

**DRAFT: Comments and suggestions welcome**

**LITIGATION, COMPLIANCE AND EUROPEAN INTEGRATION:  
The Preliminary Ruling Procedure and EU Nature Conservation Policy**

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**ABSTRACT** *This paper examines how the European Court of Justice has expanded EU Environmental laws and has done so by serving as a forum for national environmental activists pressuring for Member State compliance. In particular, I study this integrative dynamic through the evolution of nature protection policy in the European Union (EU). The purpose of this analysis is to reveal how the Court's rulings function to secure Member State compliance and at the same time can lead to the construction of supranational norms, often in opposition to national government policy positions. The findings suggest that this litigation dynamic can have the effect of fueling the integration process by expanding EU competence. The case law analysis in this study pertains to the preliminary ruling procedure, Article 234 (ex 177). By studying this process, I am able to reveal not only the interaction between the Court and Member State governments in securing compliance with European environmental laws, but also the integral role that both national judges and private litigants (individuals and environmental associations) can play in deepening integration. This study focuses specifically on the environment policy sector, yet provides a general framework for examining the case law in subsequent policy areas, with the purpose of providing a more nuanced understanding of European integration.*

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## LITIGATION, COMPLIANCE AND EUROPEAN INTEGRATION

In the last forty years, we have witnessed the evolution of an unprecedented form of supranational governance in Western Europe. The European Court of Justice (ECJ) has played a powerful role in this transformation. The Court's activism in the 1970s is now widely accepted as having transformed the Treaty of Rome, an international treaty governing nation-state economic cooperation, into a 'supranational constitution' granting rights to individual citizens (Lenaerts 1990; Mancini 1991; Weiler 1981, 1991). The Treaty of Rome stands today as the backbone of a supranational legal regime governing not only transnational free trade issues, but domestic environmental protection standards. This study examines the role of the ECJ in the expansion of European Union (EU)<sup>1</sup> policy and how this process can impact Member State compliance with Community law. In particular, I study the ECJ's environmental case law pursuant to Article 234 (ex 177) and explore how this procedure served both as an avenue to change EU nature conservation law and also as an enforcement mechanism that enabled individuals to bring legal action against their own governments.

Article 234, also known as the preliminary ruling procedure, allows (and in some cases requires) national judges to ask the ECJ for a correct interpretation of EU law if it is material to the resolution of a dispute being heard in a national court. Scholars now recognize the importance of this procedure, as it was primarily through this case law that the Court began to develop and construct its expansive constitutional doctrine (e.g. Weiler 1981, 1991). Through the constitutional doctrines of supremacy and direct effect, the Court's rulings had the impact of expanding supranational governance not only by strengthening the Court's own authority, but by empowering national judges and stimulating national legal action by individuals and groups (e.g. Alter 1998; Mattli and Slaughter 1998; Slaughter, Stone Sweet and Weiler, eds. 1998; Stone Sweet and Caporaso 1998).<sup>2</sup> The supremacy doctrine requires that national judges give precedent to EU rules over any national law or procedure that comes in conflict with these supranational rules and direct effect gives individuals directly enforceable rights under EU law.

Today, the preliminary ruling procedure is at times analogous to an enforcement mechanism. Individuals and groups are able to bring legal action against national authorities that possess incorrect implementations or have failed to transpose Community law: in essence, these legal proceedings often question the compatibility of a national practice with Community law (see Cichowski 1998, 2001). If a national judge decides to send a preliminary reference (asking the ECJ for an interpretation of EU law), the ECJ is given the opportunity to not only *expand* Community law through its clarification but also *enforce* Community law, the extent to which the ruling dismantles national legislation that is incompatible with EU law. Formally, Article 234 does not enable the ECJ to directly rule on the compatibility of national rules with EU law. However, the practical reality of the ECJ's interpretation of EU law, in a context determined by national legislation, is often a determination of the validity of these national laws (see de la Mare 1999). For example, when the Court interprets EU nature law (Council Directive 79/409/EEC and 92/85/EEC) in a way that constructs new criteria for designating wildlife and habitat protection areas, this creates a new Community rule and simultaneously declares the national practice in question (that derogates from this new criteria) as unlawful (see *Lappel Banks* decision).<sup>3</sup> National legal practices that are currently not in compliance with the Court's interpretation of Community law are dismantled and policy competence is shifted to the supranational level (e.g. Stone Sweet and Caporaso

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<sup>1</sup> I use the term EU consistently throughout this paper to refer to both present day institutions and activities, and also those occurring prior to the Treaty of European Union (1991) under the auspices of the European Community

<sup>2</sup> See *Costa Case 6/64* and *Van Gend en Loos Case 26/62*. For a general discussion of the Court's jurisprudence on the principles of "supremacy" and "direct effect" see Craig and de Burca 1999 chapters 4 and 6.

