Valuing Nature: Economic Value, Conservation Values and Sustainable Development

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Case C-371/98, The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust

[2001] ECR-I 9235; [2001] 1 CMLR 19

(European Court of Justice, G.C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), M. Wathelet, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón and R. Schintgen, Judges, 7 November 2000)

EC environmental law - habitat conservation - Directive 92/43/EEC - definition of the boundaries of sites eligible for designation as special areas of conservation – limits of Member States' discretion - economic and social considerations - Severn Estuary

Judgment

1.

By order of 21 July 1998, received at the Court on 16 October 1998, the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 2(3) and 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Habitats Directive).

2.

The question arose in proceedings brought by First Corporate Shipping Ltd (hereinafter 'FCS) for judicial review of the act by which the Secretary of State for the Environment, Transport and the Regions indicated that he was minded to propose the Severn Estuary to the Commission of the European Communities as a site eligible for designation as a special area of conservation (SAC) under Article 4(1) of the Habitats Directive.

The Community legislation

3.

According to Article 2 of the Habitats Directive:

'1.The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2.Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3.Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

4.

Article 4 of the Habitats Directive states:

'1.On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2.On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3.The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4.Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5.As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).

5.

Annex III to the Habitats Directive reads as follows:

'Criteria for selecting sites eligible for identification as sites of Community importance and designation as special areas of conservation

Stage 1: Assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II (including priority natural habitat types and priority species)

A. *Site assessment criteria for a given natural habitat type in Annex 1*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.

C. On the basis of these criteria, Member States will classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

D. That list will show the sites containing the priority natural habitat types and priority species selected by the Member States on the basis of the criteria in A and B above.

...

6.

Article 6(2), (3) and (4) of the Habitats Directive provides:

'2.Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3.Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation

objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

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

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

The main proceedings and the question referred for a preliminary ruling

7.

FCS is the statutory port authority for the port of Bristol, on the Severn Estuary, and owns considerable land in the neighbourhood of the port. Since acquiring the port, FCS has invested, in partnership with other undertakings, nearly £220 million in capital in developing its facilities. It employs 495 permanent full-time employees. The number of workers employed at the port, including FCS's own employees, is between 3000 and 5000.

8.

The Secretary of State indicated that he was minded to propose the Severn Estuary to the Commission as a site eligible for designation as an SAC under Article 4(1) of the Habitats Directive, most of the intertidal part of the estuary having already been classified as a special protection area under Council Directive 79/409/EEC of 2 April1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). FCS thereupon applied to the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales for leave to apply for judicial review.

9.

FCS submitted before that court that Article 2(3) of the Habitats Directive obliged the Secretary of State to take account of economic, social and cultural requirements when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of that directive.

10.

The Secretary of State contended that, in the light of the Court's reasoning in Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805, he could not take economic, social and cultural requirements into account when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of the Habitats Directive.

11.

In those circumstances, the High Court of Justice stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is a Member State entitled or obliged to take account of the considerations laid down in Article 2(3) of Council Directive 92/43/EEC on the conservation of natural

habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), namely, economic, social and cultural requirements and regional and local characteristics, when deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites?

The question referred for a preliminary ruling

12.

It should be noted that the question of interpretation referred for a preliminary ruling relates only to Stage 1 of the procedure for classifying natural sites as SACs laid down by Article 4(1) of the Habitats Directive.

13.

Under that provision, on the basis of the criteria set out in Annex III (Stage 1) together with relevant scientific information, each Member State is to propose and transmit to the Commission a list of sites, indicating which natural habitat types in Annex I and native species in Annex II are to be found there.

14.

Annex III to the Habitats Directive, which deals with the criteria for selecting sites eligible for identification as sites of Community importance and designation as SACs, sets out, as regards Stage 1, criteria for the assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II.

15.

Those assessment criteria are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively.

16.

It follows that Article 4(1) of the Habitats Directive does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

17.

FCS submits that identifying and defining the boundaries of the sites to be notified to the Commission with a view to designation as SACs, as required by Article 4(1) of the Habitats Directive, constitute a measure taken pursuant to the directive within the meaning of Article 2(3). It follows that Article 2(3) imposes an obligation on a Member State to take account of economic, social and cultural requirements and regional and local characteristics when it applies the criteria in Annex III to the directive when drawing up the list of sites to be transmitted to the Commission.

18.

