Committee on Resources
Full Committee

Testimony Prof. Jeremy Rabkin

TESTIMONY ON H.R. 883, THE AMERICAN LAND SOVEREIGNTY PROTECTION ACT

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In accordance with current procedure, I should begin by making it clear that I have no financial or personal stake in the issues before this Committee today. I am a university professor, with training in political science and law. But I am also an American citizen. My remarks here are inspired as much by my personal loyalty to our constitutional system as by any insights I have been able to acquire in my academic career.

I should also say at the outset that I do not raise questions about international regulation out of a generalized disdain for international law. The Framers of the U.S. Constitution were themselves quite respectful of international law (which is why, for example, Art. I, Sec. 8 confers on Congress the power to "punish offenses against the law of nations"). Throughout American history, our leading statesmen have often been insistent champions of international law. This country continues to derive many important benefits from well-functioning international agreements -- as for example, the system of trade rules developed under the General Agreement on Tariffs and Trade over the past fifty years.

But I also think that a fair reading of American history shows that international agreements can only secure enduring support from the American people when they are consistent with traditional understandings of our own Constitution. Efforts are now underway in several areas to drag the United States into international regulatory schemes that strain the limits of our own Constitution. As I have tried to explain in a recent book (WHY SOVEREIGNTY MATTERS, AEI Press, 1998), such ventures are, in some ways, as much a threat to the stability of international law as they are to our own system of government at home. I strongly support H.R. 883, the proposed American Land Sovereignty Act, as a useful brake on this larger trend and a means of reasserting our own constitutional traditions.

The underlying problem is that international regulatory schemes now reach more deeply into the internal affairs of sovereign nations and have therefore begun to threaten internal systems of government. The point is now acknowledged by the most respectable, mainstream scholars in the field of international law. Not long ago, for example, Prof. Detlev Vagts of the Harvard Law School noted that "international commitments" pose "an important problem" in their "tendency ... to shift powers and responsibilities from national and subnational units, with active, reachable legislative bodies to remote international bureaucracies." (COL. J. TRAN'L. LAW, 1997, 154) I would only qualify this statement with the caution that "international bureaucracies" are often all too "reachable" by some advocacy groups -- but without the reliable system of constitutional accountability that grounds the decisions of elected legislatures.

In what follows, then, I want to highlight the ways in which the World Heritage Convention illustrates this larger problem and why H.R. 883 is an appropriate response. Previous hearings have already amply documented the strange, unexpected intrusion of the World Heritage Convention into a local dispute about mining near Yellowstone Park. Therefore I will illustrate the points I want to make here by invoking a more recent and in some ways more disturbing dispute regarding the application of this international regulatory scheme to a mine near a national park in Australia.

The essential facts have been well documented in the Australian press. In 1982, the Australian government authorized a mining company to acquire a site for the extraction of uranium ore in enclave adjoining Kakadu National Park in Australia's Northern Territory. Local aboriginal people, who had special ownership claims on the site of the mine, asked the government to approve the new mining venture in return for royalty payments from the company. When Australia subsequently proposed Kakadu Park for listing as a World Heritage site under the World Heritage Convention, then, it specifically excluded from the boundaries of this site the land in which this Jabiluka mine would operate.

The Australian government did the same thing for Ranger mine, which has been safely operating for the past 18 years on land adjoining Kakadu Park. This mine has caused so little disruption that the Australian Wilderness Society, a leading environmental advocacy group, distributed a calendar this year which includes a picture of the Ranger mine site -- with no acknowledgment (and seemingly no recognition) that this scenic view of a famous mountain bluff in Kakadu Park actually shows the retaining pool of the mine operation in the foreground of the photo.

At any rate, as the Australian government derives considerable revenue from tourist visits to its scenic wonders, it has been anxious to ensure that mining operations do not threaten its parks. So before authorizing Jabiluka to begin operations, the government demanded very stringent scientific assessments to ensure that it would be even less disruptive than its existing counterpart. With newer extraction technologies (allowing most excavation to operate underground), the Australian government was persuaded -- after more than two years of environmental impact studies -- that the new mine would, in fact, be even less intrusive than the existing Ranger mine.

Nonetheless, environmental advocacy groups opposed the mine. And they took their protests to the World Heritage Committee, which then commissioned an expert study of its own. The study, as presented to the World Heritage Committee, warned that the mine would be a threat to the integrity of the Kakadu Park -- a World Heritage site. The Australian government protested that the report was improperly compiled and was replete with errors of science, fact and law. But the World Heritage Committee, at its meeting in Kyoto, Japan last December, urged the Australian government not to allow the Jabiluka mine to open. And it warned that unless the Australian government could rebut the findings of the report before its next semi-annual meeting, the Committee would have to list the site as "in danger," a listing that can ultimately lead to the removal of a site from the approved list of official World Heritage sites.

