OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 5 December 1990 *

Mr President,
Members of the Court,

1. Introduction

1. In this case the Commission seeks a declaration that by carrying out works detrimental to a habitat area designated as a special protection area, the Leybucht, contrary to Article 4(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (hereinafter: the 'directive'), [1] the Federal Republic of Germany has failed to comply with its obligations under the Treaty.

Initially the application also sought a declaration that works in another area, the Rysumer Nacken, were contrary to the abovementioned provision. At the hearing the Commission withdrew its application in this respect, but asked that the Federal Republic of Germany be ordered to pay the costs. I need no longer, therefore, examine that complaint, except as regards the order for costs, which I shall discuss briefly at the end of this Opinion.

2. The Court has already had to decide a number of cases concerning compliance with the obligations arising out of the abovementioned directive. These cases, however, have dealt essentially with the obligations in relation to the protection of birds themselves. In this case we are concerned for the first time with the provisions of the directive aimed at the protection of the *habitat* of certain bird species. [2]

The protection of habitat is an important aspect of the general strategy on environmental protection. The disappearance and pollution of suitable habitat areas are major causes of the high mortality rate in a number of bird species whose populations have been significantly reduced. [3] It may be added that most of the species whose numbers have diminished are migratory birds, so that the protection of habitat areas has a transfrontier dimension which entails common responsibilities on the part of the Member States. [4] However, this matter also touches on economic interests which often cannot be reconciled with the interests of the environment.

In answer to a question from the Court, the Commission stated that it had commenced 37 procedures under Article 169 of the EEC

* Original language: Dutch.

1 — OJ 1979 L 103, p. 1.

2 — Case C-334/89 *Commission* v *Italy*, now pending before the Court, also concerns protection of the habitat of certain bird species. In that case, however, the questions of interpretation are not so sharply defined as in this.

3 — See the first report of the Commission on the state of environmental protection in the Community, 1977, p 199.

4 — See the third recital in the preamble to Directive 79/409.

Treaty for failure to comply with Article 4 of the directive (as at 15 March 1990). That illustrates the great importance of this case, particularly for the future, since the Commission, at the hearing, stated that it would not require the demolition of the works already carried out in the Leybucht if the Court upheld its application.

Since this is the first but probably not the last time that the Court will be required to rule on the obligations provided for in Article 4 of the directive, I think it is desirable to situate that article in the general context of the provisions of the directive which are aimed at the protection of habitat areas and consider it from the point of view of the international conventions which exist in that field and of some related Community provisions. In referring to international conventions I do not wish to suggest that the provisions of the directive cannot impose more far-reaching obligations. Those conventions can, however, provide useful indications where the Community provisions leave gaps which must be filled by interpretation.

2. Legal background

2.1. *The provisions of Directive 79/409/EEC*

3. *Article 2* of the directive provides that the Member States must take the requisite measures to maintain the population of the bird species concerned by the directive — that is to say, all species of naturally occurring birds in the wild state in the European territory of the Member States — at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.[5]

With regard to that article the Court of Justice has repeatedly stated that:

'Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it nonetheless shows that the directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation.'[6]

4. Articles 3 and 4 of the directive contain provisions governing the protection and maintenance of habitats. *Article 3(1)* provides that the Member States must take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats[7] for all the species of birds

5 — That provision corresponds almost word for word to Article 2 of the Convention on the conservation of European wildlife and natural habitats signed at Berne on 19 September 1979, that is to say some five months after the adoption of Directive 79/409, and was subsequently approved on behalf of the EEC by a decision of the Council of 3 December 1981 (OJ 1982 L 38, p. 1).

6 — See, for the first occasion, the judgment in Case 247/85 *Commission* v *Belgium* [1987] ECR 3029, at paragraph 8).

7 — The directive does not define the term 'habitat'. In the Convention on the conservation of migratory species of wild animals, signed in Bonn on 23 June 1979, that is to say some three months after the adoption of Directive 79/409, and subsequently approved on behalf of the EEC by a Council Decision of 24 June 1982 (OJ 1982 L 210, p. 10), the term 'habitat' is defined in Article I(1)(g) as: 'any area in the range of a migratory species which contains suitable living conditions for that species'.

referred to. It is expressly provided that the Member States must take into account the requirements referred to in Article 2.

Article 3(2) lists the measures which the Member States must take as a matter of priority for the preservation, maintenance and re-establishment of biotopes and habitats. As a first measure the provision refers to the creation of protected areas.

5. Whereas Article 3 concerns the habitats of all bird species covered by the directive, *Article 4* lays down a number of measures regarding the habitats of specific bird species. *Article 4(1)* concerns the habitats of the species mentioned in Annex I. The first subparagraph provides that the Member States must take special conservation measures concerning those habitats in order to ensure the survival and reproduction of the species concerned 'where they now occur' [in the Dutch language text].[8] The second and third subparagraphs lay down a number of criteria in that respect.

