1

In the Frame

An Introduction

FIGURE 1.1. 'Picture 22. Ecotourism: . . . H.R.H. Prince Philip visits Sierra Chincua', 1988, in Mexico, *World Heritage Site Nomination Document*, p. 55. Photo: Carlos Gottfried.

I've never seen swarming butterflies. I've been in fields with dozens about. And I've picked my way cautiously over butterflies listing on the walkway in their enclosure at the Melbourne Zoo. But the winter destination for the Monarch Butterfly in Mexico looks to me, from this photograph (Figure 1.1), to be another thing altogether. For here, I see them gathering in flocks, their iridescent wings making a deciduous autumn of evergreen firs. While still more, in their thousands, fly every which way. From this photograph, I feel the air pulsing from their festive movement, I hear the percussive rhythm of their

wings and I inhale the coniferous scents stirred in their carnival. I imagine my enchanted self, there, one of those people, in this photograph, hands on hips, gazing in wonder at those butterflies.

My response to this photograph describes an aesthetic appreciation of the natural environment that has been theorised in the philosophy of environmental aesthetics.[1] This is a form of aesthetic appreciation that has been distinguished from theories of aesthetic value of the arts.[2] But the photograph comes from another discipline – international environmental law, a specialism of international law that includes treaties agreed between nation states to protect the environment.[3] Specifically, the photograph is one of several images contained in a document of the Mexican government nominating the Monarch Butterfly Biosphere Reserve for recognition under the *World Heritage Convention*.[4] The Mexican property was ultimately inscribed in the World Heritage List on the basis of 'aesthetic' and 'natural beauty' values.[5] The treaty protects natural properties deemed by the World Heritage Committee to be of 'outstanding universal value' from these and other points of view.[6] It is, however, not clear what, if any, bearing the photographs in Mexico's nomination document had on the World Heritage Committee's determination of aesthetic value.

This image set me on a path of analysing for this book many more photographs used by nation states in the international processes created to protect the environment's aesthetic value under international law. My analysis has two aims. First, to consider how the environment's aesthetic value is represented in the photographs. In addition to the *World Heritage Convention*, I examine photographic images used in decision-making processes of two other treaties that demand an understanding of the

[1] See Brady, 'Aesthetic value, nature, and environment', 186; Carlson, 'Ten steps', 13. In Section 1.1, I discuss other vantages of aesthetic appreciation, including critical perspectives.

[2] See generally Levinson, 'Philosophical aesthetics', 3.

[3] See generally Sands and Peel, *Principles of International Environmental Law*; Boyle and Redgwell, *Birnie, Boyle and Redgwell's International Law and the Environment*; cf. Alam et al. (eds.), *International Environmental Law and the Global South*. See also Rajamani and Peel, 'International environmental law', 1.

[4] *Convention for the Protection of the World Cultural and Natural Heritage*, Paris, 16 November 1972, in force 17 December 1975, 1037 UNTS 151. See further Chapter 5.

[5] Article 2, ibid. For inscription, see World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Decision 32 COM 8B.17, UN Doc. WHC-08/32.COM/24Rev.

[6] Article 2 of the *World Heritage Convention* refers to aesthetic, scientific, conservation or natural beauty points of view as elements of 'outstanding universal value'; properties can be listed on the basis of multiple criteria, and as a mix of natural and cultural heritage: World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc. WHC.21/01, paras. [46] (mixed properties) and [77] (criteria).

environment's aesthetic value: The *Whaling Convention*,[7] and the *Biodiversity Convention*.[8] My second aim is to understand the relationship between the photographic images and the decisions of international bodies that judge the environment's aesthetic value under those treaties.[9] Finding no official account of the aesthetic values represented in the photographs, I go on to develop my own. I critique conceptions of the environment's aesthetic value that are conflated with singular notions of natural beauty typical of landscapes in Anglo-American and Western European art.[10] I then propose understandings of the environment's aesthetic worth that are sensitive to the likely plural conceptions of aesthetic value among the many nations that commit to international environmental treaties.

I turn to the photographs because I see them as representing the environment's aesthetic value in ways not acknowledged in the prosaic practice of international environmental law.[11] These ways matter for law. A clear understanding of what it means to value the environment on an 'aesthetic' basis might matter to compliance with those treaties that invoke the value by their terms and in their practice.[12] But a recognition that meanings of aesthetic value may be derived from photographic representations also goes to the integrity of the treaty processes that admit them. Proper legal procedure demands that those projections of aesthetic value be acknowledged by international bodies for any part they may play in the decisions that emerge from the processes that make, implement and enforce international environmental law.[13]

The trouble is that orthodox practices of international law lack the concepts and means to see more than facts from photographs.[14] And so it is that I come

[7] *International Convention on the Regulation of Whaling*, Washington, 2 December 1946, in force 10 November 1948, 161 UNTS 72.