According to the Finnish Government, it is open to a Member State, when proposing its list of sites to the Commission, to take account of economic, social and cultural requirements and regional and local characteristics, provided that it does not compromise realisation of the Habitats Directive's nature protection objectives. The Government observes that there may, for example, be such a large number of sites eligible to be considered of Community importance within the territory of a Member State that that State is entitled to exclude some of them from its list of proposed sites without jeopardising realisation of those objectives.

19. It should be noted that the first subparagraph of Article 3(1) of the Habitats Directive provides for the setting up of a coherent European ecological network of SACs to be known as 'Natura 2000', composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, to enable them to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

20. Moreover, Article 4 of the Habitats Directive sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by Article 3(2) of the directive.

21. In particular, the first subparagraph of Article 4(2) prescribes that the Commission is to establish, on the basis of the lists drawn up by the Member States and in agreement with each Member State, a draft list of sites of Community importance.

22. To produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective of conservation of natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive.

23. Only in that way is it possible to realise the objective, in the first subparagraph of Article 3(1) of the Habitats Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1), of the directive that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. Having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level.

24. In particular, if the Member States could take account of economic, social and cultural requirements and regional and local characteristics when selecting and defining the boundaries of the sites to be included in the list which, pursuant to Article 4(1) of the Habitats Directive, they must draw up and transmit to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved.

25.

> The answer to the national court's question must therefore be that, on a proper construction of Article 4(1) of the Habitats Directive, a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.
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> **Costs**

26. […]

> On those grounds, THE COURT . . . hereby rules:
>
> On a proper construction of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

Analysis by Donald McGillivray, Lecturer in Law, Birkbeck College, University of London

In this, only the second referral from the England and Wales High Court on a point of environmental law, the Court of Justice appears to consolidate its robust and purposive jurisprudence limiting the extent to which Member States may restrict the designation of important conservation areas. But in doing so, the Court - and more so the Advocate General - cast light on some of the murky details of the Habitats Directive that, until now, have received little scrutiny. Arguably, these reveal the widespread permeation of non-environmental considerations into nearly every stage of the Habitats Directive[i] designation process. Interestingly, the case appears to be the first to reach the Court where the dispute is over the *inclusion* of an area for special conservation measures; previously all actions coming to the Court either under Articles 228 EC and 234 EC (ex Articles 169 and 177 respectively) have involved Member States excluding potentially qualifying areas.[ii]

The question for the Court was whether Member States are 'entitled or obliged' to take into account various non-environmental requirements in drawing up the initial list of sites eligible to be Sites of Community Importance (SCIs).[iii] These national lists are used by the Commission to draw up draft and then final lists of SCIs. The Member States must then designate these SCIs as Special Areas of Conservation (SACs) and secure their favourable conservation status. Together with Special Protection Areas (SPAs) designated under the sister Wild Birds Directive,[iv] therefore, SACs will form the bedrock of the Community's habitat conservation regime. Was the Secretary of State correct to think that the Severn Estuary, an area including Atlantic salt meadows and inter-tidal mudflats,[v] was a possible SAC? Or could or should he have had regard to economic and social factors, in light of the location of Bristol Port, the UK's fastest growing port and the foremost distributor of cars in the UK?

Background

As is well known, the Habitats Directive supersedes the conservation regime under the 1979 Wild Birds Directive in key respects. While the rules about the *designation* of SPAs

under the Wild Birds Directive remain untouched, the Habitats Directive provided new rules for designating other habitats and then, crucially, provides a *general* conservation regime for *all* sites falling within Natura 2000, the network of conservation areas spanning the Wild Birds and Habitats Directives.[vi] Again, the origins of this are widely appreciated. Concerned at the implications of the Court's judgment in *Leybucht Dykes*,[vii] restricting permissible development on SPAs to seemingly very narrow criteria, adoption of the Habitats Directive allowed the balance between conservation and economic interests to be readjusted. This 'flexibilisation' was accomplished by limiting the strict – but not absolute - protection regime spelt out in *Leybucht* in theory to 'priority' sites only,[viii] allowing other sites to be developed if there are "imperative reasons of overriding public interest, including those of a social or economic nature" and the damaging activity is preceded by prior assessment and accompanied by compensatory measures ensuring the coherence of the Natura 2000 network.[ix]