The fourth subparagraph imposes a specific obligation on the Member States: it must designate as special protection zones the most suitable territories in number and size for the conservation of those species, taking into account their protection requirements.[9]

Article 4(2) imposes an obligation on Member States to take similar measures for *migratory* species which are not listed in Annex I but which regularly occur in their territory. In that respect the Member States must take into account a number of criteria. According to the last sentence, they must pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

6. *Article 4(3)* requires the Member States to send the Commission all relevant information to enable it to take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 form a coherent whole. That provision must be read in conjunction with the Council Resolution of 2 April 1979.[10] In that resolution the Council asks the Member States to notify the Commission within 24 months of (a) the special protection areas which they have classified under Article 4; (b) the areas which they have or intend to have designated as wetlands of international importance; (c) the areas other than wetlands already classified according to national legislation, similar to those described in Article 4 and subject to comparable protection measures. The Council also takes note of the Commission's intention to submit appropriate proposals regarding the criteria for the determination, selection, organization and methods of administration of the special protection areas. At the hearing the Commission confirmed that the relevant proposals are still under consideration.

8 — It appears from the other language versions of the directive that the phrase 'where they now occur' must be understood as meaning 'in their area of distribution' The directive does not define this last term It is, however, defined in the Bonn Convention, cited in the previous footnote, at Article 1(1)(f) 'all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route' [Translator's note the term so defined in the English version of the Bonn Convention is 'range']

9 — In the French version this last condition, that is to say that the Member States must take into account the protection requirements of the bird species, is omitted

10 — OJ 1979 C 103, p. 6

7. The Commission's complaint in this case concerns failure to implement *Article 4(4)*. The *first sentence* requires the Member States to

'take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds'.

That obligation is subject to the following restriction:

'in so far as these would be significant having regard to the objectives of this article'.

The *second sentence* is worded as follows:

'Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

2.2 *International conventions*

(a) The Paris Convention

8. A first convention expressing concern for the habitats of wild bird species is the International Convention for the Protection of Birds, signed in Paris on 18 October 1950.[11] Article 11 of the convention provides as follows:

'In order to alleviate the consequences of the rapid disappearance of suitable breeding grounds for birds as a result of human intervention, the High Contracting Parties undertake to encourage and promote immediately, by every possible means, the creation of water or land reserves of suitable size and location where birds can nest and raise their broods safely and where migratory birds can also rest and find their food undisturbed.'

(b) The Ramsar Convention

9. The provisions of the directive on habitat are very similar to the rules laid down by the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, signed on 2 February 1971 in Ramsar (Iran).[12] [13]

Under Article 2 of the convention, each contracting party is to designate suitable wetlands within its territory for inclusion in a list of wetlands of international importance. That list is to be maintained by a specially established bureau. The boundaries of each wetland are to be

11 — United Nations Treaty Series Volume 638, p. 185.

12 — United Nations Treaty Series Volume 996, p. 245.

13 — In 1974 the Commission recommended that the Member States adhere to the Ramsar and Paris Conventions, in so far as they had not yet done so. See Commission Recommendation 75/66/EEC of 20 December 1974 to Member States concerning the protection of birds and their habitats (OJ 1975 L 21, p. 24).

precisely described and delimited on a map. Any contracting party has the right to extend the boundaries of wetlands already designated or, because of urgent national interests, to delete or restrict the boundaries of those wetlands. They must inform the bureau of those changes at the earliest possible time. They must take into account their international responsibilities for the conservation, management and wise use of migratory stocks of waterfowl both when designating wetlands and when exercising their right to change entries in the list.

Under Article 3, the contracting parties are to formulate and implement their planning so as to promote the conservation of the wetlands included in the list, and as far as possible the wise use of wetlands in their territory. They are to arrange to be informed at the earliest possible time if the ecological character of any wetland is changing or is likely to change as a result of technological development, pollution or other human interference. Information on such changes must be passed without delay to the bureau.

Under Article 4, each contracting party is to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether or not they are included in the list, and provide adequately for their supervision by wardens. Where a party, in its urgent national interest, deletes or restricts the boundaries of a wetland included in the list, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.

(c) The Berne Convention

10. The authors of the directive undoubtedly took account of the work in the Council of Europe which led to the signature of the Berne Convention on 19 September 1979.[14] Like the directive, this convention seeks to ensure the conservation of a number of species of wild animals by means of provisions for the protection of habitats on the one hand and the protection of species on the other.

Under Article 3(1), the contracting parties are to take steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats. Article 3(2) further provides that each party undertakes, in its planning and development policies, to have regard to the conservation of wild flora and fauna.

14 — See the Council Resolution of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment (OJ 1977 C 139, p. 1), to which reference is made in the first recital in the preamble to Directive 79/409 and which speaks (in paragraph 159) of proposals for the protection and management of certain wetlands 'taking due account of the work carried out . . . within international organizations such as the Council of Europe'

Article 4 states those general principles for the protection of habitats in a more concrete form as follows:

'1. Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in the Appendices I and II, and the conservation of endangered natural habitats.

2. The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimize as far as possible any deterioration of such areas.

3. The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas.

4. . . .'

Articles 5 to 9 of the convention lay down measures which must be taken for the protection of the birds themselves, in a manner very similar to the rules set out in Articles 5 to 9 of the directive.

(d) The Bonn Convention

11. The authors of the directive were certainly also aware of the work which led to the signature of the Bonn Convention. That convention contains useful definitions which clarify a number of terms used in Directive 79/409 (see footnotes 7 and 8). For the rest, the influence of this convention on the directive is less evident, and therefore I shall not discuss it in detail.

