

NOTES AND COMMENTS

WORLD HERITAGE SITES AND SUSTAINABLE DEVELOPMENT: CASE OF THE WESTERN GHATS*

Abstract

Is the environmental management regime premised upon the concept of sustainable development appropriate for a world heritage site? This is a pressing question in India given the inscription of the Western Ghats in the World Heritage List. This paper considers the question posed from the perspective of jurisprudence developed under the World Heritage Convention and legal theory. It also includes a case study from overseas – New Zealand – to demonstrate the practical ramifications of a management regime premised upon sustainable development. The paper concludes that a management approach which seeks to “balance” the tri-partite values inherent in sustainable development – environmental, economic and socio-cultural values – is inappropriate in the context of a world heritage site, and that only a method premised upon “strong sustainability” is legitimate.

I Introduction

INDIA IS a nation bestowed with cultural and natural riches. As a reflection of this bounty, there are twenty-nine sites in India inscribed upon the heritage list of the World Heritage Convention,¹ placing India amongst the top ten nations in the world for world heritage.² The World Heritage Convention³ requires parties “to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory”. However, few world heritage sites like the Western Ghats, included in the latest world heritage listing have posed management challenges. The area of the Western Ghats inscribed upon the World Heritage List is of a significant size with thirty-nine component parts covering an area of approximately 8000 kms and spanning four states,⁴ although a proportion of the site attracts the highest form of protected

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1 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 11 *ILM* (1972) (In force 17 Dec 1975).

2 Of these, twenty-three are cultural sites and six are natural sites.

3 *Supra* note 1.

4 Kerala, Karnataka, Tamil Nadu and Maharashtra.

area status,⁵ significant areas do not. Upon inscription, the World Heritage Committee noted that, “40% of the property lies outside the formal protected area system”.⁶ Many areas contain pre-existing settlements, agricultural, manufacturing and extractive industries, and face increasing pressures from consumptive-uses and land-use patterns that are *prima facie* inconsistent with environmental conservation. The Central Government and relevant state governments agree that there has to be some qualification of an absolutist conservation objective for those areas. The critical question is: what form and level of use will ensure that the natural heritage objectives of the site are met?

This paper considers whether a management approach premised upon the concept of sustainable development is appropriate for world heritage sites such as the Western Ghats, and, if so, how should the concept of sustainable development be imbued into the management regime. The paper considers this question from the perspective of World Heritage Convention jurisprudence, theory, and also includes a case study from overseas – New Zealand – to demonstrate the practical ramifications of an environmental management regime premised on sustainable development. The study becomes important as, upon inscription on the World Heritage List a site becomes “the common heritage of mankind” and creates a responsibility for all states party to the World Heritage Convention to “co-operate” in the “protection” of that site.⁷ Given this mandate, the experience of other nations

⁵ These sites are managed in the form of tiger reserves, national parks and wildlife reserves.

⁶ Specifically, the World Heritage Committee noted that, “The 39 component parts of this serial property fall under a number of protection regimes, ranging from Tiger Reserves, National Parks, Wildlife Sanctuaries, and Reserved Forests. All components are owned by the State and are subject to stringent protection under laws including the Wildlife (Protection) Act of 1972, the Indian Forest Act of 1927, and the Forest Conservation Act (1980). Through these laws the components are under the control of the Forestry Department and the Chief Wildlife Warden, thus the legal status is adequate. 40% of the property lies outside of the formal protected area system, mostly in Reserved Forests, which are legally protected and effectively managed. The Forest Conservation Act (1980) provides adequate regulatory framework to protect them from infrastructure development”. World Heritage Committee Decision 36.COM/8B.10 (“Natural Properties-Western Ghats (India)”) in “Decisions Adopted by the World Heritage Committee at its 36th Session” (St Petersburg 2012) WHC-12/36.COM/19, at160-162, also *available at*: <http://whc.unesco.org/en/decisions/4781> (last visited on 24 Sep. 2013).

⁷ Art. 6 (1) of the World Heritage Convention states: “Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the states Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.”; and see T. A. Atherton and T. Atherton “The Power and the Glory: National Sovereignty and the World Heritage Convention” 69 *ALJ* 637 (1995).

in managing precious environments, subject to intense developmental pressures may be informative to those developing the legal regime for the Western Ghats.

Ultimately, the paper argues that the sustainable development concept must be carefully prescribed in the context of a world heritage site. The argument is made that a regulatory approach that seeks simply to *balance* the tri-partite values inherent in sustainable development – economic, socio-cultural and environmental values – within each factual context, without establishing clear environmental limits that cannot be transgressed, is unlikely to protect the outstanding universal values of a heritage site.

II The inscription of the Western Ghats on the World Heritage List

The nomination to include the Western Ghats on the World Heritage List was received by the World Heritage Committee on 15 March 2010. That nomination was deferred following concerns addressing “the scope and composition of the serial property; boundaries of the property’s core area and its buffer zone; enhanced stakeholder consultation and engagement; and a range of protection, management and co-ordination measures”.⁸ As part of the nomination process, the Government of India created the Western Ghats Ecology Expert Panel (WGEEP) that consisted of a multi-disciplinary group of experts chaired by Madhav Gadgil.