The Committee's rulings set off an uproar in Australia. The government refused to order the closing of the mine, vowing to prove its case to the World Heritage Committee later this year. Critics of the mine claimed that the government had "sacrificed Australia's moral authority" in international affairs" and committed a "major show of disrespect for the world." The ultimate outcome remains in doubt. But it is plain that the World Heritage Committee has acted quite aggressively to pressure a government with a sound environmental record to reverse a carefully considered domestic policy decision.

This story should bring into focus a number of serious constitutional problems with the World Heritage Convention -- all of which, I think, may be ameliorated by H.R. 883. To start with, there is the question of whether the subject matter of the World Heritage Convention really makes it a proper exercise of the treaty power. It was once our established doctrine that the treaty power in the U.S. Constitution could only be exercised on matters "properly the subject of negotiation with a foreign country." (GEOFROY v. RIGGS, 133 U.S. 258, 267) In the same spirit, Chief Justice Hughes cautioned in a 1929 speech to the American Society for International Law that the "treaty making power is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns ...." As late as the mid-1960s, this statement of traditional doctrine was reaffirmed the Second RESTATEMENT OF FOREIGN RELATIONS LAW. By 1987, however, when the Third RESTATEMENT was published, this doctrine had been repudiated on the grounds that it was no longer possible to distinguish internal from external concerns. (Sec. 302, Com't c)

What makes this revisionist view seem plausible is that the United States has already entered into a number of treaties that seem to stretch the traditional subject-matter limits virtually to the breaking point. And, of course, the World Heritage Convention is one of those treaties. We have registered some two dozen sites with the World Heritage Convention, including not only scenic park lands but historic sites like Independence Hall in Philadelphia and Thomas Jefferson's house and grounds at Monticello. If the stewardship of Independence Hall by the U.S. Park Service is really a matter "relating to foreign affairs" (or "properly the subject of negotiation with a foreign country"), then what is not?

But it is wrong, I think, to shrug off the traditional doctrine. The fact is that the Senate continues to have qualms about ratifying human rights conventions or conventions of the International Labour Organization that purport to regulate how the American government deals with our own fellow citizens on our own soil. We have ratified only a handful of international human rights conventions and then, each time, with reservations stipulating that they would work no change in existing U.S. law.

And we know that, in other fields, reports about the demise of constitutional doctrines have been greatly exaggerated. For decades after the New Deal, many scholars insisted that there was no longer any real force to the traditional constitutional doctrines limiting the regulatory powers of Congress (by excluding intra-state matters from the congressional power to regulate "commerce among the states"). The Supreme Court emphatically rejected that notion in its 1995 ruling in U.S. v. LOPEZ (514 U.S. 549) and has, to the surprise of many scholars, breathed new life into traditional notions of federalism in other cases since then.

Conceding that the World Heritage Convention may be at the outer boundaries of permissible exercises of the treaty power, one might still argue that it is consistent with some remaining limitations. Thus, it might be argued that the United States has a stake in attracting foreign tourists to our national monuments and in inducing foreign nations to protect those scenic or historic sites which Americans wish to visit. In that sense, it might be conceived as a treaty dealing with conditions of international tourist exchange -- hence "properly the subject of negotiation with a foreign country" (or many foreign countries).

But if this is a reasonable claim, it must be because individual sites are actually lures for foreign tourists -- and it is a considered policy to try to lure foreign tourists to these particular sites by participating in the World Heritage Convention. Here the cautions of the LOPEZ ruling seem much in point. The majority opinion by Chief Justice Rehnquist protested, in particular, that the statute at issue in that case had sought to make it a federal crime to carry guns into the vicinity of local schools and Congress enacted this law without making any direct findings at all about the relevance of such matters to inter-state commerce.

Something similar has happened with the World Heritage Convention. By the terms of our existing participation in the World Heritage Convention, Congress has no say in whether any particular location within the United States can or should be listed as a Heritage site. In ratifying this treaty, then, the Senate seems to have written a blank check to international interference -- allowing almost any site to become subject to international regulation, with no prior consideration of whether the listing of the individual site is really pertinent to our underlying reasons for participating in the program. If there are legitimate reasons to bind the United States in any particular case, Congress now has no role in assessing those reasons.