2.3. *Related Community provisions*

12. Directive 79/409 served as the model for a proposal for a directive on the protection of natural habitats in general (of both fauna and flora) which the Commission submitted to the Council in 1988.[15] According to that proposal, the Member States are to designate areas which correspond to certain criteria as special protection areas. They are to do so in accordance with a timetable to be laid down in the directive. Article 7(1) of the proposal governs the measures which the Member States are to take to avoid pollution or deterioration of habitats and other disturbances affecting fauna and flora, in terms identical to those of Article 4(4) of Directive 79/409. In contrast to that directive, the proposal specifies the measures which the Member States are expected in particular to take:

15 — Proposal for a Council directive on the protection of natural and semi-natural habitats and of wild fauna and flora, submitted by the Commission to the Council on 16 August 1988 (OJ 1988 C 247, p. 3).

'2. Member States shall consider in particular the appropriate protection status to be given to areas as referred to in paragraph 1, and the setting up of integrated management plans in accordance with the ecological needs of the species and types of habitat concerned . . .

3. Where necessary to ensure a satisfactory conservation status of a species Member States shall envisage the re-establishment of destroyed or degraded biotopes or the creation of new ones.'

Article 10 of the proposal lays down the measures that Member States are to take in connection with their planning and development policies. Those policies must incorporate safeguards to ensure that damage to habitats is avoided.

13. Finally, mention should also be made of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. [16] That directive is based on the view that the best environmental policy consists in preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects (first recital in the preamble). In that perspective, the directive provides that certain large projects must be made subject to an environmental impact assessment and that the results of that assessment must be made available so that the public can express their views. The abovementioned proposal for a directive on habitats seeks an amendment of Directive 85/337 in order to ensure that all projects which may have an influence on the situation in the special protection areas are made subject to an environmental impact assessment.

16 — OJ 1985 L 175, p. 40.

3. The geographical and ecological characteristics of the Leybucht

14. The Leybucht is an area of about 2 800 hectares in the *Land* of Lower Saxony. The Report for the Hearing gives an exact description of its situation and its geographical and ecological characteristics. It is apparent therefrom that the area is of particular importance as habitat for certain bird species mentioned in Annex I to the directive, and that is not disputed by the parties.

4. The legal status of the Leybucht

4.1. *National*

15. The Leybucht is part of the Niedersächsisches Wattenmeer National Park, which is designated in a regulation of 13 December 1985 of the *Land* of Lower Saxony (hereinafter referred to as 'the protection regulation') as a protected area. [17] [18] The Leybucht represents about 1% of the protected area, which covers a total of about 240 000 hectares. Article 3 of

17 — *Niedersachsisches Gesetz- und Verordnungsblatt* No 48 of 21 December 1985, p. 533

18 — Previously the Leybucht had come under a protection scheme established by a regulation of 9 June 1981 of the Bezirksregierung Weser-Ems (*Amtsbl. Reg.-Bez. Weser-Ems* No 25 of 26 June 1981, p. 543)

the protection regulation defines its boundaries by reference to attached topographic maps. As a general criterion it is assumed that the area is bounded on the landward side by the seaward side of the dyke. On one of the attached maps which indicates the precise boundaries of the area there is an asterisk next to the Leybucht drawing attention to the following note:

'Procedure for official approval of proposed work is pending. When the procedure has been completed, the decision approving the proposed works will enter into force definitively.'

It follows from that note that the boundaries of the protected area are moved to the new line of the dyke as is established by the Bezirksregierung Weser-Ems in a planning approval decision of 25 September 1985, with effect from the entry into force of that decision. [19]

Article 4 of the protection regulation divides the area into three zones: a rest zone (most of the Leybucht has this status), an intermediate zone (the two channels which cross the Leybucht have this status) and a recreation zone (the area around the port of Greetsiel in the Leybucht has this status). Article 5 defines the activities which are permitted in those three zones. Access to the rest area is as a general rule prohibited, but there are exceptions for some activities (in particular certain agricultural and fishery activities) and for certain persons. Access to the intermediate zone is permitted, but certain activities are expressly prohibited. The recreation zone may be used as a bathing area and as a health cure area.

4.2. *International*

16. Under the Ramsar Convention Germany has designated the Ostfriesisches Wattenmeer, in which the Leybucht is situated, as a wetland of international importance. [20]

4.3. *Community*

17. At the time of the Commission's letter of formal notice (7 August 1987) the Federal Republic of Germany had not yet informed the Commission that the Leybucht formed part of a protected area. In a letter of 26 September 1983 the German Government had informed the Commission that 48 areas in the *Land* of Lower Saxony were under consideration as special protection areas. One of them was the 'Ostfriesisches Wattenmeer mit Dollart' area, to which both the Leybucht and the Rysumer Nacken belong geographically. With regard to the Leybucht the Commission considered, however, that the German Government had not, by that letter, designated that area as a special protection area in accordance with the directive. [21] The first complaint stated in the reasoned

19 — Whether an administrative decision such as this planning decision can amend the protection regulation and whether the planning decision was already in force when the dyke works were commenced are questions of national law into which the Court need not inquire.

20 — The Ramsar Convention came into force for the Federal Republic of Germany on 25 June 1976 (see the notice of 16 July 1976, BGBL. II, p. 1265). When it deposited its instrument of ratification the Federal Republic of Germany made a declaration to the effect that it assumes that the provisions of the convention do not affect measures for the protection of the population from flooding.