Until *First Corporate Shipping*, however, the Court had not ruled on the impact of Article 2 of the Habitats Directive - which refers to the aims of the Directive and the general factors to be taken into account – on the designation process. In *Leybucht*, the Court had boldly held that the economic and recreational interests mentioned in Article 2 of the Wild Birds Directive[x] were subservient to the general ecological objectives of that Directive. Later case law, notably *Lappel Bank*,[xi] similarly confirmed previous judgments since at least *Santoña Marshes*:[xii] that economic interests cannot be taken into account by the Member States either when selecting sites to be designated under the Wild Birds Directive or in determining their boundaries. The present case, therefore, was the first opportunity for the Court to rule on the impact, if any, of the differing formulation taken in Art.2(3) of the Habitats Directive, that "Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics." Did this elevate the importance of non-environmental factors across the whole of the Habitats Directive regime? And in particular, did it allow or require economic considerations to be taken into account from the initial site selection process at Member State level (i.e. was the initial stage of the designation process a measure taken pursuant to the Directive)?

The Judgment

Despite the new rules for site designation under the Habitats Directive, few expected the Court to import yet further flexibility into an already accommodating regime. On the face of the Directive, in particular Article 4(1) and Annex III, it seems fairly clear that the relevant assessment criteria are ecological: representivity, population size and density, fragmentation, and so on. As the Court put it:

> Those assessment criteria are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed . . . It follows that Article 4(1) . . . does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as sites of Community importance.[xiii]

In what was an exceptionally swift analysis, the only further issue was whether identifying and defining the boundaries of candidate SACs constituted a measure taken pursuant to the Directive within the meaning of Article 2(3), such that economic factors etc are to be taken into account. Again this was dealt with briefly, the conclusion being that:

> if the Member States could take account of economic, social and cultural requirements and regional and local characteristics when selecting and defining the boundaries of the sites to be included in the list which, pursuant to Article 4(1) of the Habitats Directive, they must draw up and transmit to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved.[xiv]

This follows from an overall understanding of the scheme of the Directive, which departs significantly from the Wild Bird Directive. The earlier Directive provides for a relatively straightforward designation process, responsibility lying with the Member States subject only to judicial scrutiny. Anxious to agree a regime at once more coherent and yet also more flexible, the designation of SACs is a drawn-out affair in four stages.

Stage 1 requires Member States to identify candidate sites and transmit these to the Commission.[xv] Sites identified as containing priority natural habitat types or species are automatically considered as SCIs.[xvi] At Stage 2 (commonly known as 'moderation') the Commission provides an assessment of the overall importance of the sites in the context of the biogeographical region and the EU as a whole in order to produce a draft list of SCIs from which, at Stage 3, a final list of SCIs is agreed.[xvii] It is at this stage that flexibility is clearly built into the designation process, since Member States may request that the Commission apply the ecological selection criteria more flexibly.[xviii] These safeguards, although somewhat weakly worded, go to the concerns of Finland which, conscious of the impact of the Habitats Directive on Member States with abundant areas which might be of Community importance, intervened in *First Corporate Shipping* to argue that economic criteria could be taken into account so long as this did not compromise realisation of the Habitats Directive's objective of ensuring biodiversity by maintaining or restoring, at favourable conservation status, natural habitats of Community interest.[xix] Following adoption of the final list of SCIs, Stage 4 requires Member States to designate these as SACs as soon as possible and within six years at the latest.[xx]

In one sense therefore, *First Corporate Shipping* is merely judicial recognition of the procedural nature of the designation process understood in its totality. If, at Stage 1, Member States could exclude sites on account of the criteria mentioned in Art. 2(3) of the Directive, then the Commission would simply not have the ecological data from which to draw up the list of SCIs from which SACs are ultimately designated.[xxi] But this seemingly simple observation masks some real practical and theoretical difficulties with the processes by which areas of land (or water) might be selected for their conservation importance.

Value and Ecological Value

By ruling only on Stage 1 of the designation process the Court avoids wider issues about environmental valuation generally and the Habitats Directive specifically. Some of these issues were discussed in the Opinion of Advocate General Léger. He also considered that bringing in economic factors at the initial stage of submitting candidate SACs to the Commission would be impermissible. But his Opinion identifies the extent to which he thought that such considerations might be relevant in the designation process:

> the solution arrived at by the Court in the *Lappel Bank* judgment cannot be applied in the context of the Habitats Directive. I consider that it is not excluded that economic, social or cultural considerations or regional and local characteristics may already be taken into account at the stage of designation of SACs and that they may allow a site hosting one of the natural habitat types in Annex I or native species in Annex II to be excluded from designation as an SAC.[xxii]

The reason given for admitting economic considerations is that the Member States must submit certain information on each site to the Commission when they submit their list of candidate SACs. This information "shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21" (i.e. committee procedures).[xxiii] This format is the so-called 'data form', the agreed form for communicating information to the Commission.[xxiv] However, this requires information on various 'impacts and activities', which include information on things like industry in the vicinity of the site, mineral extraction, port areas etc.