The WGEEP was provided with a comprehensive remit: it was to undertake an ecological assessment of the Western Ghats region; identify the particular environmental sensitivity of areas; assess threats to those ecological sensitivities; develop policy and propose methods to achieve protection of the site; and to suggest institutional and governance frameworks for effecting the policy choices.⁹ The World Heritage Committee referred the nomination back to India in June 2011 to, *inter alia*, allow the government to “to take account of any recommendations of the Western Ghats Ecology Expert Panel”.¹⁰

The first meeting of the WGEEP was held on 31st March 2010 and following investigations and the formulation of recommendations, the panel approved a draft report on 17th August 2011. The final report was submitted to the Government of India on 31st August 2011.

In May 2012, an observer to the convention, the International Union for the Conservation of Nature, recommended deferring the decision to inscribe the Western

8 International Union for Conservation of Nature (IUCN), *World Heritage Nomination – IUCN Technical Evaluation Western Ghats (India)* 1342 Rev (May, 2012).

9 Ministry of Environment and Forests, Government of India, *Report of the Western Ghats Ecology Expert Panel 2011*, 31 Aug. 2011 at 3-4, 164.

10 World Heritage Committee Decision WHC-35.COM/8B.9 in *Decisions Adopted by the World Heritage Committee at its 35th Session (UNESCO, 2011)* WHC-11/35.COM/20 at 178.

Ghats on the World Heritage List and, in particular, advised that the Indian Government pay greater attention to the recommendations of the WGEEP.¹¹ Nevertheless, the World Heritage Committee accepted the nomination and the Western Ghats were inscribed on the World Heritage List at the next meeting of the Committee in July 2012. The committee formally requested India to “[t]ake account of the outcomes of scientific studies of institutes specialized in the field, and their recommendations” and to prepare and implement “an overarching management plan or framework for the serial property as a whole”.¹²

Media reports suggest that the WGEEP report proved “controversial”¹³ within India for a number of reasons, not least because the effect of the recommendations if implemented would be to significantly restrict industrial development and consumptive-uses within the entire Western Ghats. Academics have also criticised the report for imprecision, and its remit for attempting to meld together too many issues. In particular it has been suggested that while “ecological assessments and biodiversity management plans are part of sustainable development . . . a management plan can only be effective if a political, legal and economic agenda are defined and ecological expertise kept independent of decision-making bodies”.¹⁴ Ecologists have suggested that the WGEEP fails this test.¹⁵

The Central Government’s response to the concerns was to appoint a second committee to review the WGEEP report. The high level working group, under the chairmanship of planning committee member Krishnawami Kasturirangan (Kasturirangan Committee), was asked to contribute to the formulation of a management regime for the site and to consider, amongst other things, the “importance of equitable economic and social growth being harmoniously *balanced with sustainable development* and environmental integrity”.¹⁶

The Kasturirangan Committee Report was submitted to the Ministry for Environment and Forests on 15th April 2013. The report suggests that approximately

11 IUCN *World Heritage Nomination – IUCN Technical Evaluation Western Ghats (India) – ID No. 1342 Rev* (May 2012); and the proposed Draft Decision WHC-12/36.COM/8B.10 in *World Heritage Committee Nominations to the World Heritage List* WHC-12/36.COM/8B (11 May 2012) at 11.

12 *Supra* note 6 at 162.

13 Nitin Sethi “Western Ghats experts’ panel report under review” *The Times of India*, Aug. 21, 2012, available at: http://articles.timesofindia.indiatimes.com/2012-08-21/developmental-issues/33302495_1_western-ghats-ecology-experts-panel-report (last visited on 12 Sep. 2013).

14 Jean-Philippe Puyravaud and Priya Davidar “The WGEEP Report from an Ecological Standpoint” *Management of Environmental Quality: An International Journal* (In Press, 2014).

15 *Ibid.*

16 “Working group to assess report of Western Ghats panel” *The Hindu*, Kochi, Aug. 21, 2012, available at: <http://www.thehindu.com/news/national/article3800101.ece>. (Emphasis added) (last visited on 12 Sep. 2013).

37% of the ghats (some 60,000 km²) should be classified as “ecologically sensitive” and recommends that the most destructive activities, such as new mining activity, should be prohibited within these areas. It is not entirely clear what “the most destructive activities” will include, but it also does not appear that the committee considers all hydro-electricity developments to fall within this category. Further, the report rejects the WGEPP approach to managing the ghats “which had recommended a blanket approach consisting of guidelines for sector-wise activities” within ecologically sensitive zones. Rather, the report notes that, “environmentally sound development cannot preclude livelihood and economic options for this region... the answer (to the question of how to manage and conserve the Ghats) will not lie in removing these economic options, but in providing better incentives to move them towards greener and more sustainable practices”.¹⁷

At the date of writing, the Central Government is in the process of seeking the response from stakeholders to the Kasturirangan Committee recommendations. Thus the precise approach that will be taken to the management of the Western Ghats, and in particular to the concept of sustainable development within the ghats, is at present unclear, but any management regime that is developed in relation to sites identified on the World Heritage List must accord with the requirements of the World Heritage Convention as explained in the following part of this paper.

