

CONVENTION ON WETLANDS (Ramsar, Iran, 1971)

25th Meeting of the Standing Committee
Gland, Switzerland: 23- 27 October 2000

DOC. SC25-8

Agenda item 12

Analysis and recommendations of IUCN's Environmental Law Centre (Decision SC24-10) on Revisions to Ramsar sites boundaries, interpretation of Articles 2.5 and 4.2 (Resolution VII.23, paragraphs 9, 10, 11 & 13)

Action requested: The Standing Committee is requested to consider the advice provided by IUCN Environmental Law Centre and take a decision on the way forward to bring recommendations on this issue to COP8, in particular in relation to the draft guidelines suggested in section IV of the attached paper.

1. The Standing Committee discussed the matter of Articles 2.5 and 4.2 at its previous meeting and adopted the following decision: "The Standing Committee requested the Bureau to explore with IUCN's Environmental Law Centre how the ELC might initially take the lead in developing legal advice for the SC on the issues raised in Resolutions VII.23 and VII.24, so that the Committee can then decide how to move forward" (Decision SC24-10).
2. Resolution VII.23 from COP7 is the relevant reference for this agenda item and in particular paragraphs 9 – 13 inclusive, as follows:
 9. REQUESTS the Standing Committee to develop and propose to the 8th Meeting of the Conference of the Contracting Parties (COP8) a procedure for the review of Ramsar site boundaries for reasons other than urgent national interest, without prejudice to other international obligations;
 10. RECOGNIZES that Australia will prepare two case studies (as referred to in Resolution VII.12) for the development of a more generalized approach to the revision of Ramsar site boundaries in cases other than the urgent national interest, and will provide the outcomes of these case studies in time for consideration at COP8;
 11. REQUESTS the Standing Committee, with support from the Bureau, and in consultation with the Scientific and Technical Review Panel (STRP), experts familiar with the Habitats Directive of the European Union, appropriate legal and other experts, and interested Contracting Parties, to develop for consideration and possible adoption at COP8 guidance for the Contracting Parties in interpreting Articles 2.5 and 4.2, if resources allow;

12. CALLS UPON any Contracting Parties that consider the deletion or restriction of the boundaries of a Ramsar site in the urgent national interest prior to COP8, to exercise the highest levels of environmental, economic and social impact assessment which take into consideration the full range of functions, services and benefits offered by the wetland; and
 13. URGES those Contracting Parties or organizations with experience in issues of urgent national interest or similar determinations and habitat compensation and mitigation issues to provide any relevant information and materials to the Ramsar Bureau for consideration by the Standing Committee by no later than 30 September 1999.
3. Also relevant is Resolution VII.24 concerning compensation for lost wetland areas, particularly paragraph 13: The COP “INVITES the Standing Committee to define, in cooperation with the Scientific and Technical Review Panel and the Ramsar Bureau, and in consultation with the International Organization Partners, criteria and guidelines for the compensation of wetland habitats in the case of unavoidable losses and to submit these for the approval of COP8”.
 4. It should be recalled that all Contracting Parties were invited through Diplomatic Notification 1999/6 to provide to the Bureau by 30 September 1999 any pertinent information on these related issues. Replies to this request were from Australia and the Royal Society for the Protection of Birds, which were transmitted to the Standing Committee at its last meeting.
 5. Following the SC Decision, the Bureau contracted IUCN’s Environmental Law Centre to prepare advice on this matter. The analysis prepared by the ELC is attached.
 6. The Conclusion in the attached document is that: “As noted at the outset, there is limited express guidance within the Ramsar Convention for determining ‘urgent national interest’. Nonetheless, there is sufficient guidance that can be derived from the Convention and related instruments, to devise a method for developing a set of guidelines to assist with the determination of both urgent national interest, and the adequacy of the approach toward compensation in those cases where wetlands are taken for reasons of national interest.” The Standing Committee may wish to consider agreeing to the development of the set of guidelines suggested by the ELC for consideration at its next meeting.

IUCN – The World Conservation Union
Environmental Law Centre

THE RAMSAR CONVENTION ON WETLANDS: THE ROLE OF ‘URGENT NATIONAL INTERESTS’ AND ‘COMPENSATION’ IN WETLAND PROTECTION

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21 September 2000

**The Ramsar Convention on Wetlands: The Role of ‘Urgent National Interests’ and
‘Compensation’ in Wetland Protection**

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I. Introduction

1. The *Convention on Wetlands of International Importance especially as Waterfowl Habitat* was signed in Ramsar, Iran on 2 February 1971 with the aim of stemming the progressive encroachment on and loss of wetlands. The Ramsar Convention places an obligation upon each Contracting Party to designate at least one site for inclusion in the List of Wetlands of International Importance (the “Ramsar List”). The inclusion of a site in the Ramsar List confers upon it the prestige of international recognition and obliges the government to take all steps necessary to ensure the maintenance of the ecological character of the site.
2. The Convention ensures, however, that “[t]he inclusion of a wetland in the Ramsar List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated.”¹ Contracting Parties may also at any time designate additional wetlands for the Ramsar List, or extend the boundaries of those already included.² As of July 2000, the 121 Contracting Parties had designated 1028 sites for the Ramsar List, covering an area of 78,195,293 hectares (782,000 square kilometres).
3. Under exceptional circumstances, however, a Contracting Party may, because of ‘urgent national interests’ delete or restrict the boundaries of wetlands already included in the List.³ The Convention provides that such deletions or restrictions should be compensated for by the designation as a Ramsar site of another wetland, either in the same area or elsewhere.⁴
4. In light of these provisions, at the seventh Conference of the Contracting Parties (COP), organised in Costa Rica in May 1999, two key Resolutions were adopted. By Resolution VII.23, the COP, *inter alia*,

Requests the Standing Committee to develop and propose to the 8th Meeting of the Conference of the Contracting Parties (COP8) a procedure for the review of the Ramsar site boundaries for reasons other than urgent national interest, without prejudice to other international obligations.

5. Furthermore, this resolution “requests the Standing Committee, in cooperation with the Bureau and the STRP, to develop for consideration and possible adoption at COP8 guidance for the Contracting Parties in interpreting Articles 2.5 and 4.2, if resources allow.”