[8] *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79. See 'values' in Conference of the Parties to the *Convention on Biological Diversity*, *The Strategic Plan for Biodiversity*, UN Doc. UNEP/CBD/COP/DEC/X/2, annex para. [13].

[9] On judgment and judgement as it relates to aesthetics in law, see generally Manderson, 'Judgment in law and the humanities'. In this book, 'judgment' refers to legal judgment and 'judgement' refers to aesthetic judgement.

[10] On landscape and natural beauty, see generally Kemal and Gaskell (eds.), *Landscape, Natural Beauty and the Arts*, p. 1. For eco-critical perspectives, see Braddock and Irmscher (eds.), *A Keener Perception*.

[11] On words and meaning, see d'Aspremont, 'Wording in international law'. Cf. Rose, Wewerinke-Singh and Miranda, 'Primal scene to anthropocene'.

[12] For a political science perspective, see Mitchell, 'Compliance theory', 887.

[13] See generally Kingsbury, 'Global environmental governance', 63. See also Voigt (ed.), *International Judicial Practice on the Environment*.

[14] See Chapter 6.

to rely on aestheticians – aesthetic philosophers, scholars of art history and criticism, artists and art practitioners – in my analysis of images for law. Theirs is a field that is expert both in concepts of the environment's aesthetic value, and in ideas and methods that can be employed in the task of understanding images as representations of such concepts.[15] I show in the book the ways in which images of the environment's aesthetic value are already there in the photographs used by states in the decision-making processes of international environmental treaties. As static images of natural environments judged as having aesthetic value, photographs are well suited to the demands of a legal process that documents reasons for decisions.[16] It is just that the photographs are not yet being seen in those processes for their meanings.[17] Understood and analysed as representations, the photographs could be embraced as forms of legal argument, interpretation and judgment in international law.

Ultimately, this book combines different vantages on aesthetics – the philosophy of environmental aesthetics, together with aesthetic theories and methods for the visual arts – to analyse images for critical meanings of the environment's aesthetic value relevant to international environmental treaties. This is the book's very specific ambition. But there is a broader ambition for my analysis too. By employing aesthetic ideas and methods to analyse photographs as representations, the book points to the ways in which meanings could be made from images for the administration of international laws more widely. The result is a unique jurisprudential account of aesthetic meanings and methods, engaging in an interdisciplinary examination of image for international law. It draws from different philosophies of aesthetics, and legal theories of image, to give significance to the aesthetic value of the environment in international environmental law.[18] My findings in the book also equip the practice of international law in general with aesthetic methods for making, and critically analysing, meanings from photographs in international decision-making. In so doing, I contribute to a reorientation of the contemplation of aesthetic value for jurisprudents and practitioners of international environmental law.[19]

[15] See Chapter 4.
[16] See Chapter 5.
[17] See generally Douzinas and Nead, 'Introduction', 1.
[18] See Chapter 4. Cf. on image and international law, Goodrich, 'The international signs law', 365; Miles, 'Painting international law as universal'; Miles, 'Visuality of a treaty'; Charlesworth, 'The travels of human rights', 173; Palmer, 'Absent images of international law', 91.
[19] Cf. Gillespie, *International Environmental Law, Policy and Ethics*, 2nd edn. See further Chapter 2.

In this first chapter, I explain what lies within the frame of my inquiry in the book. I briefly demonstrate how my different aesthetic vantages can shape understandings of the environment's aesthetic value, before providing an outline of how those vantages intersect throughout the book. My conception of the terms 'aesthetic', 'image' and 'international environmental law' are explained there. I conclude the chapter with an explanation of the materials and scholarly orientations that guide my analysis of the environment's aesthetic value for international law.

1.1 AESTHETIC VANTAGES

There are many vantages from which to understand aesthetic values from an image of the environment. Below I consider vantages in the philosophy of environmental aesthetics, aesthetic philosophy of visual art, and the practice of international environmental law, to highlight differences in and among them.

