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The Market for Treaties

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The Market for Treaties

Natasha Affolder*

Abstract

Corporations are consumers of treaty law. In this Article, I empirically examine three biodiversity treaty regimes—the Convention on Biological Diversity, Ramsar Convention, and World Heritage Convention—to demonstrate that corporations implement or internalize treaty norms in a variety of ways that are not captured by the dominant model of treaty implementation—national implementation. As an exegetical model, I explore how corporations use biodiversity treaties as a source of private environmental standards. I focus on the interactions between mining and oil and gas companies and biodiversity treaties, as revealed through transactional documents, corporate reports, security law filings, and treaty secretariat reports. My central claim is that treaties provide a vital, but overlooked, point of interaction between intergovernmental environmental law and transnational law as developed by private actors.

This article reveals that the gravitational pull of treaties on private actors is differentially experienced. The shadow of law (both national and international) works variably across different companies, different industries and different geographies. And the same companies that are 'dumbing down' treaty meanings in one context may be advancing tools that promote stronger and deeper implementation of these same treaty norms in another. While the empirical record is thus littered with inconsistencies and seeming contractions, one thing is clear: the implications of corporate channelling of treaty meanings and obligations are significant for international law far beyond the context of biodiversity conventions. Growing pressure to define acceptable standards of environmental and social behavior for companies is creating a robust market for "international standards"—a market for treaties.

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* Assistant Professor, Faculty of Law, University of British Columbia. Earlier drafts of this paper have been presented at the American Society of International Law's Annual Meeting, the Canadian Council of International Law's Annual Meeting, and at the University of Ottawa and University of British Columbia. I am grateful to the audience members at each of these events for their thoughtful questions and feedback. I thank Margot Young for her insights on the wider implications of this work and I acknowledge the valuable research assistance of Jalia Kangave and Jacqui Kotyk.

Table of Contents

I. Introduction 160
II. Three Blind Spots in the Literature 163
A. A Limited View of Corporations in Treaty Implementation. 163
B. A Limited View of the Role of Treaties in Private Governance 165
C. The Hard Law/ Soft Law Dichotomy 166
III. Biodiversity Treaties in Corporate Policies 167
A. Methodology and Overview 167
B. The World Heritage Convention 170
1. 'No-Go' pledges. 170
2. Awareness and disclosure—World Heritage as a risk factor. 173
3. Implementation through project decisions. 173
4. Interaction with treaty bodies 174
C. The Ramsar Convention 176
1. 'No-Go' pledges. 176
2. Awareness and disclosure. 177
3. Implementation through project decisions. 177
4. Interaction with treaty bodies and treaty partners 178
D. The Convention on Biological Diversity 179
1. Involving corporations in Biodiversity Convention implementation 180
2. Corporate standard-setting initiatives. 180
3. Requirements of corporate adherence to the treaty principles 181
E. Differential Treatment of Biodiversity Treaties 182
IV. Biodiversity Treaties as International Standards 185
A. The International Council on Mining and Metals (ICMM) Pledge 187
B. The IFC Performance Standards 188
V. Translating Treaty Law: What Gets Lost in Translation? 191
VI. Conclusion 195

I. INTRODUCTION

Pick up a textbook on international environmental law and you will quickly enter into a world where the treaty is king.[1] Flip through the pages of any recent article on "new governance" or "private environmental governance," however, and a radically different picture emerges—one of a world marked by "the failure

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1 "International environmental law develops predominantly through the establishment and evolution of highly dynamic environmental treaty systems." Thomas Gehring, *Treaty-Making and Treaty Evolution,* in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* 467, 468 (Oxford 2007).

of international 'Old Governance'"[2] and a future where private forms of international law-making stand poised to displace traditional international law, including treaties. Exit the treaty, wither the state, and enter the age of regulatory networks, public–private partnerships, and corporate codes of conduct. The very language of "Old Governance" and "New Governance" suggests a model where legal instruments occupy competing, parallel and distinct spaces. It also implies that scholars have been busy staking territory and drawing lines. This new grammar of governance implies that a choice is to be made between treaties and private law initiatives. And it comes with a threat attached—that "international law could be ineffective, obsolete and inconsequential as corporations become subject to a distinct body of rules."[3]

This Article will clarify theoretical concepts that are not apparent in a model that presumes international law and private governance initiatives compete in a zero sum game. I argue that treaties provide a vital, but overlooked, point of interaction between intergovernmental environmental law and transnational environmental law as developed significantly by private sector actors.[4] As an exegetical model, I will examine how corporations use biodiversity treaties as sources of private environmental standards. More specifically, I will focus on interactions between mining and oil and gas companies and the World Heritage Convention,[5] Ramsar Convention,[6] and Convention on Biological Diversity.[7]

Based on empirical evidence collected from corporate reports, security law filings, and transactional documents, I demonstrate that corporations implement or internalize treaty norms in a variety of ways that are not captured by the dominant model of treaty implementation—national implementation. Neither the old nor the new governance models are adequate to explain this process. This Article extends the literature by describing two other intersecting methods by which treaties influence corporate behavior. First, corporations directly

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2 Defined as "treaties and intergovernmental organizations." Kenneth W. Abbott and Duncan Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 Vand J Transnatl L 501, 501 (2009).

3 Stephen Tully, *Corporations and International Lawmaking* 6 (Martinus Nijhoff 2007).

4 These private and quasi-private standard-setting initiatives involve international institutions (such as the UN), private sector actors (acting individually or collectively), non-governmental organizations ("NGOs"), and hybrid institutions such as the International Union for Conservation of Nature ("IUCN").

5 Convention Concerning the Protection of the World Cultural and Natural Heritage ("World Heritage Convention"), 1037 UN Treaty Ser 151 (Nov 16, 1972).

6 Convention on Wetlands of International Importance Especially as Waterfowl Habitat ("Ramsar Convention"), 996 UN Treaty Ser 245 (Feb 2, 1971).

7 Convention on Biological Diversity ("Biodiversity Convention"), 31 ILM 818 (June 5, 1992).

interact with treaty norms. Second, how they interact with these norms is influenced by the intermediary of international standard-setting initiatives. An empirical study of both of these mechanisms allows one to capture more fully how corporations translate treaty norms for their own purposes, and how treaty norms are mediated through the mechanism of "international standards."

Corporations increasingly appropriate the language of environmental treaties in proving their corporate environmental credentials.[8] This interaction, while of growing practical significance, has largely escaped the attention of legal scholars. To explain why this is so, this Article begins, in Part II, by identifying three ways in which the existing scholarly literature obscures corporate engagement with treaties. In Part III, I offer a detailed empirical account of corporate use of three biodiversity conventions. My research focuses on corporate reports and transactional documents. It reveals the unevenness of corporate engagement with treaty norms. These case studies yield the unexpected lesson for treaty-making that involving corporations in treaty processes (the Convention on Biological Diversity approach) may not be the key to gaining corporate adherence. Rather, it is towards the top-down approach of mandating precise and clearly defined commitments (the list-based approach of the World Heritage Convention) that more companies in this study have swarmed. Initiatives to set "international standards" also explain the uneven landscape of corporate treaty implementation and it is to these initiatives that I turn in Part IV.

How does corporate adoption and translation of treaty norms transform the underlying treaty obligations? In Part V, I offer some cautionary messages from the experience of the treaties studied here. In translating treaty norms for corporate use, companies cherry-pick among treaty provisions, interpret treaty commitments in their least onerous forms, and obscure the ways in which corporate activities impede treaty implementation by selectively reporting on instances where corporate policies and actions advance treaty norms. The result is often that a policy that on its face seems or indeed claims to promote treaty implementation can ultimately undermine a treaty's goals. The case of 'No-Go' pledges (promises not to engage in industrial activity within certain ecologically sensitive or significant sites) is instructive as international standards are selectively adapted by corporations, resulting in commitments that appear far-reaching, but may ultimately serve to narrowly define a treaty obligation. But the record of corporate interactions with treaties is littered with inconsistencies and seeming contradictions. The same corporations that are 'dumbing down' treaty

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8 Nowhere is this more apparent than with the number of corporate reports claiming corporate adherence to the targets set by the Kyoto Protocol.

meanings are also advancing tools that might well lead to stronger and deeper implementation of these same treaty norms.

This study shows that the gravitational pull of treaties on private actors is experienced differently. The shadow of law (both national and international) works variably across different industries and different geographies. The empirical record of this study is therefore fraught with variability. No straight formula works to explain the tension between corporations as conduits of treaty implementation and as obstacles.

II. THREE BLIND SPOTS IN THE LITERATURE

Why is the interaction between public international law and private environmental governance so largely overlooked by scholars? The answer to this question lies in part in two entrenched dichotomies that continue to dominate international legal literature: the hard law/soft law distinction and the private/public divide. The scholarly practice of "territory staking" is partly to blame. Many public international law scholars remain fixated on the nation state as the dominant, and even exclusive, lens through which to study and assess international treaty law.[9] As a result, international legal scholarship is dominated by a preoccupation with explaining treaty compliance (do *states* comply with international law, and if so, why?). Treaty implementation in this literature is equally filtered through the institution of the state (with a resulting focus on national implementation). The private governance literature has responded with its own territorial claims. Corporate activities fall within the boundaries of this scholarship, but interstate lawmaking is left outside. Corporate interactions with intergovernmental agreements outside the framework of national law thus fall outside the fields of inquiry claimed by either body of literature.

A. A Limited View of Corporations in Treaty Implementation

International legal scholars predominantly approach the question of a treaty's effect from the perspective of state compliance.[10] A consequence of this state-centric focus is that analysis of treaty implementation almost exclusively

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9 But see the mounting literature on the importance of non-state actors in international law, including Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 NYU J Intl L & Pol 527 (2001); Philip Alston, ed, *Non-State Actors and Human Rights* (Oxford 2005).

10 See generally Abram Chayes and Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard 1995); *A Symposium on Implementation, Compliance and Effectiveness*, 19 Mich J Intl L 303 (1998); Edith Brown Weiss and Harold K. Jacobson, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT 2000); Ulrich Beyerlin, Peter Tobius Stoll, and Rudiger Wolfrum, eds, *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (Martinus Nijhoff 2006).

proceeds through the lens of state implementation of treaty obligations,[11] as depicted in Figure 1. Discussion of the impact of treaties on "target groups" such as corporations tends to be reserved for analysis of national treaty implementation.[12]

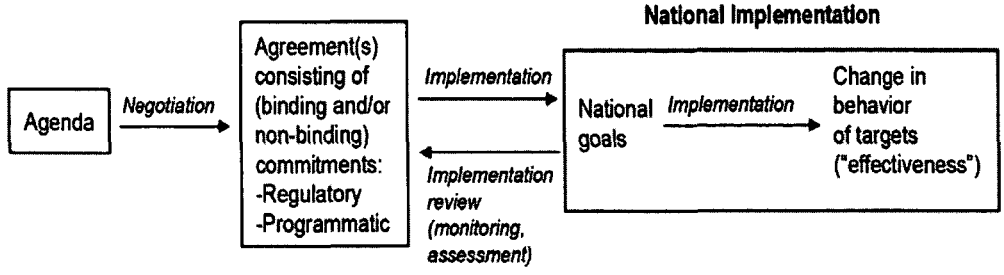


Figure 1: Classic Schematic View of the formation and implementation of environmental agreements.[13]

While the schematic in Figure 1 is presented horizontally, this model reflects a vertical process where treaties aim at states with the assumption that corporations are subordinate and operate under state law. This view is reflected in the fact that corporations (the "targets" in this figure) are included within the third box, which denotes the nation state. But measuring implementation through assessing national legislative enactments is inadequate for understanding the broader normative effects of treaties and the pragmatic uses of treaties by non-state actors. Corporations, in particular, interact with treaties in a variety of ways that are not captured by the national implementation model.[14]

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11 For example, the chapter on treaty implementation in the Oxford Handbook of International Law is entitled "National Implementation." Catherine Redgwell, *National Implementation*, in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, eds, *International Environmental Law* 922 (Oxford 2007).