¹ *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, Feb. 2, 1971, 11 I.L.M. 969 (1972) at Article 2.3 [hereinafter *Ramsar Convention*].

² *Ibid.*, Article 2.5 states: “Any Contracting Party shall have the right to add to the List further wetlands situated within its territory, to extend the boundaries of those wetlands already included by it in the List, or, because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List and shall, at the earliest possible time, inform the organisation or government responsible for the continuing Bureau duties specified in Article 8 of any such changes.”

³ *Ibid.*, Article 2.5

⁴ *Ibid.*, Article 4.2 states: “Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.”

6. By Resolution VII.24, the COP

Invites the Standing Committee to define, in cooperation with the Scientific and Technical Review Panel and the Ramsar Bureau, and in consultation with the International Organizations Partners, criteria and guidelines for the compensation of wetland habitats in the case of unavoidable losses and to submit these for approval of COP8.

7. Subsequently, to help address these requests, the Standing Committee, at its 24th meeting in November 1999 adopted Decision SC24-10:

The Standing Committee requested the Bureau to explore with IUCN's Environmental Law Centre how the ELC might initially take the lead in developing legal advice for the SC on the issues raised in Resolutions VII.23 and VII.24, so that the Committee can then decide how to move forward.

8. This paper is the Environmental Law Centre's initial effort to assist with this request. As noted below, ELC views the Convention itself as providing limited express guidance over the exact interpretation of "urgent national interests." At present, the matter has been discussed within the Convention's bodies, including the COP, the Scientific and Technical and Review Panel (STRP)⁵ and the Standing Committee,⁶ but with no conclusive outcome. Nevertheless, ample information exists to help the STRP and COP form a method for proceeding to address this important topic.

9. For these reasons, in order to develop legal advice on how to apply the term urgent national interests and to develop criteria and guidelines for compensation, the ELC proposes consideration of a two-step approach. First, to review here relevant legal principles both within the Convention, and in international and national environmental law. Then, based upon these legal maxims and guidance, ELC sets forth a set of guidelines to be used as a method to determine whether a proposal is consistent with urgent national interest and to address appropriate wetlands compensation.

II. "Urgent National Interests" - Relevant Legal Principles in International and National Environmental Law

A. Under The Ramsar Convention - Case Examples of Urgent National Interest

10. A Ramsar Convention party may restrict the boundaries of a designated wetland within its borders or simply delist a wetland from the Ramsar listing because of "urgent national interest." Parties currently maintain a great deal of discretion in justifying urgent national interest because the term, as used in the Convention, has yet to be defined, despite its presence in both Articles 2.5 and 4.2. By including such a provision without providing further guidance as to its interpretation, the Ramsar Convention effectively allows for "the

⁵ *The Ramsar Convention on Wetlands*, Notes of the 8th Meeting of the Scientific and Technical Review Panel (STRP), 22-24 September 1999, Agenda Item 22. <http://ramsar.org/strp8_minutes.htm>.

⁶ *The Ramsar Convention on Wetlands*, Report of the 24th Meeting of the Standing Committee, Nov.-Dec. 1999 at para. 57-58. <http://www.ramsar.org/key_sc24_minutes.htm#2542>.

loss of a national resource area once thought to be of international importance or significance and does not provide for any safeguards for a listed wetland.”⁷

11. In practice, the term has only been invoked twice: by Belgium in 1987, and by Australia in 1997. In 1987, Belgium announced at the third Conference of the Parties, held in Regina, Canada, that it would be reducing the size of the Lower Scheldt river site, located between Antwerp and the Dutch border. Of the three separate parts of this Ramsar site, the Galgenschoor site was to be reduced by 30 hectares in order to accommodate the further expansion of the Antwerp harbour facilities.⁸ Although the Belgian government never explicitly used the term ‘urgent national interest,’ it nevertheless proposed compensation in the form of 2,000 hectares of wet grassland habitat along the Yzer river. Since suitable compensation is the analogous obligation, it can be assumed that the Belgian government was implicitly invoking the ‘urgent national interest’ clause.
12. In the one other reported case, Australia announced on 14 March 1997 that for health and safety reasons, it would relocate the Coode Island chemical storage facility out of central Melbourne to Point Lillias. This would reduce by 20 hectares the 5460 hectare Ramsar-listed Port Phillip Bay (Western Shoreline) and Bellarine Peninsula wetlands. Australia stated that constraints in space would not allow a desired expansion of the current facility to service an economically important expansion of chemical, plastic and rubber industry. Furthermore, a long period of assessment had identified Point Lillias as the only viable alternative. Australia asserted that the relocation would support economic expansion and job creation, provide a better health and safety outcome for the people of Victoria, and bring about improved conservation through the environmental compensation package. While the proposal was later withdrawn by Australia, it nevertheless demonstrates that Australia considered these health and economic factors sufficient to constitute ‘urgent national interests.’
13. Given this limited experience with urgent national interest under the Convention, in forming guidelines as to how to apply and interpret the term, it is useful to consider potentially relevant terminology under relevant international and national legislation. ELC begins this consideration by reviewing the concept of “state necessity.”

B. Concept of “State Necessity” under International Law

14. Within the international field, ELC’s initial research has not revealed another body which uses the concept of ‘national interest’ from which a definition could be imported to assist with the Convention’s terminology. Nevertheless, a number of similar terms exist which, while not determinative in themselves, provide fundamental criteria which can be extracted and applied within the context of the Ramsar Convention. One such example is the concept of “state necessity” under international law. Originally a principle of customary law,⁹ it has been codified in the International Law Commission’s *Draft Article on the*

⁷ Cheryl Jamieson, *An Analysis of Municipal Wetlands Laws and Their Relationship to the Convention on Wetlands of International Importance Especially As Waterfowl Habitat (Ramsar)*, 4 Pace Envtl. L. Rev. 177 (1986) at 211.

⁸ *The Ramsar Convention on Wetlands*, Conference Report of the 3rd Meeting of the Conference of the Contracting Parties, 27 May - 5 June 1987, Agenda item XVI. <http://ramsar.org/cop3_conf_rpt_e.htm>.

⁹ *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 34.

