, December 11, 1997, 37 I.L.M. 22 (entered into force 16 Feb. 2005) [hereinafter Kyoto Protocol]. The committee was created under the Protocol pursuant to Decision 24/CP. 7.

136. The authority of the committee in relation to NCP functions is provided for in Eleventh Meeting of the Conference of the Parties, Resolution Conf. 11.1 (Apr. 2000) (amended at the 12th, 13th and 14th meetings of the Conference of the Parties), *available at* http://www.cites.org/eng/res/11/11-01R14.shtml (describing the authority of the committee in relation to NCP functions).

(5) the Compliance Committee to the Aarhus Convention[137]

*Table 1*

| MEA | Name of the Body With Devolved NCP Role | No. of States Represented |
|---|---|---|
| Montreal Protocol | Implementation Committee | 10 members elected from the 191 contracting parties on the basis of an equitable geographical distribution. |
| LRTAP | Implementation Committee | 9 members elected from the 51 contracting parties. |
| Kyoto Protocol | Compliance Committee | 20 members chosen from the 180 contracting parties split equally between two branches. Each branch to have one representative for each of the five official UN regions, one from the small island developing states, and two each from Annex I and non-Annex I Parties. |
| CITES | Standing Committee | Currently 18 members elected from the 172 contracting parties on the basis of equitable regional representation according to the proportion of contracting states from each region. |
| Aarhus Convention | Compliance Committee | 8 members of a nationality of a contracting party but elected to act in their personal capacity. |

These five MEAs have been the focus of much academic writing on NCPs, whether as exemplars or because of their relative novelty in terms of design.[138] Interestingly, as described below, these noted conventions share further similarities to the WHC, leading to puzzlement over the failure to consider the WHC in academic research into compliance mechanisms. It was noted that the Committee to the WHC is a limited membership body—twenty-one seats are filled by representatives of states elected from the 185 contracting parties, who hold office for a

137. Aarhus Convention, *supra* note 19, Art. 15 and Decision I/7.

138. *See, e.g.*, BIRNIE *et al.*, *supra* note 15, at 245-250; SANDS, *supra* note 78, 205-210; ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA (ULRICH BEYERLIN *et al*. eds., 2006).

fixed number of years.[139] This form of limited membership is also found in the Montreal Protocol, LRTAP, the Kyoto Protocol, the Aarhus Convention,[140] and CITES. The details are given above in Table 1. The significance of this limited membership is that progress in evaluating potential cases of non-compliance is beyond the direct influence of the state placed under the "spotlight." Investigations and inquiries therefore remain practicable despite any opposition from that state.

### *2. Similarity: Non-Confrontational Solutions*

Another similarity between the WHC and the NCPs under the five MEAs noted above occurs when the respective committees face a case of non-compliance: the NCPs of both the WHC and the other MEAs envisage non-confrontational managerial solutions, as well as confrontational punitive steps.[141] For example, the Kyoto Protocol splits its Compliance Committee into two branches: the Facilitative Branch and the Enforcement Branch.[142] Another example of an MEA with both confrontational and non-confrontational procedures is the Montreal Protocol under which the measures that can be recommended by its Implementation Committee are listed as: providing appropriate assistance, issuing cautions, and suspending rights and privileges under the agreement.[143]

Support for favoring management rather than sanction seems to be given particular emphasis in two of these regimes—the Montreal Protocol and LRTAP. The former Executive Secretary to the Ozone Secretariat, K. Madhava Sarma, has highlighted the favoring of assistance and cautioning under the Montreal Protocol.[144] Similarly, the

139. Guidelines, *supra* note 26, ¶ 21.

140. It is worth noting that it is in relation to the composition of the Aarhus Convention Compliance Committee that this treaty has received particular mention. As Svitlana Kravchenko (the current vice-chair of the committee) has pointed out, members act in their personal capacity (rather than being representatives of the States), which increases continuity in the body's composition from year to year because the States cannot easily remove or replace the members once elected. Additionally, NGOs can nominate up to two members for election. Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVT'L L. & POL'Y 1, 12-16 (2007).

