

OXFORD
UNIVERSITY PRESS

Journal of Environmental Law

**DECISION INFLUENCE AND THE LINK TO INTERNAL
MODALITIES OF DELEGATIONS TO CONFERENCES OF THE
PARTIES**

Journal:	<i>Journal of Environmental Law</i>
Manuscript ID	JEL-2017-OA-0048.R2
Manuscript Type:	Original Article
Keywords:	Delegates and Delegations, Internal Modalities, Legitimacy, Rational Persuasion, Ramsar, Influence of COP Decisions

SCHOLARONE™
Manuscripts

Review

**DECISION INFLUENCE AND THE LINK TO INTERNAL MODALITIES OF
DELEGATIONS TO CONFERENCES OF THE PARTIES**

Dr Edward J. Goodwin *

Abstract

This paper concerns the likelihood that decisions adopted at plenary meetings of the parties to multilateral environmental agreements will influence the behaviour of States Parties. Relying upon a theory emphasising the importance of rational persuasion of decisions and the legitimacy of decision-making processes, the paper explains how choices concerning the preparation of delegates and then participation of delegations at plenary meetings of the parties to environmental treaties might enhance the likelihood of those decisions having a positive effect upon the actions of States Parties. This is done using a case study of the UK delegation to a recent meeting of the parties to the 1971 Ramsar Convention on Wetlands of International Importance. That case study also provides examples of potentially positive modalities adopted by the UK, whilst also revealing suspected concerns for the future surrounding retention of experienced delegates and the impact of Brexit.

1. Introduction

This paper argues that the rules, customs, and tactics shaping the way a given State selects and prepares delegates to represent it at conferences of the parties (COPs) to multi-lateral environmental agreements (MEAs), and how that delegation then participates in these plenary meetings, has the potential to impact upon the likelihood of the decisions collectively agreed at COPs being followed by that State Party. The decisions adopted at COPs are significant for the efficient and effective operation of many environmental conservation treaties, as well as development of obligations.¹ Thus, the paper is not so much concerned with compliance with treaty obligations, but rather the influence of the non-binding decisions that are crucial to delivering the objectives of a conservation regime.

The sets of rules, customs and tactics that operate around and within delegations are encapsulated in the term 'internal modalities'. 'Internal modalities' are a neglected dimension in international environmental law studies. Certainly, there has been no attempt theoretically to link these modalities with decision influence. Imagining certain State practice and holding this up against a framework for decision influence could suffice as an attempt at such. However, since producing grounded accounts of State internal modalities to MEAs has also been neglected, and little effort has been made to design a suitable process for capturing such data, this paper looks to increase its relevance and contribution by offering a grounded and robust account of one State's internal modalities for attending a COP.

The grounded findings come from a case study into the UK's internal modalities for their delegation to COP11 of the Ramsar Convention on Wetlands of International Importance

* Associate Professor in Law, School of Law, University of Nottingham, Nottingham, UK. Email: edward.goodwin@nottingham.ac.uk. The author wishes to thank Hemi Mistry, Michael Bowman, Sandesh Sivakumaran, and Marko Milanovic for comments they provided on earlier drafts. The author alone remains responsible for any errors or omissions the paper may contain.

¹ For further discussion on obligation development see Malgosia Fitzmaurice, 'Law-Making and International Environmental Law: The Legal Character of Decisions of the Conference of the Parties' in Rain Liivoja and Jarna Petman (eds), *International Law-Making: Essays in Honour of Jan Klabbers* (Routledge 2014) 190, 193-196

1
2
3 especially as Waterfowl Habitat ('Ramsar').² The paper will first introduce Ramsar,
4 explaining how the regime (like so many wildlife treaties) relies heavily upon the decisions it
5 adopts at COPs for its effective operation. Ramsar thus relies upon States acting in a manner
6 consistent with these decisions, rendering it important to consider what draws States towards
7 acting in conformity with them. Next, the paper offers a theoretical framework explaining the
8 characteristics and conditions of decisions and decision-making that increase the
9 persuasiveness of decisions. The framework is then applied to the UK's internal modalities.
10 This highlights the practices that might have increased the persuasiveness of the decisions
11 taken at the COP in question.
12

13 The outcome of this analysis replaces a number of intuitive beliefs about best practice for
14 internal modalities (largely concerning delegate experience and appropriate consultation)
15 with evidence and concrete examples from a case study. New observations are also offered,
16 such as how the UK may soon struggle (as developing States do) to retain institutional
17 knowledge and experience. Further, there may be unique challenges created by the UK
18 leaving the European Union. These insights gain extra importance in a context of the theory
19 of persuasiveness of decisions. This then lends weight to investing in best practice concerning
20 internal modalities for delegations, such as action on training and delegate succession
21 planning, as well as for securing accessible and transparent consultation. The intended result
22 is greater influence of decisions that are the mainstay operational tool for MEA regimes like
23 Ramsar.
24

25 26 27 2. The Ramsar Convention

28 Wetlands provide valuable ecosystem services including fertile habitat for biodiversity, flood
29 control, water purification, and carbon storage. Nevertheless, their continued provision has
30 long been threatened by, *inter alia*, drainage in response to public health concerns,
31 agricultural or urban development, and inappropriate water management.³ To combat this, the
32 Ramsar Convention was adopted in the Iranian coastal resort of that name on 2 February
33 1971. In 1976 the Convention entered into force in the UK, and at the time of writing in
34 2018, 169 States were contracting parties.⁴
35

36 Ramsar's jurisdiction captures wetlands within the territories of contracting parties. Wetlands
37 are defined in Article 1(1) as:
38

39 areas of marsh, fen, peatland or water, whether natural or artificial, permanent or
40 temporary, with water that is static or flowing, fresh, brackish or salt, including areas
41 of marine water the depth of which at low tide does not exceed six metres.
42

43 This incorporates an extensive range of natural and manmade wetland habitats, and their
44 associated ecosystems, including coastal and inland wetlands.

45 Significant to Ramsar is its employment of an inventory as part of its conservation strategy.
46 Thus, wetlands falling within Article 1(1) may go on to be inscribed on the *Ramsar List of*
47 *Wetlands of International Importance* (the "List"). Consequently, Article 2 calls for States
48 Parties to enter wetlands within its territory on the List provided they are significant in
49 ecological, botanical, zoological, hydrological or limnological terms.⁵
50

51
52
53 ² 2 February 1971, 996 UNTS 245

54 ³ Michael Bowman, 'The Ramsar Convention on Wetlands: Has it Made a Difference' (2002) Yearbook of
55 International Co-operation on Environment and Development 61, 61

56 ⁴ For details, see <<http://www.ramsar.org/country-profiles>> accessed 4 March 2018

57 ⁵ Ramsar Article 2(2)
58
59
60

2.1 Substantive Obligations

Ramsar then provides for obligations applicable to all wetlands, with additional commitments applying to the sub-category of listed wetlands. The main obligation for all wetlands is that States Parties 'shall formulate and implement their planning so as to promote... as far as possible the wise use of wetlands in their territory'.⁶ "Wise use" was not defined in any greater detail in the treaty and thus the COP intervened by issuing a decision that stated that wise use of wetlands is taken to mean 'the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.'⁷ Additional obligations supporting wise use are listed in Article 4 such as to promote conservation by establishing nature reserves with adequate wardening, and to promote the training of personnel competent in the fields of wetland research and management.

In relation to the extra obligations attaching to listed wetlands, the principal obligation is that States Parties 'shall formulate and implement their planning so as to promote the conservation of wetlands included in the List'.⁸ Whilst the standard of "conservation" has come to be assimilated with wise use,⁹ again through decisions adopted by the COP to supplement the treaty text, it should be noted that the wise use of wetlands generally is qualified in Article 3 by the words 'as far as possible', unlike the obligation to conserve listed sites.

The treaty further obliges States Parties to undertake a degree of additional investment in environmental monitoring. Under Article 3(2), contracting parties must institute mechanisms to facilitate detection of adverse changes in the ecological character of listed wetlands caused by technological developments, pollution or other human interference. Ramsar then obliges States to inform the Convention Secretariat of any such change.¹⁰ A formal list of sites undergoing such change, known as the 'Montreux Record', is maintained.¹¹

The remaining substantive obligations relate to State cooperation. For example, Parties are encouraged to exchange data, and research on wetlands and their flora and fauna.¹² Further, under Article 5 they shall consult each other generally with respect to implementing their obligations, especially when dealing with transboundary wetlands and shared water systems.

2.2 Implications for the COP and this Study

The key point to take away from the above is that the substantive provisions of Ramsar are established in just four articles, comprising 14 clauses. The remaining nine articles contain definitions, establish the COP, other administrative provisions, rules for entry into force, and withdrawal and depository arrangements. Ramsar is, therefore, one of the pithier treaties adopted within international environmental law. Consequently, and given the time-consuming and difficult nature of amending treaties,¹³ it has fallen to the COP to guide and develop State practice

Given its crucial role in supplementing the few provisions of the treaty, it is worth putting the Ramsar COP in some context. In previous research the author has recounted how COPs to

⁶ Ramsar Article 3(1)

⁷ Resolution IX.1, Annex A, [22]

⁸ Ramsar Article 3(1)

⁹ Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd edn, Cambridge University Press 2010) 414-419 (hereafter "Lyster")

¹⁰ Article 3(2)

¹¹ Recommendation 4.8

¹² Ramsar Article 4(3)

¹³ In fact it was not until 1982 that a protocol was adopted to enable amendment of the treaty.