III Implications of World Heritage Convention listing

If a site is accepted for inscription upon the World Heritage List, the World Heritage Convention requires the sovereign state to “protect” and “conserve” the “outstanding universal values” that are included on the heritage list, and that formed the basis for the site’s inscription. The focus on conservation and protection is repeated and expanded in the sub-clauses of article 5 of the convention that include the requirements that states shall endeavor (in so far as possible, and as appropriate for each country):¹⁸

[T]o adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

¹⁷ Ministry of Environment and Forests “Press Release” Apr. 17, 2013, *available at*: <http://envfor.nic.in/content/high-level-working-group-presents-report-western-ghats> (last visited on 14 Aug 2013).

¹⁸ World Heritage Convention, art. 5, cl (b) to (d).

to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage...

The meaning of “conserve” and “protect” is not explained in the World Heritage Convention, and indeed a definition is absent from many multi-lateral environmental agreements with a purpose of “conservation”. However, the Convention on Biological Diversity explains ‘*In-situ conservation*’ as the conservation of ecosystems and natural habitats and *the maintenance and recovery of viable populations of species in their natural surroundings* and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties”.¹⁹ The ordinary meaning of conservation and to conserve is ‘to keep in safety or from harm, decay, or loss; to preserve in being; to keep alive’ or now more usually, ‘to preserve in its existing state from destruction or change’, or from ‘destructive influences, decay or waste’.²⁰ This suggests a high test for environmental management, and that any diminution or reduction in quality of quantity of the entity to be protected will not accord with the true meaning of conservation and protection.

The supporting documentation to the World Heritage Convention reinforces the contention that the preservation and conservation of the ‘outstanding universal values’ is paramount. For example, the World Heritage Resource Manual produced by UNESCO states:²¹

Inclusion on the World Heritage List implies that the quality and condition of a property’s values will be maintained and perhaps enhanced in the future. It is not enough for the values alone to be recognized. In addition they need to be subject to the highest international standards of care, control and management.

National jurisprudence has also clarified that the responsibility to conserve and protect a heritage site sets a high standard for environmental management, and further that a state must do all that it can to achieve this objective. In *Commonwealth of Australia v. State of Tasmania*²² the Tasmanian State Government in Australia supported the building of a hydroelectric dam on the Franklin River. The area was a world heritage site and the Australian Commonwealth Government opposed the

19 Convention on Biological Diversity, 31 ILM 818 (1992) (in force 29 Dec 1993), Art. 2 (Emphasis added).

20 P Birnie and A Boyle *International Law and the Environment* 550 (Oxford University Press, Oxford, 2nd edn., 2002).

21 UNESCO *Managing Natural World Heritage: World Heritage Resource Manual* (June, 2012) at 10.

22 46 ALR 625 (1983) (the *Tasmanian Dam* case).

development. The high court (Australia's highest court) accepted the arguments of the commonwealth. The court found that the international obligations of the World Heritage Convention to conserve and protect the heritage site, voluntarily accepted by states, were of paramount importance and must be exercised with the utmost of good faith, to the best of the state's abilities, regardless of the economic benefits of any development proposal.

There is a clear justification for this stringent approach. World heritage sites comprise less than 1% of the world's surface area, and a site has been listed because it has a "natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all of humanity. As such the permanent protection of this heritage is of the highest importance to the international community".²³ Further, world heritage status bestows a precious brand-image on a site; world heritage listing is a guarantee of quality. The benefits to tourism can be immense and world heritage status provides a safeguard for international funding bodies thus facilitating assistance *via* aid and grants. Clearly world heritage status also imposes onerous responsibilities on the state party involved, but that party cannot operate in a disingenuous fashion, hoping to continue business-as-usual and reaping the benefits of world heritage status without meeting the obligations.

Being a product of its time, the World Heritage Convention makes no mention of sustainability, and latter attempts to develop jurisprudence or clear procedural guidelines that reflect a sustainable development approach to world heritage sites have not yet borne fruit. At its highest, the Budapest Declaration (adopted at the 26th session of the World Heritage Committee) "stressed the need to ensure an appropriate and equitable balance between conservation, sustainability and development".²⁴ However, despite recent references to sustainability within committee documents, there are at present no explicit guidelines or mechanisms in the operational guidelines as to how such an approach would manifest and some commentators have also suggested that this situation should be remedied. At present, the World Heritage Convention operational guidelines simply explain that:²⁵

World Heritage properties may support a variety of ongoing proposed uses that are ecologically and culturally sustainable, and which may contribute to the quality of life of communities concerned (but) [t]he State Party and its partners must ensure that such sustainable use or any other

23 UNESCO *Operational Guidelines for the Implementation of the World Heritage Convention* WHC.08/01, para 49 (Jan. 2008).

24 *Supra* note 21 at 57.

25 UNESCO *Operational Guidelines for the Implementation of the World Heritage Convention* WHC.12/01, para 119 (July 2012).

change does not impact adversely on the Outstanding Universal Value of the property.

The clear focus appears to be that any approach to sustainable development should be premised upon the notion of “strong sustainability.