A further reason offered by the Advocate General is that Stage 2 of the designation process (under Annex III (Stage I)) refers to an assessment of the "value" of the site, as opposed to Stage 3 (Annex III (Stage II)) which refers to the "ecological value" of sites.[xxv] For Advocate General Léger, the implication is that ecological *and* economic and social information is sent to the Commission, which then reaches its decision on the draft list of SCIs only on the basis of ecological value. Hence for the Advocate General:

> I consider that it is not excluded that in the second stage, at the time of concertation between the Member States and the Commission on the selection of the SCIs, economic and social requirements may justify a site which hosts one of the natural habitat types in Annex I or native species in Annex II not being selected as an SCI, and consequently not being designated as an SAC.[xxvi]

Some indication of how this will work in practice is given in Commission guidance on the data form.[xxvii] In relation to the "global assessment of the value of the site for conservation of the natural habitat type concerned", the guidance suggests that relevant factors "may include the human activities, both in the site or in its neighbouring areas, that are likely to influence the conservation status of the habitat type, the ownership of the land, the existing legal status of the site . . .".[xxviii] This might suggest, for example, that a fragile habitat criss-crossed by public rights of way might not be selected if a similar site of equal conservation value not subject to such pressures could be.[xxix] Or, all other things being equal, that land owned by a conservation NGO might be preferred to land in multiple profit-making ownership.[xxx] Or that the location of roads intersecting habitat patches might be material to the selection of an area where the roads acted as a barrier to the dispersal of a species. But the central point should, in principle, be that such activities are material to the designation process because they are likely to influence the conservation status of the habitat type, not because the activity per se justifies the exclusion of sites *merely because of the economic impact of including them*. The difficulty is that, by referring to "requirements", the Advocate General seems to suggest that it is the needs of the economy – which tend to be prospective – that are material. It is difficult, therefore, to square this language with his observations about ecological value.

A further difficulty with possible interpretations of the Advocate General's approach is that the Commission's own guidance on the data form notes that the database generated has a variety of objectives. Most of these, however, relate to things like securing information about the sites to improve decision-making as this affects the Natura 2000 network, e.g. by providing baseline data from which the potentially negative impact, say, of tourism on Natura 2000 might be better understood and avoided.[xxxi] So, while the Advocate General's Opinion envisages economic and social factors being relevant to the process of moderation, it is neither clear *how* this should be done nor, more importantly, *whether* it should be done. The central issue that *First Corporate Shipping* fails to resolve, therefore, is the extent to which, during moderation, the Commission can have regard to things like economic impacts and activities within a candidate SAC, or which may impact on its conservation status.[xxxii] This will clearly be central to final agreement on the list of SCIs, and the process by which agreement is to be reached will mean "further political battles to be fought before conservationists can be sure that sites under pressure will actually be safeguarded".[xxxiii] Leaving decisions about economic considerations to Stage 2 of the designation process may even be preferred by national governments, since such struggles will be conducted in the world of comitology;[xxxiv] it may also be preferred by land owners and developers, seeing the opportunity for a second chance to question designation. Whether the Commission would have the resources or legitimacy to make such decisions, however, must be doubted.

Valuation and Sustainable Development

The Advocate General's analysis of the data form issue comes close to assuming that reference both to environmental characteristics and economic factors must be with a view to offsetting the former against the latter, even though, as noted above, economic data might be sought for a wide range of reasons. Given his purposive approach to Stage 1 of the designation process, this might be thought surprising. Looking at the discussion of foundational principles sheds some light.

Although the Court reached its decision without recourse to overarching principles or policy objectives, the Advocate General found support for his views on Stage 2 of the designation process in his understanding of the concept of sustainable development. According to its preamble, the Directive "makes a contribution to the general objective of sustainable development"[xxxv] and the Advocate General's Opinion provides, for the first time within the European Court of Justice, judicial comment on sustainable development as a legal concept. Since sustainable development is now included amongst the objectives of the Community,[xxxvi] and also referred to as the reason underpinning the integration duty in Article 6 EC,[xxxvii] it is worth quoting the Opinion at length on this:

> The concept 'sustainable development' does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community in accordance with Article 3 of the EC Treaty (now, after amendment, Article 3 EC). On the contrary, it emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled….
>
> The concept originates in [the First Environmental Action Programme, which stated that Community policy] should henceforth be implemented in accordance with the principle of 'integration': Implementation of these proposals must not constitute a

> new common policy separate from the others. Rather, all Community activities aimed at promoting throughout the Community harmonious development of economic activities, accelerated raising of the standard of living and closer relations between Member States under Article 2 of the EEC Treaty must now take into consideration the protection of the environment.
>
> 'Sustainable development', a fundamental concept of environment law, was taken up and defined in 1987 in the Brundtland Report. According to that report, sustainable development is development which meets the needs of the present without compromising the capacity of future generations to meet their needs. It states that the concept means that the conduct of the various policies must, at the very least, not endanger the natural systems which give us life, the atmosphere, water, earth and living creatures. The report stresses that it is necessary not to set development against the environment but on the contrary to let them evolve in coordinated fashion.
>
> To reconcile these diverse interests in the context of 'sustainable development, the Treaty on European Union introduced the principle of 'integration' in Article 130r(2) in fine. That principle requires the Community legislature to conform with environmental protection requirements in the definition and implementation of other policies and actions. Integration of the environmental dimension is thus the basis of the strategy of sustainable development enshrined in both the Treaty on European Union and the Fifth Environment Programme, entitled 'Towards Sustainability'. […]
>
> So it seems that the approach of the Commission and the Member States in the second stage of the procedure for designating SACs must, observing the objective of 'sustainable development' and the principle of 'integration', consist of assessing the interests concerned, ascertaining whether or not the maintenance of human activities in the area concerned may be reconciled with the objective of conservation or restoration of natural habitats and wild fauna and flora, and drawing the necessary consequences as regards setting up an SAC.

Clearly, these observations are directed towards the designation process as a whole, especially Stage 2, and it is unremarkable that the Court offered no view on matters beyond the questions referred. But it is worth reflecting on what this approach would lead to and, as the Court did, ask whether it would be consistent with the scheme of the Directive as a whole. And from this perspective, the remarks about conservation and sustainable development are problematic, because cases like *First Corporate Shipping* should, on the whole, not be concerned with balancing economic and ecological interests but about identifying sites that are of high conservation value in an EC context and designating them for this reason. As the rest of the Directive makes clear,[xxxviii] there are various ways in which Member States (and the Commission) can prioritise economic over ecological interests and in which development or some other form of environmentally damaging activity can be sanctioned.[xxxix]

Under the Advocate General's approach, however, this balancing exercise should take place as part of the *designation* process (i.e. at moderation), whereas, with the exception of the discrepancy between "value" and "ecological value" in Stage I and II of Annex III, the scheme of the Directive suggests that balancing conservation and other factors will generally occur *after sites have been designated*. It is these factors, then, together with

those mentioned in the data form, which lead the Advocate General to reach his conclusion about the moderation process, leaving his observations on sustainable development somewhat redundant. At the very least, it is hard to see that the undeveloped reasoning in relation to sustainable development would, in the absence of the data form requirements, justify the conclusion reached about Stage 2 of the process. The Opinion suggests that sustainable development requires a baseline of environmental quality, and beyond that a balancing of environmental and other considerations. But where? And when? There is nothing in the concept, as articulated, that would determine this. Indeed, even bearing in mind the *obiter* nature of his observations, the detachment of sustainable development from any institutional context is a notable feature of the Advocate General's presentation of the concept.[xl] Even looking simply at the wider scheme of the Directive, it is arguable that all balancing or trade-offs should be made at Member State level rather than within the Commission, not least because this is where the Habitats Directive contains visible due process and compensatory provisions.[xli] There must also be value in having the two contributors to Natura 2000 (SPAs and SACs) selected in a similar way in respect of taking non-conservation factors into account.

The Sufficiency of Site Designations and Scientific Criteria

As with previous judgments on the Wild Birds Directive,[xlii] concerns about completing the Natura 2000 network have focused on the *insufficiency* – both in numbers and extent – of candidate SACs.[xliii] The Court of Justice is now deciding the first infringement proceedings against Member States for non-implementation of the Habitats Directive. Thus in proceedings against Ireland, Germany and France,[xliv] Advocate General Léger applied the decision in *First Corporate Shipping* in holding that all three states had not submitted sufficient lists in time. In all three cases, however, the insufficiency of the national lists at the time of the reasoned opinion was either admitted or clearly inferable. Nevertheless the Opinions, and the subsequent judgment of the Court in relation to Ireland,[xlv] reaffirm that while Member States have a "certain margin of discretion"[xlvi] in site selection, only the scientific criteria mentioned in Article 4(1) and Annex III of the Directive are to be taken into account. This is for the reasons articulated by the Court in *First Corporate Shipping* about the need for comprehensive national data with which to produce a rational list of SCIs.[xlvii]

