

UNITED NATIONS EDUCATIONAL,
SCIENTIFIC AND CULTURAL ORGANIZATION

CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL
AND NATURAL HERITAGE

WORLD HERITAGE COMMITTEE

Eighth Ordinary Session

Buenos-Aires (Argentina), 29 October-2 November 1984

Item 10 of the Provisional Agenda: Protection and Management of properties
included on the World Heritage List

1. At its eighth session, the Bureau noted that the Australian authorities had requested that the judgment of the High Court regarding Western Tasmanian National Parks be brought to the attention of the Committee in order to inform interested States Parties having a similar federal system of government and to help States Parties in the implementation of conventions in general.
2. At the invitation of the Bureau, the Australian authorities have prepared a brief commentary on this judgment which is presented to the Committee in the annex.

IMPLEMENTATION IN AUSTRALIA OF THE WORLD HERITAGE CONVENTIONTHE TASMANIAN DAM CASEConstitutional Background

Australia is a federation comprising six State (and two Territory) governments as well as a national government. The national government has, under the Australian Constitution, enumerated powers which do not include a specific power relating to the environment. Nevertheless, a number of powers, including powers with respect to external affairs, trade and commerce and corporations, may be used to achieve environmental objectives. The establishment of national parks and reserves was for many years regarded as primarily a State function but the national government has become more active in this area in recent years. Electricity generation is also primarily a State function. In areas where both levels of government have legislative competence, the Federal powers prevail.

Facts

The Government of Tasmania (one of the six States in the Australian federation) intended to build a dam on the Gordon River in South-West Tasmania as part of an electricity generation scheme. The dam would have flooded the Gordon and Franklin river valleys and caused the destruction of cultural and natural features in an area that had been nominated by Australia for, and subsequently included on, the World Heritage List maintained for the purposes of the Unesco Convention for the Protection of the World Cultural and Natural Heritage.

The area included on the World Heritage List, known as Western Tasmania Wilderness National Parks ('the Parks'), comprises three national parks in Tasmania with a total area of 769,355 hectares. This represents 11.3% of the total area of that State. The Parks consist of rugged mountain chains alternating with broad button grass valleys and gentle slopes together with large fast-flowing rivers, such as the Gordon and Franklin, which have cut through the mountains to produce spectacular gorges. The coast of the Parks is characterized by an extremely steep and rugged shelving of the land.

submerged river valleys and an array of rocky offshore islands.

Treaties in Australia are not self-executing. Therefore, in the absence of the cooperation of the Tasmanian State Government, legislation by the Federal Parliament was necessary to give effect to Australia's obligation under the World Heritage Convention to protect the Parks. On 31 March 1983 Federal regulations entered into force under an existing Act of the Federal Parliament, the National Parks and Wildlife Conservation Act 1975. These regulations rendered construction of the dam unlawful. They were later reinforced, and to a large extent replaced, by a further Act passed by the Federal Parliament, the World Heritage Properties Conservation Act 1983. This Act entered into force on 22 May 1983. On the basis of this legislation the Federal Government sought an injunction from the High Court of Australia (Australia's highest judicial tribunal) preventing Tasmania from proceeding with the dam. Tasmania defended that action and challenged the validity of the Federal legislation. On 1 July 1983 the High Court upheld enough of the Federal legislation as to make it unlawful for Tasmania to construct the dam. Construction of the dam ceased almost immediately.

Issues before the High Court

The issue for decision by the High Court was whether the legislation rendering construction of the dam unlawful was within the constitutional powers of the Federal Parliament. If it was, then, by virtue of section 109 of the Australian Constitution, it prevailed over any inconsistent State law. A number of 'heads of power' in the Australian Constitution were relevant: the 'external affairs' power, the 'corporations' power (relevant since a statutory corporation, the Hydro-Electric Commission of Tasmania, was engaged in building the dam), the power to make laws with respect to the people of any race (having regard to the significance of certain caves in the Parks in relation to Aborigines) and the so-called 'inherent' power arising from nationhood.

The power upon which the Federal Government placed primary reliance to give effect to the World Heritage Convention (and the power the use of which was subsequently upheld by a narrow majority of the High Court) is the external affairs power. Four Justices of the High Court (Mason, Murphy, Brennan and Deane JJ.) upheld the use of that power to prevent construction of the Gordon-below-Franklin Dam. A minority of three Justices (Gibbs CJ, Wilson and Dawson JJ.) held that the external affairs power could not be used as a basis for Federal legislation preventing construction of the dam.

For some of the justices in the majority, the question whether the external affairs power provided an adequate constitutional basis for the legislation turned on whether the legislation implemented an obligation imposed on Australia by the World Heritage Convention. Those justices closely examined the terms of the Convention to see whether any obligation to protect the site of the dam was created. For other justices in the majority no obligation was necessary; it was sufficient that the legislation was generally relevant to the Convention.

CONCLUSION

The decision of the Australian High Court is very significant for two reasons. First, the decision constitutes the first test of the application of the World Heritage Convention in a court of law. Secondly, most of the judges were of the clear view that each Party to the Convention has an obligation to do all it can to protect sites on the World Heritage List which are situated within its own national boundaries. Although decisions of the High Court of Australia are not, of course, binding on other countries, it is certain that the Tasmanian Dam case and judgement will be of considerable importance and relevance as and when other Parties to the Convention encounter a similar problem.