<sup>3</sup> Case 44/95 1996 ECR 3805.

1998, Cichowski 1998). It is through this dynamic process of institutional change that individuals, national judges, and the ECJ are all given a greater role in EU policy evolution and the subsequent enforcement and application of Community law. The Member States that created the Treaty could not have foreseen this consequence.

The analysis is organized as follows. In this first part, I introduce a set of theoretical expectations that will guide the analysis. This is followed by an examination of the necessary conditions for the Court's role in changing EU nature conservation laws: adoption of Council Directive 79/409/EEC (the Wild Birds Directive). I highlight the origins of the provision and the lack of a Treaty basis for this 1979 legislation. Institutional evolution through the preliminary ruling procedure also relied on the precedent established through the Court's rulings pursuant to Art 226 (infringement proceedings). In particular, I focus on the role of national environmental organizations operating through the Commission's complaint procedure to report Member State non-compliance with the Wild Birds Directive.

In the second part, I examine how these factors influenced the Court's preliminary rulings in the area of nature protection and the subsequent policy and legal implications of this case law. Did ECJ preliminary rulings expand the scope, meaning and enforceability of the Wild Birds Directive? And subsequently, how has this case law impacted the development of EU nature legislation? Finally, I explore the subsequent impact on the national legal system. Have national practices changed to conform to with these new EU rules? Ultimately, this case law analysis enables us to examine the effect of ECJ rulings on the direction of Community environmental law: are Member State governments able to retain control over the trajectory of nature conservation policy despite expansive ECJ decisions?

### **Conceptualizing Judicial Rulemaking and Institutionalization**

This analysis contributes to a growing body of research examining the Court's role in integration processes (e.g. Alter 1998; Cichowski 1998; Mattli and Slaughter 1998; Stone Sweet and Brunell 1998; Stone Sweet and Caporaso 1998). I start with the assumption that through litigation, a court's resolution of societal questions or disputes can lead to the clarification and expansion of existing rules and to the construction of new institutions (e.g. Shapiro 1981). Thus, in any system of governance with an independent judiciary litigation provides a potential avenue for institutional change and subsequent national compliance. While scholars illustrate that ECJ rulings can effectively expand the scope of EU rules, the dynamics of this process and subsequent effects of this judicial rulemaking are less clear. I use the term "judicial rulemaking" to refer to the Court's authoritative interpretation of the Treaty and secondary legislation, which results in the clarification of EU laws. It is well documented elsewhere (e.g. Alter 1998; de la Mare 1999; Mancini 1989), that these interpretations can significantly alter the original measure in a way that changes what is lawful and unlawful behavior for individuals and public and private bodies operating under EU law. For example, when the Court interprets EU environmental law in a way that now brings "reusable materials" under the purview of EU waste directives (e.g. Council Directive 75/442/EEC), this creates a new rule (see *Zanetti* decisions).<sup>4</sup> The behavior of public and private bodies must reflect this new rule. And if they do not, individuals now have the ability to claim recourse before national courts.

Generally, institutionalization of a EU policy area evolves over time as a product of a dynamic relationship between institutions (secondary legislation), organizations (the ECJ) and actors (litigants and their lawyers).<sup>5</sup> By institutionalization, I mean the process by which new arenas of supranational governance emerge and evolve (see Stone Sweet and Sandholtz 1998: 9). Further, for the purposes of this analysis, I adopt the generally agreed distinctions between the aforementioned three entities (see North

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<sup>4</sup> Joined cases 206 and 207/88 *Vessosso and Zanetti* [1990] ECR 1461 and case 359/88 *Zanetti and others* [1990] ECR 1509.

<sup>5</sup> See Stone Sweet, Sandholtz and Fligstein (2001) for an elaboration of this dynamic.

1990; Hall and Taylor 1996). Institutions constitute the macro level. They are complexes of rule systems that pattern and prescribe human interaction. Organizations make up the meso level and they are more or less formally constituted spaces occupied by groups of individuals pursuing collective purposes. Finally, the micro level consists of individual action. This study understands institutionalization as a process of rule construction that is endogenous to existing governance structures (March and Olsen 1989). That is, the Court's judicial rulemaking capacity operates within the institutional framework of the Treaty, yet the Court's jurisprudence can subsequently alter these institutions. This approach is not unfamiliar to scholars of judicial rulemaking (Shapiro 1988; Stone Sweet 2000). Furthermore, it is generally similar to other studies, which examine the institutionalization of a mode or technique of governance in the EU (for example Héritier 2001; Le Gales 2001; Mazey and Richardson 2001; Shapiro 2001).

