

**Response to the Position of the United States on Climate Change
with Respect to the World Heritage Convention**

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The United States recently prepared a “Position of the United State (*sic*) of America on Climate Change with Respect to the World Heritage Convention and World Heritage Sites” (undated). In this position paper, the United States makes several incorrect statements about the World Heritage Convention and its Operational Guidelines and mischaracterizes the petitions to list various sites as World Heritage in Danger. The International Environmental Law Project, as the author of the petition to list Waterton-Glacier International Peace Park as a World Heritage Site in Danger Due to Climate Change, has prepared this response to ensure that these misunderstandings are identified and corrected.

The Consent of the State in which the World Heritage Site Exists Is Not Needed to List a Site as World Heritage in Danger

The United States misreads the World Heritage Convention to require, as a condition for inscribing a site in the List of World Heritage in Danger, the consent of the State in which the World Heritage Site is located. The United States supports this argument by claiming that because Article 11.3 of the Convention requires the consent of the concerned State for inclusion of a site in the World Heritage List, that such consent is also required for including a site in the List of World Heritage in Danger.

Under fundamental rules of treaty interpretation, as provided by the Vienna Convention on the Law of Treaties (Vienna Convention), a treaty must be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of the treaty’s object and purpose.¹ The context includes the treaty, its preamble and annexes, as well as any agreement or instrument relating to the treaty.

The ordinary terms of the World Heritage Convention demonstrate two distinct

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¹Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The Vienna Convention is widely understood to codify customary international law regarding interpretation of treaties. IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 6-23 (1973); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 608 (5th ed. 1998)(stating that “a good number” although not all, of the provisions of the Vienna Convention express general international law, and those that do not “constitute presumptive evidence of emergent rules of general international law.”). This textual approach to interpretation has attained the status of customary international law. *See, e.g.*, Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. Reports 6; OPPENHEIM'S INTERNATIONAL LAW, 1271-1275 (Jennings & Watts eds., 9th ed. 1992).

processes. While Article 11.2 of the World Heritage Convention directs the Committee to maintain the World Heritage List, Article 11.3 expressly requires the consent of the State Party in which the World Heritage Site is located. That consent makes sense in the broader context of the World Heritage Convention, which requires Parties to submit the list of sites suitable for inclusion in the World Heritage List (Articles 3, 11.1) and to ensure effective and active measures to protect and conserve those sites (Article 5).

In contrast, Article 11.4 of the Convention expressly directs the Committee to maintain the List of World Heritage in Danger. It contains no provisions for State consent. The duty to give terms and provisions their ordinary meaning requires an interpretation of the World Heritage Convention that maintains these two distinct processes. The drafters knew very well how to seek State consent when desired and they chose not to require that consent for inclusion of sites in the List of World Heritage in Danger. This conclusion is consistent with the canon of treaty interpretation that express mention of certain items, provisions, or circumstances excludes other items, provisions, or circumstances (*expression unius est exclusion alterius*). That is, one cannot read a requirement into a provision where the treaty omits that requirement.²

The Operational Guidelines for the Implementation of the World Heritage Convention (“Operational Guidelines”) are consistent with this interpretation. Paragraph 178 states that the Committee may inscribe a World Heritage Site in the List of World Heritage in Danger when “it” that is, the Committee determines that the property meets one of the relevant criteria. In addition, paragraph 183 requires the Committee to develop and adopt, “as far as possible, in consultation with the State Party concerned, a programme for corrective measures.” Paragraph 184 directs the Secretariat “to ascertain, as far as possible in cooperation with the State Party concerned, the present condition of the property.” These provisions seek consultation and cooperation *as far as possible* with the State Party in which the World Heritage Site is located, but they do not mandate the consent of that State Party.