IV Differing approaches to sustainable development and the concept of “balancing” the values inherent in sustainable development

As commonly understood, the concept of sustainable development rests upon three pillars: the imperatives of economic development; environmental protection; and social equity, and all three need are all to be accounted for.²⁶ Within different contexts, alternate approaches may be taken to this tri-partite of values. “Deep ecologists” have argued for an approach to sustainable development that has been termed “strong sustainability”.²⁷ Strong sustainability requires that human activities operate within the capacity of the environment. This approach acknowledges the limitations of the environment, and requires economic development and socio-cultural practices to operate within the confines imposed by finite environmental resources. Indeed, properly understood, this is an approach that accords with the Brundtland Report.²⁸ The Brundtland Report is premised upon acknowledging the “limitations” of the environment, and ensuring that human development operates in “harmony” with the environment. As an alternative to “deep ecology”, a “balanced approach” to sustainable development simply allow decision-makers to attempt to “balance” the tri-partite of values: all of the values will assume equal import, and no one value is to assume automatic dominance, rather each criterion is to be weighted as appropriate within the relevant context.

It is common for lawyers to refer to “balancing” or “weighing” disparate values. This is such an ancient and entrenched idea that the allegorical personification of justice is often depicted holding a set of scales. It is also commonplace to see judicial reference to this notion of balancing values. For example, in *Environmental Defence*

²⁶ World Commission on Environment and Development *Our Common Future* (Oxford University Press, London, 1987) (the “Brundtland report”).

²⁷ See much of Klaus Bosselmann’s work arguing for a strong concept of ecological sustainability, for example: Klaus Bosselmann, Ronald Engel, and Prue Taylor, *Governance for Sustainability - Issues, Challenges and Successes* (IUCN, Gland, Switzerland, 2008), also available at: <http://data.iucn.org/dbtw-wpd/edocs/eplp-070.pdf> (last visited on 1 Sep. 2013); and Bosselmann, K, “Strong and Weak Sustainable Development: Making the Difference in the Design of Law”,¹³ *South African Journal of Environmental Law and Policy* 14-23 (2007).

²⁸ See for example: K. Bosselmann, “A vulnerable environment: contextualizing law with sustainability” 2 *Journal of Human Rights and the Environment* 45-63 (2011); Klaus Bosselmann *The principle of sustainability: transforming law and governance* (Ashgate, Aldershot, UK, 2008).

Society v. Mangonui County Council,²⁹ New Zealand's (then) highest domestic court was asked to consider the correct approach to be taken to a list of values contained within the environmental planning legislation that had no legislative weighting *inter se*. The President of the Court of Appeal stated that, "it is for the planning authority or the [court] on appeal to undertake a balancing exercise on the facts of each particular case". However, Fogarty J of New Zealand, writing extra-judicially, has expressed concern about the realities of such an approach. In commenting upon the "balancing approach" to be taken in the context of environmental management, Fogarty J stated thus:³⁰

The truth is that there is an inherent conflict between conservation and development which no words can resolve.... I do not think the[se] values ... are reconcilable.

So it is accepted that in reality what purports to be a balancing exercise means that one value is to be preferred. Values are incommensurate and, as any mathematician would explain, one cannot balance entities that are incommensurate. To refer to balancing values is simply a semantic artifice used by lawyers and policy makers. In making determinations as to how to manage the environment, one value has to be chosen over others. This view is far from novel and accords with various theorists, jurist and academics. Writing in 2000, and surveying primarily UK legislation, Alder notes thus:³¹

Lawyers like to give the task of making tragic choices the appearance of objectivity by talking about the need to 'balance' competing interests and referring grandly to 'the public interest'. However these terms are misleading since nothing can be balanced without an agreed system of weighting and the notion of public interest is inadequate, even in its most plausible sense of a good common to all.

Sedley J (UK Court of Appeal) again writing extra-judicially expressly endorses this view:³²

[L]awyer's talk about striking a balance between competing interests is largely

29 [1989] 3 NZLR 257.

30 J. G Fogarty, "Giving Effect to Values in Statutes" in J. Finn and S Todd (eds) *Law, Liberty and Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008).

31 John Alder "Fundamental Environmental Values and Public Law" in K Economides (ed.), *Fundamental Values: A Volume of Essays to Commemorate the Seventy-Fifth Anniversary of the Founding of the Law School in Exeter, 1923-1998* (Hart Publishing, UK, 2000).

32 Stephen Sedley *Ashes and Sparks: Essays on Law and Justice* 296 (Cambridge University Press, Leiden, 2011).

misplaced in a field (environmental law is only one example) in which success for either side inexorably involves damaging knock-on effects.

From the ecological perspective, however, the critical flaw in an approach that purports to balance economic, social and environmental factors is the inherent bias towards development. As Whene explains, “environmental costs are often dispersed, temporally distant, difficult to measure and understand, or even unknown – all of these factors tend to devalue their standing in decision-making”.³³ The result is that “in the process of balancing tangible economic benefits and tangible social benefits against intangible and generally misunderstood environmental benefits the tangible (or quantifiable) wins every time”.³⁴

V Balancing the values: sustainable development and the New Zealand experience

As a case study for assessing the ramifications of a *balanced* approach to sustainable development, New Zealand is perhaps without par. For the last twenty years, New Zealand’s primary environmental planning regulation has been premised upon sustainability. Specifically, the law requires all decisions makers to balance the economic, socio-cultural and environmental advantages and disadvantages of the proposed activity or development, in order to “promote the sustainable management” of the resource in question. This section explains the approach taken by New Zealand, not to world heritage sites (as New Zealand’s three inscribed natural sites are within highly protected areas), but to environmental management in the wider context.