In relation to scientific evidence however:

> it should be stressed that the Habitats Directive does not recognise any particular scientific source as having legal value. It follows that Member States are free to produce all probative scientific data enabling them to select the sites within their territory which meet the requirements of the first subparagraph of Article 4(1) . . . . It is up to the Commission, where appropriate, to adduce evidence that those data have no serious scientific value.[xlviii]

At the time of writing, there remains one outstanding scientific objection to the designation of the Severn Estuary as a candidate SAC, which is presently being considered in dialogue between the statutory nature conservation agencies and an objector. The site therefore remains a *possible*, rather than *candidate*, SAC, and the Habitats Directive interests on the site are not yet formally protected by the Habitats Directive regime or UK law, although ad hoc policy seems to apply.[xlix]

The Endurability of Non-Ecological Criteria

One might be forgiven for thinking that the judgment in *First Corporate Shipping*, and in the subsequent infringement proceedings, clarifies matters at least for Stage 1 of the designation process. On closer examination, however, there are various ways in which non-environmental considerations may enter the designation process. An example is "restoration possibilities", mentioned as a criterion for both habitat and species.[l] As has been noted, the criteria of potential nature conservation value of a site, either naturally or through intervention, is "entirely contingent or judgmental".[li] And as the same report makes clear, what is often meant by a "scientific" approach to conservation is, in fact, a description of the *consistency* of the selection process rather than the extent to which scientific judgment provides answers about conservation value. This pursuit of consistency can also be seen, arguably, in relation to the criterion of "representativity" which is to be used by Member States at Stage I of the designation process.

A further example where economic and developmental interests influence designation under the Habitats Directive can be seen in *World Wide Fund-UK Ltd and Royal Society for the Protection of Birds v Secretary of State for Scotland and others*,[lii] a challenge decided by the Outer House of the Court of Session to the exclusion of areas of Cairngorm from a candidate SAC. The area excluded was to be used for a funicular railway to take skiers up the mountain, but the exclusion from the candidate site was upheld in part because it was already developed (with existing skiing facilities), begging questions about the extent to which the presence of existing development can justify the non-designation of areas of otherwise important sites.

Conclusion

Given the high biodiversity value of estuaries, the potential clash between economic and environmental values is nowhere more apparent than at super-ports such as Bristol where the economic pressure to compete for the latest generation of container vessels is intense. On closer inspection, however, the real lesson from the case is the potential economisation of environmental problems by the legal imagination. At a simple level this is seen in the remarkable feature of both the Opinion and the Judgment that, unlike the economic interests potentially at stake, the specific conservation interests at the site are never mentioned. But it is seen most clearly in the Advocate General's Opinion. Although the Court did not comment on Stage 2 of the designation process, the danger must be that the Advocate General's remarks will be used as the basis for a second challenge to designation because of economic reasons, and some evidence that this will happen is already emerging.[liii] Not only would this be unworkable, it would fundamentally misconceive the distinction between factors affecting the conservation value of a site with those which might justify potentially harmful activities affecting such sites.

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[i] Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

[ii] In relation to the Wild Birds Directive 79/409/EEC (OJ 1979 L 103, p.1), these have involved specific areas such as the Santoña Marshes (Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221), Lappel Bank (see Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal*

Society for the Protection of Birds [1996] ECR I-3805) and the Basses Corbières (Case C-374/98 *Commission* v *France* [not yet reported], or a general insufficiency of designation (see Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031). One consequence is that the interim protection of the site pending the Court's ruling was not at issue here as it was in the *Leybucht Dykes* (Case C-59/89R *Commission* v *Germany* [1989] ECR I-2607) and *Lappel Bank* cases (see the judgment of the House of Lords at [1997] Env LR 431).

[iii] In the UK, termed 'candidate special areas of conservation' (Reg. 7, Conservation (Natural Habitats etc) Regulations 1994 (SI 1994 No.2716). The actual challenge here was to inclusion of the Severn Estuary as a *possible* SAC, i.e. a site identified to Government by the Joint Nature Conservation Committee into which dialogue with owners and occupiers should be entered into about the scientific basis for designation. The 1994 Regulations make no provision over possible SACs, but see n 49 below.