How can one measure institutional change through litigation? Institutionalization in any legal domain begins by looking at whether the Court's jurisprudence transformed or changed the EU institutions governing activity in this legal domain. First, I examine the impact of ECJ jurisprudence on EU institutions and ask whether these rules have changed in precision and if they've become more binding and enforceable. As European rules become more precise and non-compliance is met with greater enforceable penalties, we can expect the policy area to become more institutionalized at the EU level. Second, institutionalization can be measured in terms of whether ECJ rulings have changed the scope of EU institutions. As the purview of EU rules expands, one can expect a greater number of actions to be formally governed by EU law. As we move across this continuum of precision, enforceability and scope, we find institutionalization at the EU level taking place (e.g. Stone Sweet and Sandholtz 1998).

This process of rule construction through litigation can subsequently have significant consequences on the relative influence that EU organizations exert on supranational policy outcomes. Scholars assert that through its jurisprudence the ECJ has operated to expand its own competence with the effect of diminishing member government control over integration (e.g. Burley and Mattli 1993; Stone Sweet and Caporaso 1998). Mattli and Slaughter assert:

The ECJ sought to promote its own prestige and power by raising the visibility, effectiveness, and scope of EU law. This concatenation of interests above and below the state gave a self-sustaining impetus to the process of integration, with the ECJ interpreting the Treaty of Rome, case after case, as requiring faster and deeper integration than member state preferences would have specified (1998: 180-1).

It is well documented in the literature that the Court's constitutional doctrine is an example of the Court enhancing its own power relative to member governments.<sup>6</sup> I examine whether the same dynamic influences the future development of EU policy. Have the Court's rulings not only led to the construction of new rules within a given legal domain, but has the jurisprudence affected the relative influence the Court *vis a vis* Member State governments has on shaping the direction of the policy area in the future?

An important aspect of this power relationship between EU organizations and Member States relates to the laws invoked in ECJ rulings. Given that ECJ rulings can change the scope, precision and enforceability of EU rules, and often in a direction that diverges from that of Member State policy objectives, a Member State government's ability to reverse these decisions becomes crucial for determining the ultimate direction of that EU policy domain. Thus, one can hypothesize that the relative ease to which a decision can be overturned or changed is a critical factor in determining whether a policy area remains more or less intergovernmental given expansive ECJ rulings. Drawing attention to the options available to Member State governments, scholars have distinguished between ECJ rulings involving constitutional law (Treaty provisions) versus statutory rules (secondary legislation) (Stone

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<sup>6</sup> See Mattli and Slaughter 1998 for a review.

Sweet and Caporaso 1998). In order to change or reverse an ECJ decision interpreting the Treaty, Member States must reach a unanimous decision to amend the Treaty in a way that would change the meaning or scope of the judicial decision: a relatively difficult act to achieve (e.g. Alter 1998; Stone Sweet and Caporaso 1998). On the other hand, judicial decisions altering the meaning of secondary legislation could be subsequently amended through new secondary legislation: an endeavor that varies in difficulty depending on the policy area (e.g. varying voting and consultation procedures), but is generally less challenging to achieve than Treaty amendments (Stone Sweet and Caporaso 1998). Thus, we might expect that expansive rulings involving secondary legislation (as is most often the case in EU environmental litigation) will be less likely to enhance EU organizations' power in a particular legal domain relative to Member State governments, than similarly expansive rulings invoking Treaty provisions.

These expectations guide the following case law analysis.

### **The Wild Birds Directive and Member State Non-Compliance**

Council Directive 79/409/EEC (the Wild Birds Directive) constituted the first binding legal instrument for Community wide nature conservation programs.<sup>7</sup> Essential to the ECJ's role in the evolution of EU natural conservation measures was first, a decision by Member States to develop at least some natural habitat protection measures as embodied in the Wild Birds Directive and second, the strategic action on the part of environmental non-governmental organizations (NGOs) to file complaints with the Commission, which subsequently led to the ECJ to develop an Article 226 case law on habitat protection. Together these two factors provide the background for the individual action before national courts pursuant to Art 234 in the area of nature conservation, which enabled the Court's subsequent judicial rulemaking in this legal domain.