12 Acknowledging that "[c]hanges in target behavior are what matter in the end, but international commitments usually must go through several stages or levels before they influence the target group." David G. Victor, Kal Raustiala, and Eugene B. Skolnikoff, eds, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* 4 (MIT 1998).

13 Taken from id at 5.

14 The need for more analysis is illustrated by Ronald Mitchell's study of intentional oil pollution, which found that although firms often failed to comply with international treaty provisions limiting ballast discharges, significantly higher levels of compliance were achieved through a requirement to adopt maritime oil pollution control technology. This was explained by the role of insurance companies in leveraging technology-based standards into effect through private monitoring programs. Ronald B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* 284–89 (MIT 1994).

To complement the national implementation account of treaty implementation, two alternative routes by which corporations may implement treaty norms need to be noted. These additional routes are mapped as A. and B. on Figure 2. While they are schematically represented as separate processes, they are not discrete but rather function in tandem.

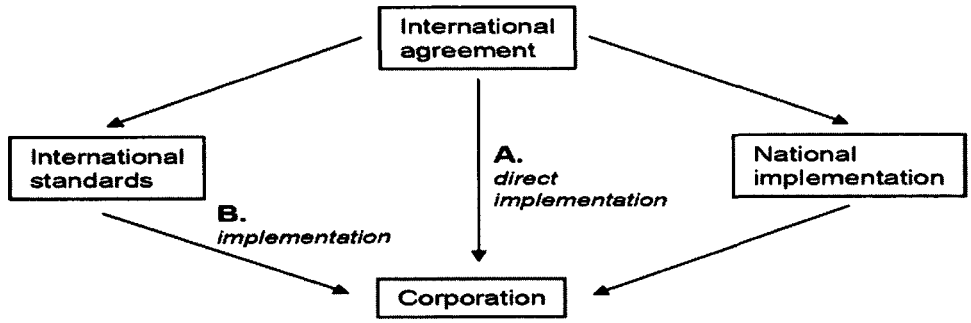


Figure 2: Schematic representation of treaty implementation by corporations

B. A Limited View of the Role of Treaties in Private Governance

While the body of literature on private governance (non-state market driven governance,[15] private authority,[16] transnational private regulation[17] and private environmental governance[18]) is rapidly proliferating, and our understanding of treaty regimes is becoming increasingly sophisticated, interaction between these bodies of literature is absent. The points of interaction between these forms of international law are obscured by the fact that the private governance literature defines itself in opposition to public international law. While I take heed of the dangers of an "overzealous lumping" together of this literature,[19] the private governance literature shares some characteristics, and

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15 Steven Bernstein and Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 Reg & Governance 347 (2007).

16 A. Claire Cutler, Virginia Haufler, and Tony Porter, eds, *Private Authority and International Affairs* (SUNY 1999).

17 Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 Am J Soc 297 (2007).

18 Philipp Pattberg, *What Role for Private Rule-Making in Global Environmental Governance? Analyzing the Forest Stewardship Council (FSC)*, 5 Intl Env Ags 175 (2005).

19 Bradley C. Karkkainen, *'New Governance' in Legal Thought and In the World: Some Splitting as Antidote to Overzealous Lumping*, 89 Minn L Rev 471 (2004).

one of these is its focus outside state and interstate lawmaking process. As a result, this literature ignores how treaties provide some of the substantive norms for the private and quasi-private initiatives that are its focus. The fault is a preoccupation with form over substance—a preoccupation that again emerges in the distinction between hard and soft law.

C. The Hard Law/ Soft Law Dichotomy

At the heart of the definition of private governance is the characterization that private and quasi-private initiatives "operate through 'soft law' approaches rather than the traditional 'hard law' of treaties."[20] It is this over-emphasized distinction between hard and soft law, deeply entrenched in both public international law and private governance scholarship, which obscures the interaction between treaty law and private governance initiatives.[21] Already, a number of criticisms of the notion of soft law have been advanced,[22] but a further problem with this label is its emphasis on form, which can blur the significance of the underlying norm. When norms are contained in treaty instruments, they may be characterised as hard law. Once a treaty norm becomes incorporated in an international standard or benchmark document such as the UN Norms,[23] it is re-classified as soft law, obscuring the relationship between the underlying treaty obligation and any behavioral change it promotes. When the standard is reproduced in a corporate loan agreement (mandating adherence to the UN Norms as a contractual obligation, for example), the binding nature of that obligation again deflects attention from the content of the underlying norm. It is this tendency to both isolate form from substance and to privilege issues of form over substance which the soft law/hard law distinction perpetuates.[24] In other words, a "soft law" diagnosis prevents interesting

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20 Abbott and Snidal, 42 Vand J Transnatl L at 506 (cited in note 2).

21 A significant focus of the private governance literature is finding ways to hold corporations legally accountable for compliance with standards. See, for example, Christine Parker, *Meta-regulation: Legal Accountability for Corporate Social Responsibility,* in Doreen J. McBarnet, Aurora Voiculescu, and Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and The Law* 207 (Cambridge 2007).

22 See, for example, Jan Klabbers, *The Redundancy of Soft Law,* 65 Nordic J Intl L 167 (1996); Dinah Shelton, *Normative Hierarchy in International Law,* 100 Am J Intl L 291, 320 (2006).

23 United Nations Commission on Human Rights ("UNCHR") Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights* ("*UN Norms*") UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (Aug 26, 2003).

24 Kal Raustiala, *Form and Substance in International Agreements,* 99 Am J Intl L 581, 582 (2005) (Raustiala makes the important point that form and substance cannot be fully appreciated as isolated variables).

questions from being asked, such as those focusing on the relationship between a standard and the underlying treaty norm.

Instead of myopically focusing on the soft or hard law character of the instrument containing treaty norms, we can reframe our inquiry to investigate how these translations of treaty norms impact the underlying norm. Do corporate codes, which reproduce or translate treaty obligations for the private sector, function to implement treaty commitments? Or, in translating norms in a restricted manner, do they limit or undermine the treaty norm? These questions, and the limitations of the existing literature, show clearly in a study of the use of biodiversity treaties in both corporate policies and international standards, to which I now turn.

III. BIODIVERSITY TREATIES IN CORPORATE POLICIES

A. Methodology and Overview

Taking non-state actors seriously can demand the adoption of unconventional research methodologies for international legal research. The primary sources for this analysis are corporate reports and transactional documents produced by major mining and oil and gas companies, including sustainability reports, annual reports, correspondence and press releases, and publicly available transactional documents on file with the US Securities and Exchange Commission (SEC) or available on corporate websites. References to treaty norms abound in corporate policy statements, press releases, investor information, pledges and contractual provisions. Transactional documents are particularly illuminating for this study as they reveal when international treaties or "international standards" incorporating treaty references are translated into a binding commitment between two private parties, reflecting a contractual internalization of an international treaty norm.

In this study, I focus on two industries—(1) mining and (2) oil and gas—that have more reason than most to attempt to bolster their environmental reputations.[25] These industries are dominated by large, reputation-sensitive companies. They cause substantial environmental degradation and they are frequently the subject of pressure from environmental non-government organizations and local communities.[26] Attempting to preempt the threat of tough legislation, protect their access to remote sites, and improve their environmental credibility with a range of communities of interest, senior members of the mining and oil and gas sectors often seek to establish their

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25 See Neil Gunningham, *Corporate Environmental Responsibility: Law and the Limits of Voluntarism,* in McBarnet, Voiculescu, and Campbell, eds, *The New Corporate Accountability* 476 (cited in note 21).

26 Id at 477.

environmental credentials. Aligning themselves with biodiversity treaties is one way for these companies to do so.

My search strategy focused on identifying any references to three biodiversity-related treaties—the World Heritage Convention, the Ramsar Convention, and the Convention on Biological Diversity—in corporate documents, including transactional documents.[27] I adopted a formalistic approach and measured references to the treaty name.[28] As the focus here is on direct interactions between corporations and treaty norms, I do not include examples of corporations referencing treaties where it is clear that they are focusing on legal compliance with domestic law, albeit domestic law that implements treaty norms.[29]

The corporate policies and practices cited in this Part are representative examples that emerge from a detailed search of the corporate records of the ten largest mining companies and ten largest oil and gas companies.[30] My focus on the largest mining and oil and gas companies assumes that the legal compliance strategies of these companies will be calibrated not only to domestic legal requirements but also to international standards. The decision to survey the largest companies is also based on the fact that together these companies represent a significant portion of the market share of these industries. In addition, I searched all company records referencing the World Heritage Convention, Ramsar Convention, and Biodiversity Convention on file with the

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27 While this research strategy demands analyzing each of these treaties individually, formal and informal mechanisms of cooperation and interaction between these three treaty regimes exist. See Catherine Redgwell, *The World Heritage Convention and Other Conventions Relating to the Protection of Natural Heritage,* in Francesco Francioni, ed, *The 1972 World Heritage Convention: A Commentary* 377 (Oxford 2008).

28 An alternative methodologically challenging approach would involve attempting to trace incorporation of treaty principles such as the precautionary principle in corporate documents back to the influence of specific treaties.

29 For example, a number of mining companies with operations in Australia reference the World Heritage Convention and Ramsar Convention in the "compliance with laws" clauses of various transactional documents as Australia's Environmental Protection and Biodiversity Conservation Act of 1999 provides that an action requires approval from the Federal Environment Minister if the action "has, will have, or is likely to have a significant impact on a matter of national environmental significance." Environmental Protection and Biodiversity Conservation Act of 1999, PL 91. Matters of national environmental significance include operations in World Heritage areas, Ramsar-listed sites and other areas protected by international agreements.

30 These corporations were selected based on the Forbes Global 2000 list of the world's largest public companies by sector. Scott DeCarlo and Brian Zajak, eds, *The World's Biggest Companies* (Forbes Apr 2, 2008), online at http://www.forbes.com/2008/04/02/forbes-global-2000-biz-2000global08-cz_sd_bz_0402global.html (visited Apr 8, 2010). Firm-specific results were further cross-referenced with a qualitative review of all documents on file with the SEC between the years 1998 and 2009 that referenced "World Heritage", "Ramsar", or "Convention on Biological Diversity."

SEC.[31] This fills in the picture of corporate engagement with these treaties by companies outside the mining and oil and gas sector, and by smaller members of these industries.

The variety of corporate documents searched provides diverse indicia of corporate interaction with treaty provisions. Certain published codes and commitments are aimed primarily at marketing effects. They target various publics, including employees and potential investors. Other documents are directed at harmonization or standardization of policies across the company for internal governance purposes.

A quantitative analysis of the corporate records search results is of limited utility. It does reveal different levels of engagement with the three treaties. For example, seven of the largest ten mining companies have policies referencing the World Heritage Convention; five referencing Ramsar; and three referencing the Biodiversity Convention. But these numbers alone reveal little about the depth or character of engagement by individual companies with each treaty.[32] References to these treaties in policy documents included commitments to treaty compliance, claims of engagement with treaty negotiation and follow-up processes, and examples of philanthropic initiatives. As my focus is on how companies use environmental treaties to set standards of behavior, I do not document the many corporate examples of philanthropy with respect to these treaties, although funding the work of treaty secretariats and specific conservation initiatives does contribute to treaty implementation.[33] Philanthropic initiatives can obscure the record of corporate environmental behavior and environmental policies that are of greater interest to this study.