1.1.1 *Environmental Aesthetics*

My description of the photograph submitted by Mexico to the World Heritage Committee at the outset of this chapter (Figure 1.1) is a reflection on a sensorial experience shaped by my imagination, emotion and my knowledge, informed by personal experiences and cultural influences. From the photographs, I imagine the sights, sounds, touch and scents of the place in ways personal to me. This is the aesthetic value of 'subjectivists' in the philosophy of environmental aesthetics.[20] For those philosophers, aesthetic value is a personal or intuited value understood differently by different people. My aesthetic imagining of swarming butterflies in terms of delight, for example, could be viewed by others with a sense of dread – the furtive movement of the insects a disquieting sign of looming disaster.[21] In contrast, some philosophers have argued that knowledge, including scientific knowledge, is integral to the aesthetic value of the environment.[22] These 'objectivists' say that an aesthetic sensibility informed by scientific insight – a sense of awe arising from the knowledge of the migratory feat of the butterflies, for example – draws on objective information that is not personal to any one individual.[23]

[20] Also described as 'non-cognitivists', see Brady, *Aesthetics of the Natural Environment*, p. 87. For non-cognitivist appreciation of butterflies, see p. 135; cf. p. 138.
[21] See generally Brady, *The Sublime in Modern Philosophy*.
[22] See, for example, Allen Carlson's 'Natural environmental model' in Carlson, *Aesthetics and the Environment*, p. 6. On positive aesthetics, see p. 72.
[23] On objectivist and subjectivist orientations, see ibid., p. xix.

Environmental aestheticians work within a broader field of Western aesthetic philosophy that includes theorists, historians, critics and practitioners in the arts.[24] However, scholars of environmental aesthetics debate the relationship between first-hand aesthetic experiences of the natural environment, on the one hand, and the aesthetic appreciation of images that is analysed in, for example, art theory and practice, on the other hand. From the vantage of some philosophers of environmental aesthetics, aesthetic concepts for the arts, such as 'natural beauty', can inform, but do not alone determine, aesthetic sensations in the natural environment.[25]

1.1.2 *Aesthetics of Visual Art*

Despite a resurgence in scholarship on aesthetics of the natural environment taking hold in the 1960s,[26] the arts, including visual art, have been the principal focus of Western aesthetic philosophy since the nineteenth century.[27] An aesthetic analysis of the photograph in Mexico's World Heritage nomination document as an artwork – as opposed to the *in situ* appreciation of the environment depicted in the photograph – could take any number of approaches.[28] The photograph could be appreciated aesthetically for such things as its formal qualities, its signs and its symbols. For example, the photograph has a nostalgic, saturated hue. From this I might wonder if the butterflies are now lost to us, another casualty of the Anthropocene.[29] Equally, I could question whether the image has been altered – a wash skilfully added, contrasts manipulated – to emphasise the supernatural powers of the insects.

There are different ways in which the image might also be analysed for its many contexts.[30] I might for example discover that the photograph has been cropped so that we do not see the crowd of tourists alighting a bus outside the frame. I might also see it as a depiction of natural beauty, or of the sublime or even of the picturesque – all terms of art with particular meanings that have

[24] See generally Levinson, 'Philosophical aesthetics', 3.
[25] See, for example, Kemal and Gaskell, 'Nature, fine arts, and aesthetics', 1. See further Section 2.2.1.
[26] See Hepburn, 'Contemporary aesthetics'; Carlson, 'Ten steps', 13. See further Chapter 2.
[27] See, for example, Stecker, *Aesthetics and the Philosophy of Art*, p. 3. See generally Fisher, 'Environmental aesthetics', 667.
[28] I describe here different aesthetic methods developed in Chapters 5–7.
[29] On threats, see, for example, World Heritage Committee, *Monarch Butterfly Biosphere Reserve*. See also World Heritage Centre, 'Sadness and concern'. On 'anthropocene', a contested term for a current geological era of human-induced change, see, for example, Jagodzinski (ed.), *Interrogating the Anthropocene*.
[30] See generally Davies and Alperson, *The Philosophy of Art*.