#### The Origins and Adoption of Council Directive 79/409/EEC

The origins of the Community nature protection measures are traceable to the activism and influence of environmental non-governmental organizations (NGOs) in the early 1970s. Following considerable public pressure in 1973, a committee comprised of national environmental ministers announced a "study with the view to possible harmonization of national regulations on the protection of animal species and migratory birds" and suggested the need for future Commission proposals on the subject.<sup>8</sup> By the end of 1974, the Commission had issued a recommendation on the subject, yet it went little further than a suggestion that all Member States should adopt various international conventions on

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<sup>7</sup> Scholars observe that until the late 1980s most Member State governments were under the impression that nature conservation was under their "exclusive competence" despite the existence of Community obligations since 1981 under the Wild Birds Directive (Krämer 2000: 131). The Community officially gained an explicit competence in the area of nature protection with the addition of Art 175 (ex 130s) in the Single European Act (see general overview of EU environmental policy in Chapter 2). However, relinquishing national control over nature conservation has been very slow: mainly for the reason of overlapping with sensitive national issues such as land use planning and the structural weaknesses (in terms of enforceability) of both national and EU nature conservation measures (Krämer 2000: 131).

<sup>8</sup> Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the Programme of action of the European Communities on the environment, OJ 1973 No. C 112/1 p. 40. Generally, there was a growing public awareness of environmental concerns in Europe at this time (e.g. the 1972 Stockholm Conference on the Environment and the Club of Rome "limits to growth"). The growing public awareness and pressure to address these concerns at the Community level became more salient in 1973 with the addition of three new Member States with comparatively active nature conservation movements (Denmark, Ireland and the United Kingdom) (see Krämer 1993 for an historical overview of the development of EC nature protection policy).

the protection of birds, and made no mention of Community legislation on the topic.<sup>9</sup> It wasn't until a group of leading national and international conservation organizations presented a petition on the protection of migratory birds to the European Parliament, Commission and Council that legislative action at the Community level would begin.<sup>10</sup> This NGO activism and pressure led to a European Parliament Resolution in 1975 urging the Commission and Council to take legislative action to protect migratory birds.<sup>11</sup> After two Commission amendments and many subsequent modifications,<sup>12</sup> the Council unanimously adopted the Wild Birds Directive (79/409/EEC) on 2 April 1979.<sup>13</sup>

The Community adoption of a nature conservation measure exceeded its powers as granted by the EEC Treaty.<sup>14</sup> Thus, the Council justified adoption of the Directive under Article 235 of the Treaty and was careful to explicitly link the need for a Community wide nature protection measure to the functioning of the Common Market.<sup>15</sup> Despite this link to economic objectives, the Wild Birds Directive introduced for the first time at the Community level that nature protection could at times override national economic priorities.<sup>16</sup> However, the real commitment to shift control over national natural habitat protection to Community legislators was not entirely clear. The Directive introduced general rather than specific requirements for protection that have resulted in significant national level conflicts over various portions of the provision: from hunting regulations (Article 7 and 8) to the allowable national derogations (Article 9) (Krämer 2000: 65; 1991a: 25-6). Stated generally, the Wild Birds Directive provided a legally binding

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<sup>9</sup> Commission Recommendation 75/66/EEC of 20 December 1974 to Member States concerning the protection of birds and their habitats, OJ 1975 No L 21/24. In particular, it recommended that Member governments should accede to the 1950 Paris Convention of Birds (signed at Paris on 18 October 1950, 638 UNTS 185) and the 1971 Ramsar Convention on Wetlands of International importance especially to waterfowl habitat (adopted on 3 February 1971 in Ramsar, Iran, 996 UNTS 245), if they had not already done so.

<sup>10</sup> These conservation groups have an extensive history of political influence on wildlife protection measures in Western European countries and also international conventions in this field. Historically, European conservation NGOs are characterized by their affluent membership base and also their greater degree of political power and influence than their general ecology counterparts (see Dalton 1994). Both national organizations as the Royal Society for the Protection of Birds in the UK and international associations, such as the International Council for Bird Preservation (ICBP or Birdlife International as it is now called), have been lobbying for habitat protection since the early 1920s (see Bowman 1999 for a historical overview of the role of NGOs in international treaties on bird protection).

<sup>11</sup> Resolution of 21 February 1973 on Petition No 8/74, titled "Save the Migratory Birds" OJ 1975 No C 60 p.51. Scholars have suggested that it is this pressure that led to various MEP questions on the subject and that ultimately this helped provide the political momentum to develop the Wild Birds Directive (see Wils 1994: 220).

<sup>12</sup> The original proposal (Proposal for a Council Directive on bird conservation, OJ 1977 no C 24 p.3) was submitted to the Council in 1976 and modified eight months later to take account for European Parliament amendments (OJ 1977 No C 201/2). Subsequently, it took the Council 20 months, after a series of modifications, to adopt the proposal. Although generally these amendments weakened the overall protection program (by diminishing the Commission's supervisory role, see pages 63 and 123), some changes did extend the explicit protection provided for certain birds (see pages 53, 102 and 128) (see Wils (1994) for a legislative history of the Wild Birds Directive).