My analysis reveals that corporations engage with biodiversity treaties outside the mechanism of national implementation of treaty law in two principal ways. First, directly through committing to respect certain treaty provisions, disclosing their impact, funding the implementation of treaty goals, taking action

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31 This search of LEXIS EDGAR Online used the search terms "World Heritage", "Ramsar", "Biodiversity Convention", and Convention /2 Biodiversity, adopting a date range of July 1, 1998–July 1, 2008.

32 For example, the only reference to the Biodiversity Convention in Anglo American's corporate reports and policies is the statement: "[a]t the international level we are committed to work in partnership with others to realise the global objectives of the Convention on Biological Diversity." *Working for Sustainable Development: Report to Society 2003* 32 (Anglo American 2003), online at http://www.investis.com/aa/docs/gr_2003-12-31a.pdf (visited Apr 8, 2010).

33 Philanthropic initiatives with respect to each of these three treaties are described in detail in several companies' corporate sustainability reports, and even on treaty secretariat websites. For example, Brazilian mining company Vale's Environmental Institute manages the Vale do Rio Doce Natural Reserve (owned by the company) and the Sooterama Biological Reserve, both World Heritage listed sites. Vale Environmental Institute, *Environmental Institute*, online at http://www.vale.com/vale_us/cgi/cgilua.exe/sys/start.htm?sid=426 (visited Apr 8, 2010).

to implement the treaty, or otherwise participating in treaty secretariat activities. Second, indirectly through engagement with "international standards" that in various ways may implement treaty obligations. In the rest of this Part, I turn to the first of these processes, direct treaty implementation by companies. I organize this discussion by treaty, allowing for a comparison of the record of corporate engagement with each treaty.

B. The World Heritage Convention[34]

The World Heritage Convention came into force in 1975 to prevent the destruction of culturally and naturally important sites. The treaty provides a defined list of properties of outstanding natural and cultural significance that its 186 States Parties[35] commit to protect and conserve.[36] Despite these commitments, it is estimated that more than one quarter of the natural World Heritage sites recognized under the Convention are threatened by mining or oil and gas development.[37]

The World Heritage Convention experience reveals the multiple planes on which corporations interact with treaty regimes. Oil, gas and mining companies claim that they perform aspects of this treaty. Insurance companies and financial institutions impose aspects of this treaty on other corporations. Corporations are also directly targeted by the World Heritage Committee, an institution that will bypass state governments in situations where state actors are unwilling or unable to stop destructive behavior within national borders. The range of mechanisms by which corporations may implement treaty provisions is reflected below.

1. 'No-Go' pledges.

Opinions diverge on the compatibility of mining activity with World Heritage status.[38] This is the case both for mining activities within World Heritage sites and mining activities that take place outside the boundaries of World Heritage sites but which impact the sites. For many conservation groups, the need to protect the integrity of World Heritage sites means that these sites

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34 The discussion regarding the World Heritage Convention in Section B draws upon earlier work published by the author: Natasha Affolder, *The Private Life of Environmental Treaties,* 103 Am J Intl L 510 (2009).

35 *States Parties: Ratification Status* (UNESCO World Heritage Centre 2009), online at http://whc.unesco.org/en/statesparties/ (visited Apr 8, 2010).

36 World Heritage Convention, Art 4 (cited in note 5).

37 Marta Miranda, et al, *Mining and Critical Ecosystems: Mapping the Risks* 17 (WRI 2003).

38 See Catherine Redgwell, *The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity,* in Donald Zillman, Alastair Lucas, and George (Rock) Pring, eds, *Human Rights in Natural Resource Development* 187, 198 (Oxford 2002).

should be automatically off-limits to mining and oil and gas activity—'No-Go' areas. At its 2000 World Conservation Congress in Amman, the International Union for Conservation of Nature (IUCN) called for government members to prohibit mining within IUCN Category I-IV protected areas.[39] While the resolution did not attract universal support, it did lead to an ongoing dialogue between members of the mining industry, conservation organizations and the IUCN on potential 'No-Go' areas for extractive activity. World Heritage sites have emerged from this dialogue as one such 'No-Go' area.

Some states fail to treat World Heritage sites as 'No-Go' areas and allow extractive activity to impact such sites.[40] Other states lack the capacity to prevent illegal mining from taking place in World Heritage sites within their territory.[41] Environmental NGOs and the World Heritage Committee have thus each directly targeted corporate behavior. Some corporations have responded by making 'No-Go' area commitments.

Eleven of the twenty largest mining companies now recognize natural World Heritage sites as 'No-Go' areas.[42] In the oil and gas sector, only one of the twenty largest oil and gas companies, Royal Dutch Shell (Shell), has committed not to explore or develop oil and gas resources within any natural

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39 IUCN Second World Conservation Congress, *Recommendation 2.82 (2000) on the Protection and Conservation of Biological Diversity of Protected Areas from the Negative Impacts of Mining and Exploration, Amman, Jordan* ("Amman Declaration") (2000). The US voted against this resolution on the grounds that "mining policy is an internal matter for sovereign states." *World Conservation Congress,* Proceedings (Oct 4–11 2000), online at http://cmsdata.iucn.org/downloads/wcc_2000_en.pdf (visited Apr 8, 2010).

40 The World Heritage Committee has voiced concern about the impact of mining projects on Yellowstone National Park (US), Kakadu National Park (Australia) and Jasper National Park (Canada). See Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 Pace Envtl L Rev 35 (2007). At its 2009 meeting in Seville, the World Heritage Committee noted with concern the potential threat that mining and energy development within the Flathead Valley posed to the Waterton Glacier International Peace Park World Heritage site. The Committee called on Canada not to permit any mining or energy development in the area prior to the completion of environmental assessments that included the participation of the USA. World Heritage Committee, *Report of Decisions*, Doc. No. WHC-09/33.Com/20, 71-72 (2009).

41 Illegal mining continues to plague the World Heritage Sites in the Democratic Republic of the Congo. See World Heritage Committee, *Decisions Adopted at the 30th of the World Heritage Committee*, Doc. No. WHC-06/30.Com/19, 16, 19 (2006).

42 Vale, Rio Tinto, BHP Billiton, Xstrata, Anglo American, Alcoa, Freeport Copper, Barrick Gold, Teck Cominco, Sumitomo Metal Mining, and Mitsubishi Materials. These companies are either original signatories to the 2003 International Council on Mining and Metals ("ICMM") Position Statement (discussed below at text accompanying note 43) or have since become members of the ICMM, and thus commit in accordance with the ICMM Position Statement to "undertake not to explore or mine in World Heritage properties." *Mining and Protected Areas, Position Statement* ("ICMM Position Statement") 2 (ICMM 2003), online at http://www.icmm.com/document/43 (visited Feb 12, 2010).

World Heritage site.[43] Figure 3 maps the recent proliferation of these 'No-Go' commitments.

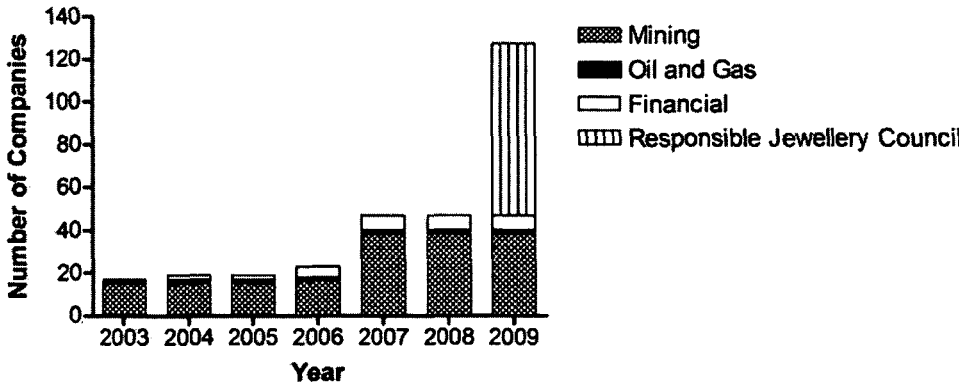


Figure 3: 'No-Go' Commitments made by companies to avoid either undertaking or financing extractive activity in natural World Heritage Sites.

It is no coincidence that these corporate pledges began in 2003. That was the year in which the International Council on Mining and Metals (ICMM) issued a position statement on mining and protected areas. The statement required the fifteen ICMM members not to explore or mine in World Heritage properties.[44] The statement ensured that "existing operations in World Heritage properties, as well as existing and future operations adjacent to World Heritage properties, are not incompatible with the outstanding universal value for which these properties are listed and do not put the integrity of these properties at risk."[45]

It is not only ICMM member companies that have adopted corporate policies respecting World Heritage Sites as 'No-Go' areas for extractive activity. The 'No-Go' standard for natural World Heritage Sites has attracted growing

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43 BP is the only other energy company on this list with a policy on World Heritage, stating that it has "no plans to enter any protected areas including World Heritage Sites." Greg Coleman, GVP, British Petroleum, *Opening Statement at the World Parks Congress in Durban*, (Sept 16, 2003), online at http://www.bp.com/genericarticle.do?categoryId=98&contentId=2015971 (visited Apr 8, 2010).

44 Sir Robert Wilson, *"No-Go" Pledge Signals a New Era of Collaboration with the Conservation Movement*, ICMM 2(4) Newsletter 1–4 (Sept 2003), online at http://www.icmm.com/library (visited Feb 12, 2010).

45 ICMM Position Statement (cited in note 42).

support.[46] It is now endorsed by energy companies, financial institutions, public sector institutions such as the Overseas Private Investment Corporation (OPIC), as well as not-for-profit organizations including the Responsible Jewellery Council.[47]

2. Awareness and disclosure—World Heritage as a risk factor.

Corporate project reports also reveal that companies are mapping and disclosing the proximity of their operations to World Heritage sites, framing World Heritage sites as a potential risk factor. World Heritage sites are gaining a place in the "environmental considerations" or risk factor analysis of individual project reports. Newmont Mining, for example, has a column in its data sheets for "Area of Total Owned Operated and Non-operated Assets which Occur Within . . . World Heritage Properties."[48] Barrick Gold's website indicates that it does not operate in World Heritage areas, but discloses that it has "three operations located near World Heritage sites."[49] Gold Fields indicates in the Environmental Performance Indicators section of its 2003 Sustainable Development Report that it "closely monitor[s] compliance with relevant legislation at international, regional and national levels, including . . . the World Heritage Convention."[50]

3. Implementation through project decisions.

Corporate documents further suggest that some oil and gas and mining corporations are making project-specific decisions in a manner that respects World Heritage norms. The Guiding Principles of energy company Cairn India commit the company "not to conduct exploration or production operations in World Heritage Sites . . . or environmentally sensitive areas." For example, when Cairn India signed an agreement in 2004 with the government of Nepal to access new drilling areas along the Indian border, it relinquished exploration rights for over 2,700 square kilometers of designated national park and wildlife areas. The company stated that this decision "was in line with company policy of

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46 See Figure 3.

47 Council for Responsible Jewellery Practices, *Mining Supplement Initial Draft*, Version 1 (Aug 11, 2008), online at http://www.responsiblejewellery.com/downloads/CRJP_Mining_Supplement_public_review_draft_v1.pdf (visited Feb 12, 2010).

