

# THE WORLD HERITAGE “IN DANGER” LISTING AS A TAKING

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## I. INTRODUCTION

In 1995, the United Nations Education Scientific and Cultural Organization (UNESCO) World Heritage Committee sent an inspection team to Yellowstone National Park, a UNESCO World Heritage site, to determine whether a mining project, on which the Crown Butte mining company had been working since the late eighties, posed a danger to the park’s

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ecosystem.<sup>1</sup> Following the inspection, the Committee placed Yellowstone on the “List of World Heritage in Danger” (hereinafter “In Danger List”) reflecting its conclusion that the mining project, though not located on Yellowstone land, would place the park in danger of irreparable harm if granted final approval.<sup>2</sup> After a land swap negotiated by the Clinton Administration, in which Crown Butte was granted rights to federal lands far removed from the park, the project was abandoned and the park was removed from the In Danger List in 2003.<sup>3</sup>

The Kakadu National Park was added to the World Heritage List in 1981 because of its natural and cultural significance to the indigenous Mirarr people.<sup>4</sup> When the addition was made, private mining operations already existed within the park’s boundaries, a problem solved by carving three “holes” out of the area declared “World Heritage.”<sup>5</sup> As early as 1996, the World Heritage Committee took note during one of its annual meetings of plans to increase mining activity in one of the three holes.<sup>6</sup> In 1998, the Committee decided to send a mission of experts to Kakadu; these experts subsequently expressed “grave concern” about the effect of the increased operations on the site.<sup>7</sup> During the Committee session which followed, the proposal to add Kakadu National Park to the In Danger List was strongly opposed by Australia, which engaged in a significant, and ultimately successful, lobbying campaign to prevent the listing.<sup>8</sup> The Committee did request periodic progress reports on the issue, and by 2001, the mining com-

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1. Fen Montaigne, *A Gold Mine in Montana Is a Lode of Controversy: Stripping of Mountain for \$600 Million Deposits Is a Threat to Yellowstone National Park, Opponents Contend*, PHILA. INQUIRER, Oct. 2, 1995, at F1.

2. *World Heritage Comm., Rep. on its 19th Sess., Dec. 4–9, 1995, at 18–19, 41, WHC-95/CONF.203/16 (Jan. 31, 1996)*.

3. Natasha Affolder, *Democratising or Demonising the World Heritage Convention?*, 38 VICTORIA U. WELLINGTON L. REV. 341, 345 (2007).

4. Graeme Aplin, *Kakadu National Park World Heritage Site: Deconstructing the Debate, 1997–2003*, 42 AUSTL. GEOGRAPHICAL STUD. 152, 153 (2004).

5. Affolder, *supra* note 3, at 343.

6. Aplin, *supra* note 4, at 160.

7. Affolder, *supra* note 3, at 344.

8. See Aplin, *supra* note 4, at 160–70 (describing Australia’s role in the controversy surrounding the proposal to include Kakadu National Park on the In Danger List).

pany agreed to discontinue mining operations until the land's traditional owners, the Mirarr people, gave consent.<sup>9</sup>

In both situations, mining companies were legally permitted to mine; the companies had rights to mine under their respective legal and regulatory frameworks. Both, however, were ultimately frustrated in their attempts to exercise those rights. It would be a stretch to claim that the mere placement or threat of placement of the World Heritage Sites on the In Danger List was *the* cause for the subsequent cancellation or halt in mining projects. Both cases involved a mixture of domestic forces at the national and local levels in addition to the international pressure brought to bear by the World Heritage Committee.<sup>10</sup> That said, it would be naive to assume that a World Heritage In Danger listing had no effect on the eventual halt of mining operations. Indeed, some have suggested that the efforts of the Australian government to avoid an In Danger listing indicated a desire to "save face."<sup>11</sup> Similarly, the Clinton Administration's National Park Service and the Assistant Secretary of Fish and Wildlife both wrote the Committee to request the fact-finding mission mentioned above.<sup>12</sup> That federal officials would have bothered to engage the Committee suggests that they expected it to have some effect. Both Kakadu and Yellowstone illustrate situations in which damage to reputation and increased costs of doing business played a role in the decision not to engage in mining activities.

As these cases demonstrate, the World Heritage Convention may exert enough pressure to give rise to concerns and questions about the scope of its role and how it functions. This paper argues that such cases can be considered a "regulatory quasi-taking." In these situations, the Committee does not

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9. *Id.* at 168.

10. In the case of the Yellowstone dispute, for example, tension existed between the mining and tourist industries in Montana. *James Brooke, A Montana Town Sees Mine's Gold And Dross*, N.Y. TIMES, Jan 7, 1996, at 1.14. For the suggestion that the position of indigenous people in Australia played a part in the Kakadu National Park dispute, see Aplin, *supra* note 4, at 166 ("It would seem highly likely that a more general concern over the position of the indigenous people in Australia . . . provided an unspoken subplot to the [World Heritage Committee] discussions.").

11. Aplin, *supra* note 4 at 166, 168.

12. World Heritage Comm., Rep. of the Rapporteur, 19th Sess., July 3-8, 1995, at 23, WHC-95/CONF.201/12 (July 31, 1995).

actually take possession of a site, but through its actions interferes with the owner's ability to utilize it. While non-binding, a World Heritage In Danger listing can prevent property owners from engaging in otherwise lawful activities on their land; moreover, there are few checks on the exercise of this power. This is problematic for two major reasons. First, insofar as private property rights are inherently important, they should be protected. Second, the absence of such checks and procedures may ultimately undermine the effectiveness of the Convention. There are two possible solutions: *ex post* judicial review and *ex ante* administrative law reforms. As I discuss below, the *ex post* review raises more problems than it would solve while the *ex ante* reforms should address both the effectiveness and property rights problems.

This paper proceeds in six parts. In Part II, the World Heritage Convention and the manner in which it functions are briefly outlined. In Part III, the manner in which it functions as a regulatory quasi-taking is described. Part IV discusses several specific problems which arise out of the quasi-taking. In Part V, I outline and discuss two possible ways of limiting the World Heritage Committee's power. I first discuss the possibility of a litigation-based framework, and the problems such a solution would present. I then turn to a Global Administrative Law (GAL) approach. After discussing general GAL principles, I outline a way in which I believe the necessary procedural safeguards can be added to the existing World Heritage Convention regime. In Part VI, I conclude.

## II. THE WORLD HERITAGE CONVENTION

In this section, I provide a brief outline of the World Heritage Convention as background for my argument. I begin with a discussion of the texts which govern the operation of the World Heritage framework. I then move on to an overview of the bodies created by those texts and what role those bodies play. Next, I outline how the World Heritage lists function. Finally, I make two observations about compliance with the Convention and the potential punitive effects of adding sites to the List of World Heritage in Danger.

### A. *The Convention Framework*

The Convention Concerning the Protection of World Cultural and Natural Heritage (hereinafter "World Heritage Convention" or "the Convention") was ratified by the UNESCO General Conference in 1972 and came into force in 1975.<sup>13</sup> Currently, the Convention has 187 party-states.<sup>14</sup> The purpose of the Convention, as stated in its Preamble, is "establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods."<sup>15</sup>

#### 1. *Relevant Texts*

Several texts govern the operation of the World Heritage framework. First, obviously, is the Convention itself, which acts as a sort of constitution. Next are the Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter "the Guidelines"), which provide a more fully fleshed out version of the treaty.<sup>16</sup> According to the Guidelines, they "aim to facilitate the implementation of the [Convention] by setting forth the procedure."<sup>17</sup> The Guidelines do not have the same status as the Convention, as they have never been signed or ratified by the member states; rather, they are compiled and revised based on the decisions of the Convention's governing bodies.<sup>18</sup> Finally, the various

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13. UNESCO, *The World Heritage Convention*, WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/convention> (last visited Jan. 13, 2011); see also Convention Concerning the Protection of the World Cultural and Natural Heritage, pmbl., Nov. 16, 1972, 27 U.S.T. 37 [hereinafter *Convention*].

14. UNESCO, *States Parties: Ratification Status* WORLD HERITAGE CENTRE, <http://whc.unesco.org/pg.cfm?cid=246> (last visited Jan. 13, 2011) [hereinafter *Ratification Status*].

15. *Convention*, 27 U.S.T. 37.

16. World Heritage Comm., *Operational Guidelines for the Implementation of the World Heritage Convention*, ¶ 2, WHC.08/01 (Jan. 2008), available at <http://whc.unesco.org/archive/opguide08-en.pdf> [hereinafter *Guidelines*].

17. *Id.* ¶ 1.

18. *Id.* ¶ 2. The World Heritage Secretariat is generally responsible for compiling and updating the Guidelines. See, e.g., World Heritage Comm., Decisions Adopted at the 31st Session, June 23–July 2, 2007, at 196, WHC-07/31.COM/24 (July 31, 2007), available at <http://whc.unesco.org/archive/2007/whc07-31com-24e.pdf> (resolving to ask the Secretariat to initiate a process "to discuss possible alternatives to the present election system").

bodies created by the Convention promulgate their own rules of procedure.<sup>19</sup>

## 2. *World Heritage Bodies*

There are several different bodies established under the Convention. The World Heritage General Assembly is made up of all of the states party to the World Heritage Convention.<sup>20</sup> It meets during the UNESCO General Conference sessions, sets dues and contributions, and receives reports from the World Heritage Committee.<sup>21</sup> The World Heritage Committee, (hereinafter “Committee”) is a body made up of representatives from twenty-one states party to the Convention who are elected to staggered terms by the membership as a whole.<sup>22</sup> The Committee has various administrative powers, including the power to establish its own operating procedures, create consultative bodies, and invite public or private organizations to its meetings.<sup>23</sup> More important, however, is the Committee’s power to establish the criteria for inclusion of sites on the World Heritage List, as well as its ability to approve those sites when submitted by member states,<sup>24</sup> its power to add sites to the In Danger List or to remove them from the World Heritage List altogether,<sup>25</sup> and its power to consider and approve requests by member states for assistance in protecting their World Heritage sites.<sup>26</sup> A selection of Committee members make up the World Heritage Bureau, which serves two functions. First, it acts as a permanent Committee, holding necessary ad-hoc meetings when the whole Committee is unavailable,<sup>27</sup> and second, it coordinates the Committee’s

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19. See, e.g., UNESCO, *Committee Rules of Procedure*, WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/committeerules/> [hereinafter *Committee Rules*]; UNESCO, *General Assembly Rules of Procedure*, WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/garules/> [hereinafter *Assembly Rules*].

20. *Assembly Rules*, *supra* note 19, at R. 7, 9.

21. *Id.* R. 7, 9, 16.1; *Guidelines*, *supra* note 16, § I.D.

22. Convention, *supra* note 15, art. 8.

23. *Id.* art. 10.

24. *Id.* art. 11.

25. *Id.*

26. *Id.* art. 13.

27. *Guidelines*, *supra* note 16, ¶ 19.

work.<sup>28</sup> Finally, the treaty creates a Secretariat, also called the World Heritage Center, charged with aiding the Committee in its duties.<sup>29</sup>

Because of the important role played by the Committee, it is worth examining its membership in greater detail. The Convention conceives of the Committee members as experts, requiring that states appoint to the Committee "persons qualified in the field of the cultural or natural heritage."<sup>30</sup> In principle, this requirement should exclude professional diplomats or mere political appointees.<sup>31</sup> Indeed, some commentators have suggested that the requirement be interpreted to suggest a wholly technocratic Committee composed of experts who do not "represent" states and may not even be from the states on whose behalf they serve.<sup>32</sup>

While there is little to support such a strong reading of the appointment requirement, there are other elements of the World Heritage framework which support an expert membership on the Committee. In addition to the requirement set out in the Convention, the Committee Rules of Procedure state that:

**5.1** Each State member of the Committee shall be represented by one delegate, who may be assisted by alternates, advisers and experts.