International Responsibility of States as a condition which relieves a state from treaty obligations it undertook, but only under very strict limitations.¹⁰

15. The concept of state of necessity was examined in detail by the International Court of Justice in the *Gabčíkovo-Nagymaros* case. At issue was a treaty between Hungary and Slovakia providing for the construction and operation of a system of locks on the Danube river as a “joint investment” by the two countries. However, as a result of intense criticism that the project generated in Hungary, the Hungarian Government decided on May 13, 1989 to suspend the works at Nagymaros pending the completion of various studies. In 1992, the Hungarian Government transmitted to the Slovak Government a *Note Verbale* terminating the 1977 Treaty. Hungary claimed that:

In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.¹¹

16. To justify its conduct, Hungary relied essentially on a “state of ecological necessity”. In its decision, the Court in *Gabčíkovo* acknowledged that the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation, but accepted only on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its *Draft*:

in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness.¹²

17. The court proceeded to examine the constituent elements of a state of necessity as set forth in customary international law and presently codified in the International Law Commission’s *Draft Article on the International Responsibility of States*: it must have been

¹⁰ International Law Commission, *Draft Article on the International Responsibility of States*, Article 33 states: “1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless: the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness: if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or if the State in question has contributed to the occurrence of the state of necessity.”

Other conditions that have been codified include force majeure (Article 31), distress (Article 32) and self defence (Article 34).

¹¹ *Gabčíkovo-Nagymaros Project* (Slovakia v. Hungary), 1997 ICJ REP. 92 (Sept. 25) at para. 40.

¹² *Supra* note 9, p. 51, para. 40.

occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations, that interest must have been threatened by a “grave and imminent peril,” the act being challenged must have been the “only means” of safeguarding that interest, that act must not have “seriously impair[ed] an essential interest” of the State towards which the obligation existed, and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity.” Thus, according to the Court, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied.

18. On this basis, the Court acknowledged that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an “essential interest” of that State within the meaning given to that expression in Article 33 of the *Draft of the International Law Commission*. The Court considered, however, that, serious though this threat to an essential interest might have been, Hungary failed to establish the objective existence of a ‘peril.’ The Court concluded that while the word ‘peril’ evoked the idea of risk, thereby distinguishing it from material damage, a state of necessity could not exist without a ‘peril’ duly established at the relevant point in time. The mere apprehension of a possible ‘peril’ could not suffice since the ‘peril’ constituting the state of necessity has to be simultaneously ‘grave’ and ‘imminent.’ ‘Imminence’ is synonymous with ‘immediacy’ or ‘proximity’ and goes far beyond the concept of ‘possibility’. As the International Law Commission emphasised in its commentary, the “extremely grave and imminent” peril must have been a threat to the interest at the actual time. That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable.
19. The Court therefore concluded that the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they ‘imminent.’ Furthermore, Hungary had other means of responding to these perceived perils. Negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon its works.
20. The value of this decision in the interpretation of what constitutes an ‘urgent national interest’ is two-fold. First, while treaty and contract law are not identical, the Court’s judgment nevertheless demonstrates the binding nature of agreements, and consequently, the high threshold that will have to be met in order for a State to be able to avoid the obligations it undertook to perform. Second, the elements that form the state of necessity, an ‘essential interest’ and a ‘grave and urgent peril,’ can be clearly analogised to the concept of urgent national interest.
21. Thus, ironically, the rejection of the Hungarian governments’ environmental grounds as state necessity by the International Court of Justice, serves to underscore in the Ramsar context, that the standard should be very stringent before countries in *Gabčíkovo* are allowed to claim “urgent national interest” as a basis to delist sites from the Convention.

C. ‘Overriding Public Interest’ in the EU

22. Another concept that provides interpretative guidance is the concept of ‘overriding public interest’ as found within the European Union. The EU’s policy on nature conservation

within its territory is essentially made up of two pieces of legislation: Council Directive 79/409/EEC on the protection of wild birds (the 'Birds Directive') which was adopted in April 1979 and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the 'Habitats Directive') which was adopted in May 1992. Together, they establish a legislative framework for protecting and conserving Europe's wildlife and habitats.

23. Similar to the Ramsar Convention, both the Habitats and the Birds directives use the concept of "imperative reason of overriding public interest" as justification for carrying out a project in spite of a negative assessment.¹³ The term itself is not defined, although the text in which it is placed does offer assistance in its interpretation. While the first paragraph of Article 6(4) states that those interests include social and economic factors, the use of the word "includes" indicates that the listing is not exhaustive. The second paragraph, on the other hand, applicable to sites hosting a priority natural habitat or a priority species, limits considerations to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest. In all cases, however, Article 6(4) states that the consideration of overriding public interests occurs only in "the absence of alternative solutions." Furthermore, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Projects that lie entirely in the interest of companies or individuals would not be considered to be covered.
24. In a 1995 decision by the Commission, it was held that high unemployment constituted an overriding public interest.¹⁴ Following Germany's reunification in 1990, unemployment soared in the new Länder. In order to help boost the economy in these eastern regions, the German government decided that it was essential to complete the missing transport links between the old and new Länder. It therefore developed a series of traffic projects called "Deutsche Einheit" (German Unity), the largest of which was the construction of a 300km long motorway - the A20.
25. The A20 intersects two large Special Protection Areas, the Trebel-Recknitz and the Peene Valley, hosting the richest alluvial alkaline fens in north eastern Germany. Other priority habitat types included raised bogs, bog woodland and calcareous fens. A considerable number of rare and endangered birds were also present. The government initially considered bypassing the SPAs altogether but this would have meant a detour of 50kms which made it untenable. It therefore sought the opinion of the Commission in accordance with Article 6 (4) of the Habitats Directive on the ground of "imperative reasons for overriding public interest."

¹³ *Habitats Directive*, Article 6.4 states: "If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

¹⁴ Commission Opinion of 18 December 1995 on the intersection of the Peene Valley (Germany) by the planned A 20 motorway pursuant to Article 6 (4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. (96/15/EC).