141. These approaches are described in Raustiala & Victor, *supra* note 128, at 681.

142. Established pursuant to Kyoto Protocol, *supra* note 135, at Article 18 and Decision 24/CP.7.

143. Adopted pursuant to Decision IV/5 of the 4th Meeting of the Parties to the Montreal Protocol.

144. K. Madhava Sarma, *Compliance with the Multilateral Environmental Agreements to Protect the Ozone Layer*, in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA

Implementation Committee under LRTAP is supposed to seek a "constructive solution" to the incidence of non-compliance.[145] Indeed, the only response explicitly mentioned under LRTAP is the provision of assistance.[146]

A similar preference is evident in the practice of the Committee under the WHC. Instances of possible non-compliance are investigated through dialogue and site visits. Even danger listing is primarily and outwardly about prioritizing the allocation of resources to tackle threats. Indeed, the ultimate sanction of de-listing has only been used once, and the characterization of danger listing as a negative factor in the logic of consequences comes down to the personal stance of the state concerned. The presence of sanctions is important, but management and allocation of assistance remains the policy of choice.

*3. Similarity: Economic Sanctions*

A further significant similarity is that the threatened or deployed sanction predominantly results in denial of access to economic benefits. CITES is the classic example, with its use of trade suspensions. The established system allows legitimate trade in species based upon the issuing of permits by importing and/or exporting states. A recommendation that the contracting parties no longer accept export permits from a particular state because of a finding of non-compliance against that state carries very real "economic clout."[147] As Peter Sand observes, "CITES secures access to a very lucrative export market (up to $50 billion annually). . . [A]n embargo practically excludes the country concerned from all legitimate trade."[148]

Similarly, under the Montreal Protocol, the ultimate suspension of rights and privileges will deny a contracting party access to the financial benefits of legitimate trade in controlled substances, the sale of production quotas to other contracting parties, and rights to technology transfer and financial support.[149]

Finally, the range of sanctions available to the Enforcement Branch of the Kyoto Protocol Compliance Committee includes a deduction of

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25, 38 (Ulrich Beyerlin *et al*. eds., 2006).

145. LRTAP Decision 1997/2, ¶ 3(b).

146. *Id.* ¶ 1. *See also,* BIRNIE *et al.*, *supra* note 15, at 247.

147. Peter H. Sand, *Sanctions in Case of Non-Compliance and State Responsibility: Pacta Sunt Servanda – or Else?* in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS – A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 259, 263 (U. Beyerlin *et al.* eds., 2006).

148. *Id.*

149. Montreal Protocol Decision IV/18, *supra* note 143; Madhava Sarma, *supra* note 144, at 30-31.

thirty percent of a state's yearly greenhouse gas emissions allowance—which it could have traded to other states—or outright suspension from all emissions trading.[150]

The judicious injection of economic factors into the logic of consequences for states' decision making (which the WHC achieved through the availability of funds and the World Heritage "brand") is therefore also found in CITES, the Montreal Protocol, and the Kyoto Protocol. Linking sanctions to the denial of access to economic benefits generates force that pulls states towards action in compliance with the treaties' provisions. Given that this feature is found in the WHC, and given the other similarities noted to the Montreal Protocol, CITES, the Kyoto Protocol, the Aarhus Convention, and LRTAP, the NCP functions of the Committee deserve to be accorded the same recognition in compliance discourse.

#### *4. Difference: Ultimate Authority to Deal with Non-Compliance*

There is, however, one final feature of the WHC system that makes it stand apart from even the five atypical MEAs. Under the WHC, the ultimate authority to deal with non-compliance lies with the Committee alone. This feature renders the degree of compliance pull much stronger.

The clearest illustration of this can be seen with a comparative examination of the authority of the Implementation Committee to LRTAP. The Implementation Committee's primary function is to investigate and report to the Executive Committee; the Implementation Committee may only make recommendations to the Executive Committee.[151] The Executive Committee alone, comprised of all the contracting parties, is empowered to adopt the recommendations.[152] As has been recognized, the decisions of that body require consensus, and can therefore easily be blocked.[153]

The same situation exists with respect to the Montreal Protocol, where the Implementation Committee has an active role in investigation, but ultimately can only make a recommendation as to whether assistance, a caution, or suspension of privileges should be the course of action.[154] The authority to take such steps, or actually impose sanctions, lies with

150. Kyoto Protocol Decision 24/CP.7, Part XV.

151. LRTAP Decision 1997/2, ¶ 9.

152. *Id*, ¶ 11.

