JUDGMENT OF THE COURT (Second Chamber)

7 October 2004 *

In Case C-239/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 June 2003,

Commission of the European Communities, represented by G. Valero Jordana and B. Stromsky, acting as Agents,

applicant,

v

French Republic, represented by G. de Bergues and E. Puisais, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

— by failing to take all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the Étang de Berre, and

— by failing to take due account of the requirements of Annex III to the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, signed at Athens on 17 May 1980 and approved on behalf of the European Economic Community by Council Decision 83/101/EEC of 28 February 1983 (OJ 1983 L 67, p. 1; 'the Protocol'), by amending the authorisation for the discharge of substances covered by Annex II to the Protocol following the conclusion of the latter,

the French Republic has failed to fulfil its obligations under Articles 4(1) and 8 of the Convention for the protection of the Mediterranean Sea against pollution, signed at Barcelona on 16 February 1976 and approved on behalf of the European Economic Community by Council Decision 77/585/EEC of 25 July 1977 (OJ 1977 L 240, p. 1; 'the Convention'), under Article 6(1) and (3) of the Protocol and under Article 300(7) EC.

Legal context

2 Article 2(a) of the Convention defines the term 'pollution' as follows:

'... the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities.'

3 Article 4(1) of the Convention states:

'The Contracting Parties shall individually or jointly take all appropriate measures in accordance with the provisions of this Convention and those Protocols in force to which they are party, to prevent, abate and combat pollution of the Mediterranean Sea area and to protect and enhance the marine environment in that area.'

4 Article 8 of the Convention provides:

'The Contracting Parties shall take all appropriate measures to prevent, abate and combat pollution of the Mediterranean Sea area caused by discharges from rivers, coastal establishments or outfalls, or emanating from any other land-based sources within their territories.'

5 Article 1 of the Protocol similarly provides:

'The Contracting Parties ... shall take all appropriate measures to prevent, abate, combat and control pollution of the Mediterranean Sea area caused by discharges from rivers, coastal establishments or outfalls, or emanating from any other land-based sources within their territories.'

6 Article 3 of the Protocol states:

'The area to which this Protocol applies (hereinafter referred to as the "Protocol area") shall be:

...

(c) saltwater marshes communicating with the sea.'

7 Article 4(1)(a) of the Protocol provides that the latter is to apply:

'to polluting discharges reaching the Protocol area from land-based sources within the territories of the Parties, in particular,

directly, from outfalls discharging into the sea or through coastal disposal,

indirectly, through rivers, canals or other watercourses, including underground watercourses, or through run-off'.

8 Article 6(1) and (3) of the Protocol states:

'1. The Parties shall strictly limit pollution from land-based sources in the Protocol area by substances or sources listed in Annex II to this Protocol.

...

3. Discharges shall be strictly subject to the issue, by the competent national authorities, of an authorisation taking due account of the provisions of Annex III ...'

9 It is clear from paragraphs 11 and 13 of Section A of Annex II to the Protocol that the system laid down in Article 6 of the Protocol covers 'substances which have, directly or indirectly, an adverse effect on the oxygen content of the marine environment, especially those which may cause eutrophication' and 'substances which, though of a non-toxic nature, may become harmful to the marine environment or may interfere with any legitimate use of the sea owing to the quantities in which they are discharged'.

10 Section B of Annex II states:

'The control and strict limitation of the discharge of substances referred to in Section A above must be implemented in accordance with Annex III.'

11 Annex III to the Protocol sets out the factors to be taken into account 'with a view to the issue of an authorisation for the discharge of wastes containing substances referred to in Annex II ...'. The States party to the Protocol must thus take into

account the 'characteristics and composition of the waste', the 'characteristics of waste constituents with respect to their harmfulness', the 'characteristics of [the] discharge site and receiving marine environment', the 'availability of waste technologies' and, finally, the 'potential impairment of marine ecosystems and sea-water uses'.

12 Also, Article 300(7) EC provides that agreements concluded by the Community 'shall be binding on the institutions of the Community and on Member States'.

Subject-matter of the action and the pre-litigation procedure

13 The Étang de Berre is a saltwater marsh of 15 000 hectares which communicates directly with the Mediterranean Sea through the Caronte Canal. The volume of water in the Étang de Berre is 900 000 000 m^3.

14 The Commission received a complaint concerning damage to the aquatic environment of the Étang de Berre, principally as a result of fresh water from the Durance being artificially discharged into the Étang de Berre whenever the turbines of the hydroelectric power station at Saint-Chamas run by Electricité de France ('EDF') were in operation.

15 EDF developed and operates the Saint-Chamas fall under:

— Law No 55-6 of 5 January 1955 relating to development of the Durance (JORF of 6 January 1955 and corrigendum at JORF of 20 February 1955), Article 1 of

which declared as being in the public interest the construction of works for regulating the flow of the Durance, for use of the waters in irrigation and for the production of electric energy, a diversion being established between the Durance's confluence with the Verdon and the Étang de Berre;

— the Decree of 28 September 1959 granting the EDF (national service) the right to develop and operate the Serre-Ponçon fall and reservoir, on the Durance, and falls to be established on the diversion of the Durance, between its confluence with the Verdon and the Étang de Berre (JORF of 7 October 1959);

— an agreement between EDF and the Minister for Infrastructure dated 19 August 1966, clause 9 of which provides:

'Electricité de France will take all appropriate measures to stop discharges into the marsh once the solids content exceeds 5 grams per litre, except where, in the event of an incident on the electricity network, that step proves exceptionally unacceptable';

— the Decree of 6 April 1972 approving the agreement and the special conditions for the Salon and Saint-Chamas falls, on the Durance (departments of Bouches-du-Rhône, Vaucluse and Gard) (JORF of 18 April 1972; 'the 1972 Decree'). Clause 17 of those conditions imposes the obligation to comply with the requirements of the agreement of 19 August 1966 that relate to discharges into the Étang de Berre;

— the operating instructions relating to the 'transfer into the Durance of waters from the diversion, in connection with the reduction of liquid and solid inputs into the Étang de Berre' ('the operating instructions'), approved on 22 April 1997 by the Regional Department for Industry, Research and the Environment.

16 Point 2 of the operating instructions sets the objectives for reducing water and alluvium inputs in the following terms:

'Water inputs

— limit on inputs per annum: 2 100 hm^3

— limit on inputs from 1 May to 30 September: 400 hm^3

Alluvium inputs

— limit on inputs per annum: 200 000 tonnes

— limit of 2 g/l for suspended matter

Compliance with the quotas

In the event of difficulty in complying with these quotas, EDF must inform the Étang de Berre Recovery Taskforce which will decide on the action to be taken.'

17 According to the case-file, EDF's Durance facilities not only serve to generate electricity at a regional level but also contribute to the security of electricity generation by providing a maximum output capacity that is immediately available to deal with incidents on the network.

18 After taking the view that the French Republic had failed to take all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the Étang de Berre or had failed to take due account of the provisions of Annex III to the Protocol by amending the authorisation for the discharge of substances covered by Annex II to the Protocol and, as a consequence, had failed to fulfil its obligations under Articles 4(1) and 8 of the Convention, Article 6(1) and (3) of the Protocol and Article 300(7) EC, on 10 May 1999 the Commission served a letter of formal notice on the French Government in order to enable it to submit its observations.

19 Since the Commission was not persuaded by the arguments set out by the French Republic in its letter of 5 October 1999, the Commission sent it a reasoned opinion reiterating the terms of the letter of formal notice and calling on it to take the measures necessary in order to comply with the reasoned opinion within a period of two months from notification thereof.

20 By letter of 31 October 2000 the French Government submitted to the Commission a dossier in response to the reasoned opinion.

21 Since the Commission considered that the dossier did not enable it to abandon its complaints set out in the reasoned opinion, it brought the present action.

The Court's jurisdiction

22 The French Government submits that the Court lacks jurisdiction to adjudicate on the action on the ground that the obligations which the French authorities are alleged to have infringed do not fall within the scope of Community law. It states that no Community directive regulates discharges of fresh water and alluvia into a saltwater marsh, so that the provisions of the Convention and the Protocol that cover such discharges do not fall within Community competence.

23 Since Treaty infringement proceedings can relate only to a failure to comply with obligations arising from Community law, it must be examined, before deciding if there has been a substantive infringement, whether the obligations owed by France which are the subject-matter of the action fall within the scope of Community law.

24 The Convention and the Protocol were concluded by the Community and its Member States under shared competence.

25 In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 9, and Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, paragraph 14).

26 From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (*Demirel*, cited above, paragraph 11, and *Commission* v *Ireland*, cited above, paragraph 15).

27 In the present case, the provisions of the Convention and the Protocol without doubt cover a field which falls in large measure within Community competence.

28 Environmental protection, which is the subject-matter of the Convention and the Protocol, is in very large measure regulated by Community legislation, including with regard to the protection of waters against pollution (see, in particular, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p. 40), Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1) and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1)).

29 Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments.

30 The fact that discharges of fresh water and alluvia into the marine environment, which are at issue in the present action, have not yet been the subject of Community legislation is not capable of calling that finding into question.

31 It follows from the foregoing that the application of Articles 4(1) and 8 of the Convention and Article 6(1) and (3) of the Protocol to discharges of fresh water and alluvia into a saltwater marsh, those discharges not having been the subject of specific Community legislation, falls within the Community framework since those articles are in mixed agreements concluded by the Community and its Member States and concern a field in large measure covered by Community law. The Court therefore has jurisdiction to assess a Member State's compliance with those articles in proceedings brought before it under Article 226 EC.

Substance

32 In support of its action, the Commission puts forward two complaints, respectively alleging:

— breach of Article 6(1) of the Protocol, in conjunction with Articles 4(1) and 8 of the Convention, on the ground that the French Republic has not taken the measures necessary to limit strictly the introduction into the Étang de Berre of substances having deleterious effects as set out in Article 2(a) of the Convention, in order to combat and abate over a long period the pollution of that marsh;

— breach of Article 6(3) of the Protocol, on the ground that the authorisation for the discharge by the Saint-Chamas power station of waste into the Étang de Berre has not been issued on the basis of the criteria laid down by the Convention and the Protocol.

The first complaint

Arguments of the parties

33 The Commission submits that Article 6(1) of the Protocol contains an obligation as to the result to be achieved.

34 According to the Commission, which relies on several scientific studies, a correlation exists between the volume of fresh water, alluvia and sediment discharged into the Étang de Berre by the Saint-Chamas hydroelectric power station, on the one hand, and the salinity rate, freshening and stratification of the waters of the marsh, the state of eutrophication due to an excessive input of nutrients (nutritive salts), and the harm to the marsh's fauna, flora and amenities, on the other. The Commission does not allege that operation of the Saint-Chamas hydroelectric power station is the sole cause of the pollution of the Étang de Berre, but that a crucial part of the pollution is attributable to its operation.

35 The Commission adds that Article 6(1) of the Protocol must be read in light of Article 6(3) thereof, under which discharges of the substances at issue are strictly subject to obtaining an authorisation taking due account of the provisions of Annex III to the Protocol. It follows that discharge of those substances, unless authorised, is prohibited, which means that the State has precise knowledge of the nature and amount of the substances discharged.

36 The existence of a regional deficit, or fragility in the security of the electricity supply in the Provence-Alpes-Côte d'Azur region ('the PACA region') at issue, is not capable of justifying the infringement of Article 6(1) of the Protocol, especially as an alternative solution exists for guaranteeing the security of the network, namely the construction of a 400 000 volt strategic line in the region, between Boutre and Carros.

37 While it is true that pollution of the Étang de Berre has been reduced in recent years under the recovery plan for that marsh, the reduction in discharges has been of a belated, erratic and, above all, very limited nature. In particular, the Commission contends that the total volume of the maximum annual discharges laid down by that plan is incompatible with the sustainable restoration of a marine environment in the Étang de Berre.

38 The French Government contends that Article 6(1) of the Protocol contains an obligation as to the means employed. In the present case, the French Republic is therefore required to prove only that it has in fact created sufficient legal means in order to limit the pollution resulting from discharges of fresh water and alluvia.

39 In this regard, the particular energy situation in the PACA region warrants the strategic interest in the Salon and Saint-Chamas hydroelectric power stations. The future 400 000 volt 'Boutre-Carros' line is only one part of a more global programme intended to meet the energy difficulties encountered in the region.

40 The French Government contests, first, the Commission's statement that from 1983 there was heavy, prolonged and particular pollution of the Étang de Berre from a land-based source, having considerable adverse effects on fauna, flora and amenities. The French Government does not claim that operation of the Saint-Chamas power

station is irrelevant to the pollution of the marsh, but it points out the significance of other polluting factors (the industrialisation of the marsh's shores, a rapid increase in population and agricultural activities), contests on a scientific level the Commission's views on the salinity of the marsh and stresses the effects, underestimated by the Commission, of wind on homogenisation of the water column.

41 Only a global approach that endeavours to reduce the sources of pollution by acting on the most influential factors will lead to restoration of the marsh. An interpretation founded solely on the inputs of fresh water does not enable the phenomena to be explained or appropriate solutions to be found.

42 Nor to this day has any serious study drawn up an inventory of the fish resources of the Étang de Berre, or analysed the underlying causes of the reduction in fishing activity on it in recent years or the factors liable to impede that activity.

43 Finally, the arguments set out by the Commission with regard to eutrophication of the Étang de Berre are not founded. They are based on studies that are old, dating back to before 1993, and incomplete.

44 The French Government contests, second, the Commission's statement that the reduction in discharges has been of a 'belated, erratic and very limited' nature. It relies in this connection on figures showing the results of application of the measures prescribed by the Étang de Berre recovery plan.

45 The French Government contests, finally, the allegation that the measures taken by the public authorities to reduce, over a long period, the pollution of the Étang de Berre have had a limited effect. In particular, the Commission's appraisal as to the inadequacy of the reduction in discharges is based on too low an assessment of the improvements recorded since 1997, as the assessment of the Étang de Berre Recovery Taskforce for 1994 to 1999 shows.

Findings of the Court

46 It is apparent from Articles 1 and 4 of the Protocol that the latter is designed to prevent, abate, combat and control pollution of the Mediterranean Sea area caused by discharges from rivers, coastal establishments or outfalls, or emanating from any other land-based sources within the Contracting Parties' territories. To this end, Article 1 of the Protocol, reiterating the commitments entered into under Articles 4 and 8 of the Convention, obliges the Contracting Parties to take 'all appropriate measures'.

47 More specifically, Article 6(1) of the Protocol obliges the Contracting Parties to 'strictly limit pollution from land-based sources in the Protocol area by substances or sources listed in Annex II' to the Protocol. Section B of that annex also refers to the 'strict limitation' of the discharge of substances listed in Section A thereof.

48 It is apparent from Article 3(c) of the Protocol that the area covered by the Protocol includes saltwater marshes communicating with the sea, and therefore the Étang de Berre. Even though the Étang de Berre has in its history truly contained saltwater for a short time only, since the Caronte Canal which links it to the sea was dug in 1863 and made deeper in 1925, it is accepted by the parties that the Étang de Berre, as a marine environment, constitutes the ecological reference condition.

49 The substances referred to in Annex II include, at paragraphs 11 and 13 of Section A, 'substances which have, directly or indirectly, an adverse effect on the oxygen content of the marine environment, especially those which may cause eutrophication' and 'substances which, though of a non-toxic nature, may become harmful to the marine environment or may interfere with any legitimate use of the sea owing to the quantities in which they are discharged'.

50 It is therefore a particularly rigorous obligation that is owed by the Contracting Parties pursuant to Article 6(1) of the Protocol in conjunction with Article 1 thereof, namely an obligation to 'strictly limit' pollution from land-based sources in the area caused by discharges of, inter alia, any substances 'even of a non-toxic nature' which may become harmful to the marine environment, and to do so by 'appropriate measures'. This strictness reflects the nature of the instrument, which is designed in particular to avoid pollution caused by the failure of the public authorities to act.

51 As the Commission has correctly pointed out, the scope of that obligation must be construed in the light of Article 6(3) of the Protocol which, by setting up a regime of prior authorisation by the competent national authorities of the discharge of substances referred to in Annex II, requires the Member States to control pollution from land-based sources in the area to which the Protocol applies.

52 In the present case, the Commission submits:

— that since 1983 the Étang de Berre has suffered heavy, prolonged and particular pollution whose adverse effects on fauna, flora and amenities are considerable;

— that this pollution is principally attributable to the discharge by the Saint-Chamas hydroelectric power station of massive quantities of fresh water, alluvia and sediment;

— that while it is true that those discharges have diminished, in particular in 1997 and 1998, the reduction has proved belated, erratic and very limited, so that the measures taken by the public authorities, particularly under the Étang de Berre recovery plan, have not been appropriate.

53 The French Government does not deny that the Étang de Berre is polluted or that operation of the Saint-Chamas hydroelectric power station contributes to the pollution, but it points out the significance of other sources of pollution, such as industrialisation of the marsh's shores, the rapid increase in the population of the nearby communes, the extension of agricultural activity and the deterioration of the water quality of the rivers which flow into the marsh. Recovery of the marsh requires a global approach which cannot focus on a single cause of disturbance.

54 This last proposition cannot be upheld.

55 The fact that the pollution of the Étang de Berre is caused also by factors, whether or not anthropic, other than the inputs of fresh water from the Saint-Chamas hydroelectric power station cannot affect the very existence of pollution from a land-based source, attributable to turbine operation at the power station.

56 The French Government has not disputed, or even sought to dispute, the Commission's assertion that the inflow at an irregular rate, through EDF's power canal, of an enormous mass of fresh water containing a high sediment load has seriously disturbed the ecological conditions of the biotope of the Étang de Berre. In accordance with the wording of paragraph 13 of Section A of Annex II to the Protocol, such inputs, 'though of a non-toxic nature, may become harmful to the marine environment ... owing to the quantities in which they are discharged'. Moreover, one of the very objectives of the Étang de Berre recovery plan, adopted by the French Government in 1993, was, as the defendant has pointed out in its pleadings, to reduce the annual inputs of fresh water and suspended matter through the canal of the Saint-Chamas power station.

57 It must therefore be determined whether the action of the public authorities, in light of their obligation strictly to limit the pollution from a land-based source that has thus been found to have been caused, has been appropriate.

58 According to the French Government, the Étang de Berre recovery plan has, since 1994/95, enabled the average volume of fresh water discharged by the power station to be reduced by 40%, compared with previous periods. The quantities of inputs of alluvia have been cut by seven-eighths, having been reduced on average from 800 000 to fewer than 100 000 tonnes per annum in the past eight years, with an average daily concentration of suspended matter that is today limited to 1g/l. Nutritive salt inputs from the EDF power canal account for only 10% to 20% of the total for phosphorus. In any event, uncertainties remain as to the share of the inputs from the EDF canal in nitrogen and phosphorus pollution.

59 The French Government further submits that it is incorrect that the reduction in discharges has been of a belated, erratic and limited nature.

60 As to those submissions, the following is apparent from the documents in the case (in particular from the January 1999 progress report on the recovery of the Étang de Berre of the Conseil général des ponts et chaussées (General Civil Engineering Council) ('the progress report'), at p. 11, the report of the groupement d'intérêt public pour la réhabilitation de l'étang de Berre (public interest group for the recovery of the Étang de Berre), entitled 'Le Bilan des connaissances, "État de santé du milieu"', of November 2002 ('the GIPREB report'), at pp. 36 and 37, and GIPREB's updated assessment of 2002, at pp. 16 and 17):

— the average annual volume of fresh water discharged by the Saint-Chamas power station between 1966 and 2000, a period covering that of the Protocol's approval by the Community and its Member States, was 3 090 000 000 m^3;

— after the recovery plan and the restrictions imposed on EDF were put in place, the average volume of water discharged was substantially reduced, annual inputs between 1 November 1995 and 31 October 2001 having averaged 2 085 000 000 m^3, thus representing a reduction of 30%;

— however, the annual inputs of fresh water from the power station vary according to the season and from year to year, given the fluctuations in operation of the power station's turbines. Thus, in 1999/2000, the period in the course of which the reasoned opinion was delivered in the present procedure, discharges from the power station were particularly high, a fact which, according to the GIPREB report, is due to an energy deficit in the PACA region;

— the massive input of fresh water thus contributes to the anoxia of the central and deep part of the marsh, where the difference in the salinity of the surface water and the deepest water is significant. In this part, a density barrier is present which limits replenishment of the deep water and gives rise to tight stratification and to an oxygen deficit, with rare and brief periods of reoxygenation when gusts of wind are strong enough to allow homogenisation of the water.

61 As to the quantities of alluvia washed along by the waters of the Durance, it is basically common ground that the inputs of those substances 'adversely affect the environment and in particular animal and plant species, increasing the turbidity of the water. Light penetration is diminished, which limits the growth of aquatic plants. Deposited on the bed in large quantities, the alluvia are also restricting for benthic fauna' (GIPREB's updated assessment, p. 17).

62 It is apparent from the GIPREB report (p. 41) that the entry into operation of the Cadarache sediment basin in 1980 and the adoption of the Étang de Berre recovery plan have enabled the power station's inputs of alluvia to be reduced, with a quantity discharged in the order of 200 000 tonnes per annum and a concentration of suspended matter limited to 2 g/l. Inputs were as low as 143 000 tonnes in 1999/2000 and 92 000 tonnes in 2000/2001, with a daily average concentration of 1 g/l, whereas the average over the period from 1966 to 2000 was 450 000 tonnes per annum.

63 However, according to GIPREB's updated report (p. 17), between 1997 and 2000 the power station discharged between 50% and 80% of all the inputs of alluvia into the Étang de Berre. Furthermore, the progress report (p. 13) notes that discharges at the power station's maximum rate of flow (250 m^3/s) and at the maximum concentration (2 g/l) over a single day would be sufficient to carry more than 40 000 tonnes of alluvia into the marsh. This level is very high if compared with the limit values fixed for sewage treatment plants, as the Commission has pointed out.

64 As regards the hydroelectric power station's inputs of nutritive salts, it is not in dispute that an excessive input of nutrients into the marine environment causes eutrophication as a result of the proliferation of plants and thus the accumulation of organic matter and oxygen depletion, which is responsible for an increased death rate for fish species, in particular benthic species.

65 The French Government itself acknowledges that since 1995, and since 1998 especially, a spectacular development of ulvae ('green tides') has been witnessed and, to a lesser extent, of enteromorpha, nitrophilous species which are adapted to a low rate of salinity and whose development is favoured in a eutrophicated environment. In its updated report (p. 31), GIPREB similarly concludes that 'the Étang de Berre is in a state of eutrophication marked by production of phytoplanktonic biomass that is still very significant in the surface waters and by the proliferation of macroalgae, essentially ulvae'.

66 In this connection, the GIPREB report reveals great uncertainties, in the absence of precise and homogeneous methods of analysis, which makes comparisons difficult when determining the hydroelectric power station's share of eutrophicating inputs (nitrogen and phosphorus).

67 That being so, the high level of eutrophication from which the shallow Étang de Berre suffers seems linked to an excessive input of nutrients, to whose presence the discharge of significant volumes of fresh water, even with a low concentration of nutritive salts, has in any event made an appreciable contribution, as is apparent from the GIPREB report (p. 92), given in particular the phenomenon of release of the phosphorus present in the sediment, to which the Commission has referred in its pleadings.

68 In light of the foregoing, even though it has been possible to witness their reduction over the years as a result of successive measures taken under the recovery plan, large quantities of fresh water, the seasonal variation in which remains very substantial, were discharged by the Saint-Chamas power station into the Étang de Berre in the period corresponding to the end of the pre-litigation procedure. In particular, it must be stated that even a limited average annual volume of discharged water of 2 085 000 000 m^3 to 2 300 000 000 m^3 constitutes a considerable quantity, especially if compared with the volume of the Étang de Berre (900 000 000 m^3), which is half the size.

69 The harmful effect of such discharges on the ecological balance of the Étang de Berre, in light both of their excessive quantities, compared with the capacity of the marsh, and their fluctuations was well known, as is apparent in particular from the GIPREB report which was lodged one year after the Commission delivered its reasoned opinion. This circumstance in itself attests the inadequacy of the measures taken by the French public authorities in light of the obligation set out in Article 6(1) of the Protocol.

70 As regards inputs of alluvia, the figures adduced before the Court reveal a significant reduction in discharges since the entry into operation of the Cadarache settling basin and the adoption of the Étang de Berre recovery plan. However, the quantities that may be swept along by the waters from the power station's turbines, particularly when the discharge is at the maximum rate of flow, remain very high.

71 In conclusion, given the strict nature of the obligation set out in Article 6(1) of the Protocol, the first complaint must be considered well founded.

The second complaint

Arguments of the parties

72 In the Commission's submission, while the 1972 Decree, read in conjunction with the agreement of 19 August 1966 concluded by the Minister for Infrastructure and EDF, does appear to be an authorisation for the discharge by the Saint-Chamas

power station of waste into the Étang de Berre, this authorisation, which predates the Convention and the Protocol, cannot have been issued on the basis of the criteria laid down by those instruments, in particular the criteria set out in Section E of Annex III to the Protocol. Nor can it have set qualitative and quantitative limits for each of the substances discharged by EDF's power canal capable of harming the ecosystems and sea-water uses.

73 The operating instructions fall outside any legislative framework and their breach cannot give rise to a legal penalty. However, Article 6(3) of the Protocol specifies that the authorisation must be issued by the competent national authorities, that is to say acting within the framework of the competence which the internal legal order of the State concerned confers upon them.

74 In any event, those instructions do not comply with the criteria laid down in Annex III to the Protocol. An authorisation taking account of all the factors set out in that annex should have regard to the composition of the discharges, so that an authorisation should have been issued for a quantity of fresh water, of suspended matter, of nitrogen and of phosphorus, element by element.

75 The French Government contends that the operating instructions have legally binding force having been approved by the prescribed authority, and penalties may be imposed if they are not complied with. They were adopted, pursuant to clause 15 of the conditions annexed to the 1972 Decree, after consultation between the main State services concerned, and approved by the Regional Director for Industry, Research and the Environment on behalf of the prefect. In addition, if the operating instructions are not complied with, under the legislation in force the holder of the concession may be fined up to EUR 12 200 and, in the case of repeated infringements, the concession may be forfeited.

76 As to the content of the operating instructions, the nature of the measures prescribed with regard both to reduction of the turbidity of the waters discharged, from 5 g/l to 2 g/l, and to the reduction of inputs of fresh water and of alluvia corresponds to the provisions contained in Annex III to the Protocol.

77 Consequently, the French authorities have issued to EDF an administrative authorisation to exploit and divert the waters of the Durance and discharge them into the Étang de Berre that is in accordance with Annex III to the Protocol.

Findings of the Court

78 As the Court held in Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, at paragraph 41, Article 6(3) of the Protocol clearly, precisely and unconditionally lays down the obligation for Member States to subject discharges of substances listed in Annex II to the Protocol to the issue by the competent national authorities of an authorisation taking due account of the provisions of Annex III to the Protocol.

79 In the French Government's submission, the operating instructions, which amend the provisions in the conditions annexed to the 1972 Decree relating to discharges into the Étang de Berre of the diverted waters of the Durance, specifically take account of the Étang de Berre recovery plan which falls within the framework of the requirements of the Convention and the Protocol. These operating instructions, whose requirements are based on the criteria of Annex III to the Protocol, constitute the authorisation issued under Article 6(3) of the Protocol.

80 As to those submissions, suffice it to state that the operating instructions were approved by the Regional Department for Industry, Research and the Environment, while the agreement and the conditions for the Salon and Saint-Chamas falls on the Durance were the subject of the 1972 Decree.

81 In those circumstances, it is not clear from the French Government's observations how the operating instructions could have legally amended the relevant provisions of the conditions annexed to the 1972 Decree in order to take account of the Protocol's requirements concerning issue of authorisations under Article 6(3) of the Protocol.

82 The French Government states that the operating instructions were adopted pursuant to Article 15 of the 1972 Decree, as is moreover apparent from the legal basis cited in the instructions.

83 Article 15 of the 1972 Decree states:

'Before the barrage of the Mallemort auxiliary inlet enters into operation, operating instructions shall be drawn up by the administrative authorities, after giving the holder of the concession the opportunity to be heard, in order to determine the conditions for opening the floodgates. These operating instructions shall be drawn up in agreement with the chief engineer in the civil engineering department at Avignon who has responsibility for the flood service in the Durance basin.'

84 It is clear, as the Commission has pointed out, that that provision concerns exclusively 'the conditions for opening the floodgates' before 'the barrage of the Mallemort auxiliary inlet enters into operation'. No mention is made of the conditions in which substances such as those listed in Annex II to the Protocol may be discharged into the Étang de Berre in accordance with criteria designed to avoid harm to its ecosystem.

85 Accordingly, whatever the content of the operating instructions, in light of the provisions of Annex III to the Protocol the French Government has not established that an authorisation for the discharge into the Étang de Berre of the substances listed in Annex II to the Protocol has been issued under Article 6(3) of the Protocol by the competent national authorities.

86 The Commission's second complaint must consequently also be upheld.

87 In conclusion, the application must be granted.

Costs

88 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that:

— by failing to take all appropriate measures to prevent, abate and combat heavy and prolonged pollution of the Étang de Berre, and

— by failing to take due account of the requirements of Annex III to the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, signed at Athens on 17 May 1980 and approved on behalf of the European Economic Community by Council Decision 83/101/EEC of 28 February 1983, by amending the authorisation for the discharge of substances covered by Annex II to the Protocol following the conclusion of the latter,

the French Republic has failed to fulfil its obligations under Articles 4(1) and 8 of the Convention for the protection of the Mediterranean Sea against pollution, signed at Barcelona on 16 February 1976 and approved on behalf of the European Economic Community by Council Decision 77/585/EEC of 25 July 1977, under Article 6(1) and (3) of the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, signed at Athens on 17 May 1980 and approved on behalf of the European Economic Community by Council Decision 83/101/EEC of 28 February 1983, and under Article 300(7) EC;

2. Orders the French Republic to pay the costs.

Signatures.