48 Newmont Mining, *Data Sheets 2006*, online at http://www.beyondthemine.com/2006/?l=2&pid=5&parent=20&id=358 (visited Apr 8, 2010) (disclosing no acres owned or operated within World Heritage Sites).

49 Barrick Gold Corporation, *Biodiversity Management and Protection*, online at http://www.barrick.com/default.aspx?SectionId=5f187b4e-b5a1-4597-895d-c43041a753f7&LanguageId=1 (visited Apr 8, 2010).

50 Gold Fields Limited, *Sustainable Development Report 2003*, online at http://www.goldfields.co.za/reports/annual_report_2003/sd_03/perfomance/enviro_perf.htm (visited Apr 8, 2010).

sparing World Heritage Sites or those areas deemed environmentally sensitive."[51] British Petroleum (BP) also has purportedly altered its investment plans to adhere to the requirements of the World Heritage Convention. The company will re-route its tankers in a liquid natural gas project in Indonesia, taking a 550-kilometer detour, to avoid the ecologically sensitive area of Raja Ampat, which is likely to be designated a World Heritage site.[52]

BHP Billiton further reports that PT Gag Nickel, a joint venture between BHP Billiton and Indonesia's state-owned mining company, conducted exploration and evaluation activity in the late 1990s at the Gag Island site, in Indonesia. In late 1999, the Indonesian government prohibited open cast mining in such areas of "Protection Forest." This decision was reversed when a Presidential Decree reinstated the right to mine in the area to thirteen mining companies, including BHP Billiton.[53] While BHP Billiton reported that it was undecided about the future of the project, the company clarified to its shareholders that it would not proceed with the project should the site be added to the World Heritage list.[54]

4. Interaction with treaty bodies.

The emergence of general corporate 'No-Go' pledges and individual projects decisions to avoid World Heritage sites are the result of private interactions between companies, activist organizations, lenders, insurers and shareholders. But these interactions do not exist in isolation from the inter-state architecture introduced to implement the Convention. Many of the initiatives described above, including the ICMM Position Statement, are the outcome of interactions between private firms and the institutions tasked with implementing the Convention. The World Heritage Committee,[55] the World Heritage Bureau,[56]

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51 *Cairn Energy takes drilling to Nepal*, BBC Online (Aug 12, 2004), online at http://news.bbc.co.uk/2/hi/business/3557996.stm (visited Apr 8, 2010).

52 Kate Barrett and Linda Yun, *BP, Cruise Lines Make Business Decisions with Earth in Mind* (Conservation International Feb 26, 2007), online at http://www.conservation.org/ FMG/Articles/Pages/BP_cruises_business_caribbean.aspx (visited Apr 8, 2010).

53 See Ingrid Macdonald, *Mining Ombudsman Annual Report 2004* 9 (Oxfam 2004), online at http://www.oxfam.org.au/resources/pages/view.php?ref=451&search=mining&order_by=date&offset=20&archive=0&k= (visited Apr 8, 2010).

54 BHP Billiton, *Questions from Shareholders* 4 (2004), online at http://www.bhpbilliton.com/bbContentRepository/Events/QuestionsfromShareholders.pdf (visited Feb 12, 2010). See also, BHP Billiton, *Health, Safety, Environment and Community Report* ("BHP Health, Safety & Community") 130 (2004), online at http://www.bhpbilliton.com/bbContentRepository/Reports/bhpb_full_hsec_report_04.pdf (visited Feb 12, 2010).

55 The Committee consists of twenty-one elected States Parties and is the key decision-making body of the Convention regime.

and the IUCN[57] have each communicated directly with companies about their impacts on World Heritage sites. The IUCN called on companies to stop buying coltan from mines within two World Heritage sites in the Democratic Republic of Congo.[58] The World Heritage Committee has requested information and action specifically from mining companies and not just the relevant state parties.[59] In 2009, the Committee applauded "the responsible position" of Tata Steel in agreeing not to carry out mining that would damage the Outstanding Natural Value of the Mount Nimba Strict Nature Reserve in Côte d'Ivoire and Guinea.[60] The Committee has also promoted the use of Memoranda of Understanding with mining companies to clarify environmental standards for specific mining sites.[61]

The IUCN in particular has played a critical role in establishing dialogues with both the ICMM and Shell, resulting in Shell's 'No-Go' commitments.[62] The IUCN's dialogue with Shell culminated in a 2007 agreement for strategic collaboration.[63] The World Heritage Bureau applauded "Shell's careful and transparent planning of its hydro-carbon exploration activities" when Shell announced that it had no plans for exploration activities in the Special Reserved Forest of the Sundarbans in Bangladesh.[64]

These direct communications and interactions between the treaty bodies of the World Heritage Committee and individual companies reveal the limitations of a model of treaty implementation that only considers corporations as operating under the purview of states, and domestic law. Corporate engagement with the Ramsar Convention is less pronounced than the World Heritage

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56 The Bureau coordinates the work of the Committee. It consists of seven States Parties elected annually by the Committee, a Chairperson, five Vice-Chairpersons, and a Rapporteur.

57 The IUCN has special status under the Convention as an advisory body, and routinely provides information and advice to the Bureau and Committee.

58 *Coltan Mining Threatens the Congo,* Arborvitae: The IUCN/WWF Forest Conservation Newsletter 11 (May 2001).

59 See World Heritage Committee, *Decisions Adopted at the 31st Session of the World Heritage Committee* ("WHC Decisions Report"), WHC-07/31 Com/24, 9 (2007).

60 World Heritage Committee, *Report of Decisions*, Doc. No. WHC-09/33.Com/20, 16 (2009).

61 World Heritage Committee, *Report on the 25th Session of the World Heritage Committee* ("WHC Report 2001"), WHC-01 / Conf 208 / 24e, 21 (UNESCO: 2001).

62 See Kevin Bishop, et al, *Speaking a Common Language: The Uses and Performances of the IUCN Systems of Management Categories for Protected Areas* 155 (IUCN 2004).

63 *Conserving Biodiversity is a Business Opportunity say Shell and IUCN* (Shell Mar 27, 2008), online at http://www.shell.com/home/content/media/news_and_library/press_releases/2008/conserving_biodiversity_27032008.html (visited Apr 8, 2010).

64 WHC Report 2001, 111–12 (cited in note 61).

Convention experience. Yet its existence confirms the practice of corporations interacting with treaties in a way that is not mediated by domestic law.

C. The Ramsar Convention

Corporate documents referencing the Ramsar Convention reflect significantly less corporate engagement with this Convention from oil and gas and mining companies than is visible with the World Heritage Convention, in both quantitative and qualitative terms.[65] Notably fewer companies have made pledges to refrain from extractive activity within Ramsar wetlands. This is not surprising. The Ramsar Convention operates differently than the World Heritage Convention. Like the World Heritage Convention, the Ramsar Convention is a list-based convention but it is not purely about conservation. The Convention, which entered into force in 1975, provides both for the conservation and "wise use" of wetlands. The Convention does not intend for the over 1800 sites currently listed on the List of Wetlands of International Importance to be off-limits to all development. Yet, reflecting the conservation goal of the treaty, some conservation groups suggest that all Ramsar sites falling within protected areas (IUCN management categories I-IV) should be recognised as 'No-Go' zones. Other conservation groups have called for extractive activity to be banned from all Ramsar Sites.[66] A number of the sites on the Montreux Record of Ramsar sites requiring priority attention' involve mining projects which impact Ramsar sites.[67] The fact that mining operations can undermine the integrity of Ramsar sites highlights the relevance of this Convention to the biodiversity policies of mining companies.

1. 'No-Go' pledges.

Conservation organizations have pushed for the recognition of Ramsar sites as 'No-Go' areas in much the same way as they have sought to secure 'No-Go' commitments for World Heritage Sites.[68] Three financial institutions,

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65 For example, searches of SEC filings on the Ramsar Convention yielded 41 hits between 2000 and April 2009. Searches on the World Heritage Convention for the same dates yielded 156 results.

66 Marta Miranda, David Chambers, and Catherine Coumans, *Framework for Responsible Mining: A Guide to Evolving Standards* 15 (2005), online at http://www.frameworkforresponsiblemining.org/pubs/Framework_20051018.pdf (visited Apr 24, 2010).

67 See Redgwell, *The International Law of Public Participation* at 205 n 74 (cited in note 38) (listing Lake Myvatan in Iceland, the St. Lucia System in South Africa, the Donau-March-Auen area in Austria, and the Lough Neagh/Lough Beg site in Northern Ireland as examples of locations where mining has impacted Ramsar sites).

68 Shell, *Mining, Mind the Gap*, online at http://www.banktrack.org/download/3_6_mining/071218_mind_the_gap_mining.pdf (visited Apr 24, 2010).

including Standard Chartered Bank,[69] ING,[70] and HSBC have now instituted policies prohibiting the financing of mining activity or forestry activity within Ramsar sites.[71] OPIC has instituted an approach of treating Ramsar sites according to their IUCN Management Category classification. As a result, it does not finance extractive activities within Ramsar sites that fall within IUCN Management Categories I-IV.[72]

2. Awareness and disclosure.

A number of companies in this study acknowledge that they are operating either adjacent to or even within Ramsar sites, without committing to avoid these sites or affecting them.[73] For example, Newmont Mining's 2007 Sustainability Report indicates that in 2005 and 2006 there were no Ramsar-listed sites within proximity of its operations. In 2007 however, 400 hectares of Ramsar listed sites were within areas of potential impact from the company's operations.[74] A number of companies nevertheless make efforts to point out that they are avoiding Ramsar sites in project decisions. For example, Xstrata discloses that the Kroondal mine in South Africa is adjacent to a wetlands area, but that this wetland is not listed under the Ramsar Convention as a wetland of international importance.[75]

3. Implementation through project decisions.

While few companies (and to-date, only financial institutions) have recognized Ramsar sites as 'No-Go' areas, a number of companies have adopted policies requiring more stringent environmental standards when their operations may impact upon Ramsar sites. For example, Xstrata has a Biodiversity and

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69 Standard Chartered Bank, *Oil and Gas*, online at http://www.standardchartered.com/_documents/Standard-Chartered-Oil-and-Gas-Position-Statement.pdf (visited Feb 14, 2010).

70 ING, *Natural Resources (Oil, Gas and Mining) & Chemicals Sector Policy*, Investment Policies, online at http://www.ing.com/group/showdoc.jsp?docid=350071_EN&menopt=CRE%7Cpol%7Cinv (visited Apr 8, 2010).

71 HSBC, *Mining and Metals Sector Policy* (2007), online at http://www.hsbc.ca/1/PA_1_1_S5/content/canada2/assets/pdf/sustainability/070810_mining_policy.pdf (visited Apr 24, 2010).

72 Miranda, Chambers, and Coumans, *Framework for Responsible Mining* at 14–16 (cited in note 66).

73 Rio Tinto notes in its Biodiversity Report on the Simandou Project in Guinea that the Project will have to develop and manage a new railway whose "corridor will cross areas of significant conservation value, which may include Ramsar-listed wetlands." Rio Tinto, *Managing biodiversity in Guinea: On the ground at Rio Tinto's Simandou Project* 3 (Rio Tinto Limited 2008), online at http://www.riotinto.com/documents/SIMANDOU_partnership.pdf (visited Apr 24, 2010).

74 *Newmont Sustainability Report 2007* 209 (Newmont 2007), online at http://www.beyondthemine.com/2008/pdf/NewmontSustainabilityReport2007web.pdf (visited Feb 14, 2010).

