Ramsar soft law is not soft at all

Discussion of the 2007 decision by the Netherlands Crown on the Lac Ramsar site on the island of Bonaire

Jonathan Verschuuren[1]

This paper is a translation of a case law annotation published in the Dutch environmental law review "Milieu en Recht" (Environment and Law), vol. 35:1 (2008), pp. 28-34.

Netherlands Crown Decision of 11 September 2007 in the case lodged by Competent Authority for the Island of Bonaire on the annulment of two of its decisions on the Lac wetland by the Governor of the Netherlands Antilles

Summary of the case

In 2006, the Competent Authority for the Island of Bonaire, one of the islands of the Netherlands Antilles (Dutch territory in the Caribbean) decided to allow for the construction of a resort totalling 44,150 square metres. Under "project Mangrove Village" in Sorobon, Bonaire, the privately owned company Crown Court Estate planned to construct 27 single units, 17 double units, a resort entry, and two gatekeeper buildings covering 10.995 square metres. Two decisions (the emphyteutic lease and the building permit) were annulled by the Governor in October 2006 and January 2007 respectively because of infringement of the Convention of Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), more specifically infringement of Article 3 of the Convention and the guidelines adopted in the Annex of Resolution VIII.9 (the duty to carry out an Environmental Impact Assessment before granting a building permit). The Lac/Sorobon wetland was designated a wetland of international importance under the Ramsar Convention on 23 May 1980. The resort was not planned to be located within the boundaries of the Ramsar site, but (partly) inside the 500 meter buffer zone surrounding the Ramsar site.

In its decision, the Crown checks the legality of the annulment by the Governor. It starts by reiterating following provisions of the Ramsar Convention:

- Article 3 (the duty of wise use of wetlands and the duty to be informed on changes in the ecological character)
- Article 6, section 1, section 2 letters d and f (the competence of the Conference of the Parties to do recommendations on the conservation, management and wise use of wetlands, and to adopt other recommendations or resolutions to promote the functioning of the Ramsar Convention).

Second, the Crown reiterates portions from a large number of resolutions and recommendations adopted by the Conference of the Parties:

- Annex to Recommendation 3.3 on Wise use of wetlands (1987)
- Annex to Recommendation 4.10 "Guidelines for the implementation of the wise use concept" (1990)
- Recommendation 6.2 on Environmental Impact Assessment (1996)
- Resolution VII.16 (nos. 10 and 11 on EIA) (1999)

[1] Prof.dr. Jonathan Verschuuren is a professor of International and European Environmental Law at Tilburg University, the Netherlands, and vice dean of the Tilburg University School of Law.

- Resolution VIII.9 and its Annex "Guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and/or processes and in strategic environmental impact assessment" (2002)

Third, the Crown mentions the requirements, laid down in Article 31 of the Vienna Convention on the Law of the Treaties (1969), that Conventions have to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, taking into account (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and (c) any relevant rules of international law applicable in the relations between the parties.

Fourth, the Crown moves on to Netherlands Antilles legislation and policies on protected areas. The Lac wetland has been designated a as a national park under this national (island) law. A 500 meter buffer zone is designated around the Lac wetland. The first 100m from the high water mark is a designated setback zone. In the 100-500m zone, controlled land use is allowed, but it has to be ensured that it is compatible with Lac's designation as a national park. These zones were also designated as such in the relevant policy plans, i.e., the Nature Policy Plan Bonaire 1999-2004 and the Lac Bay Management Plan 2003. Article 22 of the Bonaire Construction Regulation requires a permit for the construction of a new building, which permit may be refused for several reasons, one of which is the fact that the location of the building 'deforms' the natural environment.