1
2
3 MEAs were introduced and designed to provide flexibility and to overcome the failings of
4 diplomatic conferences and Inter-Governmental Organisations (IGOs).¹⁴ COPs enabled
5 regular meetings of the contracting parties thereby preventing initiatives from stalling or
6 being ignored.¹⁵ Furthermore, environmental knowledge is continually evolving, even after
7 an MEA has been concluded. Best practice can change, as can the conservation status of
8 species. Environmental problems, therefore, demand regimes that are sufficiently malleable
9 to respond to subsequent and rapid developments, and COPs meet this need far better than
10 IGOs and diplomatic conferences.¹⁶

11
12 Ramsar was one of the first environmental treaties to provide for a COP, which are now held
13 triennially. Further, from the outset, the COP has been supported by the IUCN-based Ramsar
14 Bureau, which acts as the Secretariat.¹⁷ The ‘Introduction’ to this paper detailed one type of
15 work often undertaken by COPs, namely that of obligation development. To this can be
16 added (i) systems management, (ii) strategic planning, and (iii) reviewing compliance and
17 progress.¹⁸ The COPs held under Ramsar are today competent to address multiple issues
18 falling within all of these categories. The COP can commission and publish documents
19 adding detail to the substance of treaty provisions; develop the rules of procedure for listing
20 wetlands of importance; and, monitor the state of wetlands. For example, the regime has
21 provided further elaboration on core commitments (like wise use) through the issuance and
22 regular updating of guidelines and handbooks designed to help implementation.¹⁹ Indeed, the
23 *Guidelines for the Implementation of the Wise Use Concept* observe it ‘is desirable, in the
24 long term, that all Contracting Parties should have comprehensive national wetland policies,
25 formulated in whatever manner is appropriate to their national institutions.’²⁰ Such National
26 Wetland Policies are vital to attaining wise use, since raising awareness, co-ordination and
27 planning on a national scale are vital elements to achieving this end. The guidelines also draw
28 particular attention, *inter alia*, to impact assessment of projects upon wetlands, and the
29 involvement of stakeholders and local people in formulating policies.²¹ This provides far
30 more detail than the Convention text, and provides benchmarks that can be monitored via
31 strategically drafted reporting forms that are submitted before every COP.
32
33

34 The work slated for COP11 (which is the subject of the empirical research undertaken for this
35 study) included resolutions on the *modus operandi*, delivery of advice and support, and
36 priorities of the scientific advisory panel.²² Other administrative issues concerned budget
37 reports and the hosting of the Secretariat.²³ Some agenda items related to formal
38
39
40

41
42 ¹⁴ Edward Goodwin, ‘Delegate Preparation and Participation in Conferences of the Parties to Environmental
43 Treaties’ in Malgosia Fitzmaurice and Duncan French (eds), *International Environmental Law and Governance*
(BRILL | Nijhoff 2015) 51, 60

44 ¹⁵ Simon Lyster famously called agreements that do not hold such sessions ‘sleeping treaties’; Lyster (n 9) 533

45 ¹⁶ See further Robin Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral
46 Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94 *American Journal of*
47 *International Law* 623, 628

48 ¹⁷ Article 8(1) and Resolution IX.10

49 ¹⁸ For greater detail on each category, see Goodwin (n 14) 62-64; see also Louise Camenzuli, ‘The Development
50 of International Environmental Law at the Multilateral Environmental Agreements’ Conference of the Parties
51 and its Validity’ (2007), available <http://cmsdata.iucn.org/downloads/cel10_camenzuli.pdf> accessed 4 March
52 2018

53 ¹⁹ The numerous guides and 21 handbooks can be accessed via <<http://www.ramsar.org/library>> accessed 4
54 March 2018

55 ²⁰ As adopted under Recommendation 4.10 (Annex), 6, and supplemented by Resolution 5.6 (Introduction)

56 ²¹ *Id.*

57 ²² Ramsar DR XI/16-18

58 ²³ Ramsar DR XI/1-2

1
2
3 pronouncements on the conservation status of particular wetlands.²⁴ The majority, however,
4 had the potential to impact upon expectations of contracting parties such as the form and
5 content of the Ramsar Information Sheet that needs to be produced for all listed wetlands,²⁵
6 the implications of climate change on Ramsar,²⁶ and a series of principles for the planning
7 and management of urban and peri-urban wetlands.²⁷ Of course, not all such resolutions were
8 relevant to the UK.²⁸

9
10 Whilst the range of activities of the COP is well known, the legal status of COP outputs is
11 rather more complex and consequently an extensive body of academic literature has been
12 published.²⁹ The position seemingly varies according to the type of action being undertaken
13 and whether it can be considered 'law-making', such as whether the COP is: acting as a
14 forum for the formal amendment of the MEA;³⁰ providing clarification pursuant to an
15 enabling clause;³¹ or providing interpretive functions not pursued under enabling clauses but
16 which Davies has rightly argued can amount to subsequent agreement or practice reflecting
17 the parties interpretation of a treaty under the 1969 Vienna Convention on the Law of
18 Treaties.³² These are interesting issues and much remains unresolved. Ultimately, however,
19 this paper does not turn upon the status of the decisions taken at COP11, or MEAs in general,
20 since the influence of the decisions upon a State party is its primary concern and the approach
21 adopted accommodates the different possibilities concerning legal status.

22
23 In summary, the Convention text, like so many other environmental treaties (particularly
24 those connected to conservation of biological diversity), is just the tip of the iceberg. Below
25 the surface of the hard laws accepted in the treaty lies a large body of material adopted by the
26 parties through decisions taken at the COP. It is crucial that these decisions have an influence
27 upon State behaviour since those resolutions and recommendations specify conduct that
28 should achieve the regime's objectives.

31 3. The Study's Framework on Decision Influence

32 Having given some international law context for the research, the methods and theoretical
33 framework for this paper can now be established.

34 3.1 Internal Modalities and Methods

35
36 Internal modalities are common within groups, from sports teams to law firms. They are also
37 tailored towards collective goals. Such goals can vary, for example winning a competition, or
38
39
40

41 ²⁴ Ramsar DR XI/4

42 ²⁵ Ramsar DR XI/8

43 ²⁶ Ramsar DR XI/14

44 ²⁷ Ramsar DR XI/11

45 ²⁸ For example, those on pesticide usage in rice paddies; Ramsar DR XI/15

46 ²⁹ See for example, Churchill and Ulfstein (n 16), Jutta Brunnée, 'COPing with Consent: Law-Making Under
47 Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1; Malgosia
48 Fitzmaurice, 'Consent to be Bound – Anything New Under the Sun?' (2005) 74 *Nordic Journal of International
49 Law* 483; Camenzuli (n 18); Annecoos Wiersma 'The New International Law Makers? Conferences of the
50 Parties to Multilateral Environmental Agreements' (2009) 31 *Michigan Journal of International Law* 231;
51 Fitzmaurice (n 1)

52 ³⁰ Since such changes require subsequent ratification by the parties it is difficult to view the COP as more than a
53 forum for negotiations rather than as making binding law at such moments (although the MARPOL 73/76
54 convention may provide an exception to this), see further Fitzmaurice (n 1) 193-195

55 ³¹ Such work may be closer to law-making and thus deserve greater caution; *id.*, 196

56 ³² Peter Davies, 'Non-Compliance: A Pivotal or Secondary Function of COP Governance?' in Malgosia
57 Fitzmaurice and Duncan French (eds), *International Environmental Law and Governance* (BRILL | Nijhoff
58 2015) 87, 95-96

1
2
3 securing the services of the best graduating law students in a year. At the same time, other
4 groups in the same sphere of life are implementing their own internal modalities. At some
5 point (such as during a match, or during a recruitment round) these modalities become
6 entwined and affect each other, ultimately producing a result. Whilst internal modalities are
7 adjustable, there will often be external rules that shape these practices. For example, law
8 societies regulate the legal profession, whilst various governing bodies order professional
9 sports.

10
11 The internal modalities of delegations to COPs behave in a similar way and setting.
12 Delegations will have their own internal modalities governing how they prepare for meetings
13 and how they will participate in the work of a session. These will be set according to their
14 objectives and these modalities will ultimately become entwined with those of other States
15 during COPs. What is more, autonomy to determine the nature of that internal modality is
16 constrained to the extent that international law, the treaty establishing the COP and rules of
17 procedure must be respected and followed. A significant task in this research was to gain as
18 much detail on the UK's internal modalities for COP11, as well as the external rules that
19 constrained the UK's freedom to design these modalities. This called for mixed methods
20 research.

21
22 The first method involved extensive desk-based reviews. The significant volume of material
23 concerning the endeavours of the parties to MEAs suggests this ought to reveal a lot about the
24 internal modalities of delegations. Further, the amount of material increases again if
25 recognition is given to the fact that evidence relating to delegates and delegations to treaty
26 negotiations in other realms of public international law and intergovernmental organisations
27 is included. Use of such material is appropriate given the purposive and practical similarities
28 in the operational remits of COPs, negotiating conferences, and intergovernmental
29 organisations.³³ Nevertheless, the reality is that insights into internal modalities are
30 incomplete if limited to this material. This encourages deployment of alternative methods to
31 generate wider reference points on modalities.

32
33 Therefore, the second method employed was semi-structured elite interviews with those who
34 were closest to designing and operating the UK's internal modalities.³⁴ Given the unexplored
35 nature of the area, an overly rigid structure for interviews was avoided, with preference given
36 to a loose agenda around pre-defined themes shaped by insights from the desk-based
37 enquiry.³⁵ This ensured flexibility to explore issues in greater depth and to test hypotheses,
38 even as they arose.³⁶

39
40 Interviewees were identified primarily via chain-referral to other important actors in the UK
41 delegation and, due to mentions of UK NGOs in interviews, a decision was made to approach
42 appropriate individuals in these organisations. Many had attended COP11. This offered
43 counter-points to some of the delegates' opinions. The study therefore relied upon and
44 benefited from purposive, rather than random, sampling.

45
46 Significantly, this means that the case study captured data for the complete population of the
47 UK delegation, plus a number of other NGO connected actors. The result is original and rich
48 data, which combined with the extensive desk-based research, provides a detailed, reliable,
49

50
51
52
53 ³³ Goodwin (n 14) 58-61

54 ³⁴ For a guide to such interviews, see LA Dexter, *Elite and Specialized Interviewing* (ECPR 2006)

55 ³⁵ There were broadly three themes to the questions: delegate selection, preparation and participation.

56 ³⁶ Beth Leech, 'Asking Questions: Techniques for Semi-Structured Interviews' (2002) 45(4) *Political Science*
57 and *Politics* 665, 665

1
2
3 and grounded case study. From this an analysis revealing the possible persuasiveness of the
4 decisions adopted can be built using the following theoretical framework for decision
5 influence.

6 7 3.2 A Theory of Decision Influence

8 Within a context of diminished enforcement capabilities, international environmental lawyers
9 have long been interested in how to design and manage MEAs so as to otherwise influence
10 State behaviour. Much of this has concerned achieving compliance with MEAs, which
11 requires reaching a position of fulfilling treaty obligations. Various theories have been
12 proposed concerning why States comply with such obligations, with Fitzmaurice highlighting
13 six, including Chayes and Handler Chayes' managerial theory, Brunnée and Toope's
14 interactional theory, and Franck's theory of legitimacy.³⁷ Seemingly, as Fitzmaurice states,
15 the 'theory which in the most apposite manner explains the compliance by States with a rule
16 of international law – in this case the decision of COPs – is a matter of a personal choice.'³⁸
17 Whilst some of these will be woven into the theoretical account that follows, two others
18 demand inclusion, not least because they tackle the wider notion of influencing behaviour,
19 rather than the narrower concept of fulfilling treaty obligations.³⁹ It is a theory built from the
20 last of these that is this author's chosen framework for analysing the data collected.