75 Xstrata, *Sustainability Report 2007* 87 (Xstrata 2007), online at http://www.xstrata.com/assets/pdf/x_sustainability_2007.pdf (visited Feb 14, 2010).

Land Management standard that requires biodiversity conservation plans to be implemented in Ramsar sites.[76] To implement this requirement, Xstrata Zinc Europe indicates that for its Nordenham waste deposit, which is surrounded by a Ramsar site, it conducted a baseline study of the bird population in the direct neighbourhood of the deposit. There is no indication that this study was required by national or European law.[77] Rio Tinto formed part of an initiative to list the northern ponds at Lake MacLeod in Western Australia under the Ramsar Convention.[78]

4. Interaction with treaty bodies and treaty partners.

The Standing Committee of the Ramsar Committee acknowledges that the Ramsar Secretariat has not adopted an approach of direct involvement with the business sector. Ramsar international organization partners, however, do undertake partnerships with the business sector "to seek intensified private sector engagement and to persuade and enable private companies to reduce their negative impacts on the environment and work towards sustainable development."[79] For example, Wetlands International (a Ramsar partner) has established a partnership with Royal Dutch Shell, to help Shell develop strategies geared towards protecting wetland biodiversity. Rio Tinto and Bird Life International have a partnership that is intended to engage and educate the community on conservation issues and to implement the High Andean Wetlands Ramsar Strategy.[80] BHP Billiton reports that on its Liverpool Bay petroleum development in the UK, it worked with the Ramsar secretariat and the Royal Society for Protection of Birds to create a wetland. Further, the Ramsar secretariat endorsed the company's environmental safeguards and standards for that project.[81]

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76 Xstrata, *Sustainability Report 2006* 78 (Xstrata 2006), online at http://www.xstrata.com/assets/pdf/x_sustainability_2006.pdf (visited Feb 14, 2010).

77 Xstrata Zinc Europe, *Sustainability Report 2007* 27–28 (Xstrata Zinc 2007), online at http://www.xstrata.com/assets/pdf/xz_sustainability_2007_euops.en.pdf (visited Feb 14, 2010).

78 Rio Tinto Minerals, *2005 Sustainable Development Report* 23 (Rio Tinto 2005), online at http://www.riotinto.com/documents/ReportsPublications/RTM_SD_Report_2005.pdf (visited Feb 14, 2010).

79 *Framework for comprehensive ecological and economic partnerships between the Ramsar Convention and the business sector*, Doc SC37-34, 37th Meeting of the Standing Committee, Convention on Wetlands (Jun 2008), online at http://www.ramsar.org/pdf/sc/37/key_sc37_doc34.pd (visited Apr 12 2010).

80 BirdLife International, *Conserving Flamingos in the High Andes* 32, online at http://www.birdlife.org/action/business/rio_tinto/downloads/rt_13.pdf (visited Feb 14, 2010).

81 *Our Environmental Challenge*, Environmental Report 1997 1, 32–33 (BHP Billiton 1997), online at http://www.bhpbilliton.com/bbContentRepository/Reports/enviroreport97.pdf (visited Feb 14, 2010).

D. The Convention on Biological Diversity

My analysis of corporate engagement with the Biodiversity Convention adopts a different approach than that followed for the previous two treaties because the Biodiversity Convention experience is so different. Unlike the World Heritage Convention and Ramsar Convention, the Biodiversity Convention adopts a comprehensive approach to biodiversity conservation. The Biodiversity Convention does not set specific standards or targets against which states (or corporations) measure their behavior. Rather, the treaty focuses on states parties as the agents of treaty implementation and allows these parties to define the content of specific obligations through national law and policy.[82]

The text of the Biodiversity Convention, again unlike the Ramsar Convention and the World Heritage Convention, explicitly seeks to integrate corporations into treaty processes to further implementation.[83] Corporations and industry groups were active in the negotiation of the Biodiversity Convention and they have continued to be involved in Conference of the Parties (COP) and working group meetings.[84] Particularly since 2005, the Treaty Secretariat has adopted an activist approach in engaging corporations in what it classifies as treaty implementation activities. Through multiple points of interaction with the business community, the Convention has been refashioned into an opportunity for businesses to showcase their contributions to biodiversity initiatives and for the private sector to participate in defining standards for biodiversity protection. The Biodiversity Convention is on the radar of mining companies due to the conflict between protected area status and mining.[85] This is particularly the case in the wake of the Amman Declaration calling upon IUCN member states to prohibit exploration or extraction of mineral resources in IUCN Management Categories I-IV protected areas.[86]

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82 During the treaty negotiations, certain provisions that would have inserted concrete lists and standards into the treaty regime, such as a global list of protected areas and species, were deleted as agreement was lacking. Instead, an approach of allowing state parties to select protected areas and species for protection was adopted. See Redgwell, *The International Law of Public Participation*, n 87 (cited in note 38).

83 Biodiversity Convention, Art 10(e) (cited in note 7).

84 IPIECA, the International Chamber of Commerce ("ICC"), the Business Council for Sustainable Development ("BCSD") and the World Industry Council for the Environment ("WICE") were particularly involved in the negotiations leading up to the 1992 Convention. See Fiona McConnell, *The Biodiversity Convention: A Negotiating History* (Kluwer 1996).

85 Obligations for establishing and maintaining a protected areas system are set forth in Article 8. Biodiversity Convention, Art 8 (cited in note 7).

86 Amman Declaration (cited in note 39).

1. Involving corporations in Biodiversity Convention implementation.

The Biodiversity Convention Secretariat began its most intense period of private sector engagement in 2006.[87] The need to engage business to ensure proper implementation of the treaty was a key theme of the 2006 Conference of the Parties.[88] The Biodiversity Convention Secretariat encouraged company representatives to participate in technical meetings and Conference of the Parties either as observers or as part of official Party delegations.[89] The Secretariat's consultations with the private sector also revealed the need for greater guidance around sector-specific good practice standards for business.[90]

2. Corporate standard-setting initiatives.

A number of companies and industry groups have taken up the Biodiversity Convention Secretariat's invitation to draft and promote performance standards for business with respect to biodiversity. Rio Tinto has participated in a number of Biodiversity Convention meetings and submitted reports in response to the Secretariat's call for submissions on indicators of sustainable use of biodiversity.[91] The company has used the platform of Biodiversity Convention meetings on business and biodiversity to advertise its partnership with the Earthwatch Institute and the partnership's project aimed at developing performance standards.[92] In 2008, members of the oil and gas industry and the International Petroleum Industry Environmental Conservation

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87 Executive Secretary of the Biodiversity Convention, *Private Sector Engagement in the Implementation of the Convention*, UN Doc UNEP/CBD/WG-RI/1/8, ¶ 3 (Jul 26, 2005).

88 Convention on Biological Diversity, COP Decision VIII/17, *Private Sector Engagement* in Report of the Eighth Meeting of the Parties of the Convention on Biological Diversity, UN Doc UNEP/CBD/COP/8/31 (Jun 15 2006).

89 Convention on Biological Diversity, *Report of the Business and the 2010 Biodiversity Challenge Meeting*, ¶ 30 (Jan 20–21, 2005), online at http://www.cbd.int/doc/meetings/biodiv/b2010-01/official/b2010-01-03-en.pdf (visited Feb 17, 2010).

90 Convention on Biological Diversity, *Report of the Business and the 2010 Biodiversity Challenge Meeting*, UN Doc UNEP/CBD/WG-RI/1/INF/5 (Aug 2, 2005).

91 For example, Rio Tinto representatives attended a number of meetings on the 2010 Biodiversity Challenge. See, for example *Report of the Business and the 2010 Biodiversity Challenge Meeting* (Convention on Biological Diversity 2005), online at http://www.cbd.int/doc/ meetings/wgri/wgri-01/information/wgri-01-inf-05-en.pdf (visited Feb 17, 2010); *Consideration of the Results of the Meeting on "2010 Global Biodiversity Challenge,"* Meeting Report (Convention on Biological Diversity 2004), online at www.cbd.int/doc/meetings/cop/cop-07/information/cop-07-inf-22-en.doc (visited Apr 24, 2010).

92 *A Review of Biodiversity Conservation Performance Measures* 8 (Earthwatch Institute 2005), online at http://www.cbd.int/doc/case-studies/suse/cs-suse-024-earthwatch-en.pdf (visited Apr 24, 2010).

Association (IPIECA) produced a guide for the oil and gas industry on the Biodiversity Convention. The guide's self-declared objective is to help the industry to implement the provisions of the Convention.[93]

Countries are citing corporate initiatives as evidence of treaty implementation. Canada's first national report to the Conference of the Parties of the Biodiversity Convention reports that: "Shell has initiated several actions that are assisting Canada to meet its obligations under the Convention on Biological Diversity."[94] Shell's initiatives include developing standards and guidelines on sustainable development, protecting wildlife and wilderness by adopting new procedures and supporting wildlife research, and funding projects aimed at improving the environment. The decision to make the business community an important partner in implementing the Biodiversity Convention has not been without its critics. Some conservationists suggest that the increasing role played by the business community in implementing the Biodiversity Convention undermines the Convention and leads to the commoditization of biodiversity.[95]

3. Requirements of corporate adherence to the treaty principles.

As a framework convention rather than a list-based treaty, the Biodiversity Convention is not easily translated into performance standards or specific project requirements. Transactional documents such as credit agreements and contracts in mining projects do not generally reference the Biodiversity Convention in setting out environmental protection requirements. The Convention is referenced however, in a number of private agreements between biotechnology and health sciences research companies, including agreements signed between companies and institutions based in the US (a country that has not ratified the Convention).[96] Moreover, Goldman Sachs' 2005 Environmental

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93 International Petroleum Industry Environmental Conservation Association and International Association of Oil and Gas Producers, *The Convention on Biological Diversity: A Guide for The Oil and Gas Industry* 2 (IPIECA/OGP 2008), online at http://www.cbd.int/doc/business/cbd-guide-oli-gas-en.pdf (visited Apr 24, 2010).

94 Convention on Biological Diversity, *Caring for Canada's Biodiversity: Canada's First National Report to the Conference of the Parties to the Convention on Biological Diversity* 56, online at http://www.cbd.int/doc/world/ca/ca-nr-01-en.pdf (visited Apr 24, 2010).

95 See, for example, Anne Petermann and Orin Langelle, *One Leap Backwards for Biodiversity, One Giant Step Forward for Industry: Biodiversity Loses at UN convention on Biodiversity* (Z Magazine July–Aug 2008), online at http://www.zmag.org/zmag/viewArticle/18090 (visited Feb 17, 2010).

96 For example, the US National Cancer Institute (NCI) requires its research collaborators to sign Letter of Collection Agreements, which the Cancer Institute states are necessary for NCI to comply with: "(b) the NCI's policy of adhering to the principles of the United Nations Convention on Biological Diversity ('U.N. CBD'), which calls for 'sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and

Policy Framework provides that the bank will not finance projects that knowingly engage in illegal logging.[97] The investment bank notes that while illegal logging has not yet been written into international environmental legal instruments, the Biodiversity Convention addresses the issue.[98]

E. Differential Treatment of Biodiversity Treaties

The detailed references to the World Heritage Convention, Ramsar Convention, and Biodiversity Convention contained in the corporate reports and transactional documents discussed in this section reveal the unevenness of corporate interaction with these treaties. Both the form and extent of interaction differs significantly between corporations, and between treaties. While a number of companies now expressly commit not to explore or engage in extractive activities in World Heritage sites, a similar commitment to respect Ramsar sites, or even those Ramsar sites within IUCN Management Category I-IV protected areas, has not been forthcoming. This is despite the fact that three private and one public financial institution now have in place policies prohibiting the financing of projects within Ramsar sites.