The primary legislative regime for environmental management in New Zealand is contained in the Resource Management Act, 1991 (hereinafter Act). This Act supplanted the town and country planning Acts left by the colonising British, and

33 N. Whene “The Resource Management Act 1991: A “Greener” Law for Water?” 1 NZJEL 170-171 (1997).

34 T. Black “Defending the Environment” 8 NZLJ 153 (1978), discussing the “beneficial test” developed under the Water and Soil Conservation Act, 1967 which entailed a balancing exercise be undertaken between competing interests for water allocation with no particular value being afforded priority; see also *Keam v. Minister of Works and Development* 1 NZLR [1982] at 322-323 per Cooke J (New Zealand Court of Appeal). A classic case demonstrating the developmental bias of this approach was *Royal Forest of Bird Protection Society of New Zealand Inc v. Bay of Plenty Regional Water Board* (1978) 6 NZTPA 361 (permission granted for hydro-electric generation scheme that would destroy the habitat of two critically endangered species and a world class trout river.) As Whene states, under the Water and Soil Conservation Act, 1967 “the general tolerance for environmental damage was determined exclusively by comparison with anticipated human benefits. There were no environmental standards or bottom lines which had, at all costs, to be maintained: the sole issue was balance” *Id.* at 172.

governs the management of all land, air and water in New Zealand outside the discreet areas that are absolutely protected by conservation legislation (such as national parks). At the time of its enactment, the Act was considered revolutionary and lauded the world over. It is worth dwelling briefly on the reasons why this was so.³⁵

The legislation seeks to control the effects of activities on the environment rather than focusing upon regulating specific activities and to this end was considered to accord with a liberal, market-based approach to environmental planning. It adopts an eco-systemic approach (land, air and water is inextricably linked and should therefore be subject to one management regime); provides for fully integrated management between all tiers of government (there is a hierarchy established between the Act, Central Government regulations and plans, and local government planning documents: lower level instruments cannot be inconsistent with higher level instruments) and requires a comprehensive series of plans for land, air and water management. The legislation also provides for full public participation at all stages. In terms of the public participatory emphasis of the Act, any citizen has the right to make submissions in respect of statutory amendments, regulations, planning documents, and notified permit applications, and, if they have made a submission, to be a party before the environment court (the specialist environmental tribunal that provides the adjudicatory-arm of the regime) on any appeal. The public also plays a role in monitoring and enforcement. Members of the public can bring enforcement proceedings and prosecutions pursuant to the Act, and the relative simplicity of the legislative regime facilitates compliance: people know, in the main, what they and others can and cannot do. In addition, the Act incorporates the requirement for all decision-makers to respect the cultural and spiritual values of the *Māori* people (the indigenous people of New Zealand),³⁶ and includes procedural mechanisms that promote the specific inclusion of *Māori* in decision-making.³⁷ If the specific provisions of the Act or a plan prevent a person from carrying out an activity or development, the applicant is, in most cases, able to apply for a permit that if granted will allow the activity but may contain conditions to mitigate any adverse environmental effects of the activity.

35 Note in particular that following the enactment of the Act, Geoffrey Palmer (Prime Minister of New Zealand 1989-1990 and principle proponent of the Act) stated “[t]he eyes of the environmental world are upon New Zealand. It must not drop the ball.” G. Palmer *Environment: The International Challenge* 171 (Victoria University Press, Wellington, New Zealand, 1995).

36 See in particular s. 6(e): decision makers shall recognize and provide for “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu (sacred sites), and other taonga (treasures)” and s. 7(a): decision makers shall have particular regard to “kaitiakitanga” (a rough translation equates to Māori stewardship of natural resources).

37 Such mechanisms include provision for co-management regimes, consultation requirements, iwi (tribal) resource management plans *etc.*

Critically, the Act was one of the first pieces of domestic legislation in the world to incorporate the purpose of sustainability. The entire environmental management regime was now to be premised upon *sustainable management* (a variation of the Brundtland definition of sustainable development that was supposed to place less emphasis on intra-generational equity). The stated purpose of the Act is to “promote the sustainable management of natural and physical resources”³⁸ and this concept is explained in part 2, sections 5-8, of the Act. Section 5(2) states thus:

In this Act, sustainable management means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while-

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The concept of sustainable management is further elaborated upon in the Act and an additional list of values provided in sections 6-8. For example, decision makers should take into account the value of preserving unspoilt areas of the coast and in-land bodies of water if this is factually relevant. This values framework - promoting the sustainable management of the environment - guides all decisions made under the Act.³⁹ It underpins the making of all regulations and plans, and proves determinative in applications for express permission (*via* permits) to undertake an activity that is not otherwise permitted. In introducing the legislation to Parliament, the (then) Minister for the Environment stated thus:⁴⁰

The Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided those objectives are met, what people get up to is their affair. As such the Bill provides a more liberal regime for developers. On the other hand, activities will have to be

38 Resource Management Act, 1991 (NZ), s. 5(1).

39 Including decisions made by Central Government in promulgating regulations or higher level planning documents; regional and territorial (city and district councils) authorities in preparing planning documents; and local authority bodies and the environment court in determining applications for permits to use natural resources that are not otherwise permitted by the Act or by the relevant plans (resource consents).