<sup>13</sup> OJ 1979 L 103/1.

<sup>14</sup> Prior to the Single European Act (SEA) in 1987, the EC Treaty made no mention of environmental protection. Thus, prior to the SEA the legal basis for nature conservation was Article 308 (ex Art 235). (See Krämer 2000 for the legal instruments for Community environmental law).

<sup>15</sup> The Directive states: "Effective bird protection is typically a trans-frontier environmental problem entailing common responsibilities... (and) the conservation of the species of wild birds naturally occurring in the European territory of Member States is necessary to attain, within the operation of the common market, ... the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion." (Council Directive 79/409/EEC OJ L103, p.1)

<sup>16</sup> Article 2 of the Directive states: "Member states shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level" (Council Directive 79/409/EEC OJ L103, p.1). Scholars agree this passage places economic and recreational considerations second to habitat protection (see Nollkaemper 1997: 276; Wils 1994: 226).

instrument that placed a specific obligation on Member State governments to protect certain birds and their habitat. Yet, at the same time, certain Articles of the Directive provided Member States with wide latitude to define how this protection would be implemented into their national legal systems. It is this tension that began a cycle of mobilization and litigation that overtime has expanded the meaning and scope of EU nature conservation regulations.<sup>17</sup> However, despite this expansion, the initial lack of a Treaty basis for nature protection has weakened the overall competence of Community organizations *vis a vis* Member State governments in this area of law.

### Member State Non-Compliance: Environmental Activism and Article 226 Litigation

Until the mid 1980s Member States had all but ignored their obligations under the Wild Birds Directive. While all Member States possessed national legislation on the protection of birds by the implementation deadline (6 April 1981), many national regulations did not fully implement or were in conflict with provisions of the Directive.<sup>18</sup> In general, national implementation of Directive 79/409/EEC has been fraught with errors: in 1991 and again in 1998 the Commission announced that only Denmark was in full compliance with the directive, nearly 20 years after the Directive's adoption.<sup>19</sup> Yet this lack of commitment on the part of Member State governments provided non-governmental organizations with the opportunity to participate in EU policy expansion, even without an explicit "right" to individual action for environmental protection. National and transnational environmental NGOs use of the Commission's complaint procedure has provided detailed compliance information that was otherwise extremely difficult for the Commission to collect.<sup>20</sup> Subsequently, these complaints have activated the ECJ via the Article 226 procedure making the Wild Birds Directive the most litigated piece of EU environmental law (Wils 1994).<sup>21</sup> In 1990 alone, the Commission received 129 complaints in the area of nature compared to only 32 pertaining to air quality or even 104 in water quality.<sup>22</sup> It is this Article 226 litigation that marks the beginning of the Court's judicial rulemaking in the area of nature conservation and provided the legal

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<sup>17</sup> The Habitat Directive (92/43/EEC) is the only other explicitly nature conservation measure adopted by the Community. Despite its seemingly larger scope of protection (e.g. flora and fauna rather than just birds), it has weakened the priority given to conservation measures in the face of national "economic and social interests" (see Article 6). I will discuss this Directive in greater detail below. Directive 79/409/EEC and 92/43/EEC are the two main EU laws on habitat protection. Directive 78/659/EEC on the protection of fish habitats and Directive 79/923/EEC for shellfish constitute two more, yet both have failed to provide any real protection (Krämer 2000: 138; also see CEC 1995, summary report on the application of the Directives 78/659/EEC and 79/923/EEC). Directive 85/337/EEC also has some relation to habitat protection, as it provides the mechanism for environmental impact assessment of public and private projects.

<sup>18</sup> One general problem was that in a number of Member States, this legislation was hunting legislation rather than the bird conservation (see Krämer 2000).

<sup>19</sup> CEC (1991), Eighth Annual Report on the Monitoring of the Application of Community Law (1990), COM (91) 338, p. 220; CEC (1998), Sixteenth Annual Report on the Monitoring of the Application of Community Law (1997), COM (98) 317, p. 21. And even Denmark's compliance rate is questioned by some scholars (e.g. Pagh 1999).

<sup>20</sup> See Second Annual Report on the application of Directive No. 79/409/EEC on the conservation of wild birds (1993) COM (93) 572 Final, p. 113; Krämer 1991a: 25.