26. The impact assessment determined that, in both cases, the projects would have a considerable effect on the SPAs through land loss and indirect damage. The initial proposal for the crossing over the Peene river, in particular, would have even meant a direct loss of priority habitats. The Commission therefore asked the German authorities to submit a series of less damaging alternatives for this site. On the basis of available scientific information and a site visit conducted with the German authorities three alternatives were carefully analysed by the Commission to determine the possible impacts on the habitats and species of European importance and the necessary compensation and mitigation measures. The alternative close to the existing crossing of the SPA by a country road bridge at the town of Jarmen was considered a less damaging solution.
27. The compensation measures included the recreation or restoration in the SPAs of seven different habitat types over an area of nearly 100 hectares. The authorities also undertook to reduce as far as possible the impact of the A20 during and after its construction.
28. In view of the particularly poor socio-economic state of Mecklenburg-Western Pomerania and the importance attached to the construction of the A20 as a means of alleviating this situation and considering the foreseen compensation measures proposed by the Government to compensate for loss of nature within the SPAs, the Commission concluded that, under the given circumstances, the adverse effects were justified by imperative reasons of overriding public interest.
29. However, as the Commission's interpretation has not been confirmed by a decision from the Court of Justice, it may therefore be helpful to refer to other fields of Community law where similar concepts appear. The "imperative requirement" concept was developed by the Court of Justice as an exception to the principle of free movement of goods. Among these imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environmental protection, as well as the pursuit of legitimate goals of economic and social policy.
30. In addition, Community law also knows the concept of "service of general economic interest," evoked in Article 86(2) of the Treaty, within the framework of the exception to the rules of competition envisaged for companies responsible for the management of such services. In a communication on services of general interest in Europe, the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: "they describe activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service. It is the case in particular of services in transport, energy, communication networks."¹⁵
31. Having regard to the structure of the aforementioned provisions, in specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined taking into account that the public interest must be overriding. It is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the

¹⁵ COM (96) 443, of the 11.09.1996.

particular weight of the interests protected by the Directive. In this context, it seems also reasonable to assume that the public interest can only be overriding if it is a long-term. Short term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive.

32. It is therefore reasonable to consider that the “imperative reasons of overriding public interest, including those of social and economic nature” refer to situations where plans or projects envisaged prove to be indispensable within the framework of actions or policies aiming to protect fundamental values for the citizen’s life (health, safety, environment), fundamental policies for the State and the society, or carrying out activities of economic or social nature, fulfilling obligations of public service.
33. ‘Human health’, ‘public safety’ and ‘primary beneficial consequences for the environment’ constitute the most important imperative reasons of overriding public interest. However, like the concept of “imperative reasons of overriding public interest” these three categories are not defined expressly. Community law does, however, refer to public health and public safety reasons as reasons which can justify the adoption of restrictive national measures to the free movement of goods, workers, services as well as to the right of establishment. In addition, the protection of person’s health is one of the fundamental objectives of the Community policy in the field of the environment.
34. As regards the concept of ‘public safety,’ it is useful to refer to the judgment of the Court of Justice in the *Leybucht Dykes* case¹⁶. That decision preceded the adoption of Directive 92/43/EEC and hence Article 6. However, the decision retains relevance, not least because the Court’s approach influenced the drafting of Article 6. At issue were construction works to reinforce dykes on the North Sea at Leybucht. These works involved a reduction in the area of an SPA. As a matter of general principle, the Court stated that the grounds justifying such a reduction must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In the specific case, the Court confirmed that the danger of flooding and the protection of the coast constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as these measures are confined to a strict minimum.
35. A number of other legal instruments use the term ‘public interest’ with, however, little further guidance as to the precise meaning of the term. These include the Council Directive 85/337¹⁷ that places an obligation upon states to perform an environmental assessment of any public or private project which is likely to have a significant effect upon the environment. However, Article 10 states that “the provisions of this directive shall not affect the obligations on the competent authorities to respect the [...] safeguarding of the public interest.”
36. Another example is seen in Catalonia, the law of March 30, 1988, concerning Aigues Tortes National Park, allows a permit to be granted for prohibited activities, in exceptional

¹⁶ *Commission v. Germany*, Justice of 28 February 1991, C-57/89.

¹⁷ Council Directive 85/337 of June 27, 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ No. L 175, July 5, 1985.

cases for reasons of public interest, provided that it has been expressly shown that there is no other viable solution, and provided mitigating measures are taken.

37. Further, the Wildlife Convention¹⁸ aims to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the cooperation of several states. However, under Article 9, parties are exempted from the Convention's obligations, "provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned [...] in the interests of public health and safety, air safety or other overriding public interests."
38. The term 'public' has been defined as referring to "the people of a nation as a whole," thereby providing fundamental links with the analogous concept of urgent 'national interests.'¹⁹ Primarily, analysis of the European usage of the term provides concrete examples of fields that form a public interest. These include social and economic factors, human health and public safety, and furthermore, within the concept of 'services of general economic interest,' transportation, energy and communication networks. Furthermore, as described within the context of wise use²⁰, a gradient balancing of interest is established, whereby the higher the importance of the habitat, the higher the threshold that 'public interest' will have to meet in order to be considered as overriding.
39. A similar result is supported by consideration of the Ramsar Convention's "Wise use" concept. The Ramsar Convention requires Contracting Parties, at Article 3.1, "to formulate and implement their planning so as to promote, as far as possible, the wise use of wetlands in their territory." The term "wise use" was interpreted in 1987, when the COP adopted the following definitions:
- The wise use of wetlands is their sustainable utilisation for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem.
- Sustainable utilisation is defined as "human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations".
- Natural properties of the ecosystem are defined as "those physical, biological or chemical components, such as soil, water, plants, animals and nutrients, and the interactions between them." (*The Ramsar Convention on Wetlands, Guidelines on the Wise Use of Wetlands, Annex to Recommendation 3.3, Regina, Canada, 27 May - 5 June 1987*).
40. The interpretation of 'wise use' was further clarified through the *Guidelines for the Implementation of the Wise Use Concept*, (Annex to Recommendation 4.10) and the *Additional Guidance for the Implementation of the Wise Use Concept* (Annex to Resolution 5.6). Furthermore, in 1996, the COP considered the relationship between 'wise use' and the term 'sustainable development' as used in the 1992 Convention on Biological Diversity. It was recognised

¹⁸ Convention on the Conservation of European Wildlife and Natural Habitats, Berne, September 19, 1979.

¹⁹ Brian A. Garner, ed. Black's Law Dictionary, 7th Edition, St. Paul: West Group, 1999.