21
22
23 First, Mitchell suggests that environmental agreements influence behaviour through a 'logic
24 of consequences' and a 'logic of appropriateness'.⁴⁰ The former regards States as rational
25 actors, behaving according to calculations as to what is in their best interests.⁴¹ Indeed, it is
26 worth noting that in Chayes and Handler Chayes' managerial theory of compliance they too
27 accept that self-interest enters into most if not all behaviour that deviates from directions.⁴²
28 The 'logic of appropriateness' reflects the idea that States may regard themselves in a
29 particular light and wish to be perceived in that way by other States, such as being 'green' or
30 'law abiding'. Thus MEAs signal how particular conduct will be regarded.⁴³

31
32 Second, the work of Bodansky more than deserves inclusion in any research into decision
33 influence. Bodansky has conducted a detailed assessment, synthesis, and mapping of the
34 extensive literature in the field from the 20 years before he was writing, and from which he
35 has extracted three common bases of influence upon States. These can act in combination or
36 alone, and are power, rational persuasion and legitimacy.⁴⁴ For example, a decision might be
37
38
39
40

41 ³⁷ Fitzmaurice (n 1) 208-210

42 ³⁸ *Id.*, 210

43 ³⁹ Focusing solely upon compliance with an obligation ignores other positive achievements of a regime such as
44 catalysing progress within a State that has taken it meaningfully towards (albeit just short of) meeting an
45 obligation, and it presupposes that compliance with a hard law obligation will be effective in reversing an
46 environmental threat. A focus upon influence allows for the former, whilst decisions issued by COPs are
47 commonly about promoting best practice against an environmental problem. Nevertheless, since these
48 compliance theories include the reasons why States act in a particular way, they remain relevant, as indeed
49 appears to be Fitzmaurice's assumption when citing them to explain compliance with COP decisions; *id.*

50 ⁴⁰ Ronald Mitchell, 'Compliance Theory' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford*
51 *Handbook of International Environmental Law* (OUP, 2007) 893, 901

52 ⁴¹ *Id.*, 901-902

53 ⁴² Abram Chayes, 'Compliance without Enforcement' (1997) 91 *American Society of International Law*
54 *Proceedings* 53, 55

55 ⁴³ Mitchell (n 40) 902-903

56 ⁴⁴ Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey Dunoff and Mark
57 Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the*
58 *Art* (CUP 2013) 321, 326

1
2
3 followed because of a third party exerting power or force.⁴⁵ This might include threats of
4 trade sanctions, or measures imposed by COPs as part of compliance procedures.⁴⁶
5 Presumably, Mitchell would agree and link such power to a profound effect upon a State's
6 logic of consequences. Crucially for the purposes of this research, that type of force comes
7 *after* the production of a decision at a COP. Given that this study is concerned with the
8 internal modalities for delegate preparation and participation for the COP, its focus is upon
9 events *prior* to the adoption of a decision. This paper will not, therefore, offer insights into
10 post-plenary pressure. However, the position is different with regard to rational persuasion
11 and legitimacy, and it is these two theoretical bases that underpin the analysis of the data
12 acquired in this research.
13

14 3.2.1 Rational persuasion

15
16 With respect to rational persuasion, the suggestion is that if the actor regards a direction as
17 convincing in some way, this can lead to particular behaviour. This may be because it is
18 interpreted as being in the interest of a State or the individual whose acts count as those of the
19 State.⁴⁷ Also, a decision may be rationally persuasive for other reasons; maybe it is
20 convincing according to science, the merits of a well-reasoned judgment, or a sense of
21 justice.⁴⁸ Here connections can be proposed to Mitchell's logic of consequence. For example,
22 the science convinces a State as to the likelihood of an undesirable result. They can also be
23 proposed to the logic of appropriateness. A State may regard itself as being law abiding and
24 thus a law-making decision pursuant to an enabling clause, or convincing judicial reasoning
25 as to the rightful position of the law, will direct the State accordingly.
26

27 From a practical perspective, if a COP decision is to be rationally persuasive, logically this
28 appears dependent upon three crucial stages. First, identifying key actors who need to be
29 rationally persuaded. Second, identifying the various grounds upon which a proposal might
30 then be viewed as rationally determined by those actors. Finally, having identified which
31 grounds are likely to rationally persuade key actors, ensuring that the decision issued by the
32 COP reflects them effectively. The analysis of the UK's internal modalities in the following
33 sections will highlight how each of these stages of rational persuasion played out in the
34 course of the process of negotiating and adopting decisions, from the perspective of the UK
35 delegation. It will further offer best practice recommendations for how to bolster the rational
36 persuasiveness of a decision at each of these three stages, with a view to thereby enhancing
37 the likelihood that the decision adopted will influence the behaviour of the UK, in line with
38 the overall objectives of the treaty.
39

40 3.2.2 Legitimacy

41
42 Even in the absence of power, and if an individual is not rationally persuaded by a decision, it
43 is claimed they may still follow a decision because of the perceived legitimacy of the
44 international regime's authority over them.⁴⁹ Legitimacy is understood and used in many
45 different ways by different people, but the data capture method as designed in this research
46 was best placed to focus upon normative legitimacy.⁵⁰ This form of legitimacy concerns the
47
48

49 ⁴⁵ Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford*
50 *Handbook of International Environmental Law* (OUP 2007) 706, 707

51 ⁴⁶ *Id.*, 707

52 ⁴⁷ Vaughan Lowe, *International Law* (OUP 2007) 19-21

53 ⁴⁸ Bodansky (n 44)

54 ⁴⁹ Bodansky (n 45) 707-8

55 ⁵⁰ Bodansky (n 44) 322. Descriptive legitimacy is an alternative form, however few academics have engaged in
56 the empirical research needed to consider it, Tom Tyler being a notable exception; see Tom Tyler, *Why People*
57 *Obey the Law* (Princeton 2006)

1
2
3 extent to which a regime conforms to normative standards against which it is judged. It is
4 about the qualities of the ruler.⁵¹

5
6 Normative legitimacy can relate to the legal system itself. For instance, regarding standards
7 of legitimacy for a legal system, under Brunnée and Toope's interactional theory,⁵² law's
8 value lies in the sense of obligation it generates.⁵³ That obligation is generated where States
9 and actors perceive law making to be legitimate.⁵⁴ In their theory, legitimacy flows from
10 three factors:⁵⁵ (i) shared understandings of the role of law and particular norms; (ii)
11 adherence of the norm to criteria of legality, such as the fact that a norm must not demand the
12 impossible;⁵⁶ and (iii) reinforcement of the norm through a continuing practice of legality.

13
14 Research into the internal modalities of delegates to COPs could be used to explore the
15 possible normative legitimacy of decisions since COPs play a key role in nurturing
16 obligation, as the forum for building a community of practice, and sustaining shared
17 understanding and interaction within it.⁵⁷ For example, the community of practice operating
18 under an MEA thrives through nourishment from others participating at the national and
19 international levels.⁵⁸ This means preparation that facilitates communication and interaction
20 with these communities ought to be valuable. Preparation might also establish that which is
21 practicable and consistent with national and international commitments already undertaken
22 by a state, thereby delivering on elements of legality. However, with so many different ways
23 of approaching legitimacy, and only so much space available, this paper leaves to a later date
24 using the interactional theory as a framework for the analysis of the data relating to the
25 legitimacy component of persuasion. Instead, the paper will adopt what Bodansky assessed to
26 be the more prevalent conception, namely the legitimacy of the regime bodies that issue
27 directions.⁵⁹ The links to this in the data obtained are more readily apparent.

28
29 Political scientists assessing the normative legitimacy of a governing body (as opposed to the
30 legal system), draw a distinction between input legitimacy (standards surrounding the *process*
31 of issuing directions) and output legitimacy (referring to the *results* of issuing directions).⁶⁰
32 For output legitimacy, the results ought to be effective and/or equitable. As Daniel Esty
33 observes, and utilising the work of Max Weber, '[A] demonstrated capacity to deliver good
34 outcomes has been the main attraction to nation-states of delegating elements of
35 policymaking to supranational bodies'.⁶¹ This requires a well of expertise from which to
36 draw, and the production of rational analysis leading to good outcomes.⁶²

37
38
39
40

⁵¹ Bodansky, *id.*, 327

41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
⁵² Jutta Brunnée and Stephen Toope, *Legality and Legitimacy in International Law* (CUP 2010). Thomas Franck was similarly interested in theories of legal obligation and he sought an understanding of the formal characteristics of norms that result in 'compliance pull'; see Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990)

⁵³ Brunnée and Toope, *id.*, 55

⁵⁴ *Id.*

⁵⁵ *Id.*, 53-54

⁵⁶ *Id.*, 26. The eight criteria of legality are taken from Lon Fuller's theory concerning the internal morality of law, namely: (i) generality, (ii) promulgation, (iii) prospective effect, (iv) clarity, (v) consistency, (vi) realistic demands, (vii) stability, and (viii) congruency between the rules as promulgated and as administered; Lon Fuller, *The Morality of Law* (Yale University Press 1969) 39

⁵⁷ Brunnée and Toope, *id.*, 356

⁵⁸ *Id.*, Chapter 2

⁵⁹ Bodansky (n 44) 324

⁶⁰ *Id.*, 329-332

⁶¹ Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale Law Journal 1490, 1517

⁶² *Id.*

1
2
3 The aspects that drive input legitimacy are numerous. Democracy is widely regarded as a
4 cornerstone for maintaining the legitimate exercise of authority by those governing at the
5 national level, such as the UK's Department for Environment, Food and Rural Affairs
6 (DEFRA), which is a crucial body within this study. However, the 'democratic deficit' within
7 international governance means it is impracticable to have accountability via elections, and
8 thus achieve this in full at the international level.⁶³ Instead, Esty argues that the focus needs
9 to be upon other features of democracies, and thus 'quasi-democratic legitimacy can be
10 established through mechanisms that force supranational authorities to be more attentive to
11 their representativeness and accountable to the public(s) they serve'.⁶⁴ This links to some of
12 the other factors that drive input legitimacy. For instance, it requires: the international body to
13 operate according to (stable) rules and traditions; ideally having 'check's and balances'
14 designed into the regime structure akin to the separation of powers within nation States; a
15 transparent decision-making process offering chances for debate and dialogue between those
16 stakeholders representing a range of views; and adherence to procedures that demand that the
17 authority, *inter alia*, is transparent in its operation, and offers opportunities to review their
18 actions.⁶⁵ As will be claimed, both many of the factors comprising input legitimacy and
19 output legitimacy could be enhanced through the adoption of certain practices for delegation
20 preparation and participation.
21
22
23