40 Simon Upton (4 July 1991) 516 NZPD 3018-3021 (Parliamentary speeches on the Resource Management Bill, 4th July 1991).

compatible with hard environmental standards, and society will set those standards. Section 5(2) (a-c) sets out the biophysical bottom line ... The Bill has a clear and rigorous procedure for the setting of environmental standards – and the debate will be concentrating on just where we set those standards. They are established by public process.

It was intended that a system of co-ordinated planning documents, prepared by both central and local governments, would set the environmental bottom lines to reflect the values in section 5(2) (a)-(c). However, this has not occurred. Potentially, the failure is due to three main reasons.

First, Central Government planning documents could have established clear environmental bottom lines that, following the integrated approach, would have imbued the whole planning system. By way of example, pollution limits for freshwater could have been established, or objectives and methods to protect and conserve New Zealand's remaining wetlands created. However, there has been a stark absence of guidance from Central Government. Rather, the hard, arguably political decisions as to which environmental resources to protect and how best to do so, have been left to local authorities.

Second, left to make these decisions many local authorities have simply adopted compromises, and given the requirements for public participation in the development of planning documents this is perhaps unsurprising. Public participation may be important in helping decision-makers to develop a detailed knowledge of a particular environment but, given the sustainable management imperative, submitters may also address their socio-cultural and economic needs. Very often the preferences of submitters come to the fore, and members of the public are more likely to make submissions if they believe their economic interests are at stake.⁴¹ As a result, few activities are absolutely prohibited or areas comprehensively protected in local authority plans, rather the possibility is available for potential resource users to apply for permits (termed *resource consents*) to undertake activities. In determining whether to grant permits, the decision is cast back within a sustainable management framework, and decision-makers must once again consider the tri-partite of values that often pull in different directions.

Third, the courts have interpreted the concept of “sustainable management” as drafted in section 5 of the Act in a manner that does not favour an environmental bottom line approach. In *New Zealand Rail Ltd v. Marlborough DC*,⁴² the high court noted that the meaning of sustainable management in section 5(2) of the Act (and indeed in the other sections in part 2) contains criteria that might, depending upon

41 C. Warnock and S. Righarts, “The Influence of Public Participation in Environmental Decision-Making in New Zealand” (In Press).

42 [1994] NZRMA 70 (HC).

the facts and conflict within a given case. So, for example, whilst a development might promote the economic wellbeing of a community, it may also endanger the life-supporting capacity of the (previously productive) soil upon which it was built. The question for the court was whether any particular criteria in section 5(2) (economic, socio-cultural or environmental) were to take automatic precedence? Given that there is no clear statutory hierarchy of values within the Act, the answer was “no”.⁴³ The court (in contrast to the view of the Simon Upton quoted above) rejected the idea that section 5(2)(a)-(c) of the Resource Management Act set a dominant environmental bottom line and, by implication, rejected the suggestion that the Act was an environmental protection statute. The idea of sustainable management – as drafted in the statute – did not prioritise environmental protection and conservation. All later court decisions have consistently followed this approach and, accordingly, the value to be preferred in any case will depend upon the facts in the case.

What has been the result of this approach? The clear thrust within New Zealand has been to permit applications for consumptive resource use and development. Approximately thirty-six thousand applications for resource consent are made each year; only 0.56% of those applications are refused.⁴⁴ Rather than refusing applications for development and use, the predominant approach has been an attempt to combine disparate objectives. Development has generally been permitted but conditions have been placed upon the permit to mitigate, if possible, any adverse environmental effects. Mitigation mechanisms in New Zealand have taken many forms, including offsetting and adaptive management regimes. Critically, however, this approach entails a risk that for any number of reasons the mitigation may not be successful. This concept may be illustrated by a great many cases but one is particularly stark, factually.

In *Royal Forest and Bird Society v. Buller District Council*,⁴⁵ Solid Energy (a state owned mining company) planned to develop an opencast coal mine on the Stockton Plateau, on the west coast of New Zealand’s South Island. The mine was to operate

43 *Ibid.* Grieg J stated that part 2 of the Act “expresses in ordinary words of wide meaning the overall purpose and principles of the Act. It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way.” Accordingly, part 2 of the RMA should not be interpreted in a strict or pedantic manner.

44 “Five Key Facts from 2010/2011” in Ministry for the Environment Resource Management Act 1991: Survey of Local Authorities 2010-2011 (Sep. 2011). Available at: <http://www.mfe.govt.nz/publications/rma/annual-survey/2010-2011/key-facts/index.html> Note, this does not take into account private applications for plan changes that may sanction use and development via a different route (last visited on 23 Sep. 2013).

45 [2006] NZRMA 193.

for 10 years and cover 260 hectares. There was, however, a problem. The unspoilt area was comprised of red tussock forest and constituted an important habitat for both the great spotted kiwi (New Zealand's national bird and an endangered species) and the critically endangered *powelliphanta* snail. The *powelliphanta* snail is as large as a human fist; it has a lifespan of 20 years; it has been in existence for at least 84 million years; is endemic to the Stockton Plateau and not found anywhere else in the world. New Zealand has ratified the United Nations Convention on Biological Diversity,⁴⁶ and the New Zealand Wildlife Act, 1953 classifies the snails as absolutely protected, and therefore, they could not be killed. The difficulty in the case was that their habitat was not absolutely protected under any conservation legislation as a sanctuary, refuge or reserve. Thus, the Act was the statutory regime that regulated the management of the habitat, and the test to be applied was the promotion of sustainable management. The decision-makers had to take into account the economic advantages to the nation of granting the application, balanced against the advantages of preserving the land as a habitat for kiwi and *powelliphanta*. The economic value of coal was at least NZ\$850 million (INR 4000 crore).