The Operational Guidelines further describe the authority of the Committee to list sites as World Heritage in Danger even in the absence of consent of the State Party concerned. For example, Paragraph 186 the Operational Guidelines directs the Committee to review the information and then decide by a two-thirds majority to inscribe a site in the list of World Heritage in Danger. According to Paragraph 187, only *after* the vote is the State Party informed of the Committee’s decision. Quite clearly, if the Party has consented to listing a site as World Heritage in Danger, there would be no need to inform the Party of that decision. Thus, the Committee has the authority to inscribe a site in the List of World Heritage in Danger without the consent of the concerned State Party.

² See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 634 (5th ed. 1998); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 201 (2000).

Non-State Actors and Any State Party May Submit Information to the Committee as a Petition or in Another Form to Persuade the Committee to List a Site As World Heritage in Danger

Because the United States misreads the Operational Guidelines as requiring consent of the concerned State, the United States also incorrectly claims that organizations may not submit information to the Committee that may lead the Committee to inscribe a site as World Heritage in Danger. The United States claims that, “[t]he origin of any action to include a site in the List of World Heritage in Danger is with the Committee in consultation with the State Party and with advice from the Advisory Bodies.”³ Again, neither the World Heritage Convention nor the Operational Guidelines suggests that the origin of any action rests with the Committee and the relevant State Party. The authority to list a site as World Heritage in Danger rests with the Committee, which may obtain its information from a variety of sources, including a petition.

Arguments similar to the US position have failed within the World Trade Organization. There, the question was whether WTO panels could accept *amicus curiae* (friend of the court) briefs from non-State actors. The dispute resolution provisions did not specifically allow non-State actors to provide such briefs but those provisions did allow panels to seek information. The Appellate Body in the *Shrimp/Turtle* dispute responded:

[A]uthority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted.⁴ (emphasis in original).

The position of the United States concerning petitions to the World Heritage Committee is also at odds with the position of the United States in the *Shrimp/Turtle* dispute, where the United States argued as follows:

The United States claims that the Panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to the United States, there is nothing in the DSU that prohibits panels from considering information just because the information was unsolicited. The language of Article 13.2 of the DSU is broadly drafted to provide a panel with discretion in choosing its sources of information. When a non-governmental organization makes a submission to a panel, Article 13.2 of the DSU authorizes the panel to "seek" such information. To find otherwise would unnecessarily

³ US Position Paper, at 4.

⁴ United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, para. 110 (Nov. 6, 1998), *reprinted in* 38 I.L.M. 121 (1999).

limit the discretion that the DSU affords panels in choosing the sources of information to consider.⁵

The U.S. position with respect to the World Heritage Convention is difficult to reconcile with its WTO position. The World Heritage Committee undoubtedly benefits from the contributions of non-State actors, including the IUCN and WCPA. As the Expert Working Group Meeting in Paris demonstrates, the World Heritage Committee takes seriously the advice of non-State actors and should continue to do so in order to best conserve and preserve world heritage.

An Action Plan and an Estimate of Costs Are Not Required Prior to Listing a Site as World Heritage in Danger

The United States also incorrectly claims that a proposed action plan and an estimate of costs are needed at the time of the nomination or petition to inscribe a site.⁶ However, nothing in the World Heritage Convention or the Operational Guidelines requires these two elements as a condition of inscribing a site in the List of World Heritage in Danger.

First, Paragraph 186 of the Operational Guidelines provides that the programme of corrective actions will be developed *after* the decision to inscribe a property in the List of World Heritage in Danger: Paragraph 186 provides:

Any such decision shall be taken by a majority of two-thirds of the Committee members present and voting. The Committee will then define the programme of corrective action to be taken. This programme will be proposed to the State Party concerned for immediate implementation.

Moreover, the practice of the World Heritage Committee indicates that corrective actions need not be made simultaneously with a decision to inscribe a site in the List of World Heritage in Danger. For example, the World Heritage Committee listed the Kathmandu Valley in Nepal as World Heritage in danger in 2003, but it continues to work with the Nepalese authorities to develop a long-term management plan to conserve the remaining World Heritage values of the property and adopt corrective measures to address illegal building activities.⁷ Similarly, the Walled City of Baku in Azerbaijan was inscribed in the List of World Heritage in Danger in 2003. According to the UNESCO website, “*Since then*, UNESCO has been working with the State Party and the Advisory Bodies to set up a plan of action.”⁸ (emphasis added).