24 4. The UK's Internal Modalities for COP11

25
26 It is proposed that if the contracting parties to Ramsar were able at COP11 to issue decisions
27 that are regarded by their target audience as rationally persuasive, and/or in a context where
28 crucial authorities are considered as acting legitimately (using the components of input and
29 output normative legitimacy), then this ought to have an impact upon the likelihood of these
30 decisions influencing State action. In what ways might the internal modalities adopted by the
31 UK therefore secure such rational persuasion and legitimacy?
32

33 In order to answer this, data on the UK's internal modalities was acquired using the
34 aforementioned mixed methods. The data are presented in this section under the following
35 internal modality themes: (1) populating delegations; (2) pre-COP preparation; and (3)
36 delegation participation. Each section begins with a review of the published evidence before
37 overlaying the findings of the empirical research.
38

39 4.1 Populating Delegations

40
41 When the UK exercised its right to send a delegation to Ramsar COP11, it needed to select
42 individuals to act as delegates on its behalf. This entailed both a decision concerning personal
43 attributes, and about the number of people who should be sent. The internal modalities
44 deployed in this context are constrained and shaped to a small degree by forces external to the
45 UK government, for example treaty provisions.
46

47 4.1.1 Desk-based findings

48
49 Ramsar does not place any restrictions upon the number of delegates a party, such as the UK,
50 can select to attend as its representatives. The Rules of Procedure merely indicate that
51
52

53
54 ⁶³ *Id.*, 1507-1508; Bodansky (n 44) 329-330

55 ⁶⁴ Esty (n 61) 1516

56 ⁶⁵ Esty describes these as order-based, systemic, procedural and deliberative legitimacy; *id.*, 1520; and *see also*,
57 for wider recognition of these elements, Bodansky (n 44) 329-331

1
2
3 someone needs to be designated as the head of the delegation,⁶⁶ and that all representatives
4 and advisors should carry the required credentials from their State.⁶⁷ Past practice of the UK
5 is revealed in the records of participants and is set out in Diagram 1.⁶⁸ This indicates that,
6 whilst not sending some of the largest delegations to the plenary meetings,⁶⁹ generally the
7 UK opts to send an above-average-sized group, such as the four delegates sent to COP11.
8

9 A second dimension worthy of consideration is expertise and previous experience of
10 attending COPs. The Ramsar Convention is unusual amongst MEAs⁷⁰ in that Article 7(1) of
11 the treaty states that representatives selected to attend on behalf of contracting parties 'should
12 include persons who are experts on wetlands or waterfowl'. This expertise could come from
13 scientific, administrative or other relevant knowledge or experience.⁷¹ That said, the
14 constraints Article 7(1) imposes on modalities are weak; entreating States rather than obliging
15 them to appoint such delegates, and leaving open-ended the precise level of knowledge or
16 experience regarded as appropriate to satisfy the request. Furthermore, the attendance records
17 for Ramsar COPs are unreliable indicators of individual expertise or knowledge.
18
19

20 The only measurable using attendance records is whether a delegate has had previous
21 experience of representing a State at an earlier COP. Thus, where the UK had the option of
22 sending someone who had previously attended a Ramsar COP, it did so on all but one
23 occasion, as reflected in Diagram 1.⁷² Indeed, for COP11, three of the four delegates had this
24 type of experience.
25
26

27 Diagram 1 – Size and Experience of UK Delegations to Ramsar COPs 1980-2015⁷³

28 [Insert Diagram]
29

30 Of course, research of this sort based upon UK attendance records reveals little about the
31 effects of numerical strength, substantive expertise or forensic experience upon UK
32
33
34
35
36
37

38 ⁶⁶ Ramsar Rules of Procedure (2015), Rule 16, available at <<http://www.ramsar.org/document/ramsar-rules-of-procedure-cop12>> accessed 4 March 2018.

39 ⁶⁷ *Id.*, Rule 18. For discussion of the nature of credentials compared to full powers *see* Goodwin (n 14) 68-73

40 ⁶⁸ For information on the sizes of delegations for all Ramsar contracting parties up to COP11, *see* Goodwin, *id.*,
41 76-78.
42

43 ⁶⁹ For example, States such as China, Malaysia, the Republic of Korea and the USA have, in the past, sent
44 delegations of 10 or more delegates, even if they are not hosting the COP.

45 ⁷⁰ For further examples, *see* Convention Concerning the Protection of the World Cultural and Natural Heritage,
46 16 November 1972, 1037 UNTS 151, Article 9(3). Non-environmental examples include the Convention of the
47 World Meteorological Organization, 11 October 1947, 77 UNTS 143, Article 7(b) and the Constitution of the
48 International Labour Organization, Article 3(1) available at
49 <http://ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO> accessed 4 March
50 2018.

51 ⁷¹ Ramsar, Article 7(1). The World Heritage Convention, which contains a similar clause (n 70), was, like
52 Ramsar, negotiated with the involvement of IUCN. Many of the remaining leading MEAs have been negotiated
53 with the support of UNEP. The inclusion and exclusion of such provisions may therefore be linked to the
54 documentary precedents used as starting points for negotiations; *see* Churchill and Ulfstein (n 16) 630

55 ⁷² For information on the sizes of delegations for all Ramsar contracting parties, *see* Goodwin (n 14) 78-79.

56 ⁷³ The host nation is excluded from average calculations since the records reveal exceptional numbers of
57 delegates that are out of the ordinary for the host State's usual practice, thus skewing the average; for greater
58 detail *see* Goodwin *id.*, 77
59
60

1
2
3 negotiations and engagement with COPs.⁷⁴ This was, therefore, something factored into the
4 design of the semi-structured interviews.

5 6 4.1.2 Findings from the interviews

7
8 DEFRA manages the UK's internal modality for preparation and participation in Ramsar
9 COPs. Desk-based research had already revealed that DEFRA elected to send four delegates
10 to COP11 to represent the UK, three had experience of previous Ramsar plenary meetings,
11 and one of the three had attended all of the preceding five COPs dating back to 1996. The
12 interviews supplemented this, revealing that the fourth delegate had extensive horizontal
13 experience of COPs under the treaty regimes governing climate change, trade in endangered
14 species, and migratory species regimes.

15
16 Interestingly, the interviews also revealed that this experienced delegation was put together at
17 a late stage due to individuals originally selected (who had direct responsibility for Ramsar
18 within DEFRA) suddenly being unable to attend. Nevertheless, the replacement identified at
19 short notice to act as Head of Delegation had played the same role 13 years before at Ramsar
20 COP7 and in the meantime had been closely involved with the UK's Sites of Special
21 Scientific Interest. The latter is the principal UK regulatory vehicle for implementing Ramsar.
22 A different last minute substitute had also been the policy coordinator for the previous year's
23 COP in South Korea, as well as the lead for national implementation of Ramsar commitments
24 concerning designated sites. Retention of these staff members within DEFRA afforded the
25 UK an effective, reflexive, response to the situation.

26
27 Interview responses about the UK's approach to selecting the number and required expertise
28 of delegates, revealed two things. First, the COP agenda influences the selection process.
29 This means identifying the items that are of greatest interest to the UK and the likely number
30 of relevant working groups, and then ensuring that the appropriate people attend to engage in
31 negotiations on those items. Second, DEFRA's internal modality seeks delegates who can
32 assess proceedings from at least a policy point of view, as well as from an ecological and
33 ornithological perspective. In addition, sometimes legal input is needed. For instance, given
34 the scheduled discussions at COP11 concerning the institutional hosting arrangements for the
35 Ramsar secretariat, the legal department within DEFRA recommended the inclusion of an
36 international biodiversity lawyer.

37
38 One interviewee noted that they were fortunate to be representing a State that was able to
39 field such a multidisciplinary team. Another observed that, even though the article described
40 'a "should" not a "shall"', the delegation that was sent left little doubt about the UK
41 satisfying Article 7(1)'s call for the inclusion of an expert on wetlands or waterfowl.

42
43 Turning to further issues just concerning delegate experience, UK delegation interviewees
44 affirmed the huge importance of this for the quality of engagement. One opinion expressed
45 was that inexperience because of high turnover of personnel affected a State's effective
46 representation, and the regime's efficiency and capacity to produce a consistent body of work

47
48
49
50
51
52 ⁷⁴ Indirectly relevant insights can be extracted from the literature about non-environmental treaty regimes and
53 negotiations, such as the UN General Assembly or trade negotiations; *see for example* John Hadwin and Johan
54 Kaufmann, *How United Nations Decisions are Made* (Sythoff 1960) 28-29; Conor Cruise O'Brien, *To Katanga*
55 *and Back* (Hutchinson 1962) 28; Emily Jones, Carolyn Deere-Birkbeck and Ngaire Woods, *Manoeuvring at the*
56 *Margins: Constraints Faced by Small States in International Trade Negotiations* (Commonwealth Secretariat
57 2010) 15-24

1
2
3 that builds on itself. Newly appointed individuals did not have as effective a grasp of the
4 history of Ramsar COPs, resulting in suggestions that had already been tackled a few cycles
5 previously. During the interviews there was sympathy expressed for delegates parachuted
6 into a position and without the time to review all of the regime's previous work. However, it
7 was felt this led to dependence upon the Ramsar Secretariat as well as longstanding members.
8

9 Conversely, experience of Ramsar meetings offered significant advantages since, as one
10 interviewee put it:

11
12 so much is about trust, it is about building relations with other countries, them
13 getting to know you, them knowing they can trust you and knowing they can work
14 with you.⁷⁵
15

16 Such delegates could, therefore, constructively influence an MEA meeting given their
17 knowledge of 'the influencing bottlenecks' and how they can best do their advocacy. Certain
18 individuals with extensive experience of Ramsar were noted as being widely respected for
19 their knowledge, which, in one case, led to an informal leadership role within the African
20 group of States, as well as command of delegates' attention when they wished to make a
21 point.
22

23
24 The interviewees offered their own views on the best way to acquire such expertise and
25 experience. All those interviewed believed the best method was to learn on the job alongside
26 more experienced colleagues. Good opportunities for such learning were smaller meetings
27 held between Ramsar COPs or, for those that are members of the EU, when their government
28 was holding the Presidency and therefore needed to staff bigger delegations to complete the
29 additional tasks flowing from that responsibility.
30

31 Some interviewees still saw some merit in formal training. For example, interviewees
32 mentioned a past training workshop organised for African States due to attend a different
33 MEA's COP. The interviewees felt this had led to significant engagement in that plenary
34 process from those African States, a renewed sense of collective action amongst all States
35 attending, and ownership of decisions and initiatives adopted at the COP and advocated for
36 by the African nations that had attended the workshop.⁷⁶ In terms of Ramsar led teaching, one
37 interviewee mentioned that Ramsar runs briefing sessions during COPs that enable
38 individuals from the responsible working groups to explain significant proposals that they
39 have developed. This provides all delegates with an opportunity to increase their knowledge
40 and understanding of key items on the COP agenda.
41
42
43

44 However, there was concern expressed about the future ability of the UK to field experienced
45 delegates for Ramsar because UK delegates with experience and institutional knowledge
46 were approaching retirement from service. It was felt a plan needed to be put in place to train
47 successors through attending COPs or other regime meetings.
48
49

50 ⁷⁵ This sentiment was repeated in interviews with NGOs, for example on working with experienced delegates:
51 'we know [them], [they] know us and we know [they] understand what we're talking about. That doesn't mean
52 we wouldn't talk to other people as well, including new faces, but they may be more constrained on what they
53 can pick up and do...'