Solid Energy argued that it could mitigate the adverse environmental effects of the mining. It was clear that you could not simply lift the fauna and move it to another area because you could never identify or replicate the conditions that had allowed the snails to only survive in this discreet area. Solid Energy proposed to transfer a habitat area of twelve hectares of red tussock to an intermediate site to house the fauna during the mining operations, and then to move it back. While the habitat was being re-located and established, 6000 of the snails would be kept in fridges.

At first instance, the environment court accepted that the mitigation plan – if it proved successful – was sufficient, but took into account the risks of failure. In the end, and addressing the sustainable management imperative, the value favoured by the court was the economic benefit to the nation. The consents were granted and an appeal to the high court failed.⁴⁷ Unfortunately, the case did not have a happy outcome. Eight hundred of the snails were frozen to death following a technical malfunction at the department of conservation site established to house them.⁴⁸ To date, the remaining snails have experienced a mortality rate of 30% over the natural

46 New Zealand ratified the Convention on Biological Diversity on 16 Sep. 1993.

47 Royal Forest and Bird Society appealed to the high court (see *Royal Forest and Bird Society Soc. Inc. v. Buller DC* [2006] NZRMA 193). The high court found that the environment court had to make a judgment as to which value to prefer, they had taken into account the risks of failure, and the judgement was incapable of legal challenge. The appeal failed.

48 "Mishap freezes to death 800 rare New Zealand snails" *BBC World News*, Nov. 11, 2011. Available at: <http://www.bbc.co.uk/news/world-asia-15691701> (last visited on 15 Sep. 2013).

mortality rate, and it is not anticipated that the population can sustain such a loss.⁴⁹

While this is an extreme case, as explained above the vast majority of applications to use and develop natural resources in New Zealand are granted. Further, empirical research suggests that significant numbers of conditions on resource consents are not complied with in New Zealand.⁵⁰ This does not in itself, however, demonstrate that the environment is being insufficiently protected. Indeed, it is difficult to point evidence that the quality of the environment *as a whole*, has deteriorated following the introduction of the Act primarily because New Zealand does not produce comprehensive state of the environment monitoring reports. The New Zealand Parliamentary Commissioner has criticised this omission, and observed that, “New Zealand is the only country in the OECD without an ongoing statutory commitment to regularly reporting on the state of its environment”.⁵¹ However, various fragmented reports all point to a trend of deteriorating environmental quality.⁵² External reviewers, such as the OECD Environment Directorate, have reported on the chronically deteriorating freshwater quality in New Zealand, and the Parliamentary Commissioner for the Environment has produced a plethora of reports detailing concerns as to the state of the environment and poor central government policy choices in environmental management.

If a conclusion can be drawn from the New Zealand experience, it is that an approach based on balancing the tri-partite of values inherent in sustainable development will not guarantee protection of the environment, far from it. Rather, in the absence of a valuable hierarchy, sustainable development may prove little more than a “political smokescreen designed to advance the interests of economic development”.⁵³ Ad hoc decision-making, in the absence of a planning structure

49 Morris, Rod “An unfortunate experiment” 337 *Forest and Bird* (The Royal Forest and Bird Protection Society) 14-18 (2010).

50 “Troubling report highlights deficiencies in environmental monitoring” *The University of Waikato News*, May 6, 2013. Available at: <http://www.waikato.ac.nz/news-events/media/2013/05troubling-report-highlights-deficiencies-in-environmental-monitoring.shtml> (last visited on 25 Aug. 2013).

51 Parliamentary Commissioner for the Environment *How Clean is New Zealand? Measuring and Reporting on the health of our Environment* (Apr. 2010).

52 For example, see, OECD, *Water Quality and Agriculture: Meeting the Policy Challenge* (OECD Publishing, Paris, 2012) on New Zealand’s deteriorating freshwater quality; the plethora of reports stating the concern of the Parliamentary Commissioner for the Environment as to the state of the environment and policy choices and present greenhouse gas-emissions which are approximately 22% higher than the commitment made by New Zealand in Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (in force Feb. 16 2005): See Ministry for the Environment *New Zealand’s Greenhouse Gas Inventory 1990-2010* (Apr. 2012). Available at: <http://www.mfe.govt.nz/publications/climate/greenhouse-gas-inventory-2012/index.html> (last visited on 25 Aug. 2013).

53 *Supra* note 32.

that establishes clear environmental limits that cannot be transgressed, will result in gradual decimation of environment. Thus to talk of “balancing” values, and the “sustainable development of natural resources” may simply provide a comfort that is misplaced.

VI Establishing the values hierarchy for world heritage sites

For some environmental management scenarios, a pure balancing exercise (or more accurately, freedom for the decision-maker to prefer one particular value to achieve justice on the facts) may well be appropriate. Coupled with the requirements to impose conditions to minimise environmental degradation where possible, or to offset the harm in some way,⁵⁴ such an approach may be adequate within certain environments. But within a world heritage site, the preservation and conservation of the natural values that comprise the “Statement of Outstanding Universal Values” (SOUV), for the site are “paramount”.⁵⁵ Thus, world heritage listing establishes a values hierarchy for the management regime. The greatest weight must be given to the conservation and preservation of the natural outstanding universal values of the site. How might this be achieved in practice?