²⁰ *Supra*, note 14.

that the concept of wise use as enshrined in the treaty had been developed substantially and is “considered to be synonymous with ‘sustainable use.’” (Ramsar 25th Anniversary Statement). The principle of sustainable development, in turn, has been considered to an extent by the International Court of Justice as a principle of contemporary international law (*supra* note 11, Separate opinion of Vice-President Weeramantry).

41. By linking wise use to the principle of ecological integrity and affirming that conservation includes sustainable human usage, the COP has arguably blurred the distinction between the two concepts that underpin Ramsar’s dual focus on listed and other wetlands. Logically, this makes it possible to view Ramsar’s provisions not as parallel or alternative regimes but as a gradient. The basic aim, so far as possible, should be to tackle patterns of unsustainable land and water use wherever they occur. Therefore, moving up the gradient towards wetlands of greatest ecological importance, resource management measures should be progressively tightened to a point where nature conservation is prioritised or formally weighted above other competing interests.

D. ‘No Net Loss’ Policy in the United States and Canada

42. In North America, numerous reasons have contributed to a drastic decline in wetlands area. In the United States, over half of the original 230 million acres of wetlands that the first settlers found upon arrival has been lost. As a result, wetlands protection has long been among the most controversial of national environmental policies, in part because it is implemented through inconsistent and often ineffective regulatory programs.²¹
43. At present, wetlands regulation in the United States occurs primarily under section 404 of the Clean Water Act (CWA).²² Section 404 regulates “discharges” of “dredged or fill material” into waters of the United States. The section 404 program is intended to achieve a goal of “no net loss of wetlands,” a policy recommended by a national committee of politicians, scientists, and bureaucrats. A basic definition of no net loss is given by the US Wetlands Action Plan: “wetland losses must be offset by wetland gains.”²³ The principles underlying the ‘no net loss’ principle are threefold: to protect loss of habitat, to restore (mitigate), and to develop or create (compensate) the productive capacity of habitats to achieve an overall net gain.
44. In 1990, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) signed Memorandum of Agreement (MOA) establishing a goal of “no net loss” of wetland function and values, and instituting a “sequencing” process requiring that permits be analysed in a step-wise fashion. First, no permit will be granted if there is a “practicable alternative” to the wetland discharge. Second, all “appropriate and practicable” steps must be taken to minimise adverse impacts. Third, unavoidable losses of wetland functions can be compensated by, *inter alia*, restoration of degraded wetlands or creation of manmade wetlands.²⁴

²¹ Jennifer Neal, *Paving the Road to Wetlands Mitigation Banking*, 27 B.C. Env’tl. Aff. L. Rev. 161 (1999) at 161-162.

²² *Clean Water Act (CWA)*, [33 U.S.C. § 1344](#) (1994).

²³ US Fish & Wildlife Service 1990.

²⁴ Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

45. The USA Federal Clean Water Act Section 404 Guidelines defines unavoidable as: “where a project is not water dependent then the developer must demonstrate that there are no alternative sites, that the project is in the public interest and that all means to mitigate the damage have been taken.” These criteria are similar to those outlined within the Habitats Directive relating to SPAs and SACs. Any project not directly related to the management of an SPA/SAC and likely to have a significant effect must be subject to an appropriate assessment. A damaging project should only proceed if there are no alternatives, it is imperative for reasons of overriding public interest and all compensatory measures necessary have been taken.
46. The ‘public interest’ test, a result of the Corps’ regulations imposing a variety of review criteria on applications for discharge permits, balances the expected benefits of the permitted activity and its potential environmental harms. On the one hand, for example, the Corps will consider effects on economics, land use, navigation, recreation, water supply, energy needs, and, significantly, “considerations of property ownership.” Those factors could often pose interests inconsistent with the goal of promoting biodiversity. On the other hand, biodiversity could be enhanced under the Corps’ required consideration of conservation, aesthetics, wetlands, fish and wildlife values, and, as a catch-all, “general environmental concerns.” With respect to wetlands specifically, moreover, the Corps’ rules advise that unnecessary alteration or destruction of wetlands “should be discouraged as contrary to the public interest” and that “the cumulative effect of numerous piecemeal changes can result in a major impairment of wetlands resources.” Hence, there are strong presumptions against discharges in wetlands and there are meaningful review criteria by which to promote preservation of such ecosystems.²⁵
47. Under Canadian law, legal protection for wetlands derives mainly from Section 35 of the federal Fisheries Act.²⁶ The primary federal policy tool for wetlands is the *Federal Policy on Wetlands Conservation*. This policy, issued in 1991, recognizes that wetlands are among Canada’s most threatened ecosystems and commits the government to “no net loss” of wetlands.
48. The *Fisheries Act* prohibits the harmful alteration, disruption or destruction of fish habitat unless authorized by the Minister of Fisheries and Oceans or under regulations.²⁷ If the Fisheries and Oceans Canada authorises habitat destruction, it will require habitat compensation to achieve the government’s policy goal of no net loss of fish habitat.²⁸

²⁵ B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. Colo. L. Rev. 555 (1995) at 603-4.

²⁶ *Fisheries Act*, R.S.C. 1985, Chapter F-14 (last updated 1999).

²⁷ Section 35:

(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

²⁸ This policy is stated in:

a. Habitat Conservation and Protection Guidelines of 1998;

b. Canadian Federal Government Policy on Wetland Conservation 1991;

c. Policy for the Management of Fish Habitat of 1986 (Guiding Principle (2.2.1.) of which reads: “The no net loss principle is fundamental to the habitat conservation goal. Under this principle, the Department will strive to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so that further reductions to Canada’s fishing resources due to habitat loss or damage may be prevented.”).

Wetlands are protected by the *Policy for the Management of Fish Habitat*. The policy sets the guiding principle that there be no net loss of habitat. In addition, habitats are to be improved and created in some areas.²⁹ The *Policy* contains a hierarchy of preferences for maintaining productive capacities of fish habitat. The first preference is to avoid any loss or harmful alteration through project relocation, redesign or mitigation. If it becomes impossible or impractical to maintain the same level of habitat productive capacity using those approaches then compensation will be considered in some cases. The *Policy* has a range of preferences for compensation as well: replacement of natural habitat at or near the site, moving off-site with the replacement habitat or increasing the productivity of existing habitat for the affected stock and, finally, artificial production to supplement the fishery resource.