Then, the Crown discusses the merits of the case, focusing mainly on the Ramsar Convention. I will now almost literally reproduce this part of the decision (section 2.2.3.5 of the decision). According to the Crown, the Governor was correct when he state that the Ramsar Convention obliges the authorities to not allow construction activities within the 500 m buffer zone without an EIA according to Ramsar specifications. The argument, brought forward by the Competent Authority, that the Ramsar Convention does not encompass self-executing provisions within the meaning of Article 93 of the Netherlands Constitution, which would render the Convention unsuitable for judicial review, is discarded by the Crown. Even if that were true, the Ramsar Convention remains a binding convention for the Kingdom of the Netherlands, and therefore, the Governor rightfully applied the provisions of the convention. The Crown states that the Governor, acting on behalf of the Kingdom of the Netherlands, used his competence to ensure that the duties laid down in the Ramsar Convention are followed. According to the Crown, the Ramsar Convention has to be faithfully interpreted and implemented by the state parties so that its aims are achieved. The Crown then mentions the example of Article 3 of the Ramsar Convention that has to be carried out in the light of the aim of conservation and preservation of the special ecological character of wetlands. In addition, the Crown finds that when interpreting the provisions of the convention, later resolutions, recommendations and guidelines that were adopted by the parties to the convention, have to be taken into account. The Crown states that these instruments add to the duties that already have been laid down in the convention itself, such as the duty of wise use and the duty to be informed if the ecological character of a wetland is changing or is likely to change as a consequence of human interference. Such resolutions, recommendations and guidelines are especially important because Article 3 itself does not offer much to hold on to. In addition, the Crown states, it is important that the resolutions and recommendations have been adopted unanimously by the Conference of the Parties, in which all state parties, including the Kingdom of the Netherlands, are represented.

After having concluded that the Governor was right when testing the permits against the Ramsar Convention and its recommendations, resolutions and guidelines, the Crown goes into the detail of the relevant documents. It starts with going into Recommendation 6.2 (1996) that further specifies the duty laid down in Article 3 of the Ramsar Convention that the authorities have to be informed on possible changes in the ecological character of the wetland. The Crown notes that, according to this recommendation, an impact assessment is necessary, involving experts. Then, the Crown refers to Resolution VIII.9 (2002) according to which the EIA guidelines that are to be used in biodiversity assessments also apply to any obligation to carry out an EIA within in the Ramsar convention system. The Crown notes that the procedure to carry out an EIA according to the Ramsar specifications entails several phases and offers guarantees to obtain an as complete insight in the effects of a proposed activity on a wetland as possible. Although Article 3 of the Ramsar Convention does leave the state parties considerable discretionary powers as to the exact procedure, the authorities cannot agree on activities in or nearby a Ramsar site without an EIA, according to the Crown. The Crown also concludes that the duty following from Article 3 to carry out an EIA also applies to activities outside the Ramsar site's boundaries, as long as the effects take place within its boundaries. Since national law and policy implementing the Ramsar Convention in Bonaire imposes a 500 m buffer zone, the Governor was right to conclude that the duty to carry out an EIA applies to activities within the buffer zone.

In conclusion, the Crown decides that the Governor rightfully annulled the decisions taken by the Competent Authority to allow for the construction of the resort because of infringement of the Ramsar Convention. The Competent Authority should have refused the permit on the grounds of Article 22 of the Bonaire Construction Regulation. This provision leaves enough room to only grant a permit when an EIA according to Ramsar specifications has been carried out. The Crown ends its decision by imposing the Competent Authority to repeal the decisions and to undo anything that, meanwhile, may already have been carried out as a consequence of the decisions.

Comments

Procedurally, this case harks back to administrative appeal cases before 1994 when appeals to the Netherlands Crown were very common. With the enactment of the General Administrative Law Act in that year, the appeal to the Crown was all but abolished, and it can now only be lodged against quashing orders of the Governor of the Netherlands Antilles. The formal status of the decision is that of a Royal Decree, and as the Crown is not a court, the case was prepared by the Council of State, not by its Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak van de Raad van State*, ABRvS), which is the regular court of appeals in administrative cases, but by the full Council of State of the Kingdom (see section 2.1 of the decision, on the considerations concerning the procedure, not cited above).

What is truly arresting about this decision, at least from an environmental law perspective, is its substance. The case concerns the building of a large resort close to the Lac wetland on Bonaire island. As early as 1980, Lac was listed as a protected wetland under the Ramsar Convention. When it signed the Convention, the Netherlands determined that the Convention was also applicable to the Netherlands Antilles. Although the planned resort is outside the listed wetland, it is inside the buffer zone surrounding the site, designated as such under Bonaire law. The dispute focused on the question of whether, as argued by the Governor,

the emphyteutic lease and the building permit should not have been granted without first conducting an environmental impact assessment (EIA). The Governor invoked the wise use principle and the duty to be informed about any changes in the character of the wetland, set out in Article 3 of the Ramsar Convention, as well as various soft law documents in which the contracting parties are urged only to make decisions that may have an adverse impact on protected wetlands after an EIA has been carried out. After having studied the guidelines, resolutions, and recommendations in the framework of the Ramsar Convention, the Crown came to the conclusion that Governor was right. First an EIA must be made, so that the impact is known in advance and harm to the wetlands can thus be prevented.