The SOUV detailed in the world heritage listing encapsulates what needs to be conserved and protected in the heritage site. In order to achieve the requisite standard of protection, the operational guidance to the World Heritage Convention advises that SOUV must be translated into a set of measurable objectives and targets;⁵⁶ and these objectives and targets will provide the environmental limits or bottom lines for the entire regulatory regime. These bottom lines must be integrated into all statutes, regulations and land-use planning documents that pertain to the area. Decision-makers must have duties imposed upon them to ensure that environmental bottom lines are preserved. Further, consistency between the various regulatory

54 Environmental compensation (also termed offsetting, which may include biodiversity offsetting) is an emerging focus of the legislature in New Zealand, and is being used in the regulation of air quality and air-sheds, areas containing indigenous flora and fauna, and outstanding natural landscape areas. The mechanism is supposed to facilitate development whilst resulting in no-net loss of biodiversity or environmental quality. There is much criticism from environmental groups and ecologists as to the efficacy of the approach to offsetting in New Zealand (see for example: the Biodiversity Offsets Panel at Forest and Bird *Face Up to the Future: Conference 2012*, Te Papa, Wellington, New Zealand: “Biodiversity offsets under scrutiny”. Available at: <http://www.forestandbird.org.nz/what-we-do/news/biodiversity-offsets-under-scrutiny> (last visited July 16, 2012)).

55 *Supra* note 21 at 20.

56 *Id.*, at 37, which states: “The best plans are succinct, based around achievable, measurable targets and linked to implementation systems, budgeting processes and monitoring and business plans, but they also need to leave enough space for adaptation to unforeseeable challenges and changing situations; and, of course, they should adequately and equitably involve a full range of stakeholders”.

and governance components must be assured; all decision-makers must operate in a manner that achieves the same set of objectives and targets.

The establishment of environmental bottom lines might not prohibit all development and use, but development may only be permitted if it does not transgress the environmental bottom lines and is compatible with the conservation and protection of the SOUV. In essence this will mean that existing uses that threaten the integrity of the site and outstanding universal values should cease over time, and new uses that are incompatible with the objectives and targets should not be permitted.

Such an approach may have implications for the legal procedures affiliated with decision-making. If the regime is to be partially managed by a permitting regime, the evidential burden of proof should be placed upon those applying for activity permits to demonstrate (to a high standard of proof) that the effects of their activities will be insignificant and compatible with the environmental bottom line. In cases concerning uncertain risks, an approach based on the precautionary principle should be adopted and caution preferred.⁵⁷ By a test of compatibility, small scale indigenous practices may be provided for as permitted activities in the planning regime. For peoples that have lived within the site for centuries (and on occasions, millennia) one could argue that, by definition, their practices have been compatible with the SOUV. The environment remains and is recognised as one of the most outstanding natural places on earth despite their use. The management regime must of course guard against any significant enlargement of indigenous use or a variation in the type of activity.

While the debate remains as to the precise methods used to secure the outstanding universal values for the Western Ghats, there can be no debate that environmental bottom lines must be secured rather than leaving the site to the vagaries of an *ad hoc* legal regime premised on sustainable development. Ecological expertise from both the WGEEP and the wider scientific community will be required in order to set the environmental bottom lines. Setting ecological bottom lines is not a role for lawyers but once established, it will be for the legal fraternity to ensure those bottom lines are enshrined in law, regulate the actions of all decision-makers, and are not transgressed.

VII Conclusion

This paper argues that a “balancing approach” that attributes equal weight to the three values inherent in sustainable development (environment, economic and

⁵⁷ Declaration of the UN Conference on Environment and Development, UN Doc. A/CONF.151/26/Rev.1, *Report of the UNCED*, 1(New York) *B&B Docs* (Rio Declaration) principle 15.

socio-cultural), without creating a hierarchy or weighting between those values, is inappropriate for a world heritage site and would not reflect the legal duties imposed by world heritage listing. Rather, in the context of a world heritage site the legal framework must establish a clear hierarchy of values and at the apex sits the environmental heritage to be protected. This accords with an understanding of sustainable development that reflects the concept of “strong sustainability” and is the only approach to sustainable development that can be legally valid in the context of world heritage sites. States have a duty to protect and conserve the outstanding natural universal values of the world heritage site. The management system must ensure those values are safeguarded and it will only achieve this objective if clear targets are established and non-transgressible environmental bottom lines are set that, all decision makers have a duty to adhere to.

To initiate the process, the successes and failures of foreign states might be considered and examined, and decisions should be made by the people of India as to whether the local context might accommodate or utilise an adaptation of successful processes from overseas. In particular, it may pay to be cognisant of the failures experienced by other nations. The remit to the Kasturirangan Committee suggested that the Western Ghats management plan should reflect an attempt to “balance” economic, environmental and socio-cultural factors. Accordingly, the practical ramifications of this approach as experienced by New Zealand, and the reasons for the failure of such an approach to protect the environment, may be particularly informative to the debate in India.

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