True, the World Heritage Committee will make its own determinations about which sites are appropriate for its list: individual countries can simply propose sites, while the international body makes the decision. But the Australian case should remind us that the Committee's thinking is not necessarily in accord with our own constitutional requirements.

The report of the expert team protested that the Jabiluka mine would be disruptive for local aboriginal peoples. Whether that is true or not (and some press accounts indicate that most aboriginal people were actually in favor of the mine), the fact is that the Committee and its agents seemed to think the Convention extended not simply to facilitation of international tourist traffic but to the regulation of the way a sovereign state deals with its own citizens in its own territory in a matter having no clear connection at all to the ostensible subject matter of the treaty. (Indeed, the special report cited other treaties in its findings -- which turned out to be treaties not actually ratified by the Australian government).

So, if Congress wants to reassure Americans that it is not writing blank-checks to international authorities -- in total disregard of traditional limits on the treaty power -- then H.R. 883 is one way to do it. Let Congress itself decide, case by case, whether a particular site is actually relevant to the legitimate international purposes for which the United States has entered into this treaty.

This brings us to a second problem with the current operation of the World Heritage Convention. That is the wholesale manner in which it seems to delegate U.S. treaty-making power to an international body. Here again, the traditional constitutional doctrine was firmly against such delegations. The leading text on the subject before the Second World War made the point quite explicit: The "treaty making power exercises legislative power which cannot be delegated." Even regarding an international administrative body, "delegation of political power, that is legislative or treaty-making power, to such a body would be unconstitutional." (Quincy Wright, THE CONTROL OF U.S. FOREIGN POLICY, 1922, 104, 125)

Here, too, today's leading text has abandoned the traditional doctrine. Instead, it blandly asserts that when "legislative" or "regulatory" powers are given to an international regulatory body, they may be "properly seen as implementations of the original treaty establishing the organization and giving it 'regulatory powers' and in consenting to that agreement, the Senate may be said to have consented in advance to any regulations authorized by that agreement." (Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, 2d ed., 1997, 263)

Again, I do not think the view of such contemporary scholars can or should be accepted. It is true that, in domestic affairs, we have become more accommodating of delegations of legislative power (that is, broad rule-making power) to specialized administrative agencies. But domestic administrative agencies still operate with a great many checks and controls, most notably the Administrative Procedure Act and its guarantees of due process and judicial review of agency action. Congress also has ongoing influence on domestic administration through its control over budget appropriations. There is nothing like this to limit the ventures of international regulatory agencies, which do not depend solely (or even primarily) on U.S. budget contributions and have no established system of legal procedure, let alone anything like judicial review.

And here again, the World Heritage Convention illustrates the problem. The original treaty speaks in very vague, general terms. The World Heritage Committee, established by the treaty, has then interpreted these general treaty provisions in more detailed "operating guidelines." These guidelines were not submitted to the Senate for separate ratification, nor even submitted to the President for approval by executive agreement. They are not even submitted to all the states parties to the Heritage Convention, itself. Instead, they are adopted on the say-so of the 21 member Committee, which reserves the right to make changes in these "guidelines" at any time, with no fixed procedure for doing so (and no established procedure for challenging the new provisions).

Yet the details are sometimes quite important. Australia thought it had agreed to some level of monitoring of the actual Kakadu Park, with the boundaries registered for its listing as a World Heritage site. Instead, the operating guidelines provide that not only the site, but activities within an adjacent "buffer zone," should be monitored. (Par. 17) This was, of course, our own experience with the Yellowstone dispute -- which concerned a mine not actually within the boundaries of our national park but in a neighboring area which the World Heritage Committee considered to be part of the equally protected "buffer zone."

Here again, H.R. 883 provides some brake on the constitutional problem. We may not be in a position to veto particular revisions of the "guidelines" -- though that name itself suggests the Committee's equivocation about the legal status of these rules (which are not, in fact, directly authorized in the treaty text). Still, this measure will reaffirm that the United States is governed by its own constitutional system in which Congress is the first branch of government: the measure will put the world body on notice that Congress will not be a passive partner so far as regulation of U.S. sites is concerned. When and if Congress decides to authorize international monitoring of particular sites, it can do so with up-to-date understandings about the actual, operational significance of such commitments. It need no longer simply put its trust in vague treaty language whose detailed meanings are left entirely to the determinations of an international body.

The third constitutional problem gives more force to this delegation problem. The problem is the actual character of the international authority involved. Despite the traditional strictures against delegating U.S. treaty-making authority to international bodies, there has always been an exception for judicial authorities. The United States has been prepared to submit certain carefully delineated questions to international arbitration since the Jay Treaty of 1794 (a treaty which was negotiated by a president, ratified by a Senate and implemented by a Congress which still had many members of the Constitutional Convention in its midst). We have participated in a number of proceedings before the International Court of Justice since 1946. Both NAFTA and the WTO include provisions for submitting particular trade disputes to specialized arbitration panels.