This decision is remarkable because, in two respects, it deviates from the usual approach of Dutch administrative courts when reviewing international treaties in general and the Ramsar Convention in particular. To begin with, the Crown easily dismissed the argument that the Ramsar Convention does not contain self-executing treaty provisions within the meaning of Article 93 of the Netherlands Constitution, which would render the Convention unsuitable for judicial review. The ABRvS, for instance, often uses this argument so as not to have to test against this convention (for example, ABRvS 10 February 2000, *Milieu en Recht* 2000/12, no. 122, with commentary from Bastmeijer and Verschuuren; cf. also ABRvS 21 July 2004, *Milieu en Recht* 2004/8, no. 85, with commentary from Verschuuren). In the present decision, however, the Crown adopted the approach first and elaborately argued in the landmark decision on the Road Widening Emergency Act (*Spoedwet wegverbreding*) for the A2 national highway (ABRvS 15 September 2004, *Milieu en Recht* 2004/10, no. 97, with commentary from Jesse en Verschuuren). In that decision, the ABRvS made it clear that treaties signed and ratified by the Netherlands constitute Netherlands law and must therefore be applied by the authorities, regardless of the self-executing character of its provisions (for a detailed discussion in Dutch, see R.A.J. van Gestel, J.M. Verschuuren, Internationaal en Europees milieurecht in Nederland? Gewoon toepassen! in: *Tijdschrift voor Europees en economisch recht (SEW)*, June 2005, pp. 244-251).

In the Bonaire case, the Crown takes the same approach, without referring to this landmark case, but, instead, by referring to Article 31 of the Vienna Convention. The Crown was of the opinion that the Governor, as a body of the Kingdom, was justified in using his authority to guarantee performance of the Kingdom's obligations under the Convention. This paves the way to full testing against the Ramsar Convention. And this is unique: there is no similar, earlier case law in the Netherlands in which the Ramsar Convention is given such serious attention. Hopefully, this will now also happen in other cases, even if all wetlands in the Netherlands are also listed areas under the Birds and Habitats Directives, which usually makes testing against the Ramsar Convention redundant (see Jonathan Verschuuren, The Case of Transboundary Wetlands under the Ramsar convention: Keep the Lawyers Out! (2008) 19:1 *Colorado Journal of International Environmental Law and Policy*, p. 49-127(115-116).

In my view, what is even more remarkable is the role awarded to soft law documents in interpreting the treaty obligations. The Crown at length discusses various resolutions and recommendations adopted over time by the contracting parties to the Ramsar Convention. It is these documents that indicate that decision-making procedures on projects with potentially adverse impacts on protected wetlands must include an investigation of possible effects, for example, an EIA. The Convention itself does not specify an obligation to perform an EIA. Article 3 merely states that parties must "promote … the wise use of wetlands in their territory" and that they "arrange to be informed at the earliest possible time

if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference". The concrete meaning of this provision is addressed in detail in all kinds of documents that do not have the same legal status as the Convention but are referred to in international law as "soft law". These texts are generally considered to be authoritative, but not independently legally binding documents that indicate how treaty obligations can best be interpreted. The Crown presents two arguments to attach considerable legal value to these soft law documents. Especially if the text of the Convention itself is insufficiently clear, the elaboration in soft law documents is needed to adequately interpret a relevant treaty obligation. Moreover, the resolutions and recommendations have been adopted unanimously by the Conference of the Contracting Parties, of which the Netherlands is also a member. The Crown subsequently draws the ultimate conclusion: because the above-mentioned documents recommend an EIA when applying Article 3 of the Ramsar Convention, decision-making procedures that do not include an EIA that follows Ramsar specifications are not allowed.

News of this decision spread quickly and was enthusiastically received by people who work to manage and conserve wetlands every day. Although an enormous amount of very practical and useful soft law has been developed in the wake of the Convention (see the website of the Convention Secretariat, http://ramsar.org), so far, the legal consequences of these soft law documents have been few (as is also shown in the article published in (2008) 19:1 *Colorado Journal of International Environmental Law and Policy*, p. 49-127(116), as cited above). In this case, the Netherlands Crown has had the courage to take things a step further. Who's next?