<sup>21</sup> This claim is made by Wils (1994). Utilizing the OJCD database and the European Court Reports, I examined this litigation. Between 1976-1999, national transpositions of the Wild Birds Directive were the subject of 16 ECJ rulings pursuant to Art 226 infringement proceedings. Of these cases, one third of the total cases addressed the issue of designation of special protection areas (Art 4 of the Directive) and the others dealt with general protection (Art 5), hunting provisions (Art 7), allowable derogations (Art 9) and general complaints stemming from a complete lack of national legislation implementing the Directive. While this claim holds in reference to litigation pursuant to Art 226, the preliminary ruling data in Chapter 3 illustrates this does not hold for Art 234 litigation. While this Directive is invoked in a significant number of preliminary references, as discussed later in this Chapter, EU Waste Directives are the subjects of the greatest overall amount of EU environmental litigation (see also Cichowski 1998).

<sup>22</sup> Commission Document P-5 of 8 February 1990, First Commission Report on the Implementation by Member States of EEC Environmental Law.

precedent that would later be essential for Article 234 rulings involving direct action before national courts.

The significance of this case law is two fold. First, it enabled the ECJ to begin to bring further clarity and precision to the real protection provided by the Directive and thus, expanded the claims possible before national courts. In its case law, the Court has reemphasized the general scope of the protection provided by Article 1 and 2 of the Directive. For example, ECJ rulings clarified the Directive as applying to “the European territory of a Member States as a whole” which led to the correction of national legislation in Belgium and France that limited protection to their own territory.<sup>23</sup> Further, in its very first judgments<sup>24</sup> on the Directive and also in a later judgments<sup>25</sup>, the Court has interpreted Article 2 as providing a general philosophy rather than providing a general principle that could restrict other provisions of the Directive (a principle that would have empowered national governments to derogate from protective measures for economic reasons). On this later point, Member States have not arrived at a similar opinion, with both Italy and Belgium arguing that the economic and recreational requirements mentioned in Article 2 enable them to implement national legislation that restrict the protection provided by other Articles of the Directive.<sup>26</sup> Further, the Court has expanded the protection provided against the hunting of birds,<sup>27</sup> and has restricted the general derogations originally allowed in Member State transpositions (Article 9).<sup>28</sup>

Second, this case law has implications for the direct effect of the Wild Birds Directive. However, this is judicial rulemaking is different than in other legal domains, such as the Court’s gender equality case law. The Court’s decisions regarding Directive 79/409/EEC have not expanded the provision in a way that confers new rights on individuals. That is, an individual cannot claim an individual right to nature conservation, whereas, following the ECJ’s *Dekker* decision pregnant workers could seek direct protection from discrimination and unfair treatment before a national court on the basis of the Equal Treatment Directive – an important difference when an individual or association is faced with questions of *locus standi* before national courts. Instead, the Court’s Art 226 litigation has provided greater clarity and precision to the Wild Birds Directive so that it might be successfully utilized before national courts. The logic follows.

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<sup>23</sup> Commission v. Belgium 247/85 (paragraph 18-23) and Commission v. France 252/85 (para 13-16).

<sup>24</sup> Case 247/85 and Case 252/85 at paragraph 8.

<sup>25</sup> Commission v. Germany Case 57/89 1991 ECR 903. While interpreting Article 4 (4) (the requirements for Special Protection Areas (SPAs) and in particular the allowable factors that can be give priority over SPA designation), the Court has argued that the “interests referred to in Art 2 of the Directive, namely economic and recreational requirements, do not enter into consideration”). The Court further held that this argument applied to Art 4 (1) and (2) in Case 355/90 paragraphs 16-19 and in relation to the interpretation of Art 7 (hunting provisions) in Case 435/92 paragraph 19 and 20.

<sup>26</sup> Written observations from Case 247/85 and 262/85.

<sup>27</sup> Case 157/89 *Commission v. France*

<sup>28</sup> Article 9 originally authorized wide derogations from the general system of protection as laid down in Articles 5-8. The Court’s case law in effect has expanded the scope of reasons that do not allow Member State derogations: this includes agricultural, forestry or fishing purposes in general (Case 412/85 paragraph 25), historical and cultural traditions (Case 236/85 paragraph 20 to 23) and as previously mentioned that Article 2 does not allow for reasons not specifically mentioned in Article 9 (Case 247/85 and 262/85). Article 9 (1) (c) has been particularly controversial. This provision “permit (s), under strictly supervised conditions and on a selective basis the capture, keeping or other judicial use of certain birds in small numbers.” The Court has held that the “small numbers” refers not to an absolute criterion, but refers to the overall maintenance of the species (Case 252/85). This case had involved the capture of several hundred thousand thrushes and skylarks by certain French departments who had argued this was a “very small percentage” and thus, was consistent with the Directive despite the Court and Commission’s opposition conclusion. Interestingly, the ECJ had no other choice but to declare the case as unfounded because the Commission hadn’t explicitly contested the French interpretation of “small numbers” and in Art 226 cases the burden of proof lies entirely on the Commission’s side (see paragraph 30 of the decision). Despite this seemingly non-adverse ruling (the French practice remained in place), the ECJ judgment provided a precedent that argued for a higher standard of protection and would be utilized in subsequent cases. I discuss this in the Article 234 litigation.