49. The *Habitat Conservation and Protection Guidelines* were adopted in 1994 to further define the federal government's responsibilities for habitat protection. In addition, the *Directive on the Issuance of Subsection 35(2) Authorizations* was released in May 1995 to clarify the Habitat Policy. The Directive states that authorizations should only be issued "when it proves impossible or impractical to maintain the same level of habitat productive capacity by altering the design of the project or using mitigative measures." The Directive further provides that authorizations will not normally be issued for projects that will have harmful effects on fish habitat. It outlines other methods for managing fish habitat, such as issuing letters of advice containing measures to ensure harmful effects do not occur.
50. As land use in Canada is primarily under provincial jurisdiction, the provincial laws and policies to protect wetlands are also important. Four provinces have wetland policies in place: Alberta, Saskatchewan, Manitoba and Ontario. The other six provinces (New Brunswick, Nova Scotia, Prince Edward Island, British Columbia, Quebec and Newfoundland) are at different stages of developing wetland policies. The territorial governments of the Yukon Territory, Northwest Territories, and Nunavut apply the Federal Policy on Wetland Conservation for Crown wetland use decisions.
51. The 'no net loss' policy both in the United States and Canada provides useful tools for the interpretation of the concept of 'urgent national interest.' First, it emphasises that any encroachment of protected areas must be first characterised as necessary and unavoidable. Second, the final determination is based upon a balancing of public interests, with a presumption against interference with wetlands.

III. Compensation - Relevant Principles in International and National Law

52. In addition to the conditions that allow a party to restrict Ramsar-listed sites, the corresponding issue involves determining the appropriate compensation. In general terms, the Ramsar Convention places an obligation upon the Contracting Parties to implement and formulate their planning so as to promote the conservation of the wetlands included in the List. More specifically, compensation is made mandatory where a party invokes 'urgent national interests' as the rationale for decreasing the size of a site under article 4.2. The principle of compensation is repeated in the Kushiro statement, adopted by the conference of Parties through resolution 5.1, committing the Contracting Parties to restore degraded wetlands and to compensate for wetland losses.

²⁹*Policy for the Management of Fish Habitat* (Ottawa: Department of Fisheries and Oceans, 1986).

53. In the European Community, pursuant to the *Habitats Directive*, Member States shall take all compensatory measures to ensure that the overall coherence of Natura 2000 is protected when, for imperative reasons of overriding public interest and in the absence of alternatives, a plan or project must be carried out in spite of a negative assessment.³⁰ Similarly, in accordance with the ‘no net loss’ policy found in the *Clean Water Act*, parties shall take all practicable measures to compensate for unavoidable wetland loss.³¹
54. Generally, compensatory measures *sensu stricto* are intended to compensate for the effects of the habitat affected negatively by the plan or project. Therefore, general tree-planting intended to soften a landscape does not compensate for the destruction of a wooded habitat. Similarly, measures required for the “normal” implementation of the Ramsar Convention cannot be considered compensatory for a damaging project. On the other hand, it would presumably be acceptable to improve the biological value of an area so that the carrying capacity or the flood potential are increased by a quantity corresponding to the loss on the site affected by the project.
55. It becomes clear, therefore, that compensation can occur in numerous forms. At one end of the scale is replacement habitat that is exactly like the habitat being lost: the same in size, function and value, and as close as possible to the impact site. At the other end of the scale is replacement habitat that is of a different type to that being lost: it is smaller in area and doesn’t replicate the function or value of the impact site. There is an inverse relationship between equivalence of the wetland and compensation: the more dissimilar the replacement wetland is, the greater the justification for compensation. Superimposed on this relationship must be the degree of risk that the replacement habitat will fail to provide the expected functions and values. The greater the risk, the greater the amount of compensation required as ‘insurance.’³²
56. Certain compensation procedures, particularly those in the United States, indicate a hierarchy of preferred approaches.³³ This sequence is based on the contribution the approach makes to maintaining the overall stock of habitat and the probability of success. First, there is habitat restoration. This involves restoring the functions and values to an area that once was the same habitat as that being lost. This means that the overall area of the habitat is maintained, or even increased, and because within the old habitat a number of the physical attributes may still remain, such as soil chemistry, the likelihood of success is good.
57. If habitat restoration is not a realistic option, then the next best option is habitat replacement. This means the overall area of habitat is maintained or increased. However, because many of the habitat attributes may be absent and will have to be recreated as well, the chances of success are less certain. According to Australia’s *National Wetland Policies*,³⁴ human-made wetlands are acknowledged as being capable of providing valuable functions and addressing specific environmental management issues. As a result, their creation

³⁰ Council Directive 92/43/EEC, Article 6.4.

³¹ *Supra* note 23.

³² Duncan Huggett, *Designing and Building Dynamic Coasts and Wetlands: Developing a No Net Loss Approach*, Paper presented to the *Designing & Building Dynamic Coasts and Wetlands* seminar, London, January 1998.

³³ For example, see *Fish & Wildlife Service* 1981, *Fisheries & Oceans Canada* 1986, *Illinois Interagency Wetland Policy Act* 1989, *Maryland Non-tidal Wetlands Protection Act* 1989.

³⁴ *The Wetlands Policy of the Commonwealth Government of Australia*, January 1997.

should be encouraged where suitable technology is available and it is not possible to restore previously existing wetlands. However, human-made, or purpose-built wetlands, should not be considered as replacement, or compensation, for natural wetlands proposed for destruction without expert supporting evidence.

58. Finally, if creation is not possible, then habitat enhancement should be considered. This does not result in the maintenance of the overall habitat stock. However, by enhancing the value of existing habitats of the same type, the overall value of the habitat in a region can be maintained or increased. The European Commission, addressed the restoration of wetlands in a recent communication:

The restoration and creation of wetland ecosystems is extremely difficult, as they are very complex by their nature. It is normally cheaper to conserve existing wetlands than to rehabilitate degraded wetlands. This, in turn, is more likely to be successful than the restoration of certain functions of destroyed wetlands, while the restoration of complete wetland ecosystems to their former functions and values, is almost impossible.³⁵

59. Furthermore, the European Commission's report on Natura 2000³⁶ sites addressed the timeliness of compensatory measures. It provides that a site should not be irreversibly affected before compensation is in place. This requires that replacement habitats to be created in advance of the losses be shown to have equivalent biological characteristics, and be an integral and functioning part of the site which will sustain a loss before the loss occurs. A major problem is that this requires the creation of replacement habitats normally many years in advance of losses. Therefore, compensation must be a proactive policy rather than one designed to only react to proposals resulting in habitat loss.

