Pace Environmental Law Review

Volume 5
Issue 2 *Spring 1988*

Article 7

4-1-1988

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Alexandre S. Timoshenko

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Recommended Citation
Alexandre S. Timoshenko, *Protection of Wetlands by International Law*, 5 Pace Envtl. L. Rev. 463 (1988)
Available at: http://digitalcommons.pace.edu/pelr/vol5/iss2/7

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Protection of Wetlands by International Law

Alexandre S. Timoshenko*

I. General Comments

According to Article 1 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, known as the Ramsar Convention,[1] wetlands are areas of marsh, fen, peatland or water (including areas of marine water) the depth of which at low tide does not exceed six meters. Wetlands are found in practically all regions of the world and sustain important ecological functions. Wetlands regulate the hydrologic regime and thus favor climate stability and serve as a habitat for a wide variety of indigenous and migratory bird species. Due to their unique ecosystem characteristics and relatively difficult accessibility, wetlands represent one of the most important resources of genetic diversity.

Wetlands, which are very ecologically fragile, have long been an object of human activities. These activities have continued for the last hundred years without any serious evaluation of possible environmental consequences. For example, of the nearly two hundred large-scale polder (wetlands reclamation) projects now completed or under way worldwide, in only nine cases has any serious study been made of environmental and ecological consequences.[2]

The nature of wetlands dictates that conservation should be their main, and most effective, form of protection. This follows from the use of the term "conservation" in the text of

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* Doctor of Law; Institute of State and Law Academy of Sciences of the USSR, Moscow.

1. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. ___, 996 U.N.T.S. 245, *reprinted in* 11 I.L.M. 963 (1972) [hereinafter Ramsar Convention].

2. T. Stoel, *Pulling Out the Plug*, 10 IUCN Bull. 144 (1985).

the Ramsar Convention. Therefore, the notion of "wise use" may have only a very limited application in this field of environmental protection. Wetlands have international importance in two specific instances: when they serve as habitat for migrating birds, and when they are situated simultaneously within the territory of two or more states.

The most important internationally significant factor concerning wetlands is their role as a habitat for migrating birds, particularly waterfowl. Conservation of this wildlife resource is the principle objective of the Ramsar Convention. This Convention is the only multilateral treaty regulating the protection of this category of wildlife. In the system of international environmental law this was one of the first international agreements of global coverage.[3] In a narrower sense the Ramsar Convention is one of the more important legal instruments of international wildlife law.

Under the Ramsar Convention, the contracting parties, while considering their international responsibility for the conservation, management and wise use of migratory stocks of waterfowl, designate suitable wetlands within their territories for inclusion in the List of Wetlands of International Importance. The inclusion of a wetland onto the list does not prejudice the exclusive sovereign rights of the Contracting Parties in whose territories the wetland is situated. The Contracting Parties formulate and implement their planning so as to promote the conservation of wetlands included on the list and, as far as possible, the wise use of wetlands in their territories. Meanwhile, the Convention gives preference to the establishment of nature reserves as another protection measure. In the case of a wetland extending over the territory of more than one state, the Contracting Parties consult each other regarding possible impacts on the wetland area. They also coordinate their present and future policies and regulations concerning the conservation of wetlands and waterfowl. As the

3. *See* O. Kolbasov, Miezdunarodno-pravovaja ochrana okruzhajushej sredy [International Legal Protection of the Environment] 135-36 (1982); B. Johnson, International Environmental Law 62-3 (1976); A. Kiss, Survey of Current Developments in International Environmental Law 86-7 (1976).

necessity arises, the Contracting Parties convene conferences on the conservation of wetlands and waterfowl.

The Ramsar Convention became effective in December 1975 and has been operating for more than a decade, with the number of Contracting Parties exceeding forty. The List of Wetlands of International Importance includes more than three hundred wetlands covering over twenty million hectares. Thus far, two Conferences of the Contracting Parties have taken place and a third is upcoming.

II. Critical Analysis

The starting point for strengthening wetlands protection by means of international law is a critical analysis of the content and application of the international laws now in force. The main objective of this paper is the critical analysis of the Ramsar Convention itself. The effectiveness of an international law is determined in the first place by the sphere of its application. In this respect the Ramsar Convention does not comprise a sufficient number of countries (about forty countries, compared with ninety countries participating in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[4] for example). Only very recently have major countries such as the United States and France begun to participate in the Convention. A considerable number of developing countries possessing many wetlands of international importance are among the non-participants.

The Ramsar Convention is justly appraised as the first international environmental treaty aimed exclusively at wildlife habitat protection on a global scale.[5] At the same time, the content of the Convention reflects certain deficiencies of juridical approach to environmental problems which typify the early seventies. The Convention does not exhaustively stipulate the legal status of wetlands of international importance, nor does it provide for the necessary degree of unified state actions for wetlands conservation. It also contains a

4. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

5. *See, e.g.*, S. Lyster, International Wildlife Law 206 (1985).

number of gaps in its procedural clauses.

The Ramsar Convention attempted to coordinate exclusive sovereign rights on states' natural resources, state responsibility for environmental protection, and rational use. This concept provided a cornerstone for all international environmental law. A year later the concept was more or less adequately formulated in the Principle 21 of the Stockholm Declaration.[6]

Under the Ramsar Convention, the territorial sovereignty over wetlands of international importance is interconnected with state responsibility for the protection and wise use of migrating waterfowl resources. Since the condition of migrating waterfowl is directly related to the state of their habitat, the above mentioned stipulation can be regarded as indirect evidence of the international responsibility of the Contracting Parties for conservation, management and rational use of wetlands.

The Article 2 formula[7] of the Convention gives every reason to believe that even a wetland of international importance is related to the category of national resources. At the same time, Article 5 indicates that individual wetlands can extend over the territories of more than one state.[8] Such wetlands acquire the status of a shared natural resource or, according to the terminology proposed with in the framework of the World Commission on Environment and Development, of a trans-

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6. The official text of the Stockholm declaration is contained in The Report of the U.N. Conference on The Human Environment, U.N. DOC. A/Conf. 48/14 at 2-65 and Corr.1 (1972), *reprinted in* 11 I.L.M. 1416-69 (1972). Principle 21 of the Stockholm Declaration states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

7. Article 2 of the Ramsar Convention provides for the designation, addition, modification and deletion of wetlands from the List of Wetlands of International Importance. Ramsar Convention, *supra* note 1, art. 2, 996 U.N.T.S. 245, 247, *reprinted in* 11 I.L.M. 963, 970 (1972).

8. Ramsar Convention, *supra* note 1, art. 5, 996 U.N.T.S. 245, 248, *reprinted in* 11 I.L.M. 963, 972 (1972).

boundary resource.[9]

It may be assumed that individual wetlands covered by the Ramsar Convention have such great ecological value and unique characteristics that their conservation would affect the common interests of the international community as a whole. In such a case it is possible that the concept of "common heritage of mankind" or "common property" may be applied. We cannot exclude this possibility as the "common heritage" concept is getting more and more international recognition although its preeminence has not been confirmed by opinion of law.

As stated earlier, the objective of wetlands protection is conservation. Nevertheless, according to Article 2 of the Ramsar Convention, wetlands conservation is envisaged as being parallel to "wise use." In this context, the very possibility of coupling effective conservation of a wetland (as an integral ecosystem) with any intensive use, even when it is considered to be wise, seems doubtful. The exact scientific and legal meaning of the term "wise use" is itself unclear. Even the broader term "rationale use" is far from being uniformly interpreted in international law, and as such the content of the term "wise use" seems to be especially vague. It is understood that the term "wise use" was introduced into the Ramsar Convention with the goal of establishing certain limits to the human utilization of wetlands. However, practical application of these limits seems questionable.

The gaps in the Ramsar Convention are not confined to the insufficient determination of the status of wetlands of international importance. This deficiency may be explained by the fact that the Convention took place before the concepts of shared resources, world heritage, or biosphere reserves were developed. Given the present level of international environmental law, the international quality of wetlands included in the Ramsar List might be formulated more clearly. The conservation of wetlands of international importance should be

9. World Commission on Environment and Development, WCED Doc. WCED/86/23/Add.1; *see also* R. Monro & J. Lammers, Environmental Protection and Sustainable Developments. Legal Principles & Recommendations (1987).

insured not only by the nations in whose territories such wetlands are situated, but by all nations with an environmental interest in the wetland. It is necessary to stipulate exact obligations of all nations on whose territories or under whose control an activity significantly affecting the ecological quality of a wetland takes place. In other words, international legal assurances of the effective conservation of wetlands having international importance must be guaranteed against negative transboundary interferences. In this context it is appropriate to refer to the statement made by the Swedish delegation at the Groningen Conference of the Contracting Parties which indicated the close interdependence between conservation of wetlands of international importance and the "acid rain" problem caused by the activities under the control of other countries.[10]

Certain difficulties in the application of the Ramsar Convention are created by the fact that the text contained no procedures for introducing amendments to the Convention. Meanwhile, the experience gained in the field of international environmental law demonstrated that an important characteristic of any international environmental treaty is its ability to evolve according to changing external factors: accumulation of knowledge, technological developments, or the evolution of political situations. Necessary amendments to the treaty should be introduced with the aim of ensuring optimal correlation between treaty provisions and the external "techno-socio-political environment." These changes in the treaty provisions may take the form of amendments, annexations, or other analogous acts. It is not by chance that in the field of environmental protection the so-called "framework conventions" are so widespread. The reason is that such conventions presuppose that further developments in international legal regulation will be necessary to respond to changed external conditions.

The necessity of introducing special amendment proce-

10. Convention on Wetlands of International Importance Especially as Waterfowl Habitat Proceedings of the Second Conference of the Parties, Groningen, Netherlands, May 7-12, 1984 [hereinafter Groningen Conference].

dures to the Ramsar Convention had been indicated at the Cagliari and Groningen Conferences of the Contracting Parties. This problem has been settled in principle by the signing and entering into force of the Paris Protocol.[11] As a result, it may be expected that a number of the recommendations proposed at the Cagliari and Groningen Conferences will be transformed into legal rules. However, a new question immediately arises: how to apply these new rules since not all Contracting Parties of the Ramsar Convention are participants to the Paris Protocol?

In the formal juridical sense this question is to be settled according to Article 30 and Article 40 of the Vienna Convention on the Law of Treaties,[12] which provide that in relations between a State who is party to both treaties, and a State who is party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. This means that relations between two states, one of whom is a signatory to only the Ramsar Convention and the other who is a party to both the Ramsar Convention and the Paris Protocol, are governed exclusively by the Ramsar provisions.

Thus, the problem of the limited application of possible amendments to the Ramsar Convention arises. This problem extends beyond the framework of jurisprudence. The effectiveness of a legal rule depends directly on the states which accept its obligatory character and on the degree of uniformity of activities of those participating in international relations. In the sphere of international environmental protection such uniformity is particularly important since non-participation at certain stages may substantially reduce the effectiveness of these measures or even render them useless.

The practical application of the Paris Protocol demands

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11. The Paris Protocol, which is designed to establish the procedures for introducing amendments to the Convention, was signed in 1982. Its provisions have been in force since the end of 1986. Contracting Parties of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat: Protocol to Amend the Convention, Dec. 3, 1982, *reprinted in* 22 I.L.M. 698 (1983).

12. United Nations Conference on the Law of Treaties, Vienna Convention on the Law of Treaties; United Nations, May 22, 1969, T.I.A.S. No. ___, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

not only settlement of purely juridical problems, but an evaluation of the positions of the majority of states with respect to proposed amendments to the Ramsar Convention as well. In addition, it is necessary to take into account not only the views of current members but also of potential participants to the Convention. Otherwise, the introduction of "unpopular" amendments may negatively influence both accession of new participants to the Convention, and inclusion of new territories onto the List of Wetlands of International Importance. Every amendment to the Ramsar Convention should adequately reflect the balance of what should be done and of what realistically can be done. Only the collective wisdom and sagacity of the Contracting Parties will secure further improvement of the Ramsar Convention's efficacy.

III. The USSR Participation in the Ramsar Convention

The Ramsar Convention was signed by the USSR on February 15, 1974, and ratified on December 26, 1975. Upon signing the Convention, the following statement was made: "The Government of the Union of the Soviet Socialist Republic deems it necessary to state that the provisions of Article 9 of the Convention limiting participation of certain States is in contradiction with the universally recognized principle of sovereign equality of States."

The USSR ratification instruments were deposited with the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Director-General on October 11, 1976. In accordance with paragraph 2, Article 10, the Convention entered into force for the Soviet Union from February 11, 1977 onward.

To perform its obligation under the Ramsar Convention, the USSR carried out a number of activities of national character. First, the USSR Council of Ministers adopted the Decree of December 26, 1975, entitled "On Measures to Carry Out the Obligations of the Soviet Part Under the Convention on Wetlands of International Importance Especially as Waterfowl Habitat." The Decree entrusted the Ministry of Agriculture (now Gosagroprom) with the responsibility for the imple-

mentation of the Ramsar Convention and pertinent control over Soviet involvement.[13]

The Council of Ministers of the Union Republics, the Ministry of Agriculture, and the USSR Academy of Sciences are responsible for securing wetlands protection under the Ramsar Convention and for carrying out necessary scientific research. The National List of Wetlands of International Importance includes the following territories: Kandalaksha Bay of the White Sea, Matsaalu Bay of the Baltic Sea, Volga River Delta, Kirov Bay, Krasnovodsk Bay and North-Chelenk Bay of the Caspian Sea, Karkinit Bay of the Black Sea, Danube River downstream marshes, Khanka Lake, Issyk-Kul Lake, Kurgaldjin, Teghis, Turgaj and Irghis River downstream.[14] These wetlands are major reserves and habitats for migrating waterfowl. The protection of these species must be also secured in their habitats situated in other countries.

As it was stated by the Soviet delegation at the Groningen Conference, besides the twelve wetlands from the Ramsar List located in the Soviet Union, sixteen additional wetlands covering nearly three million hectares satisfied the Ramsar criteria. All the above stated wetlands were treated as nature reserves and protected in state *zapovedniki*[15] and *zakazniki*.[16] The report of the USSR delegation also bore wit-

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13. *See* S. Postanovlenij, The USSR Collected Decrees, No. 4, st. 16 (1976).

14. Ob Ochrane Okruzhajushej Sredy, Sbornik documentov party i pravitelstva [On environmental protection: Collected Documents of the CPSU and Soviet Government] 408 (1986).

15. The Soviet government has developed a nation-wide network of natural areas devoted to the study and preservation of biotic resources. These areas are known as *Zapovedniki* and are somewhat similar to American national parks but place much less emphasis on tourism. *Zapovedniki* are specified as being forever withdrawn from economic utilization, being reserved for scientific research and cultural-educational purposes.

16. A second category of natural preserve exists in the Soviet Union, known as *Zakazniki*. There are two types of *Zakazniki*, temporary and permanent. Temporary *Zakazniki*, established for a specific period of time, are normally concerned with animal resources, and generally with only certain species found within the *Zakazniki*. Within a *Zakazniki*, the hunting of a particular species of animal may be controlled over a period of years if the animal is being threatened. Permanent *Zakazniki*, like temporary ones, protect only a portion of the natural resources within them, but are not limited to wildlife resources.

ness to an impressive range of studies to identify and describe three hundred sites of international or national importance beyond the additional sixteen sites earlier referenced.[17]

IV. Conclusion

The Ramsar Convention is an important international act in the sphere of environmental protection and a unique document in the field of wetlands conservation. The birth of the Ramsar Convention coincides with the initial period of vigorous development of environmental treaties. The Convention serves as a useful model for the elaboration of other important international treaties such as the UNESCO Convention on World Heritage, the Bonn Convention on Migrating Species, and such important international programs as the creation of a biosphere reserves network. In recent international law one can find a number of acts analogous to the fundamental concept and distinct provisions of the Ramsar Convention. While utilizing this valuable experience, the States take into consideration both the advantages and shortcomings of the Convention.

The Ramsar Convention, like any international treaty based on the compromise of different state interests, is not free of drawbacks. After more than a decade of existence, the rise in the number of Contracting Parties and the expansion of the territory of wetlands protected in accordance with the Ramsar List provides a convincing demonstration of the great practical value of this international treaty. Juridical and political improvement of the Ramsar Convention continues and is generally positive in character. The basis of these processes should be the understanding that the efficacy of the protection of wetlands of international importance can be secured by the maximum possible participation of the majority of states.

However, problems relating to the protection of wetlands of international importance still exist. These problems have both juridical and political characteristics and include:

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17. Groningen Conference, *supra* note 10, at 9-10.

- the need for an increase in the number of the Ramsar Convention participants;
- an achievement of maximum uniformity of the activities according to the Convention provisions;
- a more precise definition of criteria of the wetlands of international importance, of their status and regime both under national and international law;
- a more precise definition of the regime of the wetlands falling under the category of shared natural resources;
- the need for ensuring the protection of the wetlands of international importance from significant negative trans-boundary impact; and
- strengthening the conservation of wetlands as an important resource of biological diversity.