54 ⁷⁶ Government and NGO interviewees highlighted these workshops; background information available at
55 <[http://www.unep-aewa.org/en/news/african-preparatory-negotiation-workshop-empowers-cms-and-aewa-](http://www.unep-aewa.org/en/news/african-preparatory-negotiation-workshop-empowers-cms-and-aewa-negotiators)
56 [negotiators](http://www.unep-aewa.org/en/news/african-preparatory-negotiation-workshop-empowers-cms-and-aewa-negotiators)> accessed 4 March 2018. NGO interviews also highlighted similar training by World Wetland
57 Network for civil society on effective COP engagement.
58
59
60

4.2 Pre-COP Preparation

The UK as a State is a complex entity constituted by many parts. The UK has an executive branch divided into multiple ministries, a legislature, devolved administrations, and overseas territories. This generates the potential for great diversity of opinion on issues the COP is considering.⁷⁷ Since wetland conservation depends upon successful integration across many sectors of public life and in such a complex institutional environment, the UK's modalities for consultation as part of preparing to attend COP11 was anticipated to be a key topic for research.

4.2.1 Desk-based findings

Within DEFRA there are policy and legal divisions, and they in turn work closely with the Joint Nature Conservation Committee (JNCC) – the public body that advises the UK government on national and international nature conservation. Since divisions of DEFRA and the JNCC are in different locations, the individuals who are responsible for Ramsar implementation are spread between Bristol, London and Peterborough. Furthermore, wetland conservation requires the input and support of other bodies. For example, wetland conservation involves farming, infrastructure design, water resource management, tourism, and town planning. Policies implemented by other ministries and national NGOs, therefore, affect wetland conservation. Finally, the UK has devolved governments in Northern Ireland, Scotland and Wales, as well as 14 British Overseas Territories.

The risk this complexity creates is that vital information might be lost if DEFRA's modalities for consultation are limited, and/or that certain groups, due to their power to engage with the process, capture the framing of the State's position. Consequently, it might be thought that best practice for preparing the delegation for COP11 would be to engage with all of the noted branches and individuals as part of defining the national interest on a given issue.⁷⁸ Indeed, the few external constraints upon internal modalities on preparation push for such an approach. Principle 10 of the 1992 Rio Declaration recommends that environmental issues are best handled with the participation of all concerned citizens.⁷⁹ Article 3(7) of the 1998 Aarhus Convention⁸⁰ requires the UK (as one of the contracting parties) to promote transparency and participation in international environmental decision-making processes. Greater detail was added to this in the Almaty Guidelines to the effect that 'public participation generally contributes to the quality of decision-making on environmental matters in international forums by bringing different opinions and expertise to the process and increasing transparency and accountability'.⁸¹ Thus, participation should be as wide as possible, with particular attention given to: members of the public most affected by an environmental issue; public-interest organisations; and those contributing to, or able to alleviate, a problem.⁸²

⁷⁷ Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard 2010) 112

⁷⁸ Brunnée (n 52) 10-11

⁷⁹ Rio Declaration on Environment and Development, 31 ILM 874

⁸⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1999) 38 ILM 517

⁸¹ Second Meeting of the Parties, Almaty, Kazakhstan, Decision II/4, [28]

⁸² *Id.*, [30]

1
2
3 However, this may be difficult in practice given the limited time available to consult the
4 many and diverse groups linked to wetlands. Ramsar's Rules of Procedure (an additional
5 external constraints on modalities) create part of this time pressure. For example, the rules
6 provide that the provisional agenda and dates for the plenary meeting will be circulated one
7 year in advance.⁸³ The documentation providing detailed information on agenda items is
8 circulated at least three months before the opening of the COP.⁸⁴ This means that there is
9 limited time to consult on the proposals.
10

11 Potentially, such constraints will be mitigated by the fact that significant developments take
12 far longer to mature and will have been the subject of work in previous COPs or working
13 groups. Nevertheless, there will remain practical barriers to full participation in consultation,
14 and the danger arises for debate capture by a select few and that vital input will be missed.
15
16

17 4.2.2 Findings from the interviews

18 DEFRA's aim is to provide each delegate with briefing documents that set out the UK's
19 position on each agenda item. These can be used as reference materials during the COP
20 events. These briefing documents are produced in the light of the consultation process.
21
22

23 As to the modalities on consultation, the data acquired through interviews divides between
24 internal and external consultation. As to internal consultation, the DEFRA-convened team of
25 delegates initiated the process for COP11. The delegates produced a first draft 'position
26 paper' responding to the proposals, drawing upon their technical, legal and policy
27 backgrounds. Not only did this enable them to set the tone for the UK's position, but also
28 ensured that proposals were assessed from the various professional perspectives of the
29 delegates. A resolution viewed as benign from a policy perspective, but not from a legal
30 viewpoint, would still get highlighted.
31
32

33 Wider internal consultation followed, with the draft position paper circulated to the
34 appropriate leads within DEFRA divisions and then around other government departments,
35 devolved administrations and overseas territories. Because the UK had established a National
36 Ramsar Steering Committee,⁸⁵ the appropriate people to consult outside of DEFRA were
37 readily apparent. DEFRA chairs this Committee, which includes individuals from
38 government departments and devolved administrations.⁸⁶ It meets annually, but otherwise
39 operates in a virtual environment, and maintains regular communication via email and the
40 internet. Therefore, face-to-face meetings are unnecessary as Ramsar information can be
41 distributed electronically and views canvassed from around the country through a central co-
42 ordinator. Such a process is aimed at drawing out those departments with concerns on draft
43 resolutions that may not otherwise be obvious to DEFRA. Sympathetic negotiating positions
44 can then be formulated and included in the delegation's briefing documents.
45
46

47 One related issue is whether responses, and the negotiating positions based upon these
48 responses, enjoy the support of suitably senior figures within the government departments.
49 Given that DEFRA is not involved in discussions conducted in other departments, it has to
50
51

52 ⁸³ Rules of Procedure (2005) Ramsar COP10 DOC.2 Rev.1, Rule 5

53 ⁸⁴ *Id.*, Rule 10

54 ⁸⁵ Establishing national committees has been encouraged under Ramsar Policy since 1993; Recommendation 5.7

55 ⁸⁶ Natura 2000 and Ramsar Steering Committee Terms of Reference, available
56 <<http://webarchive.nationalarchives.gov.uk/20130402151656/http://archive.defra.gov.uk/rural/protected/internationally-designated-sites/n2kr-sc-tor-1011.pdf>> accessed 4 March 2018
57

1
2
3 take it on faith that the input received has been ‘signed off’ by suitably authorised
4 individuals. One interviewee also suggested that the final, collaboratively formulated,
5 position would receive ministerial approval as ministers are provided with a shorter summary
6 of the resolutions and proposed stances. Thus, the delegation sent to the Ramsar COP can
7 attend as the authentic representative of the UK government.
8

9 The modalities for preparing to attend COP11 also needed to capture the views of external
10 groups. This meant UK civil society organisations and EU Member States. As to the former,
11 interviews revealed that practice continues to evolve. Pre-COP11, modalities had initially
12 utilised meetings between delegates and UK civil society organisations during Ramsar COPs,
13 in order to discuss their respective positions and to resolve any disagreements. This, however,
14 limited the range of consultation to those NGOs with the resources to send representatives to
15 meetings – predominantly the RSPB, and the Wildfowl and Wetlands Trust – and thus
16 produced a rather limited constituency. Around 10 years ago, this approach was
17 supplemented by external consultation pursued through the Ramsar Forum. The Ramsar
18 Forum, one respondent suggested, was effectively the UK’s national Ramsar committee. As
19 such, it ought to have operated to feed these extra-government perspectives into national
20 Ramsar positions. The Forum comprised representatives from the National Ramsar Steering
21 Committee, plus civil society groups invited by that committee. Permanent invitees included
22 15 NGOs, such as the Wildfowl and Wetlands Trust, UK Major Ports Group, and the
23 National Farmers Union.⁸⁷
24
25
26

27 One interviewee observed that, owing to the previously described circumstances surrounding
28 last minute changes to the delegate identities and the shorter timescale available for preparing
29 for COP11, on this occasion the Forum could not be consulted in full. A targeted, lighter
30 touch was all that was practicable. Thus, government positions and lines were conveyed to
31 key organisations, such as the RSPB, and the Country Land and Business Association. There
32 then followed a two hour conference call with interested parties. One delegate intimated that,
33 fortunately, this was sufficient since there seemed to be consistency between the government
34 and NGO positions.
35
36

37 The UK delegation interviews also elicited opinions on the changes that had been witnessed
38 over time in the operation of the Forum. Some noted that there had been good engagement
39 with it as UK sites for Ramsar listing were identified.⁸⁸ However, once that process had
40 concluded, civil society interest and attendance fell away. Another respondent, who offered a
41 similar opinion on the levels of interest, was keen to highlight that this should not be
42 misinterpreted. Wetlands remained of interest and concern for all stakeholders; it was simply
43 that wetland conservation had evolved in the UK to a stage where functional discussion about
44 conservation happened through other channels. Well-established channels of communication
45 now existed between government and key players if a matter of national concern arose.
46 Furthermore, ultimately the Ramsar COP had (for UK NGOs at least) become a forum for:
47
48