The experience of the 1992 Biodiversity Convention differs sharply from that of the Ramsar Convention and World Heritage Convention. In contrast to the case of either the Ramsar Convention or the World Heritage Convention,

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other utilization of genetic resources with the [source country] providing such resources.' (U.N. CBD; Article 15.7)." *Cooperative Research and Development Agreement between the National Cancer Institute and Protarga, Inc.* (Jan 10, 2000), available at Edgar Online database. All of the private agreements cited within the Article are available at the LexisNexis EdgarOnline database. For the sake of brevity, I do not repeat the "available at" citation for each document. A research and license agreement between two California drug discovery research companies contains the following compliance with laws requirement: "Compliance with International Biodiversity Regulations. SEQUOIA shall adhere to the 1993 Convention on Biological Diversity ("CBD"), the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), and other regional and national laws and policies concerning biodiversity, and will endeavor to minimize environmental impacts of collecting Biological Materials. Relevant provisions of the CBD include: the sovereign rights of states over their biological resources; the concern that biological diversity is being significantly reduced by certain human activities; the need to provide additional scientific information about biological diversity that may contribute to its conservation and sustainable use of biological diversity; the need to promote fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including benefits that arise from traditional knowledge; and the need to respect and maintain the knowledge and practices of indigenous communities that are relevant for the conservation and sustainable use of biological diversity." *Research and License Agreement by and between Sequoia Science Ltd, Inc and Anadys Pharmaceuticals, Inc.* § 2.9.1. (Oct 10, 2002), available at Edgar Online Database.

97 *Goldman Sachs Environmental Policy Framework* 6 (Goldman Sachs Nov 2005), online at http://www2.goldmansachs.com/ideas/environment-and-energy/goldman-sachs/env-policy-pdf.pdf (visited Feb 14, 2010).

98 Id, n iv.

business organizations were involved in the negotiation of the Convention and continue to be involved in Conferences of the Parties and working parties of the Biodiversity Convention secretariat. Engaging business in biodiversity standard articulation has been a major focus of Biodiversity Convention activities. A number of individual corporations and business groups have responded to the challenge of articulating sector-specific performance standards. This approach of inviting companies to articulate the meaning of the Convention for their sector and to set their own standards of acceptable biodiversity protection behavior contrasts sharply with the list-based approaches of the other two conventions. In such list-based approaches, the conventions and their treaty bodies attempt to define acceptable standards of behavior with respect to these sites.

The evidence presented here suggests that mining and oil and gas companies have engaged to the greatest extent with the World Heritage Convention, although they were not involved in the negotiation of this treaty. This challenges the view that involving companies in treaty negotiation and follow-up leads to the greatest degree of treaty implementation by the non-state actors.[99]

The unevenness of corporate engagement with treaties is not just about different approaches being adopted for different treaties. It is also about certain companies engaging with these treaties, while others do not. I have intentionally used the names of companies in reporting their indicators of treaty engagement because it reflects the phenomenon that the same names keep coming up. They are the names of the largest companies in their sectors, with home bases in Europe, Australia, or North America. For example, seven of the largest ten mining companies have made 'No-Go' commitments with respect to World Heritage sites.[100] Three have not. These three (MMC Norilsk Nickel, China Shenhua Energy and Severstal) are all based in Russia or China. The seven companies that have made these commitments are all based in Europe or North America, with one exception.[101] The significance of the home base state can also be seen in the fact that the four largest banks with 'No-Go' policies are all based in the UK, US or Canada.[102] This study thus preliminarily suggests that the

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99 This finding is consistent with the conclusions of the treaty implementation study of Victor, Raustiala and Skolnikoff. The case studies investigated by the authors (focusing on national implementation) failed to show that greater target group involvement in treaty negotiation led to greater treaty implementation. Victor, Raustiala, and Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments* 665 (cited in note 12).

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

101 The exception is Vale which is based in Brazil.

102 These banks are HSBC Holdings (UK), JPMorgan Chase (US), Wachovia (US) and Royal Bank of Canada (Canada).

"compliance pull" of biodiversity treaties may be stronger for corporations based in states particularly sensitive to NGO pressure. Another factor limiting our understanding of the biodiversity policies of mining companies based outside Europe, North America, and Australia, is the absence of corporate reporting on biodiversity.[103]

The differences in levels of corporate engagement with the World Heritage Convention and Ramsar Convention force us to ask why the World Heritage Convention experience is somewhat exceptional. Why have natural World Heritage sites become the most accepted 'No-Go' standard? The answer to this question in part lies in the momentum built around the initial 2003 ICMM 'No-Go' commitment. It is the translation of this treaty norm into an "international standard" of industry best practice that has fostered further acceptance and corporate uptake of this norm. As Figure 3 clearly revealed, precedent is important in explaining why corporations adopt certain commitments. Corporations look to what their peers are doing. They also use the same consultants to draft their biodiversity policies.[104]

Other explanations for why the World Heritage Convention has attracted more and more far-reaching corporate commitments trace to the fact that the World Heritage Convention is a list-based treaty, thus offering an environmental standard that is easy to use and to apply. Sites are simple to identify and locate, with finite geographical boundaries. While the Ramsar Convention is also a list-based treaty, it may be more complicated to apply due to its incorporation of both a conservation and "wise use" mandate for listed sites. The clarity and precision of the World Heritage standard is singled out by both the ICMM and Shell as an important factor in explaining their decisions to adopt 'No-Go' policies for World Heritage areas, but not for other protected areas.[105]

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103 For example, of the ten largest mining companies, no public records of biodiversity policies could be found for MMC Norilsk Nickel, Severstal, and China Shenua Energy (all companies based in Russia or China).

104 Business for Social Responsibility, for example, provides training and consulting services to over 250 companies, including Barrick Gold, BP, Chevron, Gold Fields, Royal Dutch Shell and Vale. Business for Social Responsibility, *Corporate Members*, online at http://www.bsr.org/membership/member-list.cfm (visited Apr 8, 2010).

105 Sir Philip Watts, chairman of Shell's Committee of Managing Directors, explains: "The clear systems, rules and processes which support these sites provide a strong model of good practice and I hope that this kind of clarity can be developed for other protected areas." UN News Service, *UNESCO Welcomes Shell's Pledge Not to Seek Oil or Gas in World Heritage Sites* (Aug 27, 2003), online at http://www.un.org/apps/news/printnewsAr.asp?nid=8084 (visited Feb 14, 2010). The ICMM Position Statement indicates that "of the existing international systems of protected area designation only that of the World Heritage Convention and its Operational Guidelines currently meet all of these requirements sufficiently for ICMM member companies to recognize existing World Heritage properties as 'No-Go' areas . . . [Such systems should be] transparent, rigorous, based on scientific and cultural understanding, backed by legal controls, and

A final factor explaining why the World Heritage Convention has attracted more claims of adherence from companies than the other two treaties lies in its popular appeal. The convention has many qualities that make it attractive in the eyes of corporations seeking to bolster their environmental credentials. The Convention is highly visible and well regarded in the eyes of the public.[106] The World Heritage Convention enjoys the attraction of a brand label with which corporations are keen to associate. The World Heritage label renders these sites the "baby seals" of protected area law.

Finally, this study of direct corporate engagement with three treaties reveals that the diverse approaches companies take to the treaties can be traced to differences in treaty form and structure. Framework conventions such as the Biodiversity Convention may invite significant corporate involvement in terms of articulating standards and their meaning. But list-based treaties can be more easily implemented. These structural differences also account for the varied ways that these treaties are used as sources of international standards. While respect for Ramsar and World Heritage sites may be incorporated as a benchmark for corporate conduct, the Biodiversity Convention approach of contracting out standard setting leaves it to members of industry to define the scope and meaning of this convention.

IV. BIODIVERSITY TREATIES AS INTERNATIONAL STANDARDS

Companies, industry associations, investors, and watchdogs alike are all searching for new metrics by which to evaluate the environmental performance of firms. Demand for reporting standards continues to increase.[107] The absence of globally applicable environmental standards and clear metrics for such monitoring, measuring and ranking creates a market opportunity for international legal instruments. Given the impacts of private companies on the environment, and the unevenness of the legal terrain of environmental

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should contribute to the equitable resolution of different land-use, conservation and development objectives." ICMM Position Statement at 3 (cited in note 42).

106 Francesco Francioni and Federico Lenzerini, *The Future of the World Heritage Convention: Problems and Prospects*, in Francioni, ed, *The 1972 World Heritage Convention* at 401–02 (cited in note 27). ("This [visibility] is a rare feature for an international convention, since only a very few multilateral treaties, as eg, the UN Convention on the Rights of the Child, the CITES Convention, and, to a more limited extent, the Antarctic Treaty, possess the capacity of projecting their effects beyond the sphere of governmental obligations to become part of the civil society and of the everyday life of people.").

107 The 2006 Companies Act in the UK, for example, introduced a requirement of social and environmental reporting for public companies. In Canada, the Ontario Securities Commission has called for more robust environmental reporting by companies. *Environmental Reporting*, Staff Notice 51–716 (Ontario Securities Commission Feb 29, 2008), online at http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20080229_51-716_enviro-rpt.pdf (visited Feb 14, 2010).

protection, pressure to find international standards of appropriate environmental behavior comes from many directions. International NGOs, the media and citizen groups may all judge corporate conduct by these international environmental standards.

"International standards" are difficult to define. Their legal status and conceptual contours are unclear and vary. For example, project documents may reference "international standards" as a source of law governing the environmental behavior of mining companies operating outside their home countries.[108] Standards can be technical performance standards or broad statements of principle. Despite the amorphous nature of "international standards", their commercial relevance is significant, and growing. Thomas Wälde suggests that the task of managing compliance with international standards is a major challenge for both management and legal professionals in the natural resources sectors.[109]

Several standard-setting initiatives now reference international biodiversity treaties, either directly, or by invoking key principles. While the UN Global Compact does not make any explicit reference to biodiversity treaties, it does apply the precautionary approach to adhering companies.[110] The 2003 version of the UN Norms refers directly to the Biodiversity Convention and requires "accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle."[111] The incorporation of biodiversity conventions within these standards rebuts the argument that, at least in the area of international environmental law, one body of law is developing for states and another for and by the private sector.

In this Part, I focus on two sets of standards that have been influential in shaping corporate practices with respect to biodiversity: the ICMM Position Statement on Protected Areas and the International Financial Corporation (IFC)'s Performance Standards. As I depicted in Figure 2, international

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108 See, for example, Tenke Mining Corp, *Tenke Fungurume Feasibility Study Feb 2007: Technical Report* 11 (Apr 2007), online at http://www.lundinmining.com/i/pdf/TenkeFungurumeFeasibilityStudy.pdf (visited Feb 14, 2010) (indicating that the company (TFM) will "augment these applicable performance standards (legally required) with a number of reference guidelines (not legally required), intended to assure that the project environmental performance meets or exceeds the expectations of the United States, DRC [the Democratic Republic of Congo] and international stakeholders.").

109 Thomas W. Wälde, *International Standards: A Professional Challenge for Natural Resources and Energy Lawyers*, in Elizabeth Bastida, Thomas W. Wälde, and Janeth Warden-Fernández, eds, *International and Comparative Mineral Law and Policy: Trends and Prospects* 219 (Kluwer 2005).