IV. Draft Guidelines for Determining Urgent National Interest, and Appropriate Compensation under the Ramsar Convention

60. The interpretation section of the Vienna Convention on the Law of Treaties states that “[a] treaty shall 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.”³⁷ Accordingly, when interpreting elements of the Ramsar Convention, it is important to note that its purpose is “to stem the progressive encroachment on and loss of wetlands now and in the future.” The Convention asserts the fundamental importance of wetlands in terms of economic, cultural, scientific, and recreational value. Furthermore, parties of the Ramsar Convention are dedicated to the principles of ‘wise use,’ the sustainable utilisation of wetland resources in such a way as to benefit the human community while maintaining their potential to meet the needs and aspirations of future generations.³⁸ It is therefore clear that the threshold of the ‘urgent national interest’ test must be high. Otherwise, this provision would be inconsistent with the objectives and

³⁵ Commission Communication to the Council and the European Parliament, *Wise Use and Conservation of Wetlands*.

³⁶ European Commission, *Managing Natura 200 Sites: The Provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, April 2000.

³⁷ Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, Article 31.1

³⁸ See also *The Convention on Wetlands*, Resolution VII.17 on Wetland restoration, at para.10, stating that avoidance of natural wetlands loss must be a first priority

purposes of the Convention. Other legal instruments which employ similar language support this conclusion.³⁹

61. A clear, uniformly applicable test to determine whether a specific condition falls within the boundary of an ‘urgent national interests’ is however, very difficult to formulate. The factors that could justify the construction of a factory as opposed to a highway are significantly different, and both depend largely on the particular economic, social, political and environmental factors that characterise each State. To attempt extreme specificity could be both dangerous and misleading. Nevertheless, while interpretation must be made on a case-by-case basis, a number of broad principles and factors may be established on the basis of the preceding analysis.
62. The ELC suggests that these principles be put to debate, with the aim that over time they may evolve into operational guidelines the Parties can use for determining how and when a site can be subject to urgent national interests and how to determine the appropriate form of compensation. An example of such guidelines follows below.

A. ‘Urgent National Interest Guidelines

- a) The term “national” has been defined in the Oxford Dictionary as “of or belonging to a nation; affecting or shared by, the nation as a whole; devoted to the interests of the nation as a whole.”⁴⁰ On this basis, whether a proposed action will be considered for the benefit of a nation’s interest will be determined by a number of factors. These include:
 63. The affected interest must be clearly defined in its national context. For example, it must include significant unemployment, environmental degradation, or economic depression that would occur without the action.
 64. The recipients of the benefit should be set forth. A project that provides benefits to large base of recipients will be more easily characterised as one serving a national interest than one which serves a single individual or company.
 65. The extent and scope of the national interest must be reflected in the substance of the management program.
 66. The benefit of the project (social, economic, environmental, human health, public safety) should be set forth in detail. The greater the benefit, and the more multi-faceted it is, the greater likelihood that it will be characterised as a national interest.
 67. The length of time of the national benefits should be clearly set forth. The longer the time-span of the benefits, the greater it constitutes a national interest.

³⁹ See generally *Gabcikovo*, *supra* note 11; Draft Article on the International Responsibility of States, *supra* note 10.

⁴⁰ The Compact Edition of the Oxford English Dictionary, Oxford: Clarendon Press, 1971. The term “nacional” has been defined by the Diccionario de la Lengua Española as “Pertenciente o relativo a una nacion” Real Academia Española, 1992, The term “national” in French is defined as “Relatif à une nation, qui appartient à une nation”, Librairie Larousse, 1963.

- b) The term ‘urgent’ adds a further element of importance, being defined as “pressing, impelling; demanding or calling for prompt action.”⁴¹ Factors to determine whether a situation is ‘urgent’ include:
68. It should be clear whether the action is necessary. If the status quo can be maintained without threatening a national interest, then the situation cannot be considered ‘urgent.’
 69. It should be clear whether a national interest is being increasingly threatened. A situation that is quickly deteriorating will require more urgent attention than one that is slowly changing. For example, a one month increase in unemployment will not be equivalent to a rapid decrease in GNP over a period of a year.
 70. It should be clear whether the situation is critical, presenting a significant danger imminently posed by the action or inaction. The more critical the situation, the more urgent the need for action.

B. Public Interest Guidelines

71. The determination of a set of conditions which justify invoking the ‘urgent national interest’ clause, however, has to be contrasted with the national interest of maintaining wetlands and their related benefits. For example, the construction of a factory in a State that suffers from high unemployment might fall within the concept of ‘urgent national interest.’ However, examined in the context of a society that relies extensively upon wetlands for survival, it would not be within the State’s national interest to proceed with the destruction of the wetlands upon which the factory is to be built. Referred to as the ‘public interest test,’ the benefits and disadvantages of both the project and its effect upon the wetlands must be examined.⁴² This process includes examining a number of factors, including:
 72. There must be an examination of all alternatives to the delisting. The option that will cause, eliminate, or minimise harm to the wetlands must be chosen. This includes finding an alternative location, or introducing buffer zones. Consistent with environmental impact legislation, the examination of alternatives must include the “without project” option.
 73. The function of the wetland must be fully understood. The more important the wetland’s economic, social and environmental value, the higher the threshold for the proposed project. This, in turn, will depend on the unique characteristics, qualities, functions and importance of each wetland.
 74. The value of the proposed action must be spelled out. The lower its value to society, the more likely it will be that the State will benefit to a greater extent from the conservation of the wetlands.
 75. No loss of “unique” or “irreplaceable” wetlands or those housing endangered species should be permitted. In other words, in those cases where society recognises either

⁴¹ *Ibid.* In Spanish “urgencia” has been defined by Real Academia Española to mean “[n]ecesidad o falta apremiante de lo que es menester para algún negocio”. In French, “urgente” is defined as “qui ne souffre pas retard”, Librairie La Rousse.