153. BIRNIE *et al.*, *supra* note 15, at 247.

154. Montreal Protocol, Non-Compliance Procedure adopted under Decision X/10, ¶ 9.

the contracting parties acting on a two-thirds majority.[155] Thus, the affected state will have a direct say in its treatment.

Finally, the Aarhus Convention's Compliance Committee has quite limited powers. It may approach states in order to provide advice and facilitate assistance, but needs the agreement of the state concerned to produce formal recommendations or request strategies for achieving compliance.[156] Any sanction—such as a declaration of non-compliance—needs to be taken by the COP.[157]

A level of authority somewhat analogous to that enjoyed by the WHC's Committee can be discerned under the Kyoto Protocol and CITES. Under the Kyoto Protocol, both the Facilitative and Enforcement Branches of the Compliance Committee have the authority to take action against a state.[158] However, the NCP under the Kyoto Protocol allows a right of appeal to the COP in order to challenge a decision of the enforcement branch.[159] Such a right of appeal indicates that ultimate authority over sanctions still lies with the contracting parties as a collective.

Under CITES there is uncertainty as to the authority of the Standing Committee. This committee was initially established to assist with the running of the regime between COPs.[160] Susan Biniaz asserts that the Standing Committee has therefore come to play an important role in receiving advice from the Secretariat and drafting recommendations on compliance issues, although "some are recommendations to the COP, some implement delegations from the COP, and some appear to be direct recommendations to the parties."[161] She goes on to note that with respect to recommendations for all contracting parties to embargo another state's export permits, "In some cases, the Standing Committee itself has made

155. Rules of Procedure of the Meeting of the Parties to the Montreal Protocol, Rule 40(1).

156. STRUCTURE AND FUNCTIONS OF THE COMPLIANCE COMMITTEE AND PROCEDURES FOR THE REVIEW OF COMPLIANCE, ¶ 36. (adopted pursuant to, and annexed to, Decision I/7, of the First Meeting of the Parties, Lucca, Italy, October 2002). "Recommendations" refer to the draft recommendations to be made to the COP. GUIDANCE DOCUMENT ON AARHUS CONVENTION COMPLIANCE MECHANISM, 18 (2006).

157. *Id.* ¶ 37. For a detailed account see Kravchenko, *supra* note 140, at 28-31.

158. Kyoto Protocol Decision 24/CP.7, Part XIV as regards the former, Part XV as regards the latter.

159. *Id.*, at Part IX. The COP can overturn the decision if there is a three-fourths majority.

160. CITES Resolution Conf. 11.1, preamble, Rev. CoP14, *available at* http://www.cites.org/eng/res/11/11-01R14.shtml.

161. Susan Biniaz, *Remarks about the CITES Compliance Regime*, in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 89, 93 n.20 (Ulrich Beyerlin *et al.* eds., 2006).

direct recommendations for trade suspensions, apparently citing Resolution 11.3 as its legal basis; the Secretariat has called this authority 'questionable.' "[162]

Peter Sand, a former Secretary-General to CITES, argued that recommendations for suspending trade needed to be adopted by a two-thirds majority of the COP, or a majority of the Standing Committee if the authority had been delegated to them by the COP.[163] Sand made this argument when guidelines restating the entire system were in preparation.[164] Although the guidelines have since been adopted, the matter is still far from resolved. The new guidelines permit the Standing Committee to make trade suspension recommendations so far as they are "specifically and explicitly based on the Convention and on any applicable Resolutions and/or Decisions by the Conference of the Parties."[165] It is certainly arguable that any apparent allocation of ultimate sanctioning authority could still be limited by resolutions and decisions of the COP. Further, the new guidelines state that "[w]hen the Conference of the Parties decides to carry out itself the tasks delegated to the Standing Committee, it follows the same procedures as those described below for the Standing Committee."[166]

In earlier comments on the effect of this provision, the Chairman of the Working Group drafting the guidelines stated that this reflected the COP's ultimate authority to "seize itself of any matter it pleases."[167] If this is the new approach, then the COP could seize responsibility for handling a case of non-compliance. The affected state does not have such a powerful right of appeal as per Kyoto, but neither is the power of the Standing Committee unlimited. This places CITES somewhere between the Kyoto Protocol and the WHC with respect to the limits of authority.