110 United Nations Global Compact, *Global Compact Principle* 7, online at http://www.unglobalcompact.org/aboutTheGC/TheTenPrinciples/principle7.html (visited Apr 8, 2010).

111 *UN Norms*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2, Section G, ¶ 14 (2003) (cited in note 23).

standards can moderate the application of international agreements such as biodiversity conventions. References to biodiversity treaties appear not only in corporate policies, lender policies, and industry pledges, but also in the codes and policy documents produced by networks, industry associations, and certification bodies.

A. The International Council on Mining and Metals (ICMM) Pledge

Through a variety of initiatives since the 1990's, members of the mining industry have sought to address the industry's negative public perception.[112] On August 20, 2003 the ICMM issued its Position Statement on Mining and Protected Areas. In the Statement, its fifteen corporate members committed not to explore or mine in World Heritage properties. They also committed to ensure that "existing operations in World Heritage properties as well as existing and future operations adjacent to World Heritage properties are not incompatible with the outstanding universal value for which these properties are listed and do not put the integrity of these properties at risk."[113]

The ICMM Position Statement explained that World Heritage sites were chosen for such protection due to the perception that:

> Of the existing international systems of protected area designation only that of the World Heritage Convention and its Operational Guidelines currently meet all of these requirements sufficiently for ICMM member companies to recognise existing World Heritage properties as 'No-Go' areas .... Such systems should be transparent, rigorous, based on scientific and cultural understanding, backed by legal controls, and should contribute to the equitable resolution of different land-use, conservation and development objectives.[114]

The ICMM pledge is significant for the purposes of this discussion as it demonstrates a commitment by certain mining companies to respect World Heritage sites that is not mediated by state legislation, nor tied to state compliance with the Convention. In other words, a state may permit mining within a World Heritage site. But the affected mining company, if it is a signatory to the ICMM pledge, now has a separate source of obligation not to proceed with the project.

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112 These initiatives include a major, industry-led review of sustainability issues affecting the mining industry and a dialogue between the IUCN and the International Council on Mining and Metals on mining and biodiversity. See The Mining, Minerals and Sustainable Development Project, *Breaking New Ground: The Report of the MMSD Project* (IIED/WBCSD 2002); *Technical Workshop: World Heritage and Mining*, Gland, Switzerland September 21-23, 2000 (2001).

113 *ICMM Position Statement* (cited in note 42).

114 Id at Recognition Statements 10, 7.

The ICMM Statement has been an influential source for many of the corporate policies described in Part II of this paper. For example, mining company Gold Fields reports that its board adopted a Sustainable Development Framework in 2007. "In developing this [Framework], we have drawn extensively on the International Council on Mining and Metals (ICMM) Sustainable Development Principles and the Global Compact Principles as they most appropriately reflect the current relevant thought process . . . the ICMM and Global Compact principles present a well-tested and proven framework."[115]

Compliance with the ICMM Pledge has also been required by project finance lenders.[116] The ICMM Statement thus reveals how treaty provisions can provide the metrics for corporate benchmarking. This pledge was able to attract attention to the issue of protecting World Heritage sites from companies that may have been previously unaware of the requirements of this convention. The Pledge, which was widely reported in the business press, sent strong signals that mining in World Heritage sites would violate acceptable standards of corporate behavior.[117] In 2008, the Norwegian sovereign wealth fund, a large shareholder in Rio Tinto, divested itself of its shares in that company, citing the "severe environmental damage" caused by operations of Rio Tinto and Freeport McMoRran at the Grasberg gold mine in West Papua, Indonesia—impacting the World Heritage listed Lorentz National Park—as unacceptable.[118]

B. The IFC Performance Standards

The International Financial Corporation (IFC) is the largest multilateral financial organization for private sector projects in the developing world. Its

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115 *Annual Report 2007* 92 (Gold Fields 2007), online at http://www.docstoc.com/docs/393339/Gold-Fields-Limited-2007-Annual-Report (visited Feb 15, 2010).

116 Amendment Agreement dated as of July 3, 2007, amending the Credit Agreement dated as of March 19, 2007, among FCX, the Lenders party thereto, the Issuing Banks party thereto, and JPMorgan Chase Bank, N.A., as Administrative Agent and as Collateral Agent, and Merrill Lynch, Pierce, Fenner & Smith Incorporated, as Syndication Agent at § 5.10. ("SECTION 5.10. Compliance with Laws; Environmental Reports. . . . (c) . . . In addition, the Borrower will cause PTFI to conduct its operations in accordance with the current International Council on Mining and Metals (ICMM) principles referenced in Schedule 5.10A, and adhere to ICMM current commitments on World Heritage properties included in Schedule 5.10B.").

117 Ilyse Hogue, the coordinator of Rainforest Action Network, applauded Goldman Sachs' 'No-Go' pledge for similar reasons (Goldman Sachs is largely regarded as the "gold standard" in the market and "by simply making the commitment to these values, Goldman sends strong signals through the marketplace that are heard in corners of the economic system that we've yet to reach"). Traci Hukill, *The Greening of Goldman Sachs*, AlterNet (Jan 3 2006), online at http://www.alternet.org/environment/29901?page=entire (visited Apr 24, 2010).

118 David Robertson, *Norwegian Wealth Fund Sells Stake in Rio Tinto*, Times Online 147–50 (Sept 10, 2008), online at http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article4720040.ece (visited Apr 24, 2010).

Performance Standards were initially created in 1998 and updated in 2006. The Performance Standards have become a commonly used yardstick, not only for projects that the IFC finances but also because the IFC standards operate as a model for private lenders.[119] For example, the Equator Principles (which provide a framework for private sector lenders to manage social and environmental issues in project finance deals) are based on the Performance Standards. Compliance with the IFC Performance Standards or the Equator Principles is a common requirement of project finance loan agreement documents.[120]

The Performance Standards reference a number of international environmental treaties,[121] but they do not robustly align themselves with the demands of existing biodiversity treaties. For example, only select biodiversity treaties are referenced in Performance Standard 6, which addresses Biodiversity Conservation and Sustainable Natural Resource Management. During the drafting process, conservation groups recommended that Performance Standard 6 be aligned with the Convention on Biological Diversity and other biodiversity agreements, including the Ramsar Convention.[122] But in the final text, reference is made to the Biodiversity Convention, but not to the Ramsar Convention.

Performance Standard 6 references the Biodiversity Convention in a general way, indicating that it explicitly "reflects the objectives of the Convention on Biological Diversity to conserve biological diversity."[123] This Standard also requires that borrowers integrate an assessment of the significant project impacts on all levels of biodiversity within the environmental assessment process. As such, this requirement parallels the state obligation to integrate

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119 For a detailed consideration of the evolution of the IFC Performance Standards, see generally, Elisa Morgera, *Corporate Accountability in International Environmental Law* 147–50 (Oxford 2009).

120 See, for example, Tenke Mining Corp, *Tenke Fungurume Feasibility Study* at 11 (cited in note 108) (a mining project in the Democratic Republic of Congo where the Feasibility Study Report references the application of the Equator Principles).

121 The Standards explicitly reference the UN Framework Convention on Climate Change, the World Heritage Convention, the Basel Convention on the Control of Transboundary Movement of Hazardous Waste, and the London Convention on Ocean Dumping, the Convention on Long-range Transboundary Air Pollution, the Stockholm Convention on Persistent Organic Pollutants and the Montreal Protocol on Substances that Deplete the Ozone Layer. See Morgera, *Corporate Accountability* at 157 (cited in note 119).

122 International Finance Corporation, *Policy & Performance Standards Consultation Notes: Consultation with Conservation Organizations* (2004), online at http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Nov19_Bangkok+Conservation+Community+Meeting+Notes/$FILE/Bangkok+11-19+Notes+FINAL.pdf (visited Apr 24, 2010).

123 International Finance Corporation, *Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management*, ¶ 1 (IFC 2006), online at http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards (visited Feb 16, 2010).

biodiversity concerns in environmental impact assessments contained in the Convention on Biological Diversity.[124]

But in a number of ways the Principles are open to the charge that they fail to live up to international standards on biodiversity protection contained in the Biodiversity Convention. For example, the standards fail to address illegal logging, or impacts on marine ecosystems other than through encouraging sustainable fisheries. Impacts on wetlands, coral reefs and other coastal areas are not included. A review of the Performance Standards by the UK's Department for International Development (DFID) suggests that the Standards's coherence with international conventions "could be improved."[125] In particular, the failure to refer to the precautionary principle is a significant omission.[126] The DFID review also suggests that stronger wording on 'alien and invasive' species is required to bring the Standards in line with the Biodiversity Convention.[127] The IFC's own internal audit body, the Compliance Advisor Ombudsman, has equally expressed concern about the "[w]eakening of biodiversity provisions" in the 2006 Standards.[128]

Specific commitments to respect World Heritage Sites or Ramsar Sites are also missing from Performance Standard 6, leading to the charge that the Standards seem to lower the bar below what a number of companies have set as acceptable policies.[129] Compared to the 'No-Go' commitments made by a growing number of Western-based mining companies, for example, the standards appear to be a step away from ensuring respect for international agreements such as the World Heritage Convention. The IFC explicitly refused to recognise World Heritage sites and Ramsar sites as 'No-Go' areas in the standards, preferring an assessment of projects on a case-by-case basis.[130]

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124 Biodiversity Convention, Art 14(1)(a) (cited in note 7). Elisa Morgera makes this observation. *Corporate Accountability* at 159 (cited in note 119).

125 The comments of the UK (DFID) on the IFC's Environmental and Social Safeguards Review, ¶ 29.

126 Id, ¶ 28.

127 Id.

128 Compliance Advisor Ombudsman, *Note on IFC's Compliance Advisor/Ombudsman Comments on IFC Policy and Performance Standards on Social and Environmental Sustainability and Disclosure of Information*, 5.3 (Feb 16, 2006), online at http://www.cao-ombudsman.org/howwework/advisor/documents/IFCManagmentResponseandCAOcomments02-16-06.pdf (visited Feb 16, 2010).

129 Bank Information Center, Press Release, *IFC's New Standards—A Risky Step for People and Planet,* (Feb 21, 2006), online at http://www.bicusa.org/en/Article.2650.aspx (visited Apr 8, 2010).

130 IFC, *Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: IFC Responses to Stakeholder Comments and Rationale for Key Policy Changes* 26 (Sept 22, 2005).

The 2006 Performance Standards operate as an often-used precedent for defining environmental standards for the private sector. The fact that they are not robustly aligned with the standards of existing biodiversity conventions runs the risk that the Performance Standards may set the bar for biodiversity protection below that demanded by existing treaties. Indeed, they may set the bar below the standard that a number of large companies have already internalized as acceptable corporate policy.

International standard-setting initiatives are useful tools for highlighting the relevance of international treaties to corners of the market that might otherwise be oblivious to these instruments of international law. Yet these standards may fail to robustly adhere to the values and requirements of international biodiversity treaties. As treaty norms become embedded in international standards, the legitimacy of the standard instrument becomes a factor in mediating the respect given to the underlying treaty norm. As the IFC clarified in articulating its 2006 Performance Standards, a client's legal obligation is one of compliance with the Standards, not with the underlying treaty requirement.[131] As Part V will explain next, a further dilution of a treaty norm contained in an international standard can occur as corporations selectively translate standards for their own purposes.