Article 189 of the Treaty gives the impression that individuals and environmental organizations cannot directly rely on the provisions of Directive 79/409/EEC, instead they must rely on the national legislation transposing the measure.<sup>29</sup> However, following the Court's doctrine of direct effect, a directive can be directly applicable given that it is "unconditional and sufficiently precise" and "in so far as the provisions define rights which individuals are able to assert against the State" (*Becker* decision).<sup>30</sup> The Wild Birds Directive's failure to meet these criterion (especially, providing individual rights) has led some scholars to argue why this provision does not have direct effect – in that it is not fully capable of individual action before national courts (Miller 1998: 35; Geddes 1992: 38).<sup>31</sup> Despite this lack of a clear right to individual action before national courts, overtime legal scholars and national judges have come to agree on the direct effect of Arts 5 through 9 of the Directive, and parts of Art 4.<sup>32</sup> The Article 226 litigation was crucial to this acceptance, as the ECJ rulings gave greater precision and clarity to the Directive, providing national courts with guidance on how the Directive must be interpreted which ultimately enabled applicants to invoke this EU law before some national courts.<sup>33</sup>

How have individuals been able to bring legal action before national courts to force national compliance without an explicit "right to action" in EU law? In the case of the Birds Directive, individuals and environmental associations are often given some national level administrative or legal recourse against state authorities that fail to comply with their duties as established in national law. If the national or regional authority responsible to implement a certain prohibition as required by the Directive has failed to enforce established law (e.g. ban on hunting certain birds), national law may provide some avenue for groups and individuals to initiate administrative procedures (complaints, or possibly legal action) to ensure the law is enforced. Thus, national rules on legal recourse to administrative decisions and *locus*

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<sup>29</sup> Describe full text of Art 189.

<sup>30</sup> *Becker* [1982] ECR 53. This case built on the Court's earlier jurisprudence establishing the main tenets of the direct effect doctrine especially in relation to Directives: *Van Gend en Loos* Case 26/62 [1963] ECR 1; *Van Duyn* [1974] ECR 1337; *Ratti* [1979] ECR 1629.

<sup>31</sup> In addressing the issue of direct effect, Miller concludes that if the Wild Birds Directive does not recognize the rights of individuals and "if the protection of the rights or interests of human individuals is a *sine qua non* of direct effect, then the Birds Directive (and its cognates) cannot have this property" (1998: 35). Further, Geddes points to the difficulties with EU environmental law and the challenge to gain access to national courts: "There are many provisions of Community environmental law which have direct effect but where it cannot be said that those provisions were intended to protect health or welfare of individuals as to create 'Community rights' which a national court must uphold" (1992: 38).

<sup>32</sup> The high courts of France, the Netherlands and Belgium have recognized the direct effect of Arts. 5-9 of the Directive. Cases include: France, Conseil d'Etat, Case 41.971, 7 December 1984; The Netherlands, Afdeling Rechtspraak Raad van State, Case A-1.0511, 6 March 1986; Belgium, Conseil d'Etat, Case 31.573, 9 December 1988. It is interesting to note that in a 1991 ruling, Case 100 27 February 1991, the highest administrative court in Italy, Consiglio di Stato, denied direct effect to the Wild Birds Directive. Scholars have criticized this judgment as being in error (see Wils 1994: 239 note 126). Further, scholars suggest that the Court's rulings on Article 4 (designation of protection areas) have further clarified why the requirements of portions of this Article (paragraphs 1 and 2 in particular) are clear and unconditional and therefore, directly effective (Krämer 1991b: 46).

<sup>33</sup> For example, following a series of ECJ ruling clarifying the hunting provisions of the Directive (Case 157/89 *Commission v. Italy* 1991 ECR 83 and Case 334/89 *Commission v Italy* 1991 ECR 93), a series of Italian national court's utilized these rulings to uphold claims made against the local authorities for allowing the hunting of birds that were protected by the Directive, but remained unprotected by Italian law (Regional Administrative Tribunal of Umbria, 4 March 1992, no. 70, Riv. giur. amb. (1993), 310; Reg. Adm. Tri of Lombardy, sec. II, 10 Sept. 1992, no. 603; Pretore of Terni, 24 Sept, 1992, Kir. Com. Sc. Internaz. (1993), 381; Court of Cassation (criminal, joined section, 28 Dec. 1994, No. 25, Cassazione penale (1995), 892; Constitutional Court, 22 July 1996, No. 272, Const. St. (1996), II, 1239.) However, prior to these ECJ ruling numerous Italian courts maintained that the Directive did not have direct effect, and thus individual claims were not admissible (e.g. Reg. Adm. Tr. Of Marche, 10 April 1985., No. 116, Foro amm. (1985), 1978; Reg. Adm. Tr. of Sicily, 30 May 1986, I Tar (1986), I, 2557; Consiglio di Stato, sec. IV, 27 Feb. 1991, No. 100, Riv. it. dir. pubbl. com. (1992), 506).