All of these engagements have been regarded as perfectly constitutional, even though they may incidentally involve interpretation of existing international agreements in ways not previously accepted or settled by the United States. But these are quasi-judicial proceedings, which are plausibly viewed as no more an exercise of general policy-making power than the resolution of ordinary cases by ordinary courts. At the least, judicialized procedures for genuine arbitrations are thought to be a safeguard for the participating states, so that outcomes will not vary very much from

the most reasonable interpretations of the actual treaties.

But no one seriously pretends that the World Heritage Committee is a quasi-judicial body or that its decisions follow from quasi-judicial procedures. It is, in fact, a rather political body, whose members are nominated by their own governments and answer to the promptings and pressures of their home governments (though elected for limited terms at a meeting of delegates from all the participating states). It is a political forum. There is nothing wrong with politics entering international forums, of course, when they are forums for negotiation. But the World Heritage Committee is not engaged in proposing new treaty texts for separate ratification by individual governments. It is empowered to make its own decisions about which sites can be listed, which should be de-listed or declared "in danger" and on what terms these decisions should be made.

The institutional sponsor of the World Heritage Committee is UNESCO, an organization so corrupted by nasty political intrigue that the United States has refused to contribute to its budget or participate in its general program since the mid-1970s. We have continued to participate in the World Heritage Convention, evidently on the assumption that this program will be less tainted than other UNESCO undertakings. But the record of the World Heritage Committee does not inspire great confidence.

Back in 1982, when Israel-bashing was the favorite sport of the United Nations (along with denunciations of the U.S. "imperialism"), the World Heritage Committee solemnly voted to place the Old City of Jerusalem on its list of endangered sites. The United States, which happened to have a delegate on the Heritage Committee at the time, protested the impropriety of this action. Israel, which claimed legal authority over the site and was certainly in effective control of it at the time, was not a party to the World Heritage Convention, had not asked to have it listed as "in danger," had not been consulted about its views and had not even received an on-site inspection by World Heritage officials. But the Committee at that time included representatives of Egypt, Iraq, Libya, Tunisia, Pakistan and Jordan, all of whom pressed for a condemnation of Israel -- and got it: the final vote was 14 - 1 with 5 abstentions (the United States being the sole dissenter, while West European delegates decided to sit on the sidelines).

That was some time ago, of course, and UNESCO is supposed to have improved since then. But it is notable that the Old City of Jerusalem is still on the "in danger" list and the government of Israel has still not found it prudent to adhere to the World Heritage Convention. And the Australian experience suggests that the World Heritage Committee still has a taste for throwing its weight around when dealing with small countries.

Among the remarkable aspects of Australia's experience was the manner in which the "expert" report on its mine was compiled. A 7-person team, headed by an Italian professor of international law, spent four days visiting the site. The delegation included two American and two Australian scientists, who stayed behind to draft a report of their findings. According to the Australian press, all of these original authors were "shocked" at the way their initial draft was rewritten (back in Paris) by the Italian lawyer. The new version was far more critical in its assessments, omitted a number of important facts that would have put the mine in a better light and concluded with a recommendation for halting mining development at Jabiluka -- a recommendation the original authors did not favor and had never even discussed. But with only minor subsequent revisions, the rewritten version became the "report" of the "experts." Then, in defiance of ordinary procedure, this report was submitted to the Australian government only hours before it was submitted to the World Heritage Committee, itself, at its winter meeting in Kyoto. The Australian government protested that it had been ambushed by an unfair attack.

But even more remarkable was the international politicking that preceded and followed this episode. Opponents of the mine included leading members of the opposition Australian Labor Party and the small Australian Green Party. Some of them wrote directly to the World Heritage Committee, urging it to condemn the mine as a threat to Kakadu Park. Opposition politicians also made contact with Green ministers in Germany and sympathetic socialists in France and elsewhere. Before the Heritage Committee had made any decision, the European Parliament (that is, the largely advisory forum of the European Union) passed a resolution urging member states of the EU to boycott uranium from the Jabiluka mine. The EU Parliament now has a Socialist majority and the Socialist government of France happened to have its own representative on the Heritage Committee who was, according to Australian press reports, particularly active in condemning the Australian government for allowing the Jabiluka mine to go forward.