Therefore, in one regard—namely, the ultimate power of the Committee—the WHC regime is exceptional, even when compared to those MEAs commonly discussed in research into compliance procedures.[168] Including the WHC in future discourse on compliance would therefore be welcome. Particularly so when the similarities

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162. *Id.* at 94. Such recommendations do not require universal support from contracting parties in order to be effective sanctions. Sand, *supra* note 147, at 264.

163. Sand, *supra* note 147, at 265-266.

164. *Id.*

165. *Guide to CITES Compliance Procedures*, Resolution Conf 14/3 (Annex) ¶ 30, *available at* http://www.cites.org/eng/res/all/14/E14-03.pdf.

166. *Id.* ¶ 11.

167. CITES, *Interpretation and Implementation of the Convention Compliance and Enforcement Issues*, Report of the Standing Committee Working Group on Compliance, COP14 Doc 23, 4 (June 3-15, 2007).

168. *See generally* sources cited *supra* note 138.

between the WHC and the Montreal Protocol, LRTAP, CITES, the Kyoto Protocol, and the Aarhus Convention are recalled. As was demonstrated, these similarities related to a comparable devolution of power over compliance to a limited membership body, which acted so as to prefer management over sanctions, but which still retained the option of pursuing economic sanctions if needed.

### *B. Compliance and Effectiveness*

Despite the atypical features of the WHC, praising its degree of compliance pull is immaterial if it has no relation to effectiveness. As David Victor *et al.* assert, the fact that a state is acting in compliance with agreed conservation obligations does not necessarily indicate that the treaty is effective, which they define as resulting in changes in behavior that furthers the goals of a treaty. Victor *et al.* explain: "International environmental law is filled with examples of agreements that have had high compliance but limited influence on behavior. . . . Standards can be too weak, too strong, inefficient, or completely ill conceived."[169]

Initial reflection upon the key articles defining the obligations of the parties to the WHC might cause concern in this regard. Article 4 (the obligation to identify, conserve, protect, present and transmit to future generations) is predicated upon the basis that a state party will do "all it can to this end, to the utmost of its own resources."[170] Article 5 sets out the minimal action that must be taken to meet the aforementioned obligation, but requires only that states "endeavor" to take these steps "in so far as possible, and as appropriate for each country."[171] Objections could therefore be leveled at the Convention's drafting, which would undermine the previously noted strengths. Such objections would assert that if the standard for compliance is so ambiguous and vague that charges of non-compliance are difficult to make, or if the standard for compliance is so low that it can be met simply by maintaining the status quo, then the WHC would fail to protect the world's heritage and become ineffective. Professed compliance could lead to maintenance of the very status quo which threatened the world's natural heritage in the first place. Nevertheless, for the following reasons, such objections should not generate undue concern.

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169. Victor *et al.*, *supra* note 124, at 7.

170. WHC, *supra* note 1, at Art. 4.

171. *Id.* at Art. 5: "To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country: . . ."

The pit-falls of placing too much emphasis upon compliance at the expense of studying the effectiveness of a regime is made clear by Victor *et al.*,[172] and their observations deserve to be borne in mind. However, the powers of the World Heritage Committee go a long way towards averting this danger. The standards demanded of state parties under the World Heritage Convention are indeed indeterminate under Articles 4 and 5. This then leaves states free to advocate for the standards to be viewed at a level that is cleared by their actions; however, their submissions do not conclusively determine that level. This is because it is only the World Heritage Committee's view that is of any practical significance. After all, the Committee's implementation responsibilities give it the means to reinforce its judgments on the expected standards. Additionally, the World Heritage Committee initiates and approves amendments to the Guidelines, and this document plays a key role in defining the substantive content of the Convention.[173]

The Committee therefore has *de facto* authority to impose substantial and onerous obligations upon the state parties. Therefore, it has the means to ensure effective compliance. As has been seen in Part IV.C. above, the Committee's views of what does and does not accord with the obligations under the WHC certainly seem to affect the behavior of states. Therefore, it is the limited membership committee, with its executive powers over benefits offered, which has the power to articulate the standards demanded so as to render the Convention effective. Without such a system, the obligations would have been so indeterminate that state parties could have projected their own interpretations onto the treaty to maintain a veneer of compliance.