21 — Oddly enough the Commission did not take the same view as regards the Rysumer Nacken (see below, point 44).

opinion (4 July 1988) is accordingly the failure to designate that area as a special protection area. In a letter of 6 September 1988 the German Government informed the Commission that the Leybucht came under the protective scheme established by the regulation of 13 December 1985 of the *Land* of Lower Saxony. That letter states that the boundaries of the protection area are defined in detail by the maps attached to the regulation. In the Commission's application lodged at the Court Registry on 28 February 1989 the failure to designate the Leybucht as a special protection area is no longer raised as a ground of complaint against the Federal Republic of Germany.

5. **The works in the Leybucht**

18. The dyke project, as approved by the Bezirksregierung Weser-Ems in its planning decision of 25 September 1985, is described in some detail in the Report for the Hearing. I think it is useful here to draw attention in particular to two aspects of the project, that is to say the loss of protected area that the works entail and the compensatory measures provided for.

19. The completion of the project entails a loss of protected area essentially in three places. The greatest loss (about 450 hectares) is in the Greetsieler Nacken, where the 'nose' of the dyke is to be built. This is mainly an area of wet sands which are an important feeding area for birds but cannot normally be regarded as a nesting area. However, the building of the 'nose' of the dyke will also result in the loss of part of the Hauener Hooge which has an important role as a nesting, rest and refuge area for birds. A second cause of loss of protected area is the decision to build the new dyke for the protection of the Leybucht polder parallel to the existing dyke but 50 metres seawards. That will result in the loss of valuable salt marshes over a length of more than two kilometres. Finally, there is a further loss of protected area as a result of the decision to round off the line of the dyke over a distance of about two kilometres in the area of Leybuchtsiel. Here again there is a loss of valuable salt marshes over an area estimated by the German Government during the interlocutory proceedings as about 45 hectares.

20. However, the project is not entirely detrimental from the ecological point of view. The German Government has emphasized that the completion of the project will permit the closure of the two channels crossing the Leybucht, which until now were regularly dredged. Disruptive dredging work will thus no longer be necessary in the future, and the dredged material will no longer need to be dumped elsewhere in the area. The German Government does not exclude the possibility that in those circumstances seals may once again establish themselves in the Leybucht. In the planning decision of 25 September 1985 it is further expressly provided that the areas situated in the 'nose' of the dyke will be protected. The dyke which previously protected the area of the Hauener Hooge

will be opened, so that an area of about 100 hectares will once again become tidal, permitting the formation of valuable salt marshes. Finally, the planning decision states that the pits on the landward side from which clay was taken to strengthen the dyke will not be filled in, but will be declared a protection area.

6. The Commission's complaints

21. The Commission's complaints are based on the interpretation it gives to Article 4(4) of the directive. It takes the view that that provision expressly requires the Member States to take positive protective measures but also implicitly prohibits them from making the existing situation worse. That interpretation, it says, is supported by the second sentence of Article 4(4), which relates to pollution and deterioration of habitats outside protection areas. Outside protection areas only some effort on the part of Member States is required, whereas strict measures are necessary within those areas. The Commission does accept the possibility of operations in protective areas where these are for the benefit of habitats. Otherwise, the Commission recognizes only one exception: intervention where human life is in danger, and on condition that the measures taken are such as to entail the least possible deterioration of the protected area.

The Commission takes the view that the works in the Leybucht damage that area and disturb the birds there. It points out that the implementation of the planning decision will entail the loss of a large part of an ecologically important area. Finally, it maintains that certain interests were taken into account in the planning decision, in particular those of agriculture and fisheries, with the result that even if the works are primarily aimed at dyke safety they did not take the least damaging approach. On the basis of the interpretation of Article 4(4) of the directive summarized above, the Commission takes the view that in those circumstances the implementation of the planning decision is contrary to the obligations arising out of the directive.

7. The defence of the German Government

22. The defence of the German Government, which is supported by the United Kingdom, can be summarized as follows:

— the line of the dyke as defined in the planning decision lies outside the boundary of the area designated as a special protection area;

— the Commission's interpretation of Article 4(4) of the directive is incorrect; that provision leaves the Member States a broad discretion in the choice of

appropriate protective measures, and they may take into account interests other than those of the environment;

— the Commission has not shown that the damage and disturbance resulting from the works will have a significant effect having regard to the objectives set out in Article 4 of the directive;

— the dyke works were prompted solely by the need to make the dyke safer and thus to avoid the risk of flooding of the areas lying behind the dyke.

8. Assessment

8.1. *Preliminary remarks*

23. I should like to state right away that in my view the defence submission concerning the situation of the dyke — whether just inside or just outside the area designated as a protection area — is not relevant to the assessment of the Commission's complaints. Even if the new line of the dyke is just outside the protected area, it is nevertheless clear that the works carried out on the edge of the area had, and may still have, a disruptive effect within the area. Furthermore, that submission does not refute the Commission's complaint that as a result of the new line taken by the dyke a considerable part of an area designated as a protection area no longer forms part of it.

24. In my view there are two main problems of interpretation. First of all, may a Member State reduce the extent of an area designated as a protection area, and if so, under what conditions? Secondly, may a Member State carry out works which damage an area designated as a protection area and disturb the birds in that area, and if so, under what conditions? Initially I shall examine those two questions separately, since I think the legal basis for each is different. However, I shall close that examination with the conclusion that the criteria of assessment are the same for both questions. On the basis of those criteria, finally, I shall examine whether the completion of the dyke project is contrary to the provisions of the directive.