⁴² *Supra* note 26 at 603.

through legislation and/or scientific determination that a site is of such high value that a compensatory replacement is unavailable, loss should not be permitted.

C. Compensation Guidelines

76. The correlative element of invoking ‘urgent national interests’ is the obligation to provide compensation for lost wetland area.⁴³ Compensation refers to an element that constitutes an equivalent. In the context of the Ramsar Convention, however, because of the unique value and function of each wetland, it is also difficult to establish a uniform test for what constitutes sufficient compensation. Nevertheless, a number of factors can assist in that determination, including:
 77. The compensation scheme should be directly related to the lost wetland. Compensation under the Convention should not occur for any reason other than to provide compensation for a Ramsar-listed site that was reduced or destroyed. For example, land that has been flooded for agricultural reasons could not constitute compensation.⁴⁴
 78. The compensation should adequately replace the lost habitat. While there are many ways to addressing destroyed wetlands, including restoration, replacement, and enhancement, the compensation should provide an area that is at least as valuable and similar to the habitat it is replacing.
 79. The compensation should address uncertainty. Because scientific knowledge is not absolute, there exist certain risks in restoring, replacing or enhancing wetlands. The greater the value, complexity and size of the wetland destroyed, the more area should be provided as insurance, and the greater margin for error that should be anticipated.⁴⁵
 80. The compensation should be timely. Compensation made after the loss of wetlands cannot be considered adequate as the carrying capacity of the system has been reduced in the interval. Rather, a site should not be affected before compensation is in place.⁴⁶
 81. The loss of the wetland must not be irreparable. There will be situations in which adequate compensation, because of a lack of similar habitat or otherwise, will be impossible. In such cases, states will be unable to invoke the concept of ‘urgent national interests,’ without prejudice to other international principles that might permit the breach of international obligations.⁴⁷

D. Procedure for Implementing the Guidelines

82. Examination of the project: The determination of whether a project falls within the Convention’s use of the term ‘urgent national interest’ will be made following social, environmental and economic assessments of the impact of both the project and the reduction of the wetlands area, including appropriate communications:

⁴³ *Ramsar Convention on Wetlands*, Article 4.2.

⁴⁴ *Supra* note 33.

⁴⁵ *Supra* note 29.

⁴⁶ *Supra* note 33.

⁴⁷ This includes, *inter alia*, force majeure, distress, and self-defence. See *Draft Article on the International Responsibility of States*, *supra* note 10.

83. Consultation: The assessment will be made with full consultation with key stakeholders.⁴⁸
84. Notification: Any Contracting Party that wishes to restrict a Ramsar site must inform the Ramsar Bureau (and/or the Standing Committee) at the earliest possible time.⁴⁹ This must occur before any irreversible action is taken. In addition, information about a proposed restriction should be broadly disseminated to all Parties “at the earliest possible time”. Such notification is consistent with the fact that notification of restriction within States is to take place according to Article 3.2, and is intended to be given for **all** Contracting Parties consistent with Articles 8 (2)(c) (d) and (e). Moreover, Article 8 (2) (d) makes clear that prior to restriction, the Contracting Parties intended to retain the option to have the “matters ... discussed” amongst themselves. Given the shared Ramsar commitment to protection of internationally important wetlands, it would appear consistent with the treaty to require discussion of the issue prior to restriction or delisting. This activity in and of itself would not control the actual delisting and therefore would, arguably, not infringe on national sovereignty.
85. Disclosure: The information gathered by the assessment study will be disclosed to the public in a timely manner in accordance with the principle of transparency.

E. General Guidelines

86. In addition to the principles enunciated within the Convention, a number of analogous principles must be recognised, including:
87. Burden of proof: The burden of the proof will be on the proponent of the activity to demonstrate on a balance of probabilities that the project falls within the realm of an ‘urgent national interest.’⁵⁰
88. Certainty: Due to a lack of conditional language such as “potential,” “likely,” or “possible” preceding the term ‘urgent national interests’ in Article 2.5 of the Convention, the threat to the national interest must be ascertained with a substantial level of certainty. While not requiring actual damages, a risk of endangering a national interest, or similarly, a threat of the interest being urgent, would be insufficient.⁵¹
89. Contribution: The International Law Commission acknowledges that a state of necessity cannot be invoked by a state that has contributed to the occurrence of the state of necessity.⁵² Similarly, a state who contributed to a threat to its national interest, through poor policy or otherwise, should not be able to invoke Article 2.5 of the Convention in order to avoid its obligations thereunder.

⁴⁸ Stakeholders are those to be directly affected (either positively or negatively) by a proposed project, including governments and government organisations responsible for devising and implementing public policies and programs, those indirectly involved or affected such as non-governmental organisations or private sector organisations with an interest in outcomes, and especially the poor, low-income, vulnerable and excluded social groups.

⁴⁹ *Ramsar Convention on Wetlands*, Article 2.5

⁵⁰ See *Gabcikovo*, *supra* note 11.

⁵¹ *Ibid.*

⁵² *Draft Article on the International Responsibility of States*, *supra* note 10, at Article 33.

90. Precaution: Since the loss of wetlands is often irreversible, decisions must be taken in accordance with the precautionary principle. Defined at Article 15 of the Rio Declaration⁵³, and present in numerous legal instruments, the principle is designed to address scientific uncertainty inherent in the decision-making process.
91. Symbiotic relationship: Decisions involving wetlands must be taken with the recognition that nature is characterised by a symbiotic relationship. Thus, changes in wetland areas may have far-reaching and widespread effects.

V. Conclusion

92. As noted at the outset, there is limited express guidance within the Ramsar Convention for determining “urgent national interest.” Nonetheless, there is sufficient guidance that can be derived from the Convention and related instruments, to devise a method for developing a set of guidelines to assist with the determination of both urgent national interest, and the adequacy of the approach toward compensation in those cases where wetlands are taken for reasons of national interest.
93. If the list of preceding principles and guidelines is taken into account by Parties who expect to possibly invoke the urgent national interest clause, the principles and guidelines can at least serve to ensure that a full and fair debate takes place before a site is considered for delisting.

⁵³ Adopted June 14, 1992, at the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/5/Rev. 1, *reprinted in* 31 ILM 874, 878 (1992), Article 15 states: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”