## VI. AREAS FOR PRIORITY ACTION

With extensive power over the normative content of the Convention, and the means to enforce its own interpretation of that normative content, the legitimacy of the Committee and its activities is vital. Indeed, Affolder suggests that much of the "paranoid lather" and talk of UN helicopters in relation to World Heritage sites can be traced to "the power of the autonomous World Heritage Committee and the fact

172. *See* Victor *et al.*, *supra* note 124.

173. *See also* Zacharias, *supra* note 21, at 1846-51. In this respect, the WHC might share another common feature with the Aarhus Convention Compliance Committee whose work, it is claimed by Kravchenko, has acted to define and clarify terms of that treaty in a fashion similar to case law. Kravchenko, *supra* note 140, at 5. However, as Kravchenko acknowledges, while that committee's findings have so far been duly adopted by the COP to that treaty, this does mean the final arbiter is the contracting parties acting in plenary. *Id.* at 35.

that much of the normative content of the World Heritage regime is articulated in the [Guidelines] rather than in the Convention itself."[174] The Guidelines, in turn, are formulated by the Committee on a two-thirds majority without any reference to all of the contracting parties. Absent acceptance of the legitimacy of the Committee, there is a real danger of a greater decline in support amongst the public for conservation activities.

Many elements go into generating legitimacy; for example, public education initiatives can be used to help generate legitimacy in localities that tend to favor development and resist conservation. Nevertheless, two aspects of the regime may be having an undermining effect on legitimacy. The first relates to the continued indeterminacy of the normative content of Article 4, and the second to the constitution of the limited membership Committee itself.[175] These are areas currently exhibiting weaknesses that can, and should, be tackled. By highlighting their link to compliance, it is hoped that extra weight can be lent to prioritizing their resolution.

### *A. Indeterminacy*

There are two aspects of the Article 4 obligation where indeterminacy is an avoidable problem. First, there is indeterminacy as to which sites are regulated by this article. Second, it is unclear what the article (and the Convention generally) means by protection and conservation. While the uncertainty over the latter has left the field open for the Committee to interpret this so as to achieve the objectives of the Convention, it is imperative that it be explicit and consistent about the standards it is setting so as to maintain the legitimacy of its actions.

#### *1. Identifying the Relevant Properties*

Article 4 applies to sites forming part of the world heritage (as defined in Article 2), irrespective of listing. Significantly, the sites referred to in Article 2 are a far larger group than those inscribed on the World Heritage List by the Committee. Once the sites falling within

174. Affolder, *supra* note 22, at 43, 53-54.

175. Franck argues that four factors—all of which contribute to the legitimacy of an obligation—can generate a pull towards compliance with a rule unenforced by a coercive power. These factors relate to determinacy, symbolic validation, coherence, and adherence. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS, 30 (Clarendon Press, 1995). This Article differs from Franck's core thesis since the WHC has coercive power similar to the type he felt was often lacking. Nevertheless, two issues looked at in this Part do have parallels with the first and last of Franck's legitimacy factors.

Article 2 are identified, they will not instantly or necessarily move onto the List. Nor is the contracting party obliged to nominate all potential sites for listing. However, as stated, Article 4 obligations attach to all properties so identified.[176]

The central question then becomes, what evidence is sufficient to establish that a state has made such a decision and identified a natural property as falling within Article 2? The answer to this, which may vary from state to state, will be important for a range of stake-holders, such as non-governmental organizations, activists, the administrative bodies under the Convention, and other contracting parties keen to see that all states are meeting their obligations. Further, in federal systems, competence to deal with environmental matters may be divided between the central and regional governments according to whether a site falls under international law or only national law. There is then a need to identify Article 2 natural properties in order to determine the responsibilities of the two levels of government. Finally, other contracting state parties must be able to identify the properties that they are obliged to refrain from deliberately damaging in accordance with Article 6(3).[177]