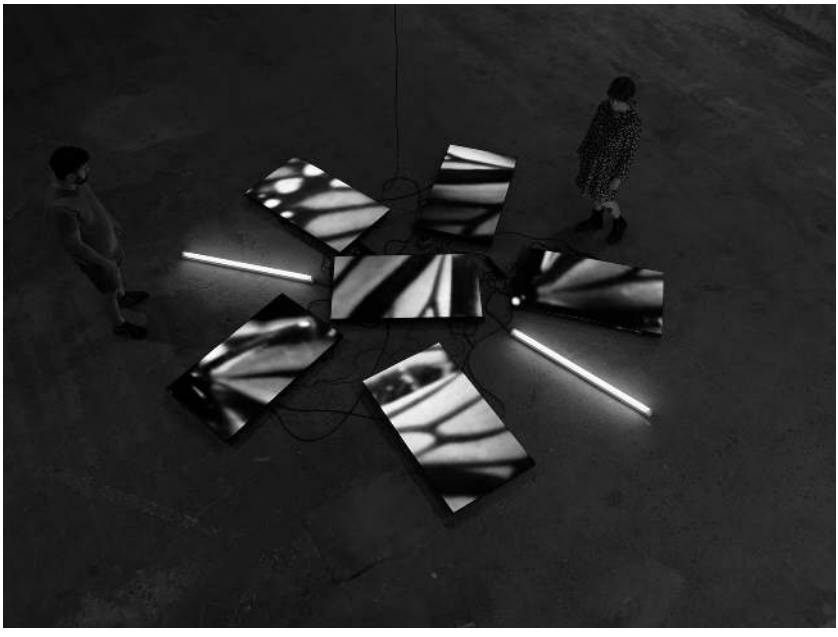

FIGURE 1.2. Diana Thater, *Untitled Videowall (Butterflies)*, 2008. Installation view at the ICA Watershed, Boston, 2018. © Diana Thater. Courtesy the artist and David Zwirner. Photo: Kerry McFate.

evolved in aesthetic philosophy in respect to landscape art.[31] I could also assume a critical view of the image, including an eco-critical view informed by artworks and art history, as well as by natural history and socio-political critique, extending to matters relevant to First Nations peoples and matters of colonialism.[32]

The video installation *Untitled Videowall (Butterflies)* (Figure 1.2), by artist Diana Thater, for example, is a contemporary artwork that enables a critical comparison with Mexico's photograph. Thater's work shows monarch butterflies on screens underfoot. It speaks to human constructions and framings of nature: Recorded, dissected, enlarged and illuminated, nature is visible and resilient.[33] However, the technological intervention also isolates, divides and renders nature surreal and superficial. The viewers of the work seen here

[31] See Brady, *Aesthetics of the Natural Environment*, p. 32.

[32] See Braddock and Irmscher (eds.), *A Keener Perception*. Cf. Elkins, *The End of Diversity in Art Historical Writing*. See further Chapter 4. In this book, 'First Nations' is used interchangeably with 'Indigenous' peoples while the *Biodiversity Convention* refers to 'indigenous' communities and their knowledges.

[33] Cf. Godden, 'Preserving natural heritage'.

look down, not up, they are looking in, not out, as they themselves perform the disassociation of humans from nature. The artwork beckons them in a critical contemplation of a human/nature divide.[34]

Referencing Thater's artwork in my aesthetic analysis of Mexico's photograph submitted to the World Heritage Committee, I might note the separation between humans and nature evident in the distinct protections of natural and cultural heritage under the *World Heritage Convention*.[35] So it is that the people in Mexico's photograph gaze upon nature as a curiosity, they are visitors to an alien world from which they stand apart. But *Untitled Videowall (Butterflies)* invites viewers to see past divisions where the natural world in Mexico's photograph is whole, and the butterfly migration from Canada and the United States to Mexico takes place without regard for walls or political borders. Although it should be observed that these are no ordinary people absorbed by nature in Mexico's photograph. The man to the right is Prince Philip, the late consort of the British Queen. A monarch gazing on monarchs. His pate aglow with beneficence. What might he have seen when he looked down his upturned nose as Empire?[36]

1.1.3 *International Environmental Law*

The vantages of aesthetic philosophers evident from an analysis of Mexico's photograph of the Monarch Butterfly Biosphere Reserve are different from each other – their perspectives on the environment and on images of the environment can differ. It is, however, not clear that any of those views corresponds to the vantage point of international environmental lawyers in their understanding of the legal qualities and outcomes of World Heritage determinations of outstanding universal value from an 'aesthetic' point of view, for the purposes of Article 2 of the *World Heritage Convention*.[37]

Mexico's photograph is included in the nation state's nomination document to the World Heritage Committee,[38] and it has been published under the 'gallery' tab dedicated to the property in the online World Heritage List.[39] However, the status of the photograph as a source of international law, or for

[34] On Diana Thater's engagement with environmental subject matter, see, for example, Ballard, 'Portfolio: Diana Thater'.
[35] Articles 1 and 2 of the *World Heritage Convention*. See Chapter 5.
[36] See Chapter 7. See further MacKenzie, *The Empire of Nature*, p. 202.
[37] See, for example, Redgwell, 'Article 2 definition of natural heritage', 64. See also Gillespie, 'Ethical considerations', 217.
[38] Mexico, *World Heritage Site Nomination Document*.
[39] World Heritage List, *Monarch Butterfly Biosphere Reserve (Mexico)*.