8.2. *Criteria of assessment in relation to the reduction of the designated area*

25. The Commission takes the view that the construction of the dyke project is contrary to Article 4(4) of the directive since it will result in a significant reduction in the extent of an area designated as a protection area. It proceeds on the basis that the term 'deterioration' covers the hypothesis of a reduction in area.[22] That point of view seems to me to be wrong.[23] In my view Article 4(4) of the directive is intended to ensure the quality of the living conditions of the birds in protection areas. It is the fourth

22 — The two other terms used in Article 4(4) of the directive, 'pollution' and 'disturbance', cannot in any event cover that hypothesis

23 — In the proposal for a habitat directive the term 'degradation' is defined as follows (Article 3(c)): 'the reduction of [the] most characteristic elements [of the habitat] without any change of category'

subparagraph of Article 4(1) and, as regards migratory birds, Article 4(2) of the directive that determine what areas must be designated as protection areas, their number and their size. It is thus in the light of the latter provisions that I shall further examine the complaint concerning the curtailment of the protection area.

26. The fourth subparagraph of Article 4(1) of the directive requires the Member States to designate certain habitat areas of bird species mentioned in Annex I as protection areas. My understanding of the provision is that the Member States need not so designate *all* areas where there are suitable living conditions for the species concerned. They must so designate the most *suitable* areas of their territory, in other words the areas of their territory in which the most suitable living conditions for those bird species are present.[24] In addition, the areas designated must be sufficient in number and in size to ensure the conservation of the species concerned.

27. Article 4(2) of the directive makes separate provision for *migratory* birds which are not listed in Annex I but regularly occur on the territory of the Member State in question. That provision is poorly drafted and thus difficult to understand. The question arises *inter alia* whether the 'similar measures' referred to in that provision include the obligation to designate special protection areas in accordance with the fourth subparagraph of Article 4(1). If paragraph 2 is read in conjunction with paragraphs 3 and 4 (which speak of the protection areas referred to in paragraph 2) it must be concluded that the obligation laid down in the fourth subparagraph of Article 4(1) applies *mutatis mutandis* to the habitat areas of migratory birds referred to in paragraph 2.

Article 4(2) of the directive states that Member States must pay particular attention to the protection of wetlands of international importance. The latter term refers without doubt to the wetlands which under the Ramsar Convention must be notified to the bureau established for that purpose.

28. The Commission acknowledges that the directive leaves the Member States some discretion in the choice of the areas to be designated. It observes in particular that in designating those areas the Member States may take into account *inter alia* the economic interests referred to in Article 2 of the directive. That discretion is also reflected in the Resolution of 2 April 1979, in which the Council takes note of the Commission's intention to submit proposals regarding *inter alia* the determination and selection of the special protection areas.[25] The fact that the Commission intends to

24 — Compare the proposal for a habitat directive, which seeks to ensure that within a period of two years the Member States classify the ten most *important* habitat areas in the Community for the conservation of threatened species (the 100 most important within a period of eight years).

25 — That discretion exists not only in relation to the habitat of birds referred to Article 4(1) but also in relation to the wetlands of international importance for migratory birds referred to in Article 4(2). Article 6 of the proposal for a habitat directive reflects the same approach. In that provision the Commission assumes that areas designated by the Member States in the context of the Ramsar Convention need not necessarily be designated as special protection areas under Directive 79/409.

make proposals but has not yet done so (see above, point 6) shows, I think, that in the meantime it is for the Member States to decide what protection areas to designate, and *a fortiori* what their precise boundaries are.

The discretion of the Member States is not, however, unrestricted. They must in particular designate the most *suitable* areas as protection areas.

29. This case, however, is concerned not with the discretion of the Member States in the designation of the boundaries of a protection area but with their discretion to change — more specifically, reduce — the extent of an area previously designated as a protection area. To what extent are the boundaries of an area designated by the Member State itself as a protection area sacrosanct? That seems to me to be one of the fundamental questions in this case that the parties have not fully examined.

In my view Article 4(1) of the directive lays down no *absolute* prohibition on the reduction in extent of an area designated as a protection area. That does not, however, mean that the discretion of the Member States as regards the reduction in extent of a designated area is the same as its discretion as regards the designation of that area. Designation is concerned with the selection of the most suitable from among the various suitable areas. The reduction in extent of a designated area, on the other hand, affects what is by definition a 'most suitable' area. The provisions of the directive are directed at the protection of such habitat as a reaction to the loss of habitat resulting *inter alia* from land reclamation, land consolidation, urban development and tourism, a loss which in turn is one of the main causes of the high death rate among a number of bird species whose population levels are rapidly diminishing.[26] It must also be borne in mind that the loss or pollution of areas of natural interest is often irreversible.[27] The possibility for the Member States to alter the boundaries of an area designated as a special protection area, in which the most suitable living conditions are by definition available, and thus to reduce in extent the protected area must therefore be made subject to restrictive conditions.

30. The answer to the question raised above must therefore be that the reduction in extent of an area designated as a protected area is permitted only on mandatory grounds arising from a general interest which is more important than the environmental interest at which the directive is aimed or the economic and recreational interests referred to in Article 2 of the directive. Support for that point of view is to be found in the Ramsar Convention, on which the provisions of the directive on

26 — See the report of the Commission mentioned in footnote 3, above, at p. 199.