Beyond the World Heritage List itself,[178] what are the likely sources of such evidence? The most obvious evidence would be tentative lists. These, after all, are the inventories of properties that, in the contracting parties' opinions, form the natural heritage as defined in the WHC, and which they hope will be included in the World Heritage List. However, there are two problems with tentative lists as evidence. First, not all state parties have submitted these lists.[179] While capacity to produce them

176. *See, e.g.*, Queensland v. The Commonwealth (1989) 167 C.L.R. 232 (High Court of Australia). In that case, Justice Dawson stated:

> The obligation of a State Party to protect, conserve, present and transmit to future generations the cultural and natural heritage situated on its territory does not flow from any listing upon the World Heritage List. It flows from the identification by the State Party of its cultural or natural heritage, an identification which the State Party is under a duty to make.

177. WHC, *supra* note 1, Art. 6(3) dictates that "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." Recall that Article 6(3) was discussed above at the end of Part II.B.

178. Inscription of a property in the World Heritage List by the Committee will, given the level of expertise guiding the Committee, be practically conclusive evidence that a natural property falls within Article 2. Support for this position has been given by Australia's Justice Dawson (see note 176). This practical effect seems justifiable since Article 12 of the WHC indicates that the Committee's decisions are not legally definitive.

179. By April 2008, 162 of the 185 contracting parties had submitted tentative lists. Report of the 32nd Ordinary Session of the World Heritage Committee, Doc. WHC-

may be a large factor in this state of affairs, if tentative lists are also the evidentiary basis for attaching obligations to a property (and the benefits of World Heritage listing may not ultimately accrue), then this could discourage states from producing lists at all.

The second problem lies in resolving the position of a property that is on an existing list, but whose nomination to the World Heritage List has been unsuccessful. The WHC states:

> The fact that a property belonging to the cultural or natural heritage has not been included in either [the World Heritage List or the Danger List] 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.[180]

Thus, a site could still be regarded by the unsuccessful nominating state as having outstanding universal value for one of those other purposes; most notably for the definition of natural heritage. In such circumstances the obligations under Articles 4, 5, and 6 would continue to apply. Yet despite this, there remains no clear procedure to determine if a state does indeed continue to regard the unlisted property as being part of the natural heritage. The lack of determinacy in relation to the fundamental issue of which sites are caught by Article 4 (and Article 6(3)) seems an unnecessary shortcoming. A form of official pronouncement from the state party involved seems a simple solution to this indeterminacy.

Beyond tentative lists, it is conceivable that documents or records produced for internal circulation at the national level might also be clear evidence. For example, state parties are supposed to produce national inventories of properties regarded as reflecting their cultural and natural heritage. Additionally, announcements regarding the status of important sites may be made by governments. Again, given the potential for these lists and announcements to identify the properties to which the obligations policed by the Committee under the WHC attach, clear procedures need to be in place for these to be made available to all relevant and concerned parties.

### *2. Protection and Conservation*

Further, the WHC does not define "protection," "preservation," or "conservation." Nevertheless, these terms are used freely in WHC documents in practice. However, while these phrases may not have been used as terms of art by the regime, particularly during the first twenty

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08/32.COM/8A (Apr. 15, 2008) (providing the Tentative Lists submitted by States Parties as of April 15, 2008, in conformity with the Operational Guidelines).

180. WHC, *supra* note 1, at Art. 12.

years of the WHC, it has been claimed that "in the development of nature protection law, each of these concepts come [*sic*] to have its own meaning and that meaning can be significant for the legal scope of the provisions of the international documents in which these concepts are to be found."[181]

Generally, these terms have the following associations. "Protection" suggests a duty to prevent a specific threat that may cause damage, although it does not cover the future use of the subject once the threat is removed.[182] "Protection" has also been used to denote a concern for the welfare of animals, thus carrying more ethical connotations.[183]

"Preservation" and "conservation," conversely, are concerned with the future management of a subject. "Preservation" has been defined as setting a subject aside and guarding it so as to maintain its natural characteristics in a manner unaffected by human activity.[184] This may therefore imply that commercial utilization is not permitted under an obligation to preserve a natural area or object.[185] On the other hand, "conservation" has been linked to sustainable use of a resource so that it may be enjoyed by present generations while maintaining its potential to meet the needs of future generations.[186] Therefore, commercial utilization is, in theory, permitted so long as it is sustainable. Of course in order to maintain a resource's potential for future generations, short-term protective measures, or longer term preservationist management levels may be needed. Thus, conservation can include protection and preservation.[187]