[iv] See n 2 above.

[v] The relevant qualifying interests at the time the action was brought were Atlantic salt meadows (Glauco-Puccinellietalia maritimae); estuaries; mudflats and sandflats not covered by seawater at low tide; and sandbanks which are slightly covered by seawater all the time. Following the first biogeographical meetings (see n 34 below), the following additional qualifying interests were added in April 2000: alosa alosa; alosa fallax; lampera fluviatilis; petromyzon marinus; and reefs. The majority of the inter-tidal part of the Severn Estuary had already been designated by the UK as a Special Protection Area under the Wild Birds Directive, and the remainder is currently a potential SPA (www.defra.gov.uk/wildlife-countryside/ewd/ewd09.htm).

[vi] But see Case C-374/98 *Commission* v *France* (7 December 2000, not yet reported) which held that sites which *should* have been classified as SPAs remain subject to the stricter protection regime under Art.4(4) of the Wild Birds Directive, since Art. 7 of the Habitats Directive applies only to areas in fact classified as SPAs. Member States thus have a certain incentive to designate SPAs.

[vii] Case C-57/89 *Commission* v *Germany* [1991] ECR I-883.

[viii] Whether in fact a stricter protection regime is applied to priority sites has been doubted; see A Nollkaemper 'Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests' (1997) JEL 271.

[ix] Art. 6(4) Habitats Directive.

[x] "Member States must take the requisite measures to maintain the population of all species of naturally occurring birds in the wild state at a level or adapt it to a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements" Art. 2 Wild Birds Directive.

[xi] Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805.

[xii] Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221.

[xiii] Judgment, paras 15 and 16.

[xiv] Ibid, para. 24.

[xv] Required by 5 June 1995 (Art. 4(1)). For the actual position see text at n 43 below.

[xvi] Annex III Stage 2 para. 1 Habitats Directive.

[xvii] SCIs are to be established by 5 June 1998. Formally, Stage 1 has not yet been completed, but the biogeographical meetings (see n 34 below) have effectively brought key parts of Stage 2 into Stage 1, in the sense that the adequacy of Member States' lists is being addressed by the Commission through intervention at Stage 1. In the light of the Advocate General's Opinion, discussed below, this may not be irrelevant.

[xviii] Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 % of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory (Art. 4(2) Habitats Directive).

[xix] Judgment, para. 18.

[xx] That is, by 5 June 2004, Art. 4(4) Habitats Directive.

[xxi] That such a 'predictable' interpretation can be given to the Directive (*ENDS Report 311* (December 2000) p.55) makes the perfunctory consideration of the case in the High Court all the more remarkable.

[xxii] Opinion, para. 000.

[xxiii] Art. 4(1) Habitats Directive.

[xxiv] See Commission Decision 97/266/EC, OJ 1997 L107, p. 1.

[xxv] For non-priority sites and habitats of non-priority species, assessment of the Community importance of the site is to include the "global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic of unique aspect of its features and the way they are combined." (Annex III, Stage II(2)(e)).

[xxvi] Para 000. It is understood that matters relating to Stage 2 of the designation process were not fully argued before the Advocate General.

[xxvii] European Commission, *Natura 2000 Standard Data Form: Explanatory Notes* (undated, see http://europa.eu.int/comm/environment/nature/en-notes.pdf).

[xxviii] Ibid para 3.1, re habitat types. Similar guidance is given in relation to habitats of species (para. 3.2).

[xxix] On the impact of visitation on conservation see R Noss, M O'Connell and D Murphy, *The Science of Conservation Planning* (Washington DC, Island Press, 1997), pp.182-3.

[xxx] On multiple ownership of land of conservation importance see the implications of the House of Lords' decision in *Bettison and others* v *Langton and others* [2001] UKHL 24 that common grazing rights are severable, which could have serious implications for sympathetic management of grazing land held in common. See similarly the new approach in the Land Registration Bill in England, which would allow for the existence *in gross* of certain land interests previously not severable.

[xxxi] See n 27 above.

[xxxii] As with other measures like the Environmental Impact Assessment Directive (85/337/EEC, OJ L175, p.40), Annex III of the Habitats Directive makes no distinction between positive and negative impacts.

[xxxiii] S. Tromans, 'Challenging Enterprise? The Designation of European Habitat Sites and National Dilemmas', Env L Rev (2001) 3, 61.