**5.2** States members of the Committee shall choose as their representatives persons qualified in the field of cultural or natural heritage. They are strongly encouraged to include in their delegation persons qualified in both fields.

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28. UNESCO, *The World Heritage Committee*, WORLD HERITAGE CTR., <http://whc.unesco.org/en/committee/> (last visited Jan. 13, 2011) [hereinafter *The World Heritage Committee*].

29. Convention, *supra* note 15, art. 14.

30. *Id.* art. 9.3.

31. Tullio Scovazzi, *Articles 8-11 World Heritage Committee and World Heritage List*, in *THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY* 147, 155 (Francesco Francioni, ed. 2008).

32. Diana Zacharias, *The UNESCO Regime for Protection of World Heritage as a Prototype of an Autonomy-Gaining International Institution*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* 301, 313 (Armin von Bogdandy et al. eds. 2010).

**5.3** States members of the Committee shall transmit to the Secretariat in writing the names, designations and qualifications of their representatives.<sup>33</sup>

Additionally, because candidates who stand for election to the Committee are mentioned by name, this suggests that they are important as individuals, not merely as proxies for the state.<sup>34</sup> This is not to suggest that state affiliation is irrelevant; state affiliation is almost certainly a consideration in voting, and is to some extent required by the treaty.<sup>35</sup> Rather, it implies that the qualifications of a given delegate could and may actually be considered by the electorate. Finally, the Committee, as mentioned, may provide funds “only for persons who are experts in cultural or natural heritage.”<sup>36</sup>

To the extent that membership requirements are effective, they both reinforce the expertise-based authority of the Committee and allow the Committee to have some measure of independence. In practice, the membership is somewhat mixed.<sup>37</sup> Some states appoint career diplomats. The United States, for example, recently appointed a career diplomat to be its representative to UNESCO and in the World Heritage General Assembly.<sup>38</sup> Canada and Thailand, by contrast, tend to appoint representatives with some expertise in natural or cultural heritage.<sup>39</sup>

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33. *Committee Rules*, *supra* note 19, R. 5.

34. *Assembly Rules*, *supra* note 19, R. 13.

35. The Convention has a “diversity requirement” for Committee membership, though it does not provide a specific enforcement strategy for this requirement. Convention, *supra* note 15, art. 8.2 (stating that the “[e]lection of members of the Committee shall ensure an equitable representation of the different regions and cultures of the world . . .”).

36. *Committee Rules*, *supra* note 19, R. 5.4.

37. Note that it is somewhat difficult to determine who a given state’s Committee delegate is. Committee membership is identified by state, rather than by individual. *The World Heritage Committee*, *supra* note 28.

38. *Biography: David T. Killion*, U.S. DEP’T STATE, <http://www.state.gov/r/pa/ei/biog/141478.htm> (last visited Oct. 15, 2011).

39. *See, e.g., The Organization: Christina Cameron*, UNESCO.ORG, [http://portal.unesco.org/en/ev.php-URL\\_ID=30467&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=30467&URL_DO=DO_TOPIC&URL_SECTION=201.html) (emphasizing Canadian representative’s long career as a “heritage executive”); Thai. Ministry of Culture, *The World Heritage Committee*, THE WORLD HERITAGE INFORMATION CENTRE, <http://www.thaiwhic.go.th/eng/committee.aspx> (last visited Oct. 15, 2011) (describing the cultural affairs expertise of all three Thai representatives).



In addition to the bodies created by the Convention, three independent bodies are assigned to act as technical advisors to the Committee and the General Assembly.<sup>40</sup> The International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) is tasked with "being the priority partner in training for cultural heritage, monitoring the state of conservation of World Heritage cultural properties, reviewing requests for International Assistance submitted by States Parties, and providing input and support for capacity-building activities."<sup>41</sup> Next is the International Council on Monuments and Sites (ICOMOS). ICOMOS is in charge of the "evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage cultural properties, reviewing requests for International Assistance submitted by States Parties, and providing input and support for capacity-building activities."<sup>42</sup> The final technical advisor is the International Union for the Conservation of Nature (IUCN), which, like ICOMOS, is to "[evaluate] properties nominated for inscription on the World Heritage List, [monitor] the state of conservation of World Heritage natural properties, [review] requests for International Assistance submitted by States Parties, and [provide] input and support for capacity-building activities."<sup>43</sup>

While the tasks assigned to the three technical advisory bodies are similar, the bodies are structured in slightly different ways. ICCROM is an "intergovernmental organization dedicated to the conservation of cultural heritage."<sup>44</sup> Currently, it has 126 member states.<sup>45</sup> ICOMOS is a professional association, open to those "qualified in the field of conservation, practicing the profession of architect, archaeologist, town planner, engineer, administrator of heritage, art historian or

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40. Convention, *supra* note 15, art. 8.3; *Guidelines*, *supra* note 16, ch. I.G.

41. *Guidelines*, *supra* note 16, ¶ 33.

42. *Id.* ¶ 35.

43. *Id.* ¶ 37.

44. Int'l Ctr. for the Study of the Preservation and Restoration of Cultural Property, *What is ICCROM?*, ICCROM.ORG, [http://www.iccrom.org/eng/00about\\_en/00\\_00whats\\_en.shtml](http://www.iccrom.org/eng/00about_en/00_00whats_en.shtml) (last visited Aug. 20, 2011).

45. *Id.*

archivist.”<sup>46</sup> IUCN is an association open to national and international non-governmental organizations (NGOs), governments, and government agencies.<sup>47</sup> Additionally, volunteer experts sit on IUCN’s various subject-specific commissions.<sup>48</sup>

### B. *The Operation of the Convention*

The Convention attempts to create the “effective system of collective protection” mentioned in the Preamble<sup>49</sup> in three ways: first, through the maintenance of the World Heritage and In Danger lists;<sup>50</sup> second, through the provision of financial and technical support to states in whose territory World Heritage sites are found;<sup>51</sup> and third, via a series of educational programs.<sup>52</sup> Of these, the lists are the most prominent and will be the focus of this paper.

The process of adding a site to the World Heritage List is initiated by the member state in whose territory the site is located.<sup>53</sup> Parties create a tentative list of sites to be included, the advisory bodies evaluate the sites and then issue reports, and the Committee votes on the nominations based on that advice.<sup>54</sup>

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46. Int’l Council on Monuments and Sites, *About ICOMOS*, ICOMOS.ORG, <http://www.international.icomos.org/about.htm> (last visited Aug. 20, 2011).

47. Int’l Union for the Conservation of Nature, *About IUCN*, IUCN.ORG, <http://www.iucn.org/about/union/members/> (last updated Oct. . 5, 2011).

48. *Id.*

49. Convention, *supra* note 15, pmbl.

50. *Id.* art. 11.

51. *Id.* art. 13.

52. Educational programs are mentioned in section VI of the Convention and in chapter VI.C of the Guidelines. Convention, *supra* note 15, § VI; *Guidelines*, *supra* note 16, ch. VI.C.

53. Convention, *supra* note 15, art. 11; *Guidelines*, *supra* note 16, ch. III. Note that the “Old City of Jerusalem and its Walls” is an exception; the listing was proposed by Jordan. INT’L COUNCIL ON MONUMENTS AND SITES, ADVISORY BODY EVALUATION OF OLD CITY OF JERUSALEM AND ITS WALLS 1 (Apr. 1981), *available at* [http://whc.unesco.org/archive/advisory\\_body\\_evaluation/148.pdf](http://whc.unesco.org/archive/advisory_body_evaluation/148.pdf). It was approved in 1981. *See* World Heritage Comm., Rep. on Its 6th Sess., Dec. 13–17, 1982, at 10, CLT-82/CH/CONF.015/8 (Jan. 17, 1983). Israel did not become a party-state until 1999. *Ratification Status*, *supra* note 14.

54. Convention, *supra* note 15, art. 11; *Guidelines*, *supra* note 16, chs. III.A–III.J.

According to the Convention, A World Heritage site is added to the List of World Heritage in Danger when "serious and specific dangers" threaten the site, major conservation efforts are necessary for the protection of the site, and assistance has been requested.<sup>55</sup> If these requirements are met, the Committee may decide by vote to add the site to the In Danger List. Both the Convention and the Guidelines require that assistance "be requested" before a site can be placed on the In Danger List, but neither specifies who must actually make the request.<sup>56</sup>

The Committee may vote to delete a site from the List of World Heritage in Danger. Such action may be taken when remedial measures have failed and the site "has deteriorated to the extent that it has lost those characteristics which determined its inclusion" on the List, and "where the necessary corrective measures . . . have not been taken within the time proposed."<sup>57</sup> This is a double-edged sword; on the one hand, removal is a severe shaming tool, essentially a statement that a site is so damaged that it is no longer part of the "shared heritage of mankind." In taking this step, however, the Committee loses any power it has over the management and preservation of the site.

Two important points can be made about the way in which the World Heritage framework operates. First, the lack of an enforcement mechanism in the Convention framework means that the Committee must rely heavily on voluntary compliance. Second, In Danger listings were not intended to be punitive, but have shifted to become so. Each of these points will now be discussed in greater detail in turn.

Because there is no compliance mechanism, a decision by the Committee will have little effect on party-states unless they can be convinced to accept the decision. The ability to convince states to do so is based, partly, on the perceived authority of the Committee and the Convention framework as a whole. This authority can be thought of as either "expertise-based" or

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55. Convention, *supra* note 15, art. 11.4. There is some disagreement about whether the state in whose territory the site is located must be the party requesting assistance. I discuss this in greater detail in Part IV.A.

56. Convention, *supra* note 15, art. 11.4; *Guidelines*, *supra* note 16, ch. IV.B.

57. *Guidelines*, *supra* note 16, ¶ 192.

“principle-based.”<sup>58</sup> The latter type of authority relies, generally, on the Committee being seen as a guardian of a broadly shared ethical or moral principle; thus, insofar as the regime aims to protect sites because of their intrinsic worth as “heritage of mankind as a whole,”<sup>59</sup> it relies on principle-based authority.<sup>60</sup> The former, expertise-based authority relies on the Committee being perceived as a neutral body making decisions based on its own special scientific knowledge and experience.<sup>61</sup> Under this form of authority, states follow the Committee’s rulings because they perceive such rulings as correct, non-political decisions based on the scientific, objective approach of the advisory bodies. Such authority probably does more to secure actual compliance than any perception of the Committee as protecting broadly shared principles.<sup>62</sup> It should be noted that, while persuasive, this type of authority is fragile; expertise-based authority is “limited by the content of its expertise.”<sup>63</sup> If the decisions of the Committee and its advisors come to be seen as purely political or beyond the scope of their expertise, their authority would be undermined.

One scholar has argued that the Convention assumes that scientifically based decisions are less likely to be contested and thus have greater compliance records.<sup>64</sup> This analysis works on two levels. States may be more willing to comply with a decision if it is seen as scientifically, and thus objectively, correct; however, even where states do not care about making the scientifically correct decision, their compliance might still be assured if they wish to avoid looking as though they are avoiding compliance with a sound decision. Thus, the impartiality of the Committee serves not only to assure the state whose

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58. DEBORA D. AVANT ET AL., *Who Governs the Globe? in* CAMBRIDGE STUDIES IN INTERNATIONAL RELATIONS: WHO GOVERNS THE GLOBE? 1, 12–13 (Debora D. Avant et al. eds., 2010).

59. Convention, *supra* note 15, pmb1.

60. AVANT ET AL., *supra* note 58, at 12–13.

61. *Id.*

62. S. Javed Maswood, *Kakadu and the Politics of World Heritage Listing*, 54 *AUSTL. J. INT’L AFF.* 357, 361 (2000).

63. AVANT ET AL., *supra* note 58, at 12. The point here is that attempting to graft one’s expertise-based authority into a new area may be unsuccessful if one is not an expert in that area. Avant et al. use the example of educational experts making pronouncements about technology standards. *Id.*

64. Maswood, *supra* note 62, at 361.

compliance is sought, but also to create an environment in which that compliance will be easier to obtain.

The Convention attempts in several places to ensure that the World Heritage framework will enjoy the necessary expertise-based authority. As discussed above, the Convention drafters intended the representatives who sit on the Committee to be experts, rather than career diplomats or political appointees.<sup>65</sup> The Convention provides specifically for both the participation of private organizations or individuals, presumably experts, "for consultation on particular problems"<sup>66</sup> and for the consultative bodies mentioned above.<sup>67</sup> The Guidelines are even more specific, providing that:

Committee decisions are based on objective and scientific considerations, and any appraisal made on its behalf must be thoroughly and responsibly carried out. The Committee recognizes that such decisions depend upon:

- a) carefully prepared documentation;
- b) thorough and consistent procedures;
- c) evaluation by qualified experts; and
- d) if necessary, the use of expert referees.<sup>68</sup>

Furthermore, the Convention provides for "equitable representation of the different regions and cultures of the world" on the Committee.<sup>69</sup> The Committee supports this effort by providing funding for representatives from developing states who "are experts in cultural or natural heritage."<sup>70</sup> The intention is to increase the legitimacy of the Committee by ensuring that a range of opinions is represented, rather than only those of the wealthy, northern states, and by increasing the expertise of the Committee.<sup>71</sup>

The second important point about the World Heritage framework's operation is that the Convention does not intend for listings to be punitive. The treaty's text, when discussing the In Danger List, calls for the creation of "a list of the prop-

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65. Convention, *supra* note 15, art. 9.3.

66. *Id.* art. 10.2.

67. *Id.* art. 8.3.

68. *Guidelines*, *supra* note 16, ¶ 23.

69. Convention, *supra* note 15, art. 8.2.

70. *Committee Rules*, *supra* note 19, R. 5.4.

71. Zacharias, *supra* note 32, at 313.

erty appearing in the World Heritage List for the conservation of which major operations are necessary. . . . This list shall contain an estimate of the cost of such operations.”<sup>72</sup> The Guidelines call for the development of “corrective measures” in consultation with the state<sup>73</sup> and demand that a specific and significant portion of the World Heritage Fund be set aside for assistance with the properties on the In Danger List.<sup>74</sup> These provisions, coupled with the presence of the World Heritage Fund, suggest a framework for encouraging conservation via informing member states and providing assistance.<sup>75</sup> Article 7 of the Convention emphasizes this point:

For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.<sup>76</sup>

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72. Convention, *supra* note 15, art. 11.4.

73. *Guidelines*, *supra* note 16, ¶¶ 183–84.

74. *Id.* ¶ 189.

75. Indeed, there is reason to believe that an In Danger listing was initially to be made only at the request of the state party whose property was being listed. See Meeting of Experts to Establish an Int’l Sys. for the Prot. of Monuments, Grp. of Bldgs. & Sites of Universal Interest, Final Rep., July 21–25, 1969, at 17, SCH/MD/4 (Nov. 10, 1969), *available at* <http://whc.unesco.org/en/documents/1532> [hereinafter Meeting of Experts] (noting that the intervention of the international authority should follow a specific request by a Member State); Special Comm. of Gov’t Experts to Prepare a Draft Convention & a Draft Recommendation to Member States Concerning the Prot. of Monuments, Grps. of Bldgs. and Sites, Draft Rep., April 4–22, 1972, at 27, SHC.72/CONF.37/19 (Apr. 21, 1972), *available at* <http://whc.unesco.org/en/documents/1484> [hereinafter Special Comm.]. Australia took this position in the Kakadu dispute. See Aplin, *supra* note 4 (describing Australia’s argument that a site can only be placed on the In Danger List with the state party’s approval). The World Heritage Committee has expressed the opinion that a request need not be made by a state party *at all*, let alone by the party in whose territory the property is located. World Heritage Comm., 6th Sess., Legal Considerations Concerning Inscription of Properties on the List of World Heritage in Danger and the Potential Deletion of Properties from the World Heritage List, March 17–22, 2003, WHC-03/6 EXT.COM/INF.4A, <http://whc.unesco.org/archive/2003/whc03-6extcom-inf4ae.pdf> [hereinafter Legal Considerations]. I discuss this point in greater detail below.

76. Convention, *supra* note 15, art. 7.

This is borne out both in the claims made by the Committee, itself, and in an examination of the sites on the In Danger List.<sup>77</sup>

That said, the Committee is, and the drafters of the Convention were, clearly aware of the potential punitive "naming and shaming" elements presented by the In Danger List. The Guidelines state that "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."<sup>78</sup> There is some linguistic ambiguity here as to whether the point is that the listing will shame the state party into compliance or whether it will act as an alarm bell, alerting a member to previously unnoticed dangers. In their discussions of listing the Kakadu site, however, the Committee expressed this awareness more explicitly:

The delegates stressed the importance of the Convention as a tool of international co-operation for the purposes of heritage conservation, and commented that they did not want to see the prospect of in Danger listing for a World Heritage property interpreted as a threat or punishment.<sup>79</sup>

The fact that the Committee felt the need to specifically state that a listing was not meant to be a punishment clearly indicates that they were aware of the possibility that it could be. Thus, the behavior of the Committee, coupled with the reaction of states to a listing or potential listing, suggests that, while there is ample evidence that the In Danger List was never intended to be punitive, the Committee is aware of the potential punitive effect.<sup>80</sup>

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77. In his discussion of the Kakadu National Park dispute, Aplin cites nine other controversial World Heritage Sites, several of which were never added to the In Danger List Aplin, *supra* note 4, at 171. The delegates of the Committee have, themselves, expressed the worry that the In Danger List would become a punishment. World Heritage Comm., 3rd Extraordinary Sess., Rep. of the Rapporteur, July 12, 1999, at 11–12, WHC-99/CONF.205/5Rev. (Nov. 19, 1999) [hereinafter 3rd Extraordinary Sess.].

78. *Guidelines*, *supra* note 16, art. 177d.

79. 3rd Extraordinary Sess., *supra* note 77, at 11–12.

80. See Zacharias, *supra* note 32, at 327 (discussing the effectiveness of naming and shaming).

### III. THE IN DANGER LISTING

As mentioned, an In Danger listing is generally a designation given at the request of the state party in whose territory the property is located and functions only to provide preservation assistance. There are situations, however, in which the listing may severely limit a *third-party* property owner's ability to use his property. In the sections that follow, I will examine the mechanisms by which an apparently non-binding pronouncement by the Committee undermines the property owner's ability to utilize his property in a manner which would normally be in accordance with domestic law. I will then argue that these listings should be thought of as a regulatory quasi-taking.

Two things should be noted at the outset. First, not every addition to the In Danger List involves private property rights. Private property might be implicated when, for example, an owner's use of his private property is included as a cause for the listing or the Committee states that he must cease using the property before the site will be removed from the List. Second, it is important to keep in mind the interaction between process and outcome in the World Heritage framework. The normative claim that "certain naturally and culturally significant sites should be preserved" seems uncontroversial but involves trade-offs; preservation means that other valuable uses for land must be sacrificed. Thus, insofar as we do not want to over-protect, we want the process to effectively identify those *truly* significant sites, and any critique of the process also calls into question its outcomes. This paper focuses primarily on more *acceptable* outcomes, but improvement of the process should also lead to more *accurate* outcomes.

#### A. *Effects of an In Danger Listing*

Consider the following scenario: the World Heritage Committee is notified, either by a state party or an NGO,<sup>81</sup>

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81. The Convention, itself, does not specifically authorize the involvement of NGOs in monitoring the status of Heritage Sites. The Guidelines, however, anticipate their involvement. *See, e.g., Guidelines, supra* note 16, ch. IV.A (providing for situations where "the Secretariat receives information . . . from a source other than the State Party concerned . . ."). Alternatively, the state party might notify the Committee that it has authorized "new constructions which may affect the outstanding universal value of the property," without taking any position on the propriety or legality of the construction. *Id.*



that a private land owner whose property is located adjacent to a World Heritage site is preparing to engage in an activity, possibly a construction or mining project, that could have a deleterious effect on the World Heritage site. The Committee then votes to send an investigation team composed of experts,<sup>82</sup> which visits, conducts a study, and reports on the condition of and dangers to the property. Based on this report, the Committee votes to add the site to the In Danger List.<sup>83</sup> The Committee does not seize the private property on which the deleterious activity is being conducted. Rather, by placing the property on the In Danger List, the Committee exerts pressure on the private actor, and does so with knowledge of the potential effects.<sup>84</sup> Through the World Heritage framework, the Committee exerts pressure via a variety of means, each of which I now discuss in turn.

### 1. *Pressure from the Property Owner's State*

First, the Committee places pressure on the private actor's state. The listing may do this directly: criticism by an international body, particularly one which commands some measure of expertise-based authority, may simply be a source of embarrassment to a government. It may also do so indirectly either by influencing the state's reputation for compliance or by creating soft law, which, under certain circumstances, may harden.

Insofar as a state values the benefits of ongoing international cooperation, its reputation is important. A state with a reputation of following through on the international obligations it undertakes and the treaties it signs will be seen as trustworthy by other states and thus will find it easier to enter into advantageous agreements in the future.<sup>85</sup> There is a certain amount of agreement among scholars that, to some extent, this desire for a positive reputation may motivate state treaty compliance.<sup>86</sup> By signing the Convention, states party recog-

82. *Guidelines*, *supra* note 16, chs. IV.A, IV.B.

83. *Id.* ch. IV.B.

84. *See infra* Part II, in which I discuss the Committee's awareness of the potentially punitive nature of an In Danger listing.

85. ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 105-06 (1984).

86. Even scholars critical of the reputational theory of compliance acknowledge that it does play some role. *See, e.g.*, Rachel Brewster, *Unpacking*

nize “that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . belongs primarily to that State” and agree that “[i]t will do all it can to this end, to the utmost of its own resources.”<sup>87</sup> Thus, from a simplified perspective, by allowing its World Heritage sites to deteriorate or to face threats that would place them in danger, a state is failing to live up to its treaty obligations and damaging its reputation.

The reputation picture, however, is somewhat more complex. Because the costs of adhering to treaties may vary depending on the subject of the treaty, and because the value of compliance may likewise vary from treaty regime to treaty regime, a state may have differing reputations in connection with different regimes or treaties.<sup>88</sup> In other words, non-compliance with the World Heritage Convention may not hurt a state which seeks to join a trade treaty unless the reasons for non-compliance with the Convention implicate some element of the new treaty.

In evaluating the strength of the reputational theory, one must confront the additional factor that in many cases it is governments, and not states, that gain a reputation for compliance or non-compliance.<sup>89</sup> This may shorten the time horizon; a government may not worry about a damaged reputation after it leaves office.<sup>90</sup> This also implies that non-compliance may be understood by other states, not as a signal of general disregard for the rule of law, but as a signal of changing policy priorities.<sup>91</sup>

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*the State's Reputation*, 50 HARV. INT'L L.J. 231, 269 (2009) (“Reputational concerns obviously can promote compliance but this argument has to be used with far more care.”); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S113 (2002) (“To say that the power of reputation to enforce compliance is usually modest is no more a dismissal of reputation than the claim that many cooperative agreements are relatively shallow is a dismissal of cooperation.”).

87. Convention, *supra* note 15, art. IV.

88. Downs & Jones, *supra* note 86, at S97.

89. Brewster, *supra* note 86, at 249.

90. *Id.* at 250.

91. Brewster offers the example of breaches of trade agreements signaling an increased interest in environmental policies, and thus an increased potential for compliance with environmental agreements. *Id.* at 260.

The Committee may also place indirect pressure on the private actor's state by issuing pronouncements that are incorporated into the decisions of other international or intergovernmental bodies. While there may not be a direct consequence to a listing in the sense that an In Danger listing may not have any specific penalties, an In Danger listing may be considered by other intergovernmental bodies in ways that have concrete consequences. Where this occurs, the soft law created by the Committee "hardens." The World Bank, for example, occasionally considers the presence of World Heritage sites in its funding decisions.<sup>92</sup> An In Danger listing might compromise a state's ability to secure funding from the World Bank. Thus, an In Danger listing has the potential to influence the decisions of other intergovernmental bodies in ways that can be costly for non-compliant states party.

While the consequences of failure to live up to an obligation should not be overstated, there is evidence of a sense of obligation on the part of the state, or at least a desire not to lose face.<sup>93</sup> Nepal's efforts to stave off a Committee decision to place the Kathmandu Valley on the In Danger List could be an example.<sup>94</sup> Concern in 1992 over the state of the preservation

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92. WORLD BANK, ENVIRONMENTAL ASSESSMENT SOURCEBOOK (1999), ch. 3, ¶ 6, available at <http://siteresources.worldbank.org/INTSAFEPOL/1142947-1116497775013/20507408/Chapter3SocialAndCulturalIssuesInEA.pdf> ("At the earliest stages of project identification and preparation, it is incumbent on the task manager, with advice and operational support provided by the Regional Environment Division (RED) and the Environment Department (ENV) to alert governments to potential cultural property issues. A first step would be to check the list of Unesco [sic] World Heritage Sites . . ."); WORLD BANK, *OP 4.11- Physical Cultural Resources*, ¶ 3, n. 4, in WORLD BANK OPERATIONAL MANUAL (2006), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20970737~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> ("The impacts on physical cultural resources resulting from project activities, including mitigating measures, may not contravene either the borrower's national legislation, or its obligations under relevant international environmental treaties and agreements. . . . This includes the Convention concerning the Protection of the World Cultural and Natural Heritage, 1972").

93. Aplin, *supra* note 4, at 166.

94. See generally World Heritage Comm., Compilation of World Heritage Comm. and Bureau Decisions Taken Between 1992 & 2003 Concerning Kathmandu Valley World Heritage Property, Nepal, May 3-7, 2004, <http://whc.unesco.org/archive/ComDecisions1992-2003.pdf>.

of cultural sites in the Kathmandu Valley led to an ICOMOS report in 1993 and the suggestion by some Committee members that the site be added to the In Danger List.<sup>95</sup> The next decade consisted of a series of yearly reports, expressions of concern, and assurances by the Nepali delegate that listing the Kathmandu Valley on the In Danger List was unnecessary. A 2000 Committee report states,

[The] Committee, recalling that it had deferred the inscription of Kathmandu Valley on the List of World Heritage in Danger numerous times, expressed its disappointment that the State Party was not convinced of the constructive objectives of the List of World Heritage in Danger, as a mechanism for strengthening further political commitment and mobilizing international technical cooperation and greater awareness at both national and international levels.<sup>96</sup>

It was another two years before the Kathmandu Valley was added to the In Danger List in 2004.<sup>97</sup>

Of course, it is possible that Nepal had other motives besides saving face. Two possibilities, however, can be ruled out. It is unlikely that the Nepali Government was worried that a listing would undermine development plans; the Report of the World Heritage Committee's twenty-fifth session suggests that protected buildings were being demolished but then *rebuilt*, only in an "inappropriate" manner, and that historical buildings were frequently not demolished but given improper additions.<sup>98</sup> Second, it is unlikely that Nepal was worried about a loss of funding; the Committee had indicated its intent to provide financial assistance.<sup>99</sup>

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95. World Heritage Comm., Rep. of the Rapporteur, 17th Sess., June 21–26, 1993, ¶ VIII.3, WHC-93/CONF.002/2 (Aug. 9, 1993).

96. World Heritage Comm., Rep. on its 24th Sess., Nov. 27–Dec. 2, 2000, ¶ VIII.3, WHC-2000/CONF.204/21 (Feb. 16, 2001) [hereinafter Rep. on its 24th Sess.].

97. Decision Adopted by the 27th Sess. of the World Heritage Comm., June 30–July 4, 2004, WHC-03/27.COM/24 (Dec. 10, 2003).

98. World Heritage Comm., Rep. on its 25th Sess., Dec. 11–16, 2001, ¶ VIII, WHC-01/CONF.208/24.

99. "The Committee further recommended that other States Parties be engaged in the conservation and monitoring effort by providing technical and financial assistance to the concerned authorities of His Majesty's Gov-

In the Canadian Cheviot Mine dispute, too, there is evidence of a sense of obligation. In 1997, prior to approval of a mining project, a joint review was conducted by the Alberta Energy and Utilities Board and the Canadian Environmental Assessment Agency. During the review, Parks Canada officials stated:

Parks Canada was concerned with potential impacts on the Park, which is identified as a world heritage [sic] site, from the Cheviot Coal Project. Parks Canada indicated that their primary concern with the proposed Cheviot mine project lies in the fact that any deterioration in the regional ecosystem has the potential to impact Parks Canada's ability to meet its mandate for ecological integrity within the Park.<sup>100</sup>

In a 2000 joint review, the Canadian Department for the Environment echoed this sentiment.<sup>101</sup> It is noteworthy that Parks Canada made mention of the site's World Heritage designation in the context of its review. This indicates that the obligations inherent in the World Heritage status were part of the agency's deliberation.

## 2. *Pressure from Private Actors*

By listing a site, the Committee places indirect pressure on the private actor, primarily by providing support for domestic and international groups opposing his or her activities. One way to examine this indirect pressure is via the framework used by Beth Simmons in her analysis of human rights treaties and the mobilization of domestic actors. Simmons argues that

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ernment of Nepal. In this regard, the Committee decided to consider reserving an appropriation within the 2001 International Assistance budget, to finance specific time-bound activities related to the protection of the urban fabric within the World Heritage site." Rep. on its 24th Sess. *supra* note 96, ¶ VIII.32.

100. EUB-CEAA Joint Review Panel, Decision 2000-59, Rep. on Cheviot Coal Project, Mountain Park Area, Alta., App. 1, at 119 (June 1997), *available at* <http://www.ercb.ca/docs/documents/decisions/2000/2000-59-app1.pdf>; Affolder, *supra* note 3, at 345.

101. See EUB-CEAA Joint Review Panel, Decision 2000-59, Rep. on Cheviot Coal Project, Mountain Park Area, Alta., at 141, (June 1997) *available at* <http://www.ercb.ca/docs/documents/decisions/2000/2000-59.pdf> (noting that "the federal government on a number of occasions indicated its concern that meeting [its environmental obligations] was at some risk").

the effective mobilization of individuals is a function of the value they place on the cause and the probability of success.<sup>102</sup> Under certain circumstances, she argues, treaties raise the expected value of mobilization and increase its chance of success.<sup>103</sup> While not treaties, the same may be said about listings by the World Heritage Committee.

A treaty, according to Simmons, increases the expected value of mobilization by altering the way in which individuals understand their interests.<sup>104</sup> For example, the Convention on the Elimination of All Forms of Discrimination against Women encourages women to view themselves as equal to men and deserving of equal opportunities.<sup>105</sup> While the potential for radical issue reframing by the World Heritage Convention should not be overstated, the Convention does more than simply classify nominated sites as important; it aims to frame such sites as “world heritage of mankind as a whole,” the destruction of which “constitutes a harmful impoverishment of the heritage of all the nations of the world.”<sup>106</sup> Thus, classification as a World Heritage site encourages people to think of a site not just as locally significant, but as important to the whole of mankind.

With respect to increasing the chances of the success of mobilization, Simmons argues that treaties offer intangible benefits to a movement: specifically, they have the effect of legitimizing a movement’s goals.<sup>107</sup> With respect to the World Heritage Convention, a listing legitimizes and reinforces the claims of those opposing the private landowner’s activity.<sup>108</sup> A

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102. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 136 (2009).

103. *Id.* at 138.

104. *Id.* at 139.

105. *Id.* at 203 (arguing that the Convention on the Elimination of All Forms of Discrimination Against Women has improved the legitimacy of women’s demands for equality).

106. Convention, *supra* note 15, pmb1.

107. SIMMONS, *supra* note 102, at 146–47. Simmons identifies other advantages as well; however, these are less relevant to the Convention.

108. Environmental groups that discuss the conservation of Kakadu National Park frequently mention its World Heritage status. *See, e.g.*, Austl. Conservation Found., *ACF- Northern Australia*, ACF ONLINE, [http://www.acfonline.org.au/default.asp?section\\_id=7](http://www.acfonline.org.au/default.asp?section_id=7) (last visited Jan. 13, 2011); Austl. Conservation Found. *Traditional Owner’s Generous Offer to Kakadu*, ACF ONLINE (Jun. 7, 2010), [http://www.acfonline.org.au/articles/news.asp?news\\_id](http://www.acfonline.org.au/articles/news.asp?news_id)

decision by the World Heritage Committee can have a legitimizing effect by adding the support of a purportedly neutral third party to the conservation group's cause.<sup>109</sup> For example, the Australian Conservation Foundation, a NGO, cited a 1998 Committee assessment mission which disapproved of mining in Kakadu National Park.<sup>110</sup> Not only was the assessment mission considered persuasive enough to cite even though Australian Government pressure prevented the World Heritage Committee from ever actually listing Kakadu National Park as endangered, the assessment mission was also cited in

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=2891; *The Year in Review and the Year Ahead*, ENVIRONMENT (Env't Cntr. N. Territories, Darwin, Autl.), Dec. 1999-Jan. 2000, at 1, available at [http://www.ecnt.org/pdf/news\\_2000\\_Jan.pdf](http://www.ecnt.org/pdf/news_2000_Jan.pdf). Conservation newsletters discussed the status of the listing. See, e.g., Jim Green, *Jabiluka: World Heritage Nightmare for Government*, GREEN LEFT WEEKLY, Mar. 3, 1999, <http://www.greenleft.org.au/node/20164>; Jim Green, *World Heritage Reports Oppose Jabiluka*, GREEN LEFT WEEKLY (May 26, 1999), <http://www.greenleft.org.au/node/19573>; *Kakadu Victory: Uranium Miner Backs Down*, GREEN LEFT WEEKLY (Mar. 29, 1995), <http://www.greenleft.org.au/node/9593>; Andrew Nette, *Australia Using "Dirty Tricks" to Block Criticism of Controversial Uranium Mine*, ALBION MONITOR (Mar. 8, 1999) <http://www.albionmonitor.com/9903a/copyright/ozdirtytricks.html>. The Gundjehmi Aboriginal Corporation, which represents the interests and rights of the Mirarr, prominently features the Kakadu's World Heritage listing on its website. *World Heritage Country*, THE GUNDJEHMI ABORIGINAL CORPORATION, <http://www.mirarr.net/heritage.html> (last visited Jan. 13, 2011). Mentions of the World Heritage status of Yellowstone by conservation groups are more difficult to locate on the internet, possibly because the mining dispute there occurred in the mid-1990s, when internet usage was less common and generally less sophisticated. For one example, see *Gold in Them Thar Hills*, EARTHJUSTICE.ORG, <http://earthjustice.org/features/gold-in-them-thar-hills> (mentioning the role of the World Heritage Committee in opposing the opening of mines near Yellowstone). For other mentions of activist groups' use of sites' World Heritage listings, see EARTHWORKS & OXFAM AMERICA, *DIRTY METALS: MINING, COMMUNITIES, AND THE ENVIRONMENT* 14-15 (2004), available at <http://www.nodirtygold.org/pubs/DirtyMetals.pdf>. (describing several World Heritage sites that remain vulnerable to mining); Ryland Nelson, *UNESCO Warns of Threats to Rocky Mountain Wildlife Connectivity*, OUR FERNIE COMMUNITY CO-OP (Mar. 07, 2010, 11:56 AM), <http://www.ourfernie.com/unesco-warns-threats-rocky-mountain-wildlife-connectivity>; and Paul Rauber, *Endangered Danger List*, SIERRA MAGAZINE, July/Aug. 2003, available at <http://www.sierraclub.org/sierra/200307/lo11.asp> (describing the role of UNESCO's In Danger List in preventing harm to World Heritage sites).

109. The issue of the WH Committee's status as a neutral, expert third-party was discussed briefly above, in the context of the advisory bodies. I discuss it in greater detail below.

110. *Traditional Owner's Generous Offer to Kakadu*, *supra* note 108.

conjunction with the Fox Report, an official Australian governmental report on mining.<sup>111</sup> The Committee's assessment, then, was placed on the same level as the government's official report. Additionally, a listing can amplify the claims of a conservation group, demonstrating that *even the international community is appalled by what's going on.*<sup>112</sup> Finally, a listing is accompanied by a recommended program of corrective action, thereby providing a benchmark and potential model for legislation that private actors can use to pressure governments.<sup>113</sup>

An In Danger listing, then, will have several effects on the landowner mentioned above. Once the site is added to the In Danger List, the private landowner faces the prospect of a strengthened naming and shaming campaign by NGOs, which may damage his reputation. He may find that, once labeled "the business that destroyed a World Heritage site," he will be unable to sell his product.<sup>114</sup> Second, he may face a loss of

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111. See generally *The Fox Report*, PARLIAMENT OF AUSTRALIA: SENATE (May 8, 2003), [http://www.aph.gov.au/Senate/committee/uranium\\_ctte/report/c01-1.htm](http://www.aph.gov.au/Senate/committee/uranium_ctte/report/c01-1.htm) (discussing the Fox Report's methodology, scope, and recommendations).

112. An article in the National Parks Traveller provides another example, stating that "even the United Nations took a stand by pointing to the proposed mine as the reason for placing Yellowstone on its list of 'In Danger' World Heritage Sites." Kurt Repanshek, *Land Deal Closes The Book On the New World Mine Proposed on Yellowstone National Park's Doorstep*, NATIONAL PARKS TRAVELER (June 15, 2010 4:54 PM), <http://www.nationalparkstraveler.com/2010/06/land-deal-closes-book-new-world-mine-proposed-yellowstone-national-parks-doorstep6045>.

113. *Guidelines*, *supra* note 16, ch. IV.B.

114. There are numerous examples of lobbying efforts based on damage or potential damage to a World Heritage site that could lead to boycotts in the future. See *Bulgaria: Bansko Sliding Down a Slippery Slope*, TOURISM CONCERN (May 6, 2009), <http://www.tourismconcern.org.uk/index.php?mact=news,cntnt01,detail,0&cntnt01articleid=119&cntnt01returnid=79> (describing local opposition to a ski resort in Bulgaria near a World Heritage site); *Ethical Tour Operators Group Challenges Dubious Tourism Developments*, TOURISM CONCERN (Aug. 2, 2010), <http://www.tourismconcern.org.uk/index.php?mact=news,cntnt01,detail,0&cntnt01articleid=181&cntnt01returnid=79> (describing other successful lobbying efforts); *Protea Withdraws Application to Build Hotel beside World Heritage Site*, TOURISM CONCERN (Apr. 15, 2010) <http://www.tourismconcern.org.uk/news/171/262/Protea-withdraws-application-to-build-hotel-beside-World-Heritage-site.html> (discussing a hotel developer's withdrawal of an application to build near a World Heritage site due to lobbying from environmental interest groups); Stuart Pimm, *The Call to Boycott Madagascar's Rosewood and Ebony Explained*, NATIONAL GEOGRAPHIC NEWSWATCH (Oct. 6, 2009), <http://blogs.nationalgeographic.com/blogs/>



support from other businesses or investors. The threat of the loss of business partners or investors is not an empty one; in 2003, a number of the world's largest mining companies signed on to the "No Go Pledge," promising not to explore or mine in World Heritage properties.<sup>115</sup> The pledge has been followed by similar promises by such companies as Royal Dutch Shell and Goldman Sachs, which committed to "not knowingly finance extractive projects or commercial logging in World Heritage sites."<sup>116</sup> Third, the property owner may face a decrease in state support or outright state opposition as his government faces the pressures mentioned above. Thus, permits may take longer to acquire or be subject to greater scrutiny, the property owner may face investigation, and his costs may increase as he is forced to litigate. Finally, he may find himself trapped with land that has become unusable or forced to sell the land at a loss.

The point, then, is that by moving a site to the In Danger List, the World Heritage Committee exerts pressure on the state to interfere with the private actor and reinforces the actions of domestic and international groups opposing the private action. As a result, because of the loss of business partners, damage to reputation, government opposition, and other factors, the cost to the private actor may rise so substantially that he cannot utilize his private land for his chosen project.

### B. *In Danger Listings as a Taking*

One way to view the operation of an In Danger listing is as a regulatory quasi-taking. Guidance can be taken from U.S. takings jurisprudence. Under U.S. law, Congress and the state legislatures have significant powers to regulate the use of land, as evidenced by the numerous zoning and environmental protection laws. The U.S. Supreme Court has held, however, that if regulation "goes too far" it will be recognized as a regulatory

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news/chiefeditor/2009/10/madagascar-forest-crisis.html (discussing calls for consumers to boycott Malagasy wood, which is harvested near World Heritage sites).

115. Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*. 24 PACE ENVTL. L. REV. 35, 59 (2007).

116. *Id.* at 60.

taking.<sup>117</sup> The doctrine is loosely defined; the Court has not crafted a set formula for determining when a regulation has gone “too far.”<sup>118</sup> In general, however, the doctrine rejects the idea that, in order for the government to have “taken” property, it must physically occupy or seize title to the property, and posits instead that significant interference with property rights may constitute a taking as well.<sup>119</sup>

At first glance, an In Danger listing closely resembles a regulatory taking. By listing a site as In Danger, the Committee does not seize title, nor does it force the state to do so; however, it exerts both direct and indirect pressure on the private property owner. This pressure may ultimately prevent the owner from effectively using his property. Like in U.S. regulatory takings cases, the goal of the official action is not necessarily to deprive the owner of the economic benefit of his property, but this may be the practical effect.

A closer examination, however, shows that In Danger listings differ from regulatory takings in two key ways. First, there is a real difference between the direct state action involved in regulatory takings cases and the pressure exerted by the Committee. Second, the actions of the Committee are inevitably one of many different factors which coalesce to place pressure on the landowner.

With respect to the difference between state action under domestic takings doctrine and the actions of the Committee, one might argue that the actions taken by the Committee are no different than the naming and shaming campaign private NGOs frequently undertake. If the World Heritage Committee is engaging in a taking, one might claim, then so is every NGO that tries to shame a private actor into acting.

This claim, though, ignores key differences between the actions of the World Heritage Committee and a standard NGO. First, the sense of legal obligation imposed by the Committee is important. Because the World Heritage Convention is a treaty, ratified by the party-states, the pronouncements of the Committee carry greater legal weight than those of an NGO. Calls by an NGO for a boycott of a given company do

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117. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

118. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

119. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002).

not, generally, give rise to a sense of obligation on the part of the state. The World Heritage Convention, by contrast, does. Second, as discussed above, the Committee and its advisory bodies, ICCROM, ICOMOS, and IUCN, are intended to be impartial, basing their decisions on objective evidence.<sup>120</sup> NGOs, in contrast, tend to be cause-oriented groups. They do not generally claim to be neutral, third-party, experts in a dispute;<sup>121</sup> nor does their ability to meet their goals depend on such a stance.<sup>122</sup> Just as important, a cause-oriented NGO will be *expected* to support or oppose a given issue. Thus, their statements may do little to alter the debate, whereas the World Heritage Committee, when perceived as neutral, may be able to do so.

Nevertheless, the actions of the Committee are, and must be, indirect; it cannot create legal obligations which act directly on domestic actors. The Convention is careful to preserve the sovereignty of its signatories. Article 6 of the Convention demonstrates this balance between obligation and sovereignty:

*Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage . . . is situated, and without prejudice to property rights 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.*<sup>123</sup>

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120. See *supra* Part II.

121. Earth First!, an environmental interest group whose slogan is "No Compromise in the Defense of Mother Earth!," provides a rather extreme example. See *About Earth First!*, EARTHFIRST.ORG, <http://www.earthfirst.org/about.htm> (last visited on Jan. 15, 2011). The World Wildlife Fund states, "WWF's mission is the conservation of nature." *Who We Are*, WORLD WILDLIFE FUND, <http://www.worldwildlife.org/who/index.html> (last visited on Jan. 15, 2011). The NRDC states, "The Natural Resources Defense Council's purpose is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends." *About NRDC: Mission Statement*, NRDC.ORG, <http://www.nrdc.org/about/mission.asp> (last visited on Jan. 15, 2011).

122. There are, of course, exceptions. The Union of Concerned Scientists claims that it "stands out among nonprofit organizations as the reliable source for independent scientific analysis." *About Us*, UNION OF CONCERNED SCIENTISTS, <http://www.ucsusa.org/about/> (last visited on Jan. 15, 2011).

123. Convention, *supra* note 15, art. 6.1 (emphasis added).

The Convention couches language creating a cooperative, international obligation to protect shared heritage in language explicitly protecting sovereignty. Thus, the Committee cannot create domestic legal rules; listings occupy a middle ground between the actions of private actors, such as NGOs, and those of sovereign state actors.

The second difference between a domestic taking and an In Danger listing is that the latter factors into much broader disputes between landowners, local and national governments, NGOs, and others; when there are instances of World Heritage Committee takings-like behavior, it is usually in the context of a larger dispute. For example, when the Yellowstone dispute occurred, there was takings-like behavior by the World Heritage Committee, but other factors were also present: President Clinton was attempting to use the mine dispute to play to his base, national politicians attempted to use the issue to gain leverage, and the local citizens were fighting over whether they wanted a tourist or a mining economy.<sup>124</sup> As a result, it is not possible to isolate a World Heritage regulatory quasi-taking from other influences when one does occur at all; the Committee's actions may not be the sole factor leading to the landowner's decision to abandon his plans.

Finally, it might be argued that In Danger listings are no different than any other set of regulations: if In Danger listings are regulatory quasi-takings, then so are all national and international regulations. This misses an important distinction between means and results in takings law. In *Lucas v. South Carolina Coastal Council*, for example, David Lucas sued the South Carolina Coastal Council, a regulatory body charged with preserving the South Carolina coastline, when a law they were assigned to enforce prevented him from building on two residential lots he owned.<sup>125</sup> The Court agreed with Lucas' claim that, if the regulations effectively extinguished all of his property's value, he was entitled to compensation regardless of the

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124. See Brooke, *supra* note 10 (describing conflicting local opinions in the Yellowstone dispute); Timothy Egan, *A New Populist; Idaho Freshman Embodies G.O.P.'s Hope and Fear in '96*, N.Y. TIMES, Jan. 15, 1996, at A.1 (describing the role the Yellowstone dispute played in national politics); Todd S. Pardum, *Clinton Unveils Plan to Halt Gold Mine Near Yellowstone*, N.Y. TIMES, Aug. 13, 1996, at A.10 (describing President Clinton's involvement in the Yellowstone dispute).

125. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

legislature's motivations.<sup>126</sup> In that case, there was nothing about the regulations, the means, themselves, which would have made them a regulatory taking; rather, it was the effect on Lucas' property, the result of those means, which would have made the Costal Council's actions into a regulatory taking. Thus, in a sense, it is possible that any set of regulations could be a regulatory quasi-taking, but such will depend on whether they sufficiently interfere with private property rights.

These issues lead to two conclusions. First, a more nuanced view of an In Danger listing should be taken. The fact that listings lack the "hardness" characteristic of domestic law does not mean that a listing has no effect. A listing may not be a full regulatory taking, but the fact remains that the Committee is, at the very least, creating soft law which has a real impact on the property owner's rights, thus the term "regulatory quasi-taking." Second, the fact that a regulatory quasi-taking is not a full-fledged seizure of title should not mean that the listings have no effect at all and should thus be left unregulated. Some measure of proportionality is necessary; for a regulatory quasi-taking, a softer taking than the domestic version, we need a set of controls which are somewhat less demanding than constitutional prohibitions and full judicial review.

#### IV. PROBLEMS ARISING OUT OF THE REGULATORY QUASI-TAKING

Despite the Committee's ability to exercise a regulatory quasi-taking power, there are very few procedural and no structural checks on its exercise. This gives rise to at least two major problems. First, insofar as private property and private property rights are valuable, it is problematic that the Convention framework allows for regulatory quasi-takings but provides little in the way of protections for those private property rights. Second, because there are no checks on the takings power and because a taking may offend local values, the lack of procedure has the potential to ultimately undermine the effectiveness of the entire regime. There are two reasons for this. By notifying the Committee of a potential danger to a World Heritage site and then choosing not to oppose an In Danger listing, a national executive could effectively ratchet up the pres-

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126. *Id.* at 1016.

sure on a private landowner without having to engage domestic administrative, legislative, or judicial checks. In this way, the Convention appears to be a political tool. Additionally, with no check on the Committee's power, and no requirement that it explain or defend its decisions, there is no way for observers to ensure that such decisions are legitimate.

#### A. *Aggravating Factors*

These two problems must be assessed in terms of two aggravating factors.<sup>127</sup> First, the listing of a site is not necessarily a consensus-based decision. While the issue is contentious, it is likely that the Committee has the power to list a site without the owner state's consent, effectively overruling the state. The reports leading up to the drafting of the Convention, itself, seem to indicate a preference for listing only with state approval. The Final Report of the Meeting of Experts to Establish an International System for the Protection of Monuments, Groups of Buildings and Sites of Universal Interest in 1969, states:

The intervention of the international authority should follow a specific request by a Member State in difficulties over protecting immovable cultural property of exceptional interest. The internal authority might consider intervening, however, to take charge of monuments and groups of buildings of outstanding value which for political or religious reasons were being neglected by the authorities of the country in which they stood.<sup>128</sup>

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127. Bodansky points out these two factors with respect to international environmental agreements. He observes that two problems will probably undermine the legitimacy of such agreements:

First, the coming generation of environmental problems will probably require more expeditious and flexible lawmaking approaches, which do not depend on consensus among states. Second, to the extent that international environmental law is beginning to have significant implications for non- or substate actors (who have not consented to it directly), rather than just for the relations among states, state consent may for them have little legitimating effect.

Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 606 (1999).

128. Meeting of Experts, *supra* note 75, at 72.

But, upon finding that there are few sites being neglected deliberately, the report states that voluntary aid is most appropriate and "must not lead to any kind of interference in the domestic affairs of the State or to any form of internationalization."<sup>129</sup> A later report includes a draft of the treaty, which provides that "[t]he inclusion of a property in these lists requires the consent of the State Party concerned. . . . [A] request by the latter will be necessary before a property may be included in the 'List of World Heritage in Danger.'"<sup>130</sup> That this language was dropped from the final treaty could suggest that the drafters rejected the idea altogether.

The final Convention, however, is ambiguous, and the Guidelines seem to lean away from mandatory state consent. In the article discussing the In Danger List, the 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. . . . The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately."<sup>131</sup>

No mention is made of state consent. The Convention does not specify who must make the request for assistance, and, in any case, the "urgent need" clause obviates the request in some situations. The Guidelines provide only that a decision to list a site as endangered requires a two-thirds vote<sup>132</sup> and relegate input of the state party to the same paragraph as input from the advisory bodies and other organizations.<sup>133</sup>

The question of state consent was unsettled as late as 1999 when it arose in the context of the Kathmandu Valley dispute.<sup>134</sup> The UNESCO legal advisor to the Committee issued

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129. *Id.*

130. Special Comm., *supra* note 75, at 27.

131. Convention, *supra* note 15, art. 11.

132. *Guidelines*, *supra* note 16, ¶ 186.

133. *Id.* ¶ 185.

134. World Heritage Comm., Rep. of the Rapporteur, 23rd Extraordinary Sess., Nov. 26–27, 1999, ch. III, WHC-99/CONF.208/8 (Nov. 28, 1999) *available at* <http://whc.unesco.org/archive/1999/whc-99-conf208-8e.pdf>.

an opinion regarding the question in 2003. While not binding, the opinion states that the Convention does not itself require a state to request or consent to the addition of one of its properties to the In Danger List.<sup>135</sup>

The second aggravating factor is the impact of the Committee's decisions to list a site on non-state actors. In the past, international law dealt primarily with states, and thus the decision by a state to bind itself in a treaty usually affected only the state itself.<sup>136</sup> The World Heritage Convention is different; a decision on the part of a state to bind itself by ratifying the Convention has the potential to bind individual citizens. As discussed above, a listing and the resulting naming and shaming campaign can have a significant impact on a private landowner's ability to use his land. The problem here might be expressed as one of attenuation. We have no problem with individuals consenting to be governed by their state, or with states consenting to bind themselves. The additional step, though, of the state consenting to allow a third body to bind its citizens seems illegitimate; the relationship between the private actor and the body doing the regulating becomes too attenuated. Indeed, the attenuation problem may be compounded by the problem of a lack of state consent; if the state does not consent and the individual has only consented to governance by the state then there exists a legitimacy deficit.

### B. *Private Property*

To the extent that we think private property and private property rights are valuable, then we would expect to see some effort to grapple with their role in a given legal framework. A comparison to U.S. takings law is again helpful; despite the somewhat confused, ad hoc nature of U.S. takings jurisprudence, U.S. courts have long tried to balance the need for regulation with protecting the rights of property owners. The Convention framework, however, allows for regulatory quasi-takings but provides little protection for those rights. There is thus a stark contrast between the way in which U.S. courts approach the protection of property rights and the lack of protection afforded by the Convention.

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135. Legal Considerations, *supra* note 75, at 72.

136. Bodansky, *supra* note 127, at 610.



Not only are property rights enshrined in the U.S. Constitution, U.S. courts have struggled to find a way to adequately protect them while still allowing for legislative and regulatory flexibility. When attempting to discern whether a given regulation or regime is so restrictive as to constitute a taking, U.S. courts generally rely on "essentially ad hoc, factual inquiries."<sup>137</sup> The Supreme Court has been unable, and unwilling, to create a set formula for regulatory takings.<sup>138</sup> Instead, it examines a number of factors to determine whether a taking has occurred;<sup>139</sup> that is, it will look at the facts of a specific situation to determine whether the regulation has gone far enough that it constitutes a taking.<sup>140</sup> In past cases, these factors have included the economic impact of the government regulations, the interference with "investment backed expectations," the character of the government action,<sup>141</sup> or whether government action interfered with "interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property.'"<sup>142</sup> The number and variety of issues considered demonstrates the Court's willingness to take a difficult path; rather than create a rigid, set rule that might not protect property rights in some instances, it has chosen careful examination of the specific factors in any given case.

Despite the reliance on multi-factored balancing in most situations, the Supreme Court has outlined some situations in which a regulatory regime is designed such that taking will automatically be found. In these situations, the Court has essentially stated that property rights are so important that there is no reason for regulation which can override the fact that an owner has been deprived of all use of his property. In *Lucas v. South Carolina Coastal Council*, the Court stated that when a landowner must "sacrifice *all* the economically beneficial uses in

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137. *Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978).

138. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

139. *Tahoe-Sierra*, 535 U.S. at 326.

140. The idea that a regulation may go so far that it constitutes a taking was first laid down in *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (laying down the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

141. *Penn. Cent. Transp. Co.*, 438 U.S. at 124.

142. *Id.* at 125.

the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>143</sup> When a governmental action results in the permanent occupation of property, even if a minor occupation, a taking has occurred.<sup>144</sup>

In contrast to the struggle of U.S. courts to protect private property rights while still preserving legislative flexibility, the World Heritage Guidelines provide that in determining whether to list a site as in danger, “the Committee may. . . decide to send a mission of qualified observers from the relevant Advisory Bodies or other organizations.”<sup>145</sup> Aside from a two-thirds majority vote, there are no other procedural requirements and no requirements that an affected third party be considered.

While a duplication of a U.S.-like litigation system for protecting property rights within the framework of the Convention is wholly impractical, as discussed below, and probably unnecessary, a comparison between the U.S. system and the World Heritage system serves to highlight the lack of protections afforded to property rights under the World Heritage Convention. While proving the inherent value of private property is far beyond the scope of this paper, insofar as property rights are considered inherently valuable, they should be afforded some level of protection.

### C. *Undermining Regime Effectiveness*

As discussed, the Convention relies on being perceived as a neutral, expert third party in order to gain compliance. The lack of a check on the Committee’s power lends credibility to claims that the Committee is acting in an arbitrary or politically-driven manner or that its decisions are grounded on incorrect evidence. Should the Convention come to be seen as illegitimate, or as a tool of the executive or foreign powers, its judgments will cease to be accepted on authority. Without an alternative enforcement mechanism, the Convention will become toothless.<sup>146</sup>

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143. *Id.* at 1019.

144. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982).

145. *Guidelines*, *supra* note 16, ¶ 184.

146. It should be kept in mind that enforcement, strictly speaking, is not the goal of the treaty. It aims to facilitate conservation—not to force it.

One way in which the authority could be undermined is if the Convention were actually to be used in a purely political manner. Domestic regulatory and taking powers are often subject to judicial review or legislative veto.<sup>147</sup> The use of legislation to effect a taking will be subject to the checks inherent in the legislative process, as well as judicial review. Administrative actions will similarly be subject to judicial oversight and legislative overruling. The World Heritage Convention contains none of these; thus, the de facto taking power introduces the ability for states to use the Convention as a tool to circumvent domestic administrative, legislative, and judicial checks. Rather than affecting a taking through domestic channels, a national executive could pursue his goals through the Convention. He might choose to notify the Committee, specifically, of the potential impact of the private landowner's project or could mention the issue in one of the required periodic reports.<sup>148</sup> An executive could then actively advocate an In Danger listing, or at least choose not to oppose a listing. This would effectively ratchet up the pressure on a private landowner without requiring the executive to engage administrative, legislative, or judicial checks.

Jeremy Rabkin, in his article, "The Yellowstone Affair," claims that the Yellowstone dispute represents exactly this type of behavior. He argues that "the U.S. government, rather than rely on its own legally mandated procedures, readily cooperated in this effort to use an international short-cut to influence the decision of a domestic policy dispute."<sup>149</sup> Rabkin is partially correct; the Clinton Administration certainly tried to use the World Heritage Convention to increase its leverage, though the solution eventually reached was largely domestic. The Administration made no secret of its opposition to the

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147. See generally Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 BROOK. J. INT'L. L. 343 (2007).

148. *Guidelines*, *supra* note 16, chs. IV.A, V.A.

149. Jeremy Rabkin, *The Yellowstone Affair: Environmental Protection, International Treaties, and National Sovereignty*, at 5, COMPETITIVE ENTERPRISE INSTITUTE, May 1, 1997, [http://cei.org/sites/default/files/Jeremy%20Rabkin%20-%20The%20Yellowstone%20Affair%20Environmental%20Protection,%20International%20Treaties,%20And%20National%20Sovereignty\\_0.pdf](http://cei.org/sites/default/files/Jeremy%20Rabkin%20-%20The%20Yellowstone%20Affair%20Environmental%20Protection,%20International%20Treaties,%20And%20National%20Sovereignty_0.pdf).

New World Mine.<sup>150</sup> Because the mining company owned the mineral rights,<sup>151</sup> the President was unable to easily prevent it from mining. In the World Heritage Committee, however, the Administration was free to take whatever action it wanted. In two letters in 1995, the Assistant Secretary of the Interior informed the Committee that Yellowstone was “in danger,” and promised to keep the Committee informed.<sup>152</sup> In the subsequent debate on whether to add Yellowstone to the In Danger List, the U.S. representative made no objections to the listing.<sup>153</sup> Choosing not to fight the In Danger listing was, arguably, a way of bolstering other efforts to stop the mine, which were ultimately successful: in August of 1996, the Clinton Administration negotiated a land swap with the mining company.<sup>154</sup>

Even if the Convention were not actually used politically, the perception that its decisions are based on political or other non-scientific bases would be damaging. This effect can be seen, to some extent, in the U.S. reaction to the Yellowstone dispute. Those who opposed the result often saw the World Heritage Committee as a foreign power bent on interfering with what should have been a domestic issue and on imposing arbitrary dictates.<sup>155</sup> Insofar as these criticisms are linked to a suspicion of all international institutions, it is likely that the World Heritage Committee, in any form, would have been met with hostility; however, the lack of any check on the Committee’s power, at the very least, made the criticisms seem more credible. There are several reasons for this. Generally, the lack of any checks on Committee actions means that the Com-

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150. Montaigne, *supra* note 1 (quoting Bill Clinton as stating that he was “very worried” about the mine and that “no amount of gain that could come from (the mine) could possibly offset any permanent damage to Yellowstone . . .”).

151. Brad Knickerbocker, *Flap Over Neighboring Gold Mine*, CHRISTIAN SCIENCE MONITOR, May 23, 1995, at 11.

152. See World Heritage Comm., *supra* note 2, at 18.

153. *Id.* at 19.

154. Pardum, *supra* note 124.

155. Elizabeth McGeehan, *Americans Losing Control of U.S. National Treasures to United Nations*, NAT’L POL’Y ANALYSIS (July 1999), <http://www.nationalcenter.org/NPA253.html>; Rabkin, *supra* note 105; Amy Ridenour, *Keep the Statue of Liberty Free: An Argument for Congressional Oversight of U.N. Land Designations in the U.S.*, NAT’L POL’Y ANALYSIS (July 2002), <http://www.nationalcenter.org/NPA419.html>.

mittee need not justify them; it need not give reasons for the decisions it makes.<sup>156</sup> More specifically, without a requirement that the Committee justify its actions, there is no chance to vet the evidence on which the Committee's decision was based, nor is there any way of ensuring that a given decision is made for acceptable reasons as opposed to political considerations.

## V. SOLUTIONS

I offer two possible strategies for fixing the problems outlined above. In order to constrain the power of the World Heritage Committee to infringe on private property rights, one might choose to institute a litigation-based system whereby individual rights are enforced against the World Heritage Committee, similar to the system under which U.S. takings are litigated. Accordingly, one could try to create a system of judicial review to regulate government takings. Alternatively, one could rely on the emerging discipline of Global Administrative Law, attempting to graft elements and principles from domestic administrative law onto the Convention. The U.S. takings approach will be discussed first, in Part V.A. The Global Administrative Law approach will be discussed in Part V.B.

### A. *The Litigation-Based Approach*

Suppose the Committee were to create a rule that it will not place a site on the In Danger List if doing so would constitute a "quasi-taking." Aggrieved parties could then bring suit to prevent inclusion on the In Danger List whenever they felt their property rights would suffer a quasi-taking as a result. Imposition of this U.S.-inspired system would give rise to numerous problems, however.

There are a number of practical problems that would arise. First, the World Heritage framework does not create an organization with sufficient "institutional differentiation"<sup>157</sup> to

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156. There is a link here to the point made in Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 39 (2005), that requiring a reasoned decision forces actors to justify their actions, thus opening that justification to scrutiny.

157. I take the concept of institutional differentiation from Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 88 (2005).

handle suits of this kind; that is, it lacks, among other things, a distinct judicial body. The Committee, as the very body whose decision is being reviewed, is an inappropriate venue for hearing suits. While, under article 10 of the Convention, “[T]he Committee may create such consultative bodies as it deems necessary for the performance of its functions,”<sup>158</sup> this cannot be read as an authorization to create a new, co-equal judicial body.

Even assuming that a co-equal body could be created, a second practical problem has to do with the source of law; simply importing domestic law would be impossible. Because the different takings laws of the various member states reflect different balances between the needs of the society and the rights of individuals, it is unlikely that delegates would be able to agree on which nation’s body of law to use. Moreover, domestic law faces a different set of questions than the World Heritage Committee. If, instead of selecting a body of domestic law, the Committee develops its own “international takings” jurisprudence, this, too, would cause problems. State parties place varying levels of importance on private property and its protection.<sup>159</sup> Would the new jurisprudence be a lowest common denominator? It seems likely, too, that if the Committee lacks the power to create a co-equal body, it lacks the power to create a co-equal body capable of promulgating a whole new body of law.

Conceptual problems arise as well. One is that the actual loss of all economically beneficial uses cannot be attributed *directly* to the Committee, itself. This is why the takings are *quasi*-regulatory; the Committee does not exercise its own power and thereby prevent a landowner from using his property. As discussed above, the Committee, by listing a property, engages in naming and shaming.<sup>160</sup> The question, though, is whether a lawsuit is the appropriate method of addressing this more indirect interference with private property. Another problem has to do with remedy. Under U.S. takings jurispru-

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158. Convention, *supra* note 15, art. 10.

159. For example, the United States protects private property in its Constitution while Canada does not. For a comparison of the U.S., Australian, and Canadian takings jurisprudence, see Christie, *supra* note 147.

160. It is, however, a particularly effective form of naming and shaming, and one the Committee is aware of.

dence, a taking is permitted subject to just compensation, but it is not clear that just compensation is appropriate in the World Heritage case, particularly in light of the indirectness just discussed. Assuming compensation were appropriate, who would compensate? The Committee? The state? Finally, there is a proportionality issue. Because this is not a case of a true, full taking, does it make sense to insist on full judicial hearing? Or does the fact that it is only de facto mitigate that to some extent? The lack of suitable answers here indicates that the GAL approach is preferable.

### B. *The Global Administrative Law Approach*

Because following a litigation-based model involves the problems outlined above, a Global Administrative Law approach would be more effective. Generally, GAL seeks to use the tools of administrative law to address problems associated with international organizations and global governance. Richard Stewart has identified four basic components of U.S. federal administrative law that can provide a general framework for GAL: procedural requirements for agency decision-making, threshold requirements for the availability of judicial review, principles for defining the scope of review, and provisions regarding public access to agency information.<sup>161</sup> While the World Heritage Convention does not create a regime with the institutional differentiation necessary for an entire administrative law scheme, particularly full judicial review, the reliance on administrative procedure and some of the underlying principles of administrative law would solve many of the problems identified above. Of particular importance here are two aspects: first, the procedural aspect of administrative law, and second, the use of administrative review.

#### 1. *Theory*

A number of principles can be drawn from the literature on Global Administrative Law, in which several key legal principles and processes have been identified.<sup>162</sup> First are the connected concepts of "procedural participation" and "trans-

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161. Stewart, *supra* note 157, at 73.

162. The list in this article is echoed in Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations*, 6 INT'L ORG. L. REV. 319, 324 (2009).

parency,<sup>163</sup> behind which is the idea that affected individuals should have the right to have their views heard before a decision is made.<sup>164</sup> Tied to this is the idea that the decision-making process must be transparent;<sup>165</sup> not only must a party be given the opportunity to be heard, but the party must know that they have such an opportunity, they must have the information necessary for that opportunity to be meaningful, and they should be permitted to view the results of the decision-making process so that they can ensure that their input was meaningful. Benedict Kingsbury and his co-authors point out a secondary function: transparency promotes accountability by “exposing administrative decisions . . . to public and peer scrutiny.”<sup>166</sup> “Reasoned decisions” are a third feature they point out.<sup>167</sup> If a body is to be accountable in its decision-making, it must explain why a given decision was reached. Such decision-making has both a justificatory function, forcing the decision-maker to explain their reasoning and thus constraining the possible bases for that decision, and a guiding function, giving future “players” notice as to what matters to the decision-maker. Kingsbury and his co-authors also point out that reasoned decisions may have the effect, or at least the intent, of increasing the acceptability of a decision.<sup>168</sup> Finally, the principle of providing a “review of decisions” is important because it provides the forum in which many of the other principles can be enacted; it is within the context of a review that parties can participate, that the administrative body can be forced to justify its actions, and that those justifications can be scrutinized.<sup>169</sup> Because the focus of this investigation has been the effect of the World Heritage regime on an individual property owner’s rights, these principles must be arrayed accordingly.<sup>170</sup>

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163. KINGSBURY ET. AL., *supra* note 156, at 37.

164. *Id.*

165. *Id.* at 38.

166. *Id.*

167. *Id.* at 39.

168. *Id.*

169. *Id.*

170. Kingsbury et al. discuss the use of GAL to protect individual rights, claiming that “a prior hearing for the affected person, specific justifying reasons, and the possibility of review” are generally required. *Id.* at 45–46.



Procedure, in general, has the potential to affect the institutional environment in which agency decisions are made and as a result limits the range of feasible agency decisions.<sup>171</sup> This is accomplished by using procedural requirements to assign relative degrees of importance to constituencies and parties to a dispute, thus channeling agency decisions.<sup>172</sup> Therefore, the rules governing agency procedure might require that agency to conduct an environmental impact statement or cost-benefit analysis, thus elevating the importance of environmental or efficiency concerns. This allows those designing the procedure to cabin the discretion of an agency over the long term. Here, the concern is with both the rights of an individual property owner as well as the Convention's effectiveness. Thus, changes to the World Heritage regime would need to focus on increasing the importance of private property owners implicated by In Danger listings and ensuring more "correct" outcomes, which would shore up, rather than undermine, the Convention's expertise-based authority.

## 2. *Implementation*

Before applying these principles to the Convention, however, it is worth asking whether a "top-down" approach is more appropriate than a "bottom-up" approach;<sup>173</sup> that is, should the problems associated with an In Danger listing be addressed by the application of GAL principles to the World Heritage regime or should the regime's actions be filtered through the domestic administrative procedures of the state parties? From another perspective, the question is, are the safeguards to be centralized within the global administrative body, itself (top-down), or can they be decentralized in the states (bottom-up)?

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171. Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987).

172. *Id.*

173. The concepts of "top-down" and "bottom-up" application of administrative law to global institutions is discussed by both Kingsbury et al. and Stewart. Kingsbury et al., *supra* note 156, at 53 (describing two approaches to constructing global administrative law); Stewart, *supra* note 157, at 63. Mario Savino uses the terms "centralized" and "decentralized." Mario Savino, *Global Administrative Law Meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices*, 43 N.Y.U. J. INT'L L. & POL. 263, 326 (2011).

A bottom-up approach is tempting in light of the varying values and importance of private property among the states party.<sup>174</sup> Under a bottom-up, decentralized approach, the World Heritage regime would remain unchanged, but member states would reinforce their domestic property protections or tailor their adjudicative systems to more easily interact with the Convention. Such an approach would allow states to judge the suitability of listings in light of local values and balances private and public rights. One reason for favoring the alternative, top-down approach, though, is the uneven ability of the states involved in the Convention to apply domestic administrative law to the Committee decisions.<sup>175</sup> The state parties

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174. Kingsbury, et al. discuss this issue in with respect to the use of GAL to protect individual rights; their worry is that such an approach presupposes the importance of liberal values and might be rejected by states which do not share such a conception. See KINGSBURY, ET AL., *supra* note 156, at 46 (“[O]ther states may well object to administrative law measures to protect individual rights, especially as applied to domestic administrations.”).

175. This point seems self-evident; Afghanistan is probably less capable of implementing the administrative and judicial procedures necessary for an effective bottom-up approach to GAL than the United States or Western Europe. It can be illustrated more fully using the rating systems by Freedom House and Transparency International as indicators of good governance. Freedom House rates countries

based on a checklist of 10 political rights questions and 15 civil liberties questions. The political rights questions are grouped into three subcategories: Electoral Process. . . , Political Pluralism and Participation. . . , and Functioning of Government . . . . The civil liberties questions are grouped into four subcategories: Freedom of Expression and Belief . . . , Associational and Organizational Rights . . . , Rule of Law . . . , and Personal Autonomy and Individual Rights . . . .”

*Methodology*, FREEDOM HOUSE, [http://www.freedomhouse.org/template.cfm?page=351&ana\\_page=363&year=201](http://www.freedomhouse.org/template.cfm?page=351&ana_page=363&year=201) (last visited Jan. 15, 2011). According to Transparency International, “the Corruption Perceptions Index (CPI) 2010 is an aggregate indicator that brings together data from sources that cover the past two years. For the CPI 2010, this includes surveys published between January 2009 and September 2010.” *Corruptions Perceptions Index 2010: Short Methodological Note*, TRANSPARENCY INTERNATIONAL, [http://www.transparency.org/content/download/55893/892545/CPI2010\\_short+Method\\_EN.pdf](http://www.transparency.org/content/download/55893/892545/CPI2010_short+Method_EN.pdf) (last visited Jan. 15, 2011). Accordingly, Afghanistan, Chad, and Uzbekistan are rated “not free” by Freedom House, while France, the US, and Italy are rated “free.” *Table of Independent Countries*, FREEDOM HOUSE, <http://www.freedomhouse.org/template.cfm?page=549&year=2010> (last visited Jan. 15, 2011). Transparency International rates Denmark and New Zealand as tied for “least corrupt country” while Iraq (#175), Uzbekistan (#172), and

would have wildly varying results for similar problems under a bottom-up approach, which, while not necessarily fatal to the approach, seems unjust. More importantly, though, because the goal of addressing de facto takings is to protect an individual right, having varying levels of protection based merely on an individual's location is unacceptable. A second reason to oppose a bottom-up approach is that it does not address the legitimacy issues discussed in Part IV; if the regime relies on a reputation for being a neutral, expert third party in order to secure compliance and the problems threaten this conception, a bottom-up approach does little to help. It does not cure the problems with the regime *itself*; rather, it filters those problems through a domestic system. Finally, because the de facto taking does not necessarily implicate the state, domestic administrative procedures might not be engaged; that is, because the de facto taking occurs at least partially as a result of naming and shaming, there might not be any domestic state action to address.

Because the bottom-up approach would face significant problems and given the difficulties associated with negotiating, signing, and ratifying a new treaty, the final option is to find ways to integrate the GAL principles outlined above into the existing World Heritage structure. These principles of Global Administrative Law that are applicable to the World Heritage regime include procedural participation, transparency, reasoned decision-making, and review of decisions.

In some areas, the World Heritage Convention, interpreted by the Guidelines, already complies with several of the principles. The Committee, when making a decision whether to place a property on the World Heritage List, is provided with a set of criteria on which to base its decisions.<sup>176</sup> The Committee's decisions are available on its website, which often includes summaries of Committee debates.<sup>177</sup> The advisory

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Afghanistan (#176) are at the bottom of the list. *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results) (last visited Jan. 15, 2011).

176. *Guidelines*, *supra* note 16, chs. II.D, II.E.

177. Summaries of Committee decisions can be found at UNESCO, *Decisions*, WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/decisions/> (last visited Oct. 15, 2011); summaries of meetings, reports, and other documents can be found at UNESCO, *Documents*, WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/documents> (last visited Oct. 15, 2011).

bodies, too, write reports, the content of which is prescribed by the Guidelines and publicly available.<sup>178</sup> The Committee thus operates in a transparent manner and provides reasons for its decisions.

The concept of “procedural participation,” though, should be more fully integrated into the World Heritage regime. Granting procedural participation involves giving both “notice”<sup>179</sup> and “opportunity to be heard.” Notice is, to a small degree, provided for in the current Guidelines, which state that “[p]arties are encouraged to prepare nominations with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties.”<sup>180</sup> This guideline, though, is only a suggestion and applies only to the creation of the Tentative Lists of nominated properties. For notice to be effective, it must apply when decisions which affect the rights of the party are being made and it must be mandatory. Thus, the Guidelines should provide for notification of landowners when activity on their property is the reason for, or implicated in, the decision to add a property to the In Danger List. Additionally, the Guidelines should require, rather than suggest, the notification of those parties during the formulation of Tentative Lists. Because this would be a matter of procedure, it could be added to the Guidelines under the Convention’s article 10 and would not require treaty revision.<sup>181</sup>

“Opportunity to be heard” might be provided for in two ways. It could be required in the advisory body reports. Currently, the requirements for these reports are contained in Annex 6 of the Guidelines. Annex 6.A governs the ICOMOS procedure but mentions nothing about relevant stakeholders.<sup>182</sup> Annex 6.B governs ICUN procedure and mentions discussions

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178. *Guidelines, supra* note 16, ¶ 143.

179. “Notice,” while important in civil procedure, does not seem to be applied frequently in GAL. This could be because of the difficulty associated with providing notice to the potentially large number of individuals who are affected by the actions of global administrative bodies, and thus the infeasibility of notice. Alternatively, it could be that many of the processes examined by GAL are more akin to the rule making role of administrative bodies than to the adjudicative function.

180. *Guidelines, supra* note 16, ch. III.A.

181. Convention, *supra* note 15, art. 10.3.

182. *Guidelines, supra* note 16, Annex 6, ¶¶ 1–4.

with relevant authorities and stakeholders, but the language is more of a description than a requirement.<sup>183</sup> These could be rewritten to mandate discussions with all stakeholders. Because of the potential for harm to an individual, though, it seems more appropriate to provide for either actual presence during the Committee's deliberation on an In Danger listing or the ability to submit materials. Both options seem to be well within the appropriate subject matter for the Guidelines, and the Convention provides that the "Committee may at any time invite public or private organizations or individuals to participate in its meetings for consultation on particular problems."<sup>184</sup> The Committee has been known to accept the input of NGOs and companies on occasion;<sup>185</sup> however, actually mandating this, coupled with notice, would be more protective of an individual's rights.

The most difficult principle to insert into the existing treaty structure is review. Review by a co-equal judicial body capable of actually overruling the Committee would seem to require an actual treaty revision. Article 10, however, allows the Committee to "create such consultative bodies as it deems necessary for the performance of its functions."<sup>186</sup> This could justify the creation of a review board or ombudsman as long as the role of that body was only to provide advice rather than actual judicial review. Under such a system, if a party is potentially adversely affected by an In Danger listing and presents this view to the Committee but the Committee still decides to add the property to the In Danger List, that party could appeal to the review board. Because the Committee relies on its reputation to ensure compliance, a convincing, well-reasoned review of a Committee decision, even if non-binding, would be particularly effective.

There is a complication with respect to establishing a review mechanism because of the lack of a Constitution, body of statutes, or common law against which the review could be conducted. Put another way, a review checks to see whether

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183. *Id.* Annex 6, ¶ 8(iii).

184. Convention, *supra* note 15, art. 10.

185. World Heritage Comm., Rep. of Decisions, 33rd Sess., June 22-30, 2009, at 72, WHC-09/33.COM/20 (July 20, 2009), available at <http://whc.unesco.org/en/decisions/1814> (noting the "high level of public concern").

186. Convention, *supra* note 15, art. 10.3.

the actions of an agency are in accordance with some pre-determined standard, but in the World Heritage regime, it is not clear what that standard would be. There are several options. First, the review panel might look to see if the Committee followed its own standards, as set out in the Guidelines, as well as the standards set out in the Convention, when making designations. Second, the panel might look to see whether the proper process was followed. Were the property owners given notice? Were they afforded opportunities to be heard? Third, the panel could ask whether the reasons given adequately justify the decision made. Here, it would be undesirable to have a rehashing of the initial investigation, debate, and decision-making process; rather, the panel should ask whether the Committee's justifications, assuming they are valid, adequately support the decision reached.

The proposals outlined above should help to cure the problems outlined in Part IV by enhancing procedure, ensuring transparency, and providing opportunity for the affected individual to be heard. The procedural adjustments attempt to limit the reasons for which an action can be taken and to require the consideration of certain facts. By increasing the role of the private property owner in the proceedings, such procedural adjustments would increase the importance of property rights and the property owner. Specifically, requiring the Committee to notify and listen to private property owners means that, if it chooses to disregard those concerns, it will need to justify its decision to do so. Additionally, in obtaining such information, the Committee will not only be provided with greater information on which to base its decision, but will be less susceptible to accusations of political bias, thus preserving its authority. Providing for review provides an opportunity for error correction, an opportunity for the Committee to demonstrate its good faith, and an opportunity for the property owner to defend his interests. Assuming the Committee has not engaged in politically motivated designations, the review will provide an opportunity to prove this, and the property owner will have the opportunity to explain why their rights should not be infringed. As a result, the proposals should go a long way to curing the problems set out above.

Finally, it is worth briefly returning to the point made earlier that process and outcomes are linked. If we believe that the World Heritage framework should avoid over-protecting

natural and cultural heritage to the detriment of other valuable uses for land by protecting only those *truly* culturally and naturally significant sites, then the proposed reforms may aid in providing more accurate outcomes. First, as stated, they provide more information on which the Committee may base its decision. Second, they provide error correction. Finally, and possibly most significantly, they provide the Committee with a defense of the competing use of the land. As a result, they should enable increased accuracy.

## VI. CONCLUSION

This paper has argued that, by placing a World Heritage site on the In Danger List, the World Heritage Committee may be engaging in a regulatory quasi-taking. This is because, in doing so, the Committee places pressure on private landowners that can ultimately undermine their ability to freely use their property. Of course, it is desirable to avoid mining or hotel development next to significant cultural or natural sites. But procedure matters. The way in which the Committee reaches its decisions and the steps it takes to reach those decisions are important because, as discussed above, the process a regime employs can impact the effectiveness of that regime. Moreover, an inadequate process may undermine important values. As discussed above, providing greater procedure can protect the interests of the parties, in this case private property owners, and can dispel suspicions that outcomes are politically driven or illegitimate. The Global Administrative Law solutions I have proposed, such as providing notice and opportunities to be heard, and affording some form of review, attempt to improve the procedure within the existing treaty framework.