The current imprecise use of these terms under the WHC without due consideration of the implications of such use is problematic. As noted by Christina Cameron with respect to the WHC, "If the international community is to monitor World Heritage Sites, it must have access to universally agreed-upon standards of conservation—or, more accurately, standards for the acceptable limits of change—against which to monitor."[188]

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181. P. VAN HEIJNSBERGEN, INTERNATIONAL LEGAL PROTECTION OF WILD FAUNA AND FLORA 43 (IOS Press, 1997).

182. *Id.*

183. *Id.*

184. *Id*. at 44 (quoting the 1991 Draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources).

185. *Id.*

186. M. J. Bowman, *The Ramsar Convention Comes of Age*, 42 NETH. INT'L L. REV. 1, 15 (1995).

187. Van Heijsbergen, *supra* note 181, at 51-2.

188. Christina Cameron, *The Strengths and Weaknesses of the World Heritage Convention*, 28(3) NATURE & RESOURCES 18, 20 (1992).

Formulating and disseminating clearer guidelines on the acceptable limits of change would put the Committee in a more legitimate position to hold national governments accountable for their obligations. This would therefore enhance compliance pull by giving greater credibility to the reactive monitoring activities of the Committee. MEAs, such as Ramsar, have produced detailed guidance to assist enclave managers and state parties to meet their obligations. Unfortunately only recently has it even been suggested that such guidance should be produced under the WHC.[189] Until such guidance arrives, the inconsistent use of what appear to be terms of art undermines the determinacy of the WHC, the legitimacy of the Committee's responses, and the possibility for compliance pull.[190]

### *B. The Legitimacy of the Committee*

In the past, concerns were raised about the constitution of the Committee and the consequences flowing from the range of states that have enjoyed terms of office. In 2000, figures prepared by Belgium indicated that ninety-five contracting parties had never been represented on the Committee, while ten parties had been elected more than three times.[191] Further, those states that had not been on the Committee had few, if any, sites on the World Heritage List, while the opposite was true

189. Report of the 25th Ordinary Session of the World Heritage Committee, ¶ III.14, Doc. WHC-01/CONF.208/24 (Dec. 2001).

190. It remains currently unclear whether the limit of permitted change set by Article 4 of the WHC is one of preservation, or only such change as is needed to facilitate presentation of a site to the public (on which, *see generally* Haigh, *supra* note 6), or a limit which still allows commercial sustainable utilization. Jim Thorsell support's the latter noting that, "listing does not preclude extractive use." Jim Thorsell, *Nature's Hall of Fame: IUCN and the World Heritage Convention* 7(2) PARKS 3, 3 (1997). This seems to be a fair observation. Such extraction is permitted within the Great Barrier Reef World Heritage Site in zones permitting sport fishing, for example. However, it may be that the standard of management is a bespoke form of sustainable development for the WHC in that the sites must be managed in a way that also maintains their heritage values. In 2005, such a stance received general support when the Guidelines stated at Paragraph 119:

> World Heritage Properties may support a variety of ongoing and proposed uses that are ecologically and culturally sustainable. The State Party and partners must ensure that such sustainable use does not adversely impact the outstanding universal value, integrity and/or authenticity of the property.

Guidelines, *supra* note 26, ¶ 119.

191. Report of the 24th Ordinary Session of the Bureau of The World Heritage Committee, para VI.7(5), Doc. WHC-2000/CONF.202/17 (Aug. 2000), *available at* http://whc.unesco.org/archive/2000/whc-00-conf202-17e.pdf > page 56, ¶ V.7(5).

for those who had enjoyed multiple terms of office.[192] Belgium seemed to suggest there was a correlation.[193]

Article 8(2) of the WHC states that the "election of members of the Committee shall ensure an equitable representation of the different regions and cultures of the world."[194] Nevertheless, as Belgium's data seems to suggest, this has been difficult to translate into practice. Increasing the permitted number of states on the Committee was felt to be an impractical solution since the limit of twenty-one is set by Article 8(1) and would consequently require formal amendment.[195] Fortunately, a number of alternative approaches have been adopted. Voluntarily abstaining from seeking re-election at the end of a six-year term has been frequently promoted, as encapsulated in the resolution of the General Assembly in 1989.[196] Since then, more significant changes have been introduced, whereby one seat is reserved on the Committee for a state with no property listed on the World Heritage List.[197] The system remains under regular review, which should be welcomed as part of the process for ensuring and enhancing legitimacy.