V. TRANSLATING TREATY LAW: WHAT GETS LOST IN TRANSLATION?

Ultimately, does it matter that private standards and corporate policies now reference biodiversity treaty commitments? Does such corporate and private sector translation of these treaty norms strengthen or weaken the underlying norms? Will the IFC Performance Standards' explicit references to international treaties "foster the implementation of MEAs [multilateral environmental agreements] thanks to the responsible conduct of the private sector?"[132] Does the experience of the three biodiversity conventions and two international standards examined here support such an optimistic view?

A close examination of the ways in which treaty standards are translated by corporations and mediated by standard-setting organizations invites a cautious approach to evaluating corporate treaty implementation. The visibility of certain biodiversity conventions in international standards is easy to record. However, the fact that a number of treaties do not make it onto the radar of these

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131 Id at 9 (stating that references to international conventions are "intended to acknowledge the international consensus and support on these instruments, but not to create client obligations to comply with these agreements, as these agreements rest with signatory States and not with business.").

132 Morgera, *Corporate Accountability* at 168 (citied in note 119).

standards suggests that they are even less likely to attract subsequent attention and resulting incorporation in later standard-setting initiatives.

For those conventions that attract significant corporate engagement such as the World Heritage Convention, the implications of corporate pledges of adherence to treaty standards are mixed. There is a real tension between the activities of certain corporations which foster treaty implementation, raise corporate environmental standards, and promote an awareness of biodiversity treaty requirements, and those corporate activities which undermine the effectiveness of biodiversity treaty regimes.

The experience of the World Heritage 'No-Go' pledges is instructive in revealing some tensions inherent in the translation of treaty standards by corporations. The ICMM Pledge defined the relevant standard for member companies as requiring not only a commitment not to explore or extract within natural World Heritage Sites, but also a commitment to ensuring that existing and future operations adjacent to World Heritage properties do not threaten the integrity of these protected sites.[133]

How has this requirement been translated in subsequent corporate policies and practice? The results are mixed. Although Brazilian mining company Vale is a signatory to the ICMM charter, it does not reference the 'No-Go' pledge in its sustainability reports.[134] BHP Billiton, however, has integrated the pledge into its 2007 biodiversity position. It robustly interprets the pledge as an "an undertaking not to explore or mine in World Heritage properties and a commitment to take all possible steps to ensure that operations are not incompatible with the outstanding universal values of World Heritage properties."[135] Evidence that BHP has internalized this commitment can be found in specific actions that the company has taken at projects adjacent to World Heritage Sites. For example, BHP details the social and environmental assessments undertaken by the company at the Buxhuis bauxite concession, which neighbors a World Heritage site in Central Suriname.[136]

A number of other mining companies simply translate their commitment pursuant to the ICMM Position Statement as a promise not to mine within World Heritage Sites, and ignore the other, potentially onerous aspects of the pledge. Xstrata thus includes the commitment "not to explore or mine in World

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133 ICMM, *Position Statement* (cited in note 42).

134 See, for example, Vale, *2007 Sustainability Report* (2007), online at http://valeinco.com/sustainability/reports/pdf/Vale_Inco_Web.pdf (visited Feb 16, 2010).

135 BHP Billiton, *Health, Safety & Community* at 18 (cited in note 54).

136 Ian Wood, *BHP Billiton: Environmental Considerations in Gaining and Maintaining our Licence to Operate*, 22 (June 15, 2007), online at http://www.bhpbilliton.com/bbContentRepository/acsiPresentationJune2007.pdf (visited Feb 16, 2010).

Heritage listed sites" in its discussion of its biodiversity policies.[137] It declares that "[n]o Xstrata operations are adjacent to World Heritage designated areas." It omits to declare that it will not operate adjacent to these areas or that it will ensure any such operations do not undermine the integrity of the adjacent World Heritage site.[138] Alcoa translates its commitment simply as one "not to explore or mine in World Heritage Sites."[139]

These limited and partial translations of the full ICMM Position Statement raise the concern that corporate translation of both this pledge, and its underlying commitment to the World Heritage Convention, are conceived by some companies as simply a form of signalling their environmental responsibility and a way of gaining reputational advantage for very little cost. Such partial translations can result in a restrictive interpretation of the Position Statement. This interpretation does not effectively implement the treaty's requirement of ensuring that activities surrounding World Heritage Sites are not incompatible with the outstanding universal value for which these properties are listed.[140] These examples point to a corporate preoccupation with optics (the signing of the pledge). They suggest that some companies value the symbolic over actual implementation of their commitments.

The ICMM Pledge is useful to multiple actors. Not only is it adopted by corporations as evidence of compliance with an international environmental standard, it is also used by the World Heritage Committee. In 2007, the World Heritage Committee called directly on Kilembe Mines to respect international standards on mining in World Heritage properties "as outlined in the [ICMM] Position Statement" and to stay out of the Rwenzoris Mountains National Park in Uganda.[141] In addressing exploratory mining concessions that were granted by the government of the Democratic Republic of the Congo inside two national parks,[142] the Committee both urged the State Party to revoke these concessions as incompatible with the World Heritage status of the property. The Committee also called on the "holders of any concessions to respect international standards with respect to mining in World Heritage properties, as outlined in the [ICMM] Position Statement."[143] The World Heritage Committee may also find the ICMM

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137 Xstrata, *Sustainability 2007* at 85 (cited in note 75).

138 Id.

139 Alcoa, *2007 Sustainability Highlights* 18, online at http://www.alcoa.com/global/en/about_alcoa/sustainability/pdfs/sustain_highlights07.pdf (visited Feb 16, 2010).

140 World Heritage Convention, Art 6 (cited in note 5).

141 World Heritage Committee, *Decisions Report* at 50 (cited in note 59).

142 Id at 11–12. The parks in issue are the Kahuzi-Biega and the Virunga National Park World Heritage Sites.

143 Id at 11, 13.

Pledge to be a useful tool in pressuring states to respect the World Heritage Convention. Corporations that have given up the right to mine in World Heritage sites have an incentive to pressure governments for treaty adherence "from below" to prevent other companies from exploiting the resources within these sites.

The ways in which the ICMM Position Statement has thus been used to influence more companies to respect the World Heritage Convention reveal the potential of standard setting initiatives to leverage biodiversity treaties into wider use by companies. In some cases, business organizations can be found to have robustly and expansively defined international treaty obligations, highlighting the relevance of international treaties even where they have not been implemented through national law.[144] But the ways in which certain companies have narrowly defined their obligations pursuant to this pledge also remind us of the potential dangers of corporate colonization of treaty interpretation and implementation processes.

For framework treaties such as the Biodiversity Convention that adopt an approach of providing a venue for the articulation of biodiversity standards by and with the private sector, other reasons to be cautious emerge. The Biodiversity Convention's open invitation for companies to participate in conferences of the parties and implementation workshops is an invitation that appeals to (and is taken up by) large, well-funded northern companies with the budgets to participate in treaty and non-state standard-setting initiatives. Technical decision-making is thus shifted to behind the scenes venues where well-funded northern companies with the budgets to participate in treaty and

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144 *A Guide to Developing Biodiversity Action Plans for the Oil and Gas Sector* created by the International Petroleum Industry Environmental Conservation Association and the International Association of Oil and Gas Producers, expansively defines the legal and regulatory requirements for preparing a biodiversity action plan ("BAP"):

> 3.1.1 Legal and regulatory requirements: The HSE professional (or other relevant staff) should assess whether international conventions related to biodiversity that *mandate* a BAP, have been ratified and/or enacted in national legislation. In some cases international agreements that have not been ratified or enacted can still be relevant to a company and act as important drivers for the preparation and implementation of a BAP. For example, Russia is an important country in the African Eurasian Waterbird Agreement (AEWA) region, but has not yet ratified the agreement. Nevertheless AEWA's Action Plan and Implementation Priorities are valid for Russia as well. Thus although AEWA is not enacted in Russian legislation (and does not therefore give rise to a mandatory requirement for a BAP), a company operating there may consider a BAP to be *necessary* or *recommended* to ensure its biodiversity conservation efforts are aligned with the AEWA Action Plan.

International Petroleum Industry Environmental Conservation Association and International Association of Oil and Gas Producers, *A Guide to Developing Biodiversity Action Plans for the Oil and Gas Sector* 6 (2005), online at http://www.ipieca.org/activities/biodiversity/downloads/publications/baps.pdf (visited Feb 16, 2010).

standard-setting initiatives. Decision-making often occurs in behind-the-scenes venues where business organizations and individual companies engage with members of international secretariats and shape new developments.[145] Companies recognise treaty implementation as an opportunity to accomplish goals that they were unable to secure through the negotiation of the actual agreement.[146]

This study ultimately reveals that any attempt to generalize about corporate behavior with respect to treaties is problematic. Corporations are not monolithic. And the record of corporate implementation of biodiversity conventions outside the mechanism of national treaty implementation is arguably mixed. The results of this study are admittedly untidy.

VI. CONCLUSION

Ideally, a conclusion wraps it all up. Unfortunately, the empirical record here does not lend itself to either clear summaries or bold conclusions. Rather, in analyzing the empirical observations of this study, I am struck by the degree to which the record of corporate interactions with treaties is littered with inconsistencies and seeming contradictions. The same corporations that are 'dumbing down' treaty meanings are advancing tools that might well lead to stronger and deeper implementation of these same treaty norms. This study reveals that corporations may not be the best targets for the task of treaty implementation, yet they are often the best placed to make treaty implementation practically happen. Corporate behavior with respect to treaties is not monolithic or consistent. The gravitational pull of treaties on private actors is differently experienced. The proliferation of claims to respect World Heritage Sites as 'No-Go' areas (see Figure 3) also tells us that precise and clear treaty requirements may register more with the private sector than open-ended invitations to participate in treaty processes. This experience suggests that a straightforward top-down approach of enunciating clear and specific treaty obligations may be what works best if the ultimate goal is to get the private sector to implement treaty norms. But this paper offers no singular formula to explain the tension between corporations as conduits of treaty implementation and as obstacles.

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145 Tully, *Corporations and International Lawmaking* at 217 (cited in note 3).

146 Philipa Hughes, ed, Colloquium, *A Private Sector View of International Trade Negotiations*, 91 Am Soc Intl L Proceedings 89, 91 (1997). (Maureen Smith, Vice President for International Affairs, American Forest and Paper Association comments, "You can often accomplish through implementation what you were not able to accomplish through negotiation of the actual agreement.").

Conveniently, a reluctance to "wrap it all up" feeds well into my thesis. For some readers, this Article may be missing a vital piece—a new theory, and the welcome opportunity a theory brings to stake new territory. I am not giving the reader an all-encompassing new theory and a resulting territorial claim because that is precisely the approach that has caused us to miss important observations in the first place. The significance of treaty implementation by corporations has been overlooked as scholars have drawn borders that place corporations and treaties into distinct fields of inquiry.

This Article has revealed and explained the inadequacy of a current model of treaty implementation that remains trapped within the nation-state. But in presenting two alternative routes of treaty implementation (direct implementation by corporations and implementation mediated through international standards), this Article does not diminish the importance of the state in treaty implementation. The state is far from irrelevant in explaining corporate processes of treaty implementation. But the shadow of law (national and international) falls variably across different industries and geographies. Corporate interactions with treaties are shaped by states. These interactions are also shaped by the uneven influence of transnational networks of conservation groups, whose power may be more acutely felt in London, Washington or Brussels, than in other capital cities.

The implications of corporate channeling of treaty meanings and obligations are significant for international law (and for law generally) beyond the context of biodiversity conventions. Human rights and labor are two areas ripe for further empirical and theoretical work exploring the relationship between corporations and treaties. These are equally areas where the pressure to define acceptable standards of social behavior for companies will create a market for "international standards"—a market for treaties.