27 — In the Resolution of 17 May 1977, already referred to in footnote 14, the Council takes note (paragraph 6) of the determination of the Member States to ensure that the present quality of environmental areas will not deteriorate, particularly in view of the often irreversible or practically irreversible nature of some pollution.

habitat are in part based.[28] That convention gives the parties the right to restrict or even delete the boundaries of designated areas, but only in furtherance of urgent national interests. The convention adds that the parties must consider their international responsibilities. They must also as far as possible compensate for any loss of part of the designated areas.

31. In my view a general and abstract description of the interests which may, in accordance with the proposed interpretation, justify a boundary correction is neither desirable not necessary. There can be no doubt that the reasons put forward by the German Government in order to justify the dyke works in the Leybucht — in particular the reinforcement of the dyke in order to protect the people living behind it — must be regarded as a compelling reason arising from a general interest which is more important than the interest in the conservation of birds.[29] Nor, indeed, does the Commission deny that work which is necessary exclusively on grounds of dyke safety may be carried out in a protection area. Its claim is that the details of the dyke project in question, in particular the line taken by the new dyke, are not necessary on grounds of dyke safety. In its view that result could also have been achieved with less loss of protected area.

The Commission thus takes the approach that any intervention in a protection area must not only be prompted by compelling reasons but must also be necessary in the sense that the desired result cannot be achieved with less damage to the environment. I shall address the question whether that point of view is correct, and if so whether those additional criteria were fulfilled in this case, after examining the criteria in accordance with which pollution, deterioration and disturbance in the protection area must be assessed.

8.3. *The criteria of assessment as regards deterioration and disturbances in a protection area*

32. The Commission takes the view that the works carried out in accordance with the planning decision are contrary to Article 4(4) of the directive on the ground that they cause deterioration in living conditions in the Leybucht and disturb the birds present there. The Commission correctly bases that claim on Article 4(4), which indicates the protection measures which the Member States must take as regards the areas designated as protection areas in accordance with Article 4(1) or (2).

33. Here again I should like to begin by rejecting an argument to which the United Kingdom in particular attached considerable

28 — See the Commission's Recommendation that the Member States accede to the Ramsar Convention, referred to in footnote 13, which dates from before Directive 79/409, and the Resolution of the Council of 17 May 1977, referred to in footnote 14, which speaks of possible future proposals, building on the convention, for the protection of wetlands in the Community, taking into account the work carried out in international organizations (paragraphs 154 to 159).

29 — See the abovementioned Resolution of 17 May 1977, in which the Council describes the aim of Community environmental policy as follows: 'to improve the setting and quality of life and the surroundings and living conditions of the peoples of the Community' (paragraph 11).

importance. It concerns the interpretation which it ascribes to the provision in the first sentence of Article 4(4), according to which the Member States must take steps against pollution, deterioration and disturbances 'in so far as these would be significant having regard to the objectives of this article'. According to the United Kingdom the word 'significant' in that provision must be assessed in the light of the objective set out in Article 4(1) of the directive, that is to say in relation to the survival and reproduction of the species concerned. In so far as the planned works do not endanger the survival and reproduction of the bird species present in the Leybucht, they are not, according to the United Kingdom, contrary to the directive.

Construed in that way Article 4(4) of the directive would permit a considerable degree of pollution, deterioration and disturbance. That does not appear to me to be consistent with the objective of Article 4. In my view the Council intended, in the provision in question, to indicate that no pollution, deterioration or disturbance which significantly affects the quality of the living conditions of the birds may take place in the protection area concerned. It thus also covers negative aspects which, although they do not endanger the survival and reproduction of the birds, do significantly affect their survival and reproduction in the most suitable circumstances. I should also like to point out that only the German, Danish and Dutch versions of the phrase under discussion link pollution, deterioration *and* disturbance to the condition of significant effect. The other versions can also be read as meaning that only disturbance must have a significant effect. That seems to me to be an additional reason not to give the words pollution and deterioration as used in Article 4(4) the restrictive sense argued for by the United Kingdom.

34. Nor does the very broad interpretation given by the Commission to Article 4(4) of the directive seem to me to be correct. I think its submission that that provision prohibits as a matter of principle *every* act resulting in pollution, deterioration, or disturbance goes too far. Article 4(4) goes on from Article 4(1) and (2), which require Member States to designate special *protection* areas. In speaking of 'appropriate steps to avoid pollution or deterioration [or disturbances] . . . in respect of the protection areas', Article 4(4) is, I think, referring in particular to an obligation on the part of the Member States to establish general rules for the protection in those areas of the quality of the living conditions of birds, so that they can live and reproduce in the most suitable circumstances. The proposal for a habitat directive reflects the same approach. In Article 7(2) of that proposal consideration of the appropriate protection status to be given to habitat areas is indicated as an initial measure in preventing the pollution or deterioration of habitat. The establishment of such general rules for the protection of the most suitable conditions of living and reproduction need not necessarily prohibit all pollution, deterioration or disturbance in any circumstances.

I should also point out that in this case the Commission has not consistently applied its own view in practice. It is ready to accept continued disturbance resulting from dredging work in that area. Similarly, it made no complaint concerning the protection regulation even though it does not classify the entire Leybucht as a rest area. Those examples are sufficient to show that in practice the Commission does not work on the basis of so far-reaching an interpretation as that indicated above.