## VII. CONCLUSION: THE SIGNIFICANCE OF THE WORLD HERITAGE REGIME AND THE BUILT-IN PROCESS OF COMPLIANCE PULL

The creation of the Committee brought into existence a centralized body with considerable executive powers. These powers are often retained under a treaty by contracting parties acting in plenary as a COP. Yet in the case of the WHC, power has been almost entirely devolved to the Committee, which is, significantly, a limited membership body. Some of these powers give substance to the obligations and detail to the procedures by which the Convention is to be implemented. This is achieved through the issuing and amending of the Guidelines, and the

192. *Id.*

193. *Id.*

194. WHC, *supra* note 1, at Art. 8(2).

195. Report of the Special Session of the Bureau of The World Heritage Committee, ¶ 6, DOC. WHC 2000/Conf.202/4 Rev.1 (SPE) (Oct. 2000).

196. Summary Record of the 7th General Assembly, ¶ 12, Doc. CC-89/CONF.013/6 (Nov. 1989). Such moves however have proved unsuccessful with a number of states ignoring the resolution; for example, the United States in 1991, and China, Egypt, Mexico, and Spain in 1997.

197. This was first put into practice at the 13th General Assembly in 2001. *See* Summary Record of the 13th General Assembly, ¶ 82, Doc. WHC-2001/CONF.206/8 Rev (Oct. 2001).

practice of the Committee. Ultimately, these enable the Committee to steer the content of the obligations towards standards that are themselves substantial and effective.

Powers over implementation must be added to these powers of defining content. At this key point, the Committee acts as a "gatekeeper" to the significant benefits (both economic and political) offered under the treaty. It is the Committee who controls the brand and ensures that only the best of the best sites are inscribed as the world's heritage. It is also the Committee that awards financial assistance from the World Heritage Fund.

Finally, the Committee plays the central role in reviewing implementation by contracting parties and, if necessary, investigating possible instances of non-compliance uncovered via reactive monitoring. While systems for implementation review and non-compliance procedures are increasingly common within international environmental law, only a few MEA regimes exist which delegate enforcement powers to centralized bodies. Currently the WHC is rarely mentioned in this context, but in the future it should be. The Committee not only serves the role of giving meaning to non-compliance with key obligations, but also has the authority, in practice, to recognize non-compliance. After recognizing non-compliance, the Committee has real sanctioning options, from making unilateral requests, which the contracting parties may well regard as punitive, to ultimately de-listing and eliminating benefits. Nevertheless, the Committee still rightly prefers to offer management options in the first instance. While the WHC shares important features with the Montreal Protocol, LRTAP, CITES, the Aarhus Convention, and the Kyoto Protocol, it goes beyond these treaties in a powerful way: the enforcement powers of the Committee are not limited by a need to obtain the support of all the parties acting as a plenary—instead, that power is exercised by the small group of states elected to the twenty-one seats.

The elaboration, implementation, and enforcement roles of the Committee combine to draw states into compliance with the provisions of the treaty. The treaty creates a real or perceived association between cooperation with the Committee, performance of obligations, and furthering one's own national interests. These treaty-generated forces undermine the notion of unfettered freedom in decision making and suggest a sense of coercion based upon self-interest. This positioning of the Committee has had a major impact upon the logic of consequences that states engage in, so as to favor conserving and protecting natural heritage in compliance with the treaty's objectives. Given that the set-up employed is unusual among MEAs, it is a real surprise that the World Heritage system is so often omitted from compliance discourse.

Nevertheless, determinacy and questions over the composition of the Committee have the potential to undermine the legitimacy of the body and reduce the treaty's capacity to pull states towards compliance. If there was ever a need to find justifications for committing resources to addressing these elements of the system, this Article provides one of some significance—the potential impact on compliance pull.