*standi* for environmental groups are the more important criterion that has to be fulfilled, rather than the actual rights embodied in the EU provision.<sup>34</sup>

## BIRDS AND BEYOND: EVOLVING EU NATURE LAWS

The Wild Birds Directive, together with the ECJ's Art 226 case law, has in effect given individuals and environmental organizations the ability to bring legal action before national courts without a "right of action" (Krämer 1991b: 52). The legal norm was not designed to give rights to individuals or associations. However, overtime, this Directive has enabled legal action before national courts. In this second part, I examine how this litigation, in the form of Article 234 preliminary rulings, in turn pushes for further institutionalization in the field of EU environmental policy. Have the rules governing EU nature protection become more precise, binding, and enforceable? Furthermore, how has the scope been expanded? In this final, perhaps most important stage, I explore the feedback effects of this strategic action and rulemaking. How have the rulings changed the litigating environment, and what are the policy consequences of these changes? How have they affected the intergovernmental or supranational nature of this policy sector? Furthermore, who are the main actors fueling this evolution? The following two sections will explore this dynamic.

### Effects on Litigation

The following case law analysis focuses on the sources and consequences of the Court's Art 234 rulings involving the Wild Birds Directive. This is an important area of EU environmental case law not only because it is the main focus of infringement proceedings, but also because it involves the greatest number of environmental association or NGO sponsored litigation before national courts (e.g. Cichowski 1998). Further, this Art 234 case law offers a comparison to studies involving the Court's jurisprudence in other policy areas concerned with positive integration: such as gender equality (see Tesoka 1998; Cichowski 2001). First, similar to the gender equality area, nature protection was not a priority for the Community and the ability of individuals and associations to bring claims before national courts, that in effect force national compliance, was certainly not foreseen. I explore the dynamic interaction between national mobilized interests, national courts and the ECJ's judicial rulemaking function as an explanation for this similar outcome. Second, the variation in legal basis between EU gender equality law and environmental law (Treaty versus secondary legislation) enables us to explore how this may affect Member State governments' ability to change, reverse or amend undesirable ECJ rulings that involve these varying EU laws. The outcome is crucial to the overall policy consequences of this litigation, as it enables us to understand if and how Member State governments have controlled the evolution of EU nature protection laws.

### The Legal Basis for Nature Conservation Litigation

This litigation has primarily grown out of legal claims under Directive 79/409/EEC.<sup>35</sup> The majority of cases involve environmental associations bringing legal action against a public authority for wrongful implementation of the Directive. Not surprisingly, these have arisen in national legal systems that are more hospitable to legal action by environmental organizations: France, Belgium, Italy and the United Kingdom. The remaining cases involve criminal proceedings in which an individual charged with

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<sup>34</sup> See Krämer (1991b: 52).

<sup>35</sup> In the time period of this study 1976-1997, only one case invoked Council Directive 92/43/EEC the Habitats Directive (Case 44/95, this will be discussed in the subsequent section), all other cases involved the Wild Birds Directive.

violating national environmental regulations questions the compatibility of the national practice with EU law. Unlike the area of gender equality law, litigants do not have the strength of a directly applicable Treaty-based right to back their environmental claims.<sup>36</sup> Theoretically, we might also expect the ECJ to have a diminished basis to make expansive rulings without the strength of a Treaty provision (e.g. Ellis 1998). However, this helps explain why the Court's prior Art 226 case law has played an important role in the development of the ECJ's preliminary rulings in this area. Even in the absence of a clearly defined EU environmental right, this case law provided the Court with a strong legal precedent to respond to the legal claims brought by individuals and environmental groups and decide in a way that often changes national laws. The following case law analysis illustrates this dynamic.

### Judicial Rulemaking and the Evolution of EU Nature Conservation Policy

The first preliminary ruling involving the Wild Birds Directive came by way of a Dutch court in the *Gourmetterie Van den Burg* case.<sup>37</sup> This case involved Art 14 of the Wild Birds Directive that allows Member States to adopt more stringent nature protection measures. The reference originated from a Dutch appellate court in which the plaintiff was appealing the charge that he had wrongfully imported a bird species