[xxxiv] At the Atlantic Biogeographical meeting in September 1999 at Kilkee, Ireland, where the insufficiency of the UK's first tranche of sites was badly exposed, the UK Government initially sought to exclude consideration of the Severn Estuary from any assessment of the sufficiency of the UK's list of candidate sites, pending the decision in *First Corporate Shipping*, but changed its position on being persuaded that this would benefit those seeking the assessment of non-conservation issues at Stage 1 (Ian Hepburn, pers. comm., 29 March 2001 and 18 October 2001). On Kilkee see House of Lords Select Committee on the European Communities, Twenty Second Report, *Biodiversity in the European Union (Final Report): International Issues*, Session 1998-99 (1999), para. 38.

[xxxv] "Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities".

[xxxvi] Art. 2 EC.

[xxxvii] Art. 6 EC: 'Environmental protection requirements must be integrated into the definition and implementation of the Community's policies and activities referred to in Article 3, particularly with a

view to promoting sustainable development'. See further Macrory, 'Legal Issues of the Amsterdam Treaty: The Environment' in O'Keefe and Twomey (eds) *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 2000) and T. Schumacher, 'The Environmental Integration Clause in Article 6 of the EU [sic] Treaty: Prioritising Environmental Protection', Env L Rev (2001) 3, 29.

[xxxviii] See Art. 6 Habitats Directive.

[xxxix] The vagueness of these provisions, however, have given rise to understandable concern about the implementation of the Directive. The Commission has attempted to give guidance, see European Commission, *Managing Natura 2000 Sites: the Provisions of Article 6 of the Habitats Directive 92/43/EEC* (Luxembourg, 2000).

[xl] Barns, 'Environment, Democracy and Community', (19**) *Environmental Values* 101-133.

[xli] Due process (Art. 6(3) Habitats Directive); compensation (Art. 6(4) Habitats Directive). It should be noted, though, that the Commission's moderation committee is open to involvement by approved NGOs such as WWF, and also involves Commission-appointed experts. For criticism of the Commission in this respect see n 8 above.

[xlii] See, most notably, Case C-3/96 *Commission* v *Netherlands* [1999] Env LR 147 on the sufficiency of designation of SPAs.

[xliii] See the figures given in European Commission 'Natura Barometer', *Natura 2000 Newsletter*, Issue 12, September 2000, pp.6-7: 5 Member States (where the sites identified varied between 3 and 5.7% of territory) were considered 'notably insufficient'; the remaining Member States had submitted lists which were 'substantial but still incomplete' varying between 10.8 and 23.8 % of territory (often because of the inclusion of buffer zones), suggesting that the Commission will take a fairly strict view of the 5% rule in Art. 4(2) mentioned at n 18 above. However, the % figures are indicative, since they are proportions of the territorial surface area of the Member States but may include coastal waters. For the latest figures see http://europa.eu.int/comm/environment/nature/barometer/barometer.htm

[xliv] Cases C-67/99 *Commission* v *Ireland*, C-71/99 *Commission* v *Germany*, and C-220/99 *Commission* v *France*, 3 May 2001, not yet reported.

[xlv] Case C-67/99 *Commission* v *Ireland*, 11 September 2001, not yet reported.

[xlvi] Ibid, para. 29.

[xlvii] Ibid, paras 34 and 35, repeating almost verbatim the judgment in *First Corporate Shipping*, paras 22 and 23.

[xlviii] Para. 116 of the Advocate General's Opinion, citing, by analogy, Case C-3/96 *Commission* v *Netherlands*, n 2 above, para. 69.

[xlix] In England, candidate SACs are included within the protective regime, see the Conservation (Natural Habitats etc) (Amendment) (England) Regulations 2000 (SI 2000 No.192) and PPG9, *Nature Conservation* (1994). But *possible* SACs are protected less formally, through a Ministerial statement that such sites will receive equivalent protection (on the similar approach to potential SPAs see PPG9, para.000). Regarding candidate SACs, there are as yet no corresponding Regulations for Wales, which could be important for cross-border sites such as the Severn Estuary.

[l] Annex III, Stage 1, A(c) and B(b) Habitats Directive.

[li] See Parliamentary Office of Science and Technology, *Biodiversity and Conservation*, POST Note 144, July 2000, Briefing Note, reproduced as an Appendix to House of Commons Select Committee on Environment, Transport and Regional Affairs, Twentieth Report, *UK Biodiversity*, Session 1999-2000 (2000).

[lii] [1999] Env LR 632, see comment by Last at Env L Rev (1999) 1, 000.

[liii] DG Environment, European Commission, pers. comm. 3 October 2001.