35. It is thus for the Member States to lay down a system of protection for the areas designated by them. Unlike the provisions of the directive concerning the introduction of a system of protection for birds themselves (Article 5 et seq.), Article 4(4) contains no indication of concrete measures to be taken by the Member States. It appears from the Council Resolution of 2 April 1979 that the Commission intended to submit appropriate proposals, but it has not yet done so (see above, point 6). In those circumstances it is for the Member States, taking full account of the environmental interest with which the directive is concerned, to determine what specific measures must be taken to ensure the most suitable living conditions in the designated areas and to prevent pollution, deterioration and disturbances which would significantly affect those circumstances. It cannot, I think, be inferred from the directive that they must necessarily prohibit all deleterious action in the whole area.

36. In this case the *Land* of Lower Saxony adopted a regulation for the protection of the 'Nationalpark Niedersächsisches Wattenmeer', of which the Leybucht is part. The Commission has not claimed that the provisions of that regulation go beyond the discretion retained by the Member States, in spite of the fact that the regulation permits activities resulting in disturbance or deterioration in some areas. The planning decision approved by the Bezirksregierung Weser-Ems on 25 September 1985 also modified the established protection system by permitting works on the edge of the protected area. A problem thus arises here similar to that discussed above (points 29 to 31) in connection with the reduction in extent of a protected area: does the directive permit the modification, harmful to birds, of a system of protection drawn up by the Member State within its discretion, and if so, under what conditions?

Unlike the question of the reduction in extent of a protected area, the problem now under discussion is not expressly dealt with in the Ramsar Convention or any other international convention. I think the answer must nevertheless be the same, since pollution and deterioration and even some forms of disturbance also often have irreversible consequences for the areas in question. Here again I therefore take the view that a Member State may diminish the quality of living conditions in a protection area in relation to a previously established level only if that is necessary for compelling reasons arising from a general interest which is more important than the environmental interest with which the directive is concerned. I therefore conclude that the

reduction in extent of a previously designated protection area and the diminution in the quality of living conditions in such an area must be assessed on the basis of the same restrictive criteria, although the two issues are governed by different provisions of the directive.

8.4 *Can the works be justified?*

37. The German Government has submitted that the reinforcement of the dyke was necessary for the protection of the people living behind the dyke — that is to say, as indicated above (point 31), quite clearly a compelling reason arising from a higher general interest than that with which the directive is concerned — and that that was the only reason for the initiation of the project. The Commission does not dispute that. It complains, however, that in determining the new line of the dyke the Federal Government took into account not solely considerations of safety but also the interests of fishing and agriculture. More specifically, the planning decision is, it says, contrary to the directive because, owing to the fact that those other interests were taken into account, the loss in area is greater than is strictly necessary on grounds of safety.

38. Before dealing with that submission I should like briefly to discuss the evidence put forward by the Commission in support of it. Neither in its application nor in its reply did the Commission put forward an alternative plan. Only at the hearing did it argue that the desired level of safety for the population could be achieved by reinforcement of the existing dyke instead of the construction of a new dyke further towards the sea.

The Commission has not submitted any study or other data to support the statements and this rather belatedly proposed alternative. It cannot, therefore, be taken into account. Nevertheless I am ready to accept that the dyke safety which was considered necessary could have been achieved with less loss of land (but not without any loss of land at all), if the interests of fishing and agriculture had not been taken into consideration. The German Government, moreover, does not dispute that.

39. The Commission's submission is based on the view that Article 4 of the directive does not permit Member States to take economic interests into account in drawing up projects which may affect an area designated as a protection area.

It will appear from the foregoing that I am in agreement with the Commission that the reduction in extent of a designated special protection area or a diminution in the quality of living conditions in such an area is only permitted where the work carried out can be justified by compelling reasons arising from a general interest which is more important than the environmental interest protected by the directive. I am also in agreement with the Commission that the protection of human life is (of course) such a higher interest, that (in the absence of

special or exceptional circumstances which are difficult to foresee) economic or recreational interests do not constitute such an interest and that the work carried out must in any event be necessary, that is to say of such a nature as to implement the higher interest which it is sought to protect, and indispensable for that purpose.

I differ, however, from the Commission in so far as it will go no further and in particular takes no account at all, where the main intervention is justified by a general interest superior to the environmental interest, of other general interests of lesser importance, such as those referred to in Article 2 of the directive. In my view, account may be taken of those other general interests in drawing up a project required by an interest superior to the environmental interest on condition that the additional harm to the environment so caused is not disproportionate in comparison with the considerable harm to those other interests should no account be taken of them.

I should point out that the proposal for a habitat directive reflects the same approach. That proposal seeks to amend Directive 85/337 (mentioned in point 13, above) so as to provide that all projects to be carried out in a special protection area must be made subject to an environmental impact assessment. That means that projects in a protection area are not *ipso facto* prohibited but that the expected benefits must be carefully balanced against the resulting harm to the environment.

40. It should be emphasized in this connection that the German Government has submitted a detailed planning decision from which it appears that the decision on the dyke project was proceeded by a lengthy public procedure. In an initial stage a large number of organizations and associations, including a number of nature protection associations, were consulted concerning the works to be carried out. The project was then made public and the plans were made available for public consultation. More than 300 objections to the project were submitted, a large number of them concerning the effects of the project on the fauna to be protected in the Leybucht. After balancing of the interests involved and investigation of alternatives those objections were answered one by one in the planning decision. The German Government thus in fact submitted the project to an environmental impact assessment.