international treaty interpretation, which might elaborate on the meaning of aesthetic value for the treaty, is not certain: Such sources are commonly derived from written texts.[40] A more likely source then for understanding the aesthetic point of view adopted for the treaty is the Statement of Outstanding Universal Value endorsed by the World Heritage Committee in its decision to inscribe the property.[41] It explains the aesthetic and natural beauty values for the Monarch Butterfly Biosphere Reserve in the following terms:

> The overwintering concentration of the monarch butterfly in the property is the most dramatic manifestation of the phenomenon of insect migration. Up to a billion monarch butterflies return annually, from breeding areas as far away as Canada, to land in close-packed clusters within 14 overwintering colonies in the oyamel fir forests of central Mexico. The property protects 8 of these colonies and an estimated 70% of the total overwintering population of the monarch butterfly's eastern population.[42]

The superlatives, numbers and percentages expressed in the Statement of Outstanding Universal Value could be seen to speak to measures and comparison consistent with the vantage of an aesthetic philosophy tied to science. There is, however, no mention of the 'aesthetic' or 'natural beauty' points of view posited in the treaty and referenced in the criterion against which the property was assessed. The measured bureaucratic prose provides little insight into the aesthetic qualities of the natural phenomenon that has been afforded the World Heritage imprimatur and consequent protection under the *World Heritage Convention*.[43]

1.2 INTERSECTING VANTAGES

These three different vantages on aesthetic value – the philosophy of environmental aesthetics and of the arts, and the practice of international environmental law – are examined in Chapters 2 to 4, and then employed through case studies of my three treaties in Chapters 5 to 7, before I conclude the book with Chapter 8. Each chapter features an artwork 'exhibit' that I analyse from aesthetic perspectives to introduce the themes addressed, and the methods of

[40] In accordance with the *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331. On written sources, see Gardiner, *Treaty Interpretation*, p. 255. See further Section 3.5.1.
[41] World Heritage Committee, *Monarch Butterfly Biosphere Reserve*.
[42] World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Statement of Outstanding Universal Value.
[43] Cf. reference to sounds, ibid. See further Chapter 5.

analysis applied, in the relevant chapter. Together with artworks that are also featured within the chapters, the images make an exhibition: They 'tell a story alongside the text but do not illustrate it directly'.[44]

1.2.1 *Scholarship and Practice on Aesthetics and Image*

Chapters 2 to 4 explain and examine different approaches to understanding the term 'aesthetic' in aesthetic philosophy, and in the philosophy and practice of law. Chapter 2 outlines the principal themes of the philosophy of environmental aesthetics before examining the ways in which scholars of international environmental law have characterised aesthetic value as an environmental value. I explain conceptions of the 'natural environment' and 'nature' in terms of environmental aesthetics, paying particular attention to the scholarship of Emily Brady, a prominent philosopher of environmental aesthetics whose integrated theory of environmental aesthetics informs my characterisation of the aesthetic value of the environment through the remainder of the book.[45] The chapter then addresses scholarship on international environmental law that has examined the 'aesthetic' value of the environment protected under the terms of several international environmental treaties. Scholars recognise aesthetic value as one of several environmental values motivating states in their international agreement to protect the environment. Several associate aesthetic value with natural beauty and most conceive of environmental values in terms of the philosophy of environmental ethics as opposed to the philosophy of aesthetics that I employ in the book.[46]

The practice of international environmental law, as a specialist discipline of international law, relies on customary rules of treaty interpretation to construct meanings for terms in international treaties.[47] In Chapter 3, I employ these doctrinal methods of treaty interpretation to define 'aesthetic' value for the three international treaties that form the basis of my case studies in Chapters 5 to 7: The *World Heritage Convention* and the *Biodiversity Convention*, in which 'aesthetic' value is an express term, and the *Whaling Convention* where, for reasons I explain, aesthetic value informs the interpretation of the treaty. This orthodox approach to treaty interpretation is a 'vantage' point available in international environmental law to construct meanings for the environment's

[44] Tsing, *The Mushroom at the End of the World*.
[45] For Brady's scholarship, see further Section 2.2.3.
[46] See Section 2.3.2.
[47] Codified in the *Vienna Convention*. See generally Gardiner, *Treaty*.