49 feeding into larger wetland conservation issues at a global scale against which,
50 perhaps, some of our UK issues are rather more minor... I think they’re [*the*
51
52

53
54 ⁸⁷ Natura 2000 and Ramsar Forum Terms of Reference, available
55 <<http://webarchive.nationalarchives.gov.uk/20130402151656/http://archive.defra.gov.uk/rural/protected/internat>
56 <[ionally-designated-sites/n2krf-tor-0810.pdf](http://webarchive.nationalarchives.gov.uk/20130402151656/http://archive.defra.gov.uk/rural/protected/internationally-designated-sites/n2krf-tor-0810.pdf)> accessed 4 March 2018

57 ⁸⁸ See Section 2 on Ramsar listing.
58
59
60

1
2
3 NGOs] playing quite a nicely judged game of priorities that actually in a global
4 context some of the issues that are important for the UK are actually probably
5 best dealt with at home by trying to speak to the minister... rather than taking it
6 to an international forum...
7

8 In contrast, it was believed that in other States 'where wetland conservation is in its infancy
9 then having a national committee where you can get together all of the various players is
10 crucially important'.
11

12 Responses from NGO participants in the interviewing process were in line with those
13 expressed by the UK delegates, but they also highlighted a cultural factor. Thus, the
14 representatives of one NGO agreed that a national wetland issue ought not to be pursued
15 through a Ramsar meeting unless it corresponded with issues in other countries, or that the
16 wetland habitat in question was very rare and in imminent danger of being lost. They
17 accepted that, for their organisation, the normal course of action for a nationally confined
18 issue would begin with their own established lines of communication with government. The
19 NGOs believed that outside the UK these channels of communication may not be available
20 'depending upon the country's mentality and whether the Government is used to working
21 with civil society'. This could lead to a need for greater campaigning in some countries where
22 government/civil society interactions were lacking, in comparison to the UK where, at the
23 time, 'the Government is normally consultable if it does anything really stupid'.
24
25
26

27 The above has focused upon national consultations. However, at the time of the research and
28 writing the UK was a member of the EU. Even though the EU is not a contracting party to
29 Ramsar, UK membership carries expectations to engage in consultations with other Member
30 States within areas of EU competence. The EU has competence in all aspects covered by
31 Ramsar except for setting Secretariat budgets and hosting arrangements. This expectation is
32 encapsulated in the duty of sincere cooperation and the notion that Member States are acting
33 as trustees of the Union interest in situations where the EU lacks the standing to exercise its
34 competences.⁸⁹ The interviews indicated that the modalities for EU consultation involved the
35 lead being taken by the State then holding the EU Presidency. The interviewees surmised that
36 pre-COP meetings in Brussels are predominantly concerned with trying to find consistency in
37 views on matters, and allocation of lead roles on issues once at the COP. The information
38 acquired was then fed into the UK briefing documents produced in advance of the COP.
39
40

41 4.3 Participation in Negotiations 42

43 The moment when the various internal modalities of State Party delegations to Ramsar
44 intersect in the collective production of decisions is during the actual COP. At this moment
45 both the preparatory stages, and the modalities for participation at the plenary session,
46 become intertwined. It is to the latter set of modalities – on participation – that this section
47 finally turns.
48

49 4.3.1 Desk-based findings 50 51 52 53

54
55 ⁸⁹ Marise Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements
56 on Behalf of the European Union' in Anthony Arnall and others (eds.), *Constitutional Order of States: Essays in*
57 *EU Law in Honour of Alan Dashwood* (Hart 2011) 435

1
2
3 The external constraints upon a State's internal modalities for participation are derived from
4 the founding treaty and the rules of procedure. The framework these set, within which the
5 internal modalities operate, has a profound effect upon the parties' expectations and power
6 relationships.⁹⁰ Most obviously, the rules defining the basis upon which decisions and
7 resolutions will be adopted can have a particular influence upon the way States negotiate.
8 Steinberg describes these decision-making rules as either majoritarian, weighted voting, or
9 based upon consensus or unanimity; the last reflecting an approach of sovereign equality.⁹¹

11 Ramsar provides that every effort must be made for decisions to be adopted with the
12 consensus of the parties present at the COP; voting is only permitted as a last resort.⁹² This
13 favouring of consensus decision-making raised interesting questions that the interviewing
14 stage looked to explore. For example, does this lead to ambitious States holding out for
15 significant concessions through which their support, or at least silence, can be bought?
16
17

18 On a different tack, with non-plenary contact groups and discussions being widely utilised at
19 COPs, how do delegations operate to ensure they have access to these discussions?⁹³ In
20 theory an uninvolved State may raise an objection in plenary following the outcomes of those
21 contact group negotiations, resulting in the decision either being defeated or delayed until that
22 State has been consulted. However, how would such action be regarded?
23

24 A final area of interest concerns the general strategy adopted by the delegation with a view to
25 influencing proceedings. Here there exist theories concerning different forms of leadership,⁹⁴
26 and more recognition that in epistemic communities the claim to knowledge is a source of
27 influence.⁹⁵
28
29

30 4.3.2 Findings from the interviews

31 The interviews generated data broadly relating to co-ordination, tactics, and the Ramsar
32 consensus-based decision-making process. These will be covered in turn.
33

34 The head of delegation leads basic coordination of the UK's engagement. The head
35 determines (i) which delegate should attend a given working group, (ii) when contact needs
36 to be made with advisors back in the UK, and (iii) when a stance or position on an agenda
37 item can confidently be advanced as being one to which the UK can commit. The interviews
38 also revealed that, whilst having multiple delegates enabled attendance at parallel
39
40
41

42 ⁹⁰ Jacob Werksman, 'Procedural and Institutional Aspects of the Emerging Climate Change Regime: Improvised
43 Procedures and Impoverished Rules?', workshop paper (23 November 1999)
44 <<http://www.ucl.ac.uk/cserge/Werksman.pdf>> accessed 4 March 2018

45 ⁹¹ Richard Steinberg, 'In the Shadow of the Law or Power? Consensus-Based Bargaining and Outcomes in the
46 GATT/WTO' (2002) 56(2) *International Organization* 339, 339

47 ⁹² Ramsar, Article 7(2) *cf* Ramsar Rules of Procedure (n 66) Rule 40. Whilst resort to voting is rare under
48 Ramsar, there are notable exceptions within international environmental law, such as the Convention on
49 International Trade in Endangered Species of Wild Fauna and Fauna (3 March 1973, 993 UNTS 243), where
50 additions to and amendments of its appendices are regularly made following a vote.

51 ⁹³ See in the context of inexperienced NGOs being unfamiliar with ways to influence the COP process, Elisabeth
52 Corell, 'Non-State actor influence in the negotiations of the Convention to Combat Desertification' (1999) 4(3)
53 *International Negotiation* 197, 209-210 and 213

54 ⁹⁴ See Robert Keohane, *Political Influence in the General Assembly (International Conciliation No. 557)*
55 (Carnegie Endowment for International Peace 1966) 37-38; Joyeeta Gupta and Lasse Ringius, 'The EU's
56 climate leadership: Reconciling ambition and reality' (2001) 1(2) *International Environmental Agreements: Politics, Law and Economics* 281, 282

57 ⁹⁵ Corell (n 93) 199

1
2
3 discussions, the ensuing atomisation of the delegation necessitated significant efforts towards
4 maintaining consistent and acceptable positions. UK co-ordination meetings began at 06:30
5 in the morning, followed one hour later by EU co-ordination. COP proceedings would begin
6 at 10:00 and would finish around 18:00, with regular 'catch-up' coordination meetings during
7 the day and later in the evening. The facility for coordination with non-attending colleagues
8 back in the UK remained possible due to modern communications, and one interviewee
9 indicated that strategic pauses could be taken in Ramsar proceedings if the chair of a session
10 felt it was beneficial to give delegates a chance to communicate with their home departments.
11 Furthermore, the briefing document produced (as described in earlier sections) continued to
12 evolve as part of this coordination process, and was a constant point of reference.
13
14

15 Tactically, being part of the EU shaped the UK delegation's approach. Thus 'different
16 countries took the lead on behalf of the other EU Member States on particular resolutions... it
17 was a very effective way of... playing to the strengths within the EU family.' Indeed, the UK
18 led in some contact groups on behalf of the EU, supported by a small team made up of
19 individuals from EU States. The EU's collective strength also came to the fore when progress
20 seemed to be being blocked by one State. The EU group was able to select a particular
21 individual with key experience from within their ranks, and that individual was able to
22 engage that State's delegation directly to resolve the impasse. Moreover, in plenary, an
23 intervention by one EU State from behind their national flag still indicated to the whole
24 plenary that that State was effectively speaking for all 28 EU Member States.
25
26

27 In addition to this, the interviews revealed some expected tactics. Experience within the UK
28 delegation helped to identify key individuals within other State groupings. Given the respect
29 accorded to the expressed opinions of these individuals within their coalitions, spending time
30 explaining and seeking to persuade them of a given stance (if successful) was an efficient
31 way of bringing a larger group of States towards a preferred position. In contrast, certain
32 States were known to approach COPs with set positions and no intention to engage in
33 negotiations and compromise. The tactic here was, nonetheless, to make efforts to approach
34 them during informal occasions (such as coffee breaks) in order to try to find out if there was
35 a way to secure a resolution that satisfied each other's position. The UK regarded
36 negotiations as needing to continue, in the last resort, without these parties, but in the hope
37 that in plenary matters would ultimately proceed without objection.
38
39
40

41 Having covered coordination and tactics, consensus decision-making was also explored in the
42 interviews. The general observation was made that Ramsar did expended great effort in
43 accommodating people so that decisions could be made via consensus. This promoted 'buy-
44 in', since participants would not feel they were being pressured into something they did not
45 want to do. Consensus decision-making, however, also created tension as a small minority of
46 States could dig in to ensure that the consensus accommodated their view. This could lead to
47 decisions being watered down to the point of meaninglessness. Nevertheless, States that had
48 missed a contact group, and who then looked to use the plenary and the need for consensus so
49 as to have their say, were regarded as taking 'a bit of a nuclear option'. The implication being
50 that diplomatically, exploiting the need for consensus so as to overcome delegation numerical
51 strength failings, was unacceptable. Having the capacity to send enough delegates who could
52 attend key groups, therefore, remained important.⁹⁶
53
54
55

56 ⁹⁶ Consensus decision-making is considered further later in this article.
57
58
59
60

1
2
3 The issue of the hosting of the Secretariat became entangled with consensus decision-making
4 during COP11, and lay behind a number of responses connected to the process. Thirty States
5 appeared to be committed to moving the Secretariat to UNEP for a variety of reasons.⁹⁷ The
6 majority, however, felt that this was unnecessary.⁹⁸ It was thus clear that the two positions
7 were a long way apart, but, given the extended period of uncertainty over the hosting
8 arrangements, many were strongly in favour of concluding and closing the matter. The Chair
9 of the COP therefore took the contentious decision of calling for a show of hands at the start
10 of the plenary meeting to see if there would be enough support for change if consensus could
11 not be reached and voting was required. The subsequent vote indicated there would not be the
12 two-thirds majority at that time to approve a move from IUCN to UNEP.⁹⁹
13
14

15 Given that the UK was in favour of the *status quo* it is unsurprising that the interviewees
16 generally supported this indicative vote, despite the general culture of consensus decision-
17 making. One observed that those against the indicative vote were generally those who wanted
18 the Secretariat to move to UNEP, but were aware that they were unlikely to win if the matter
19 was determined by a final vote. Another noted that the indicative vote did not hinder
20 discussions and that many States felt the Chair could lead the discussion as it wished, and the
21 show of hands would be a useful barometer to know where matters stood. By establishing
22 that there were more than a third of States who would block a move to UNEP, the parties
23 knew that move was going nowhere. Consensus negotiations could, therefore, be conducted
24 on the basis that the Secretariat would be located with IUCN, and solutions could be pursued
25 on that footing.
26
27
28
29

30 5. The UK's Internal Modalities For COP11 and the Likelihood of UK Compliance

31 In Section 3 it was proposed that according to theory decisions at COP11 were more likely to
32 influence UK behaviour if they were regarded as rationally persuasive and/or the issuing
33 authority normatively legitimate. Section 4 then established in detail the internal modalities
34 for the UK in connection with their engagement with the COP11 process and the decisions
35 taken at that session. In this section it is necessary to step back from the detail to take a
36 broader perspective through the lenses of normative legitimacy (both the input and output
37 forms of legitimacy detailed in Section 3) and rational persuasion. These lenses draw out
38 from the data and bring to the foreground those modalities that these theories suggest
39 might¹⁰⁰ impact upon the persuasiveness of the decision from the perspective of engendering
40 suitable UK action in response.
41
42
43

44 5.1 Legitimacy

45
46
47
48 ⁹⁷ Such as the need to improve synergies with other MEAs, and a perceived increase in the political and
49 international visibility of Ramsar; Earth Negotiations Bulletin, Summary of the 11th Conference of the Parties to
50 the Ramsar Convention on Wetlands (IISD 2012), 4 <<http://www.iisd.ca/download/pdf/enb1739e.pdf>> accessed
51 4 March 2018

52 ⁹⁸ Not least because the political visibility issue could easily be resolved by including a high-level ministerial
53 segment; *id.*, 15

54 ⁹⁹ *Id.*, 4. The two-thirds majority is required by Article 8(1).

55 ¹⁰⁰ The paper examines how practice *might* lead to more persuasive decisions since the empirical research was
56 designed to establish the content of the UK's internal modalities, and not the degree to which the UK did
57 comply with the decisions reached.

1
2
3 It will be recalled that in the theories on normative legitimacy of authorities¹⁰¹ (normative
4 being a reference to the qualities of the ruler) a distinction exists between input and output
5 legitimacy. As was explained in Part 3.2.2, for output legitimacy (referring to the results of
6 issuing directions), (a) access to experts, and (b) due delegation to such individuals in order
7 to generate rational decisions insulated from political values, is known to be crucial.¹⁰² For
8 input legitimacy (standards surrounding the process of issuing directions) it was also
9 established in Part 3.2.2 that *inter alia* (1) transparency, (2) stable rules and traditions, (3)
10 public participation, (4) due deliberation, and (5) democratic decision-making, are vital.¹⁰³ In
11 the following sections, the data will be used to highlight how these factors in output and input
12 legitimacy might be being secured.
13
14

15 The crucial authorities in this study are obviously Ramsar (and its COP), and the lead-
16 implementing agency within the UK (DEFRA). DEFRA, for instance, must be viewed as
17 normatively legitimate amongst the key actors it will seek to influence as it implements
18 Ramsar decisions.
19

20 5.1.1 Input legitimacy

21 Focusing first upon DEFRA's internal modalities¹⁰⁴ as revealed by the research, its approach
22 to consultation could be significant for delivering input legitimacy via a transparent,
23 participatory process. The National Ramsar Steering Committee secures participation in
24 formulating a State position for cross-government officials and devolved governments.
25 Further, previous meetings of the Ramsar Forum ought to have promoted Government
26 transparency amongst civil society and academics, and to have given NGOs a participatory
27 role as well. However, these were not employed for COP11 and, whilst the situation dictated
28 such temporary measures, informal consultation via conference calls with selected wetland
29 NGOs risked undue influence and private lobbying from a closed group, thus potentially
30 undermining a sense of a transparent participatory process.¹⁰⁵ That said, at least there was
31 some consultation with non-governmental bodies. Nevertheless, repetition of this form of
32 consultation needs to be avoided.
33
34
35
36

37 Thus, with the Forum noted to be in decline, it is encouraging to note that, since conducting
38 the interviews, a new initiative has been pursued in which DEFRA has compiled an email
39 circulation list of stakeholders and other interested parties in biodiversity issues, all of whom
40 are invited to various consultation meetings for the biodiversity conventions. In March 2015
41 these parties were invited to Barnes Wetland Centre to discuss the agenda items for Ramsar
42 COP12. The new mechanism seems open to anyone with an interest and it appears easy to
43 approach DEFRA to become a member of this circulation list. This was something that was
44 not so easy for the Ramsar Forum, which operated on an invite basis and was in practice
45 limited to the groups listed in its *Terms of Reference*.¹⁰⁶ If successful this body could prove to
46
47
48

49 ¹⁰¹ As opposed to normative legitimacy of a legal system; see Part 3.2.

50 ¹⁰² See also Esty (n 61) 1517

51 ¹⁰³ See also Bodansky (n 44) 329-332

52 ¹⁰⁴ As a short aside, it is worth noting that DEFRA's own normative input legitimacy receives a significant boost
53 by being nested within a democratic political system; Esty (n 61) 1507 and 1515

54 ¹⁰⁵ Elizabeth Kirk, 'The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity'
55 in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law*
56 (Edward Elgar 2016) 95, 97

57 ¹⁰⁶ (n 87)

1
2
3 be an excellent vehicle for delivering transparency and wider participation, reinforcing the
4 deliberative and procedural aspects of input legitimacy of the Ramsar COP process, as well
5 as the authority of DEFRA to implement decisions.
6

7 Ramsar's COP process can also be assessed through an input legitimacy optic. In Part 4, the
8 dominance of consensus decision-making was highlighted. Such forms of decision-making
9 should secure due deliberation by ensuring an equal voice for all participants, and thus
10 enhance input legitimacy. However, in recent years, controversies have occurred about the
11 meaning of consensus and consensus-decision making, particularly where a small minority of
12 States have objected to a course of action.¹⁰⁷ As the research presented herein reveals,
13 Ramsar is not immune to controversy surrounding its rules for adopting decisions, as
14 exemplified in the 'show of hands' initiative at COP11 concerning Secretariat hosting. This
15 event is concerning given it threatens many of the aspects of input legitimacy; suggesting the
16 regime does not operate according to transparent predictable and stable administrative rules
17 nor do its processes engage all interested parties. If input legitimacy is undermined, so too is
18 one of the forces driving decision influence.
19
20

21 5.1.2 Output legitimacy

22 DEFRA's deliberate selection of delegates with suitable experience and expertise could also
23 connect to output legitimacy. Experienced delegates encourage adoption of positions and
24 collective agreement of decisions that are properly rooted in science, are rational, insulated
25 from politics, and account for known challenges for wetland conservation thereby yielding
26 better outcomes.¹⁰⁸
27
28

29 5.2 Rational Persuasion

30 It is worth recalling that rational persuasion is when an actor regards a direction as
31 convincing in some way. This may be because it is interpreted as being in the interest of a
32 State or the individual whose acts count as those of the State. Alternatively, it may be
33 convincing according to science, the merits of a well-reasoned judgment, or a sense of
34 justice. Because of this, three crucial stages need to be considered: (i) identifying key actors
35 who need to be rationally persuaded; (ii) identifying the various grounds upon which a
36 proposal might then be viewed as rationally determined by those actors; and (iii) having
37 identified which grounds are likely to rationally persuade key actors, ensuring that the
38 decision issued by the COP reflects them effectively.
39
40
41

42 Taking each in turn, as to (i) classically MEAs establish obligations and issue directions that
43 depend upon national implementation to have effect. Therefore, the obvious group that needs
44 to be rationally persuaded by a decision is the lead government agency for Ramsar. In the UK
45 this meant DEFRA (and more immediately, the delegates representing DEFRA). Post-
46 COP11, DEFRA was relied upon to begin the process of adjusting national approaches and
47 regulation in accordance with the resolutions.
48
49
50

51 ¹⁰⁷ The best example of this in international environmental law of recent years comes from the climate change
52 regime; see for an excellent critique Dapo Akande, 'What is the meaning of "consensus" in international
53 decision making?' *EJIL: Talk!* (8 April 2013) <<http://www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making/>> accessed 4
54 March 2018; see also Antto Vihma, 'Climate of Consensus: Managing Decision Making in the UN Climate
55 Change Negotiations' (2015) 24(1) *RECIEL* 58
56

57 ¹⁰⁸ Esty (n 61) 1517
58

1
2
3 However, as indicated earlier, the management of wetlands cuts across multiple aspects of
4 national policy, and in seeking to make adjustments DEFRA is itself reliant upon the
5 cooperation of other government departments and devolved administrations to approve
6 regulations and enforce them. According to the theory, for them to adjust their behaviour,
7 these actors must ideally also be rationally persuaded by DEFRA's instructions.
8

9 The data collected relating to the modalities on consultation highlights that the introduction
10 of the National Ramsar Steering Committee has helped to identify in advance the relevant
11 actors across central and devolved governments. In contrast the temporary measures used in
12 the run up to COP11 may not have captured all of the non-governmental actors. In future the
13 new biodiversity liaison initiative (mentioned in Section 5.1) offers a mechanism for actors to
14 identify themselves with, and declare an interest to, DEFRA. This is supplemented by the
15 experience of DEFRA staff which helps to prioritise actors within government and key NGOs
16 for consultation.
17
18

19 As to (ii), having contacted a number of appropriate actors in the run-up to COP11, DEFRA
20 employed modalities that should have released and collated a great volume of information
21 defining the interests of wetland stakeholders. In this regard, the data once again indicated the
22 importance of experience. For instance, freedom was given to individuals to produce the first
23 draft responses to the proposed COP11 agenda items. In this process, one respondent
24 described how their own knowledge of previous standing committee work, as well as past
25 objectives and 'red lines', gave a good indication of the likely discussions and concerns at the
26 COP. This then fed into producing practicable proposals for circulation to national actors.
27
28

29 Thereafter, recourse to consultation with the National Ramsar Steering Committee and key
30 NGO actors, offered the potential for the DEFRA delegation to have an excellent
31 understanding of the form of outcome that was likely to appeal to all sectorial interests.
32 Interestingly, the data indicated that much of that consultation was facilitated by electronic
33 communications, and this practice ought to be considered by other States as a cost effective
34 way to capture viewpoints. However, as a warning, that same mode has costs linked to the
35 fact that communication is far more effective when parties are physically present with each
36 other; otherwise body language might be missed, or the intensity of engagement
37 diminished.¹⁰⁹ It seems, however, that having reasonable awareness of a large range of actors'
38 concerns should be preferable to awareness of fewer interests at a more nuanced level.
39
40

41 Turning to (iii) and the participation phase of internal modalities, once again the data
42 consistently indicated that delegate experience is key to translating the identified bases of
43 rational decisions into the products of COPs. The modalities for the UK delegation on
44 delegate selection indicated a valuing of quality of delegates (particularly linked to
45 experience of Ramsar meetings) over quantity. Such experience generated influence within
46 the regime, as well as securing greater effectiveness in terms of disseminating State positions
47 at the plenary session – indeed, this was confirmed in the data with respect to modalities for
48 participation at the COP where experience enhanced the ability to identify key delegates in
49 whom it was worth investing time with a view to securing the UK's preferred positions.
50
51
52
53

54
55 ¹⁰⁹ The diminished quality of communication in the absence of physical interaction is a recognized challenge for
56 online dispute resolution; Joseph Goodman, 'The Pros and Cons of Online Dispute Resolution: An Assessment
57 of Cyber-Mediation Websites' (2003) 4 Duke Law and Technology Review 1, 10-13
58
59
60

1
2
3 Securing such experience required a commitment to staff retention and stability (at least to
4 the extent of one delegate having attended a series of previous plenary sessions), and
5 investment in facilitating practical training derived from attending sessions (not necessarily
6 the plenary, but preferably with a mentor) rather than from classroom-based instruction.
7

8 Pausing to look beyond the UK's internal modalities to Ramsar contracting parties more
9 generally, if the theory is correct then the recommendations for securing rationally persuasive
10 decisions are that States ought to plan for, and be supported in developing, delegates with
11 experience of international environmental negotiations, and ideally specifically for Ramsar.
12 Although there was some support expressed by the UK delegates for international training
13 workshops to this end, the preferred way to do this was suggested to be shadowing colleagues
14 before being left alone to represent a State. It might, however, prove difficult for States with
15 limited budgets to afford sending multiple personnel to a meeting. As a result, regime funds
16 or international aid would need to be released to support such measures, rather than merely
17 attendance by a single delegate. The potential positive impact upon decision influence would
18 more than justify this.
19
20

21 Alternatively, delegates need to have easy access to others who can fill gaps in knowledge
22 and experience. This might be through engaging NGO experts to join delegations, or
23 accepting assistance from other States in the form of their nationals joining delegations.
24 These solutions, though, pose problems as NGOs ultimately answer to different
25 constituencies compared to the many democratically elected States, whilst there may be
26 concerns about the independence of other nationals joining delegations. Less problematical is
27 making use of negotiating blocs, like that operated by the EU Member States, or through
28 proper support from advisors back in the State's national offices. The justification is obvious:
29 suitably experienced and supported delegates are believed to be better able to assess in
30 advance, and challenge during COP negotiations, the legal, diplomatic and scientific merits
31 of a decision. An adequately staffed and supported delegation with experience in multi-lateral
32 negotiations is also best equipped to insert the State's own rationally persuasive stance into
33 the final product.
34
35
36

37 The data suggested particular strengths for the UK in this regard; regime, policy, legal,
38 scientific, vertical and horizontal experience was all present within the delegation to COP11.
39 There was also no suggestion that the UK had insufficient numbers to attend important
40 contact groups at the COP. This may not be the case for all countries participating in Ramsar
41 COPs, but the pursuit of rationally persuasive decisions re-emphasises how important
42 succession planning might be for future UK engagement with Ramsar. The interviews,
43 however, revealed concerns about succession planning, as well as cutbacks in departmental
44 budgets that again hinted at increasing challenges in this regard.
45
46

47 Further, coalitions were significant for the UK delegation in the context of COP11. Acting as
48 a coalition clearly offered the UK the chance to have its positions represented and amplified
49 at the COP. Different States enjoyed different diplomatic relationships, and this could be used
50 to reach further than a State acting on its own. The coalition also bolstered the effective size
51 of the delegation. However, this coalition was founded upon membership of the EU, and, as
52 mentioned already, following 'Brexit' this is not projected as being automatically available in
53 the future. This possible loss of collective bargaining power, and potential impact upon the
54
55
56
57
58
59
60

1
2
3 UK's internal modalities presents itself as a key area of future concern for decisions that
4 might be rationally persuasive within the UK.
5
6

7 8 6. Conclusion

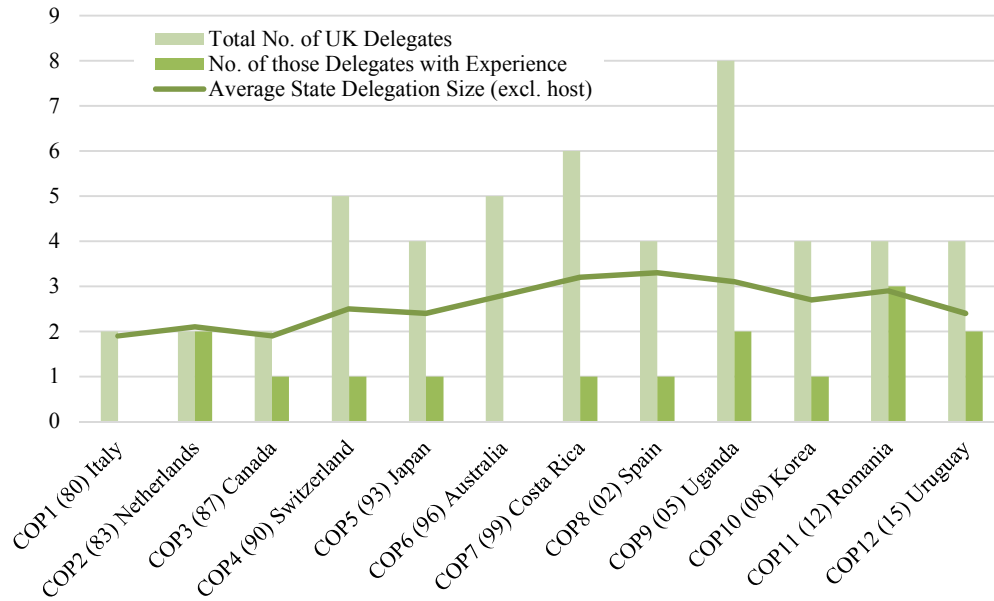
9
10 This paper has explained that decisions taken by the COP to Ramsar, in common with many
11 other MEAs, are crucial for the effective operation of the regime. These decisions, therefore,
12 need to influence the behaviour of the States Parties to Ramsar. Internal modalities for the
13 preparation of delegations, and the participation of those delegations at COPs, can be linked
14 to the characteristics of the decision and decision-making process that according to theory
15 affect the likelihood of those crucial decisions influencing State behaviour. This is because
16 the normative legitimacy of the decision-making process, and the degree to which a decision
17 is rationally persuasive to a State, might be enhanced or undermined by decisions made by a
18 State when implementing its internal modalities surrounding delegations to the Ramsar COP.
19 This position was illustrated by recourse to a grounded case study on the UK delegation to
20 COP11.
21
22

23 This analysis of the data acquired on the UK government's internal modalities for delegate
24 preparation and participation at COP11 suggests that, if we accept Bodansky's assessment of
25 the literature on decision influence as being accurate, the UK had adopted practices that
26 enhance the likelihood that decisions adopted at that session (and indeed future COPs if
27 replicated) will be viewed as being legitimate and rationally persuasive by the UK. In theory
28 this should, in turn, increase the chances of those decisions having the desired impact upon
29 the UK's actions and thus the wise use and conservation of wetland areas. Naturally, it has
30 only been possible to draw theoretical conclusions (thus talk in terms of likelihood) since the
31 empirical research was designed to establish the content of the UK's internal modalities, and
32 not the degree to which the UK did comply with the decisions reached.
33
34

35 The case study has also served to provide examples of practice that other States may feel
36 would be practicable and represent a desirable development for themselves. In turn, if the
37 theory proposed in this paper is correct, many of these adjustments could ultimately enhance
38 the persuasiveness of COP decisions within those States. Delegate experience and numerical
39 strength, wide and transparent consultation, use of modern communication, delegation
40 briefing papers that evolve, and resort to negotiation blocs, have all been highlighted as of
41 potential importance, and this could be used to inform international aid and capacity building
42 initiatives.
43
44

45 However, risks within the UK's internal modalities were also identified. Some have already
46 been addressed, such as reforms for consulting externally with NGO's and other private
47 stakeholders. Nevertheless, whilst numerical strength, substantive expertise and forensic
48 experience had all been secured across the appointment of delegates and used to great effect
49 in the lead-up to, and at, the COP, concerns became evident about future capacity to have
50 access to these qualities. This was because of limited funding and succession planning, as
51 well as the imminent departure of the UK from the EU. When linked to the theory advanced
52 in this paper concerning persuasiveness of decisions, this lends weight to calls for urgent
53 action to retain and transfer institutional knowledge and experience.
54
55
56
57
58
59
60

Diagram 1 – Size and Experience of UK Delegations to Ramsar COPs 1980-2015¹



¹ The host nation is excluded from average calculations since the records reveal exceptional numbers of delegates that are out of the ordinary for the host State’s usual practice, thus skewing the average; for greater detail see [removed for anonymity] *id.*, 77