Yet when the Australian government sought to plead its case in background lobbying at Kyoto, it was denounced by opposition politicians in the Australian Parliament for "thuggish pressure" and for "politicizing the World Heritage Committee." Outside Parliament, environmental advocacy groups were equally scathing, decrying the government's diplomatic efforts as "an 11th hour assault on the processes of the international community's highest arbiter of World Heritage values" (as the president of the Australian Conservation Foundation put it).

These days, the United States is not so tempting a target for international bullies as Australia or Israel. But the underlying point remains. Far from a judicial body or an impartial expert body, the World Heritage Committee is a highly political forum. It is not even an insulated bureaucracy but an arena for issue-trading and coalition building within transnational advocacy networks.

The United States, of course, has its own advocates, eager to make deals and connections with counterparts in other countries. In the Yellowstone affair, local environmental advocates in Montana were the first to urge the intervention of the World Heritage Committee into a local dispute. Our own environmental advocates are certainly welcome to form whatever alliances they like with French Socialists, German Greens or any other foreign groups they think will enhance their credibility within this country. We have a guarantee of free speech in our Constitution and a great deal of tolerance in our culture for activist advocacy. But ultimate responsibility for domestic government is supposed to remain under the control of our own elected legislatures. Delegating any serious authority to a body like the World Heritage Convention is delegating authority to a new political forum -- one in which the United States government itself is not always represented (as membership on the 21 person Heritage Committee rotates among member states of the Convention).

By itself, H.R. 833 will not change the character of the World Heritage Committee or the activist politics associated with it. But it will act as a brake on the scale of whole-sale delegation to such a body. If the bill is enacted, I would urge Congress to authorize participation of particular U.S. sites only for limited, renewable terms -- perhaps for three years at a time -- so that Congress can reevaluate whether participation has been helpful or has caused unexpected difficulties.

The recent Australian experience, like the earlier Yellowstone experience, suggests that the World Heritage Committee does pose potential dangers in itself. The danger, of course, is that, as American advocates echo the rhetoric seen so recently in Australia, we may begin to forget who has the ultimate responsibility for stewardship of natural or cultural treasures on the territory of the United States. The danger, in other words, is that we will come to see a venture in international cooperation as a scheme of international control -- just because some advocates in this country find the leanings of the World Heritage Committee, at any particular moment, more to their liking than the decisions of responsible constitutional authorities in our own country. That will not be healthy for the United States -- or for the long-term prospects of U.S. participation in the World Heritage Convention.

But there is also a larger stake here. The World Heritage Convention has turned out to be the precursor of far more ambitious schemes of international environmental regulation. The Clinton administration has signed the far more ambitious Biodiversity Convention and the Kyoto Protocol on climate change. Both seem to reach even more deeply into domestic affairs, delegate even more authority to international administrative bodies and risk even more entanglement in politicized, policy-making forums. The Senate has not yet ratified either treaty but the Clinton administration (or its successor) might seek to revive them.

Sustainable American participation in such ventures will require important new safeguards that are not clearly provided in these treaties. The American Land Sovereignty Act can provide a model for future efforts in establishing such safeguards. Certainly, the present bill can highlight the importance of such safeguards. The ultimate issue, addressed by this bill, is not what policy we make but where and how we make our policy. Congress must have an ongoing role in domestic policy under our Constitution. Simply putting a matter into a treaty cannot detach it from the constitutional responsibilities of Congress. That is what H.R. 883 will affirm.

The Clinton administration has opposed this bill in the past. In earlier hearings on the previous versions of this bill, administration representatives warned that it would impede American leadership for Congress to insert itself into the process. I hope the Committee on Resources will not be intimidated by such arguments. The truth is that, without

congressional involvement, there is little chance of securing the necessary trust and cooperation to make such international programs at all viable in this country.

In 1919, the United States Senate refused to ratify the Covenant of the League of Nations, because President Wilson would not accept any proposed reservations. Those reservations sought to ensure that American participation in the League would not jeopardize basic prerogatives of Congress under our own Constitution. Looking back on that experience a decade later, Winston Churchill noted the oddity that Wilson refused to his Republican opponents in Congress even "a tithe of the fine principles and generous sentiments he lavished upon Europe ... Peace and good will among all nations abroad, but no truck with the Republican Party at home. That was his ticket and that was his ruin and the ruin of much else as well." (THE AFTERMATH, 1929, 125)

I hope this session of Congress can coax President Clinton to a more accommodating response. Without congressional participation, there cannot be a secure basis for American participation in such ventures as the World Heritage Convention. The Congress would do well to make that clear now -- rather than in angry, impulsive reaction to some future crisis or confrontation.

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