⁵ *Id.* at para. 9.

⁶ US Position Paper, at 2.

⁷ UNESCO, World Heritage in Danger, <http://whc.unesco.org/en/158>.

⁸ *Id.*

Second, the United States similarly misconstrues the World Heritage Convention to require “an estimate of the cost of such operation” as a prerequisite for inscribing a site in the List of World Heritage in Danger.⁹ Article 11.4 of the Convention states that the “*list* shall contain an estimate of the cost” of any operations.¹⁰ It does not say that a request for assistance must be accompanied by an estimate of the cost of any operations. Thus, an estimate of costs is not a necessary element of a request for assistance.

Paragraph 177 of the Operational Guidelines nicely summarizes the requirements for listing a site as World Heritage in Danger:

- a) the property under consideration is on the World Heritage List;
- b) the property is threatened by serious and specific danger;
- c) major operations are necessary for the conservation of the property;
- d) assistance under the *Convention* has been requested for the property; the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inscription of a property on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat.

As is evident, none of these requirements include an estimate of the cost of efforts to protect a site or an action plan of corrective actions.

The Petitions Identify Serious and Specific Dangers

The United States mischaracterizes the petitions for inscribing certain sites in the List of World Heritage in Danger as failing to identify serious and specific dangers and the major operations necessary for the conservation of the sites.¹¹ The United States, however, fails to give examples to support such a statement. In fact, this is likely because each petition identifies serious and specific dangers as well as major operations to mitigate such dangers. For example, the serious and specific dangers identified in the petitions include the drastic retreat, and even

⁹ US Position Paper, at 2.

¹⁰ Article 11.4 of the World Heritage Convention provides:

The Committee shall establish . . . a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific danger[s].

¹¹ US Position Paper, at 2.

loss, of many glaciers;¹² glacial lake flooding,¹³ which could also cause the flooding of local villages;¹⁴ loss of species habitat and species migration to unprotected areas;¹⁵ drastic changes in hydrology, such as the loss of streams fed by glacial melt;¹⁶ and species loss.¹⁷

The serious and specific dangers identified in the petitions are exactly of the type suggested by the Convention text, which says that serious and specific dangers include the threat of disappearance caused by accelerated deterioration, calamities and cataclysms, and changes in water level and floods. In addition, each petition identifies specific corrective measures that could mitigate or remedy these threats, including flood control mechanisms,¹⁸ disaster plans,¹⁹ risk assessments,²⁰ and, most importantly, reductions in greenhouse gas emissions.²¹ Each petition clearly addresses each of the elements required by the Convention and the Operational Guidelines for the World Heritage Committee to list these sites as World Heritage Sites in Danger.

Obligations under the World Heritage Convention

The United States also mischaracterizes the nature of a Party's obligations under the Article 6.3 of the Convention. Article 6.3 of the World Heritage Convention requires each State Party "not to take any deliberate measures which might damage directly or indirectly" World Heritage Sites. The United States claims that not taking action, such as not signing the Kyoto

¹² See Petition to the World Heritage Committee Requesting Inclusion of Waterton-Glacier International Peace Park on the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures and Actions 9–10 (February 2006) [hereinafter Waterton-Glacier Petition]; Petition to the World Heritage Committee Requesting the Inclusion of the Huascarán National Park in the List of World Heritage in Danger as a Result of Climate Change 30–31 (November 17, 2004) [hereinafter Huascarán Petition]; Petition to the World Heritage Committee Requesting Inclusion of Sagarmatha National Park in the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures & Actions 18 (November 15, 2004) [hereinafter Sagarmatha Petition].

¹³ See Huascarán Petition, *supra* note 12, at 33; Sagarmatha Petition, *supra* note 12, at 19.

¹⁴ See Huascarán Petition, *supra* note 12, at 33; Sagarmatha Petition, *supra* note 12, at 21–23.

¹⁵ See Waterton-Glacier Petition, *supra* note 12, at 12–14.

¹⁶ See *id.* at 11–12.

¹⁷ See *id.* at 14.

¹⁸ See Huascarán Petition, *supra* note 12, at 39–40 (listing controlled breaching; water lowering by tunnel, culvert, spillway, siphons, or pumps; and dam construction); Sagarmatha Petition, *supra* note 12, at 25 (same).

¹⁹ Huascarán Petition, *supra* note 12, at 51–52; Sagarmatha Petition, *supra* note 12, at 40.

²⁰ Huascarán Petition, *supra* note 12, 51; Sagarmatha Petition, *supra* note 12, at 40.

²¹ Waterton-Glacier Petition, *supra* note 12, 20–26; Huascarán Petition, *supra* note 12, at 57–58; Sagarmatha Petition, *supra* note 12, at 39.

Protocol, does not constitute a deliberate action.²²

However, Article 6.3 of the Convention does not ask countries to ratify other international agreements. Instead, requires State Parties to ensure that their deliberate measures do not damage World Heritage Sites. The deliberate measures that harm the World Heritage Sites subject to the petitions are greenhouse gas emissions. These emissions are undoubtedly actions, and the failure to reduce such emissions is contrary to the Parties' recognition under Article 4 of the Convention that they "will do all [they] can" to ensure the protection, conservation, and transmission of world heritage to future generations. Further, Article 5 of the Convention states that "each State Party . . . shall endeavor . . . to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation" of world heritage situated in its territory.

The United States suggests that the petitions argue simply that the United States and other Parties are obligated to ratify the Kyoto Protocol. This is not the case. While some of the petitions address the relationship between the abovementioned obligations and the Kyoto Protocol, none of the petitions insist that the World Heritage Convention obligates Parties to ratify the Kyoto Protocol. However, all of the petitions do make the case that any program of corrective measures for sites threatened by climate change must make reductions in greenhouse gas emissions a priority. Whether a Party implements this corrective measure by reducing its greenhouse gas emissions pursuant to the Kyoto Protocol or through independent—and perhaps stronger—actions is a decision left to each Party's sovereign processes. The petitions do not claim otherwise.

To the argument that data are insufficient to distinguish human-induced climate change from natural variability, the Intergovernmental Panel on Climate Change has already said that "[t]here is new and stronger evidence that most of the observed warming over the last 50 years is attributable to human activities."²³

Lastly, the United States argues that any obligation to reduce greenhouse gas emissions "would apply equally to all State Parties, not just developed countries."²⁴ However, the United States ignores the accepted principle of common but differentiated responsibilities. In the context of the UN Framework Convention on Climate Change, those countries more responsible and better able to respond, such as the United States, bear a disproportionate burden to mitigate

²² US Position Paper, at 2.

²³ United Nations Framework Convention on Climate Change (UNFCCC) & United Nations Environment Programme, *Climate Change Information Kit, Climate Change Information Sheet*, 1, ¶ 2 (2002), available at <http://unfccc.int/resource/iuckit/cckit2001en.pdf>.

²⁴ US Position Paper, at 3.

the impacts and reverse the causes of climate change.²⁵

Conclusion

The United States position paper misstates the relevant law and process for inscribing property in the List of World Heritage in Danger. It also misstates the obligations of State Parties to the World Heritage Convention. It further misstates the claims included in the five petitions to list World Heritage in Danger due to Climate Change. Lastly, the United States ignores the findings of the Intergovernmental Panel on Climate Change concerning the state of the science pertaining to climate change.

²⁵ Article 3(1) of the UN Framework Convention on Climate Change provides: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” In the preamble to this convention, the Parties acknowledge that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”