The German Government has further pointed out that the plans were amended twice in order to minimize the loss of land. It was not possible to go further in avoiding loss of land without causing significant harm to fisheries and agriculture. Access to the sea for the fishing fleet from the harbour of Greetsiel — that is to say, the most important German harbour for the crab fishery — would be endangered. In addition, the drainage of about 35 000 hectares of agricultural land, much of which

is under sea level, would become difficult. The Commission has admitted that an alternative could give rise to not insignificant problems for fisheries and agriculture but argues that that is the price that must be paid for nature conservation.

41. Those interests must be balanced against the encroachment on a valuable ecological area over some 450 hectares in Greetsieler Nacken, where the 'nose' of the dyke is to be built (the area within the 'nose' of the dyke remains protected; in addition, it will be possible once again to transform an area of some 100 hectares in the Hauener Hooge into rare salt marshes), on valuable salt marshes as a result of the movement of the dyke 50 metres outwards opposite the Leybucht polder and on valuable salt marshes over an area of about 45 hectares as a result of the rounding of the corner of the dyke (a question which, according to a statement of the German Government at the hearing, is still under examination). The ecological characteristics of about a quarter of the Leybucht are thus altered by the implementation of the planning decision. That alteration does not mean, however, that that quarter of the area is completely lost as habitat for wild birds, as is confirmed by the figures submitted by the German Government, which track the population of a number of bird species present in the Leybucht since the beginning of the works. No decline in the bird population present in the Leybucht can be perceived from those figures. In addition, the implementation of the planning decision is also associated with compensating measures (see above, point 20), in particular the discontinuation of dredging work in the two channels which cross the Leybucht.

42. Although it is not for the Commission, or indeed the Court, in deciding whether an application under Article 169 of the EEC Treaty is well founded, to put themselves in the place of the German authorities, they are required to examine whether those authorities, in balancing environmental and other interests, took adequate account of the environmental interest with which the directive is concerned and whether those authorities thus remained within the discretion which they retain under the directive.

Having regard to the foregoing, I think that was in fact the case here. In drawing up a project which is indispensable for the safety of human beings, the German authorities also took into account the continuation in that area of fishing and agricultural activities. It appears from the documents before the Court that that took place in a manner whereby, after a thorough public inquiry, it could reasonably be concluded that no disproportionately great additional harm to the environment would be caused. Consequently, in my view the German authorities did not act contrary to Article 4 of Directive 79/409. I therefore propose that the Court dismiss the Commission's application.

9. The order for costs in relation to the claim concerning the works in Rysumer Nacken

43. In the introduction I have already mentioned that the Commission has discontinued its claim as regards the works in the Rysumer Nacken. It has nevertheless asked for costs against the Federal Republic of

Germany as regards this part of its application. The German Government, conversely, has asked that the Commission be ordered to pay the costs.

Under Article 69(4) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs, unless the discontinuance or withdrawal is justified by the conduct of the opposite party. The Court has held that provision to be applicable also where the applicant does not discontinue or withdraw from the proceedings entirely but simply abandons part of its claim. [30]

The Commission justifies its decision to withdraw its claim as regards the works in the Rysumer Nacken by reference to new arguments put forward by the German Government: the northern part of that area is not part of the area covered by the protection regulation; furthermore, landfill operations are no longer taking place there; the southern part of the Rysumer Nacken was not designated a protection area.

44. The submission that those arguments are new seems to me to be only partly true. In its defence the German Government expressly stated that the southern part of the Rysumer Nacken was not designated as a protection area. However, only in its rejoinder did the German Government object that the northern part was not a special protection area (in the defence it had stated the opposite) and that in addition landfill operations were no longer being carried out there.

However, in my view the fact that the German Government stated only in the rejoinder that the northern part was not a protection area is no reason to order the Federal Republic to pay part of the costs as regards the claim concerning the Rysumer Nacken. First of all, I have found no judgment of the Court in which the submission of new arguments has been accepted as a reason not to make an order for costs against an applicant who withdraws from or discontinues an action. Furthermore, and above all, I am struck by the fact that the Commission took a different position as regards the Rysumer Nacken from that which it took in relation to the Leybucht, notwithstanding the fact that it had the same information for both areas. In footnote 21, above, I have already pointed out that the Commission inferred from the mention of the 'Ostfriesisches Wattenmeer mit Dollart' in the German Government's notification of 26 September 1983 that the Rysumer Nacken had been designated as a protection area by the Federal Republic, but not the Leybucht, although both areas are geographically part of the 'Ostfriesisches Wattenmeer'. Furthermore, before its application was submitted the Commission was in possession of the protection regulation of 13 December 1985 and the attached maps, which indicated the precise boundaries of the protected area. In the case of the Leybucht, in light of that information the Commission dropped the complaint put forward in the reasoned opinion to the effect that the Federal Republic had failed to designate that area as a protection area, contrary to the directive (see above, point 17). Although it appears from the attached

30 — See *inter alia* the judgment in Case 54/87 *Commission* v *Italy* [1989] ECR 385, at paragraph 20.

maps that the Rysumer Nacken is not part of the area protected under the regulation of 13 December 1985, the Commission did not drop its complaint, put forward in the reasoned opinion, that the works in that area were carried out contrary to the provisions of the directive on the protection of areas designated as special protection areas.

In those circumstances the Commission cannot maintain that the discontinuance of that part of its application was justified by the conduct of the German Government. It could not, on the basis of the information in its possession when it submitted its application, assume that the Rysumer Nacken formed part of an area designated as a special protection area.

Conclusion

45. To sum up, I propose that the Court dismiss the application and order the Commission to pay the costs, including those of the intervener.