

Legal Memo re: Legal Issues Relating to Climate Change and the Mandate of the Ramsar Convention

26 May 2015

Executive Summary

1. This legal memo provides a brief overview of the parameters of interaction between the Convention on Wetlands of International Importance especially as Waterfowl Habitat¹ (**Ramsar Convention**) and the UN Framework Convention on Climate Change² (**UNFCCC**). The memo addresses three specific questions raised by Ramsar Convention Parties:
 - a. Whether, as a general question of treaty law as reflected in the Vienna Convention on the Law of Treaties³ (**VCLT**), treaty bodies are capable of taking on commitments that are co-beneficial as between treaty regimes;
 - b. Whether, on the basis of the Ramsar Convention, climate change can be said to be within the mandate of that treaty body; and
 - c. Is there anything in the Ramsar Convention which requires Parties to the Ramsar Convention to treat wetlands in countries categorized by the UNFCCC as non-Annex 1 Parties differently in the context of the Ramsar Convention?
2. By way of executive summary, the legal analysis and findings to date are:
 - a. Treaty bodies are capable of assuming co-beneficial commitments, provided such commitments are within their mandates;
 - b. Climate change issues related to wetlands can be considered within the mandate of the Ramsar Convention; and
 - c. The Ramsar Convention does not require Parties to the Ramsar Convention to address wetlands in countries categorized by the UNFCCC as non-Annex 1 Parties as distinct.

Co-beneficial outcomes between treaty regimes

3. As a written agreement between states or other entities possessing international legal personality, a treaty is binding on the Parties thereto as a matter of international law in accordance with the principle of *pacta sunt servanda*.⁴

¹ 2 February 1971, 996 UNTS 245 (as amended).

² 9 May 1992, 1771 UNTS 107.

³ 22 May 1969, 1155 UNTS 331.

4. Each treaty is – in form and substance – a separate source of international legal obligations. It is a State’s sovereign right to enter into the treaties that it sees fit, on any subject matter it sees fit.⁵ It follows, *a fortiori*, that simply because a particular treaty addresses a particular subject matter, a state is not precluded from entering into another treaty that touches on the same area. Further, no state is precluded from addressing subject matter covered by one treaty body in the deliberations of another treaty body, leading to an outcome beneficial to both treaty regimes—a co-beneficial outcome. Indeed, the various environmental treaty bodies have repeatedly called for the exploitation of inter-treaty synergies in order to promote such outcomes.⁶
5. Overlapping treaty regimes are accordingly commonplace in international law, and indeed may be encouraged in certain fields.⁷ As noted in VCLT Article 30, which provides a mechanism for the resolution of treaty conflicts, treaties often touch upon similar international concerns. If a state, having entered into a treaty, were barred from entering into a subsequent treaty dealing with the same subject matter, a mechanism akin to VCLT Article 30 would not be necessary.
6. This overlap may be seen with respect to climate change in manifold distinct manners. The UNFCCC notwithstanding, important and timely climate change obligations have been expressly undertaken a wide range of other international agreements.⁸ Such agreements have in no way been invalidated by other States, nor argued to be unnecessary, on the basis that the UNFCCC has exclusive jurisdiction over climate change in all its aspects. Similarly and in the converse, Parties to the CBD, the UNFCCC and the Watercourses Convention do not argue that these treaty bodies cannot undertake biodiversity, climate change or river management obligations affecting wetlands due to a legal monopoly held by the Ramsar Convention.
7. Accordingly, the Ramsar Convention is in no way precluded from seeking a co-beneficial outcome with the UNFCCC with respect to climate change. If the subject matter of the discussions fall within the mandate of the Ramsar Convention, such mutually supportive engagement would indeed be encouraged by States in the current international policy environment as a demonstration of synergies between MEAs.

⁴ VCLT Art 26: “Every treaty is binding upon the parties to it and must be performed by them in good faith”.

⁵ VCLT Art 6: “Every State possesses capacity to conclude treaties”.

⁶ See e.g. CBD Decision X/20; CITES Decision 14.38; CITES Resolution Conf. 10.4; CMS Resolution 10.21; CMS Resolution 10.25; ITPGRFA Resolution 8/2011 Ramsar Convention Resolution X.11; WHC Decision 34 COM 5D. Further: *Promoting synergies within the cluster of biodiversity-related multilateral environmental agreements* (UNEP-WCMC Research Paper, April 2012), http://www.unep-wcmc.org/system/dataset_file_fields/files/000/000/045/original/Promoting_synergies_in_the_biodiversity_cluster.pdf?1395761916 [accessed 22 May 2015].

⁷ Particularly in international environmental law, where the ecosystems approach may make overlapping or mutually reinforcing regimes desirable. On relations between international environmental agreements, see P. Sands & J. Peel, *Principles of International Environmental Law* (3rd edn, CUP 2012) 105–7. One can see, for example, how an endangered species regulated by the Convention on International Trade in Endangered Species, 3 March 1973, 993 UNTS 243 could also be migratory, placing it within the mandate of the Convention on the Conservation of Migratory Species, 23 June 1979, 1651 UNTS 333. Both, in turn, could interact with the Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79.

⁸ See e.g. the EU–Canada Comprehensive Trade and Economic Agreement, the final text of which includes multiple provisions dealing with the interface of trade and climate change in Ch. 25: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [accessed 19 May 2015].

Climate change and the mandate of the Ramsar Convention

8. Unlike States, international treaty bodies do not possess general competence: they may only exercise the powers expressly or impliedly bestowed upon them by their Parties.⁹ The capacity of the Ramsar Convention to consider issues of climate change therefore depends on the extent to which its constitutive instrument permits such consideration to take place.
9. The Ramsar Convention has the initial capacity to determine its jurisdiction (*vel non*) over climate change. That jurisdiction will be determined via interpretation of the Ramsar Convention in accordance with the rules enshrined in the VCLT. Any interpretation so given, where accompanied by an assertion of propriety, will be presumed valid.¹⁰
10. As its full name suggests, the Ramsar Convention is a treaty on wetlands and water.¹¹ Consequently, any attempt by the Ramsar Convention to address, for example, a desert or the high seas might be seen as *prima facie ultra vires*. Further guidance as to the limit of the Ramsar Convention's remit can be seen in the Preamble to the agreement, which refers to, *inter alia*: "*the interdependence of Man and his environment*"; "*the fundamental ecological functions of wetlands*"; and "*the desire to stem the progressive encroachment on and loss of wetlands now and into the future.*" The Preamble further expresses confidence that "*the conservation of wetlands and their flora and fauna can be ensured by combining far-sighted international policies with coordinated international action.*"
11. Further provisions of the Ramsar Convention demonstrate the breadth of its mandate. Article 3(1) refers to the need for parties to "*promote the conservation of the wetlands*" and the need for "*wise use*" of the same. Article 6(1) establishes the Conference of the Contracting Parties (**CoP**). Paragraph (2)(d) of the same provides that the CoP will be competent to "*make general or specific recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands*". Paragraph (3) requires that Parties ensure that the relevant officials within their territories take these recommendations into account.
12. On this basis, it is possible to conclude that the Ramsar Convention possesses general jurisdiction over issues pertaining to the conservation of wetlands. Given the impact of climate change on wetland areas,¹² the Ramsar Convention addresses these questions as part of its mandate in relation to wetlands. Due to its capacity to advise on the "*wise use*" of wetlands, the remit of the Ramsar Convention extends beyond providing advice as to conservation. The treaty body, in accordance with its agreed treaty mandate, can proactively consider ways in which

⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 p 66, 78. Further: James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 184ff.

¹⁰ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962 p 151, 168; "*when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the states purposes of the United Nations, the presumption is that such action is not ultra vires the Organization*".

¹¹ Art 1(1) of the Ramsar Convention defines wetlands as including:
"[A]reas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres."

¹² See e.g. V. Burkett & J. Kusler, 'Climate Change: Potential Impacts and Interactions in Wetlands of the United States' (2000) 36 *Journal of the American Water Resources Association* 313; T. P. Dawson et al, 'Climate change impacts on freshwater wetland habitats' (2003) 11 *Journal for Nature Conservation* 25; K. L. Erwin, 'Wetlands and global climate change: the role of wetland restoration in a changing world' (2009) 17 *Wetlands Ecology and Management* 71;

wetlands may serve to limit the effects of climate change in terms of mitigation and adaptation, with such limitations reinforcing the conservation sought by the Ramsar Convention.

Does the Ramsar Convention require Parties to the Ramsar Convention to treat wetlands in countries categorized by the UNFCCC as non-Annex 1 Parties differently, in the context of the Ramsar Convention?

13. The Preamble to the UNFCCC recognizes expressly that “*standards applied by some countries may be inappropriate and of unwarranted social and economic cost to other countries, particularly developing countries*”. This concept of common but differentiated responsibility¹³ for the developing world can be found elsewhere the UNFCCC and within that treaty regime functions as a principle for the allocation of the burden of coordinated action in the field.
14. The UNFCCC expresses the concept of common but differentiated responsibility through the listing of countries in annexes. Annex I Parties to the Kyoto Protocol of the UNFCCC commit themselves to a range of obligations that are not necessarily shared by other, non-Annex I Parties.¹⁴ As stated previously, however, each multilateral treaty is a formally separate source of binding, international obligations – unless some form of express incorporation is in effect, the delineation of Parties into Annexes within the framework of the UNFCCC and its Kyoto Protocol does not affect the obligations contained in the Ramsar Convention, and *vice versa*.
15. As such, whilst the Ramsar Convention and its internal practice may draw thematic inspiration from the work of the UNFCCC (i.e. the possibility for wetlands to contribute positively to the mitigation of or adaptation to climate change), it need not, as a matter of international law, import the Annex I/non-Annex I restrictions found in the context of the UNFCCC and its protocol. To permit otherwise would be to allow the possibility that a Party to the Ramsar Convention that was not a Party to the UNFCCC could, in effect, find itself bound by the terms, distinctions and obligations of the latter, contradicting the general rule of VCLT Article 34: “*A treaty does not create either obligations or rights for a third State without its consent*”. As the Ramsar Convention does not provide obligations invoking VCLT Article 35 regarding the imposition of obligations on third states, such a finding would be untenable.
16. Consequently, if the Parties to the Ramsar Convention, via the COP, reach a conclusion regarding the wise use of wetlands in non-Annex I countries, the treatment of those wetlands *vis-à-vis* wetlands located in the territory of Ramsar Parties is not governed by distinctions, rights or obligations that are agreed in the UNFCCC. In accordance with international law, differential responsibilities of developing country Parties to the Ramsar Convention can be interpreted as those *sui generis* to the Ramsar Convention itself and agreed by its Parties, as expressed through CoP Recommendation 1.2 (29 November 1980) on ‘Developing Countries in the Convention’. In this CoP Recommendation, which may demonstrate subsequent practice and therefore provide assistance in the interpretation of the Convention, the CoP called on developed country Parties to assist developing country Parties in fulfilling their obligations under the Ramsar Convention through the provision of aid, travel funds and training programmes.¹⁵

¹³ Further: Sands & Peel, *International Environmental Law*, 233–6. Cf. Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol. I), Annex I (12 August 1992), Principle 7.

¹⁴ Cf. UNFCCC Art 4(2), (3). Annex I Parties include the industrialized countries that were members of the Organisation for Economic Co-operation and Development in 1992, plus countries with economies in transition, including the Russian Federation, the Baltic States, and several Central and Eastern European States.

¹⁵ On similar lines, cf. CoP Recommendation 5.5; CoP Recommendation 6.16.

Conclusions

17. On balance, the Ramsar Convention and UNFCCC seek to achieve key international objectives related to environmental protection and sustainable development. The UNFCCC coordinates international actions intended to mitigate the effects of anthropogenic climate change—which may itself be accelerated through the release of CO₂ from different sources. This climate change, in turn, will adversely affect wetlands protected by the Ramsar Convention, and can be slowed through the wise use of wetlands promoted by the Ramsar Convention. The result is a common interest as between the mandate of each Convention, such that each may draw upon the other to pursue its objectives, demonstrating synergies and co-benefits. Each of these Conventions is a key treaty in addressing its mandate which does not have exclusivity, and the mandate of one does not prevent the other from addressing key concerns of its Parties with a view to generating mutually supportive outcomes for the world's environment and its people. Furthermore and in relation to this question, it is not clear that operational distinctions between the UNFCCC Parties can or should be imported in whole or in part into the interpretation and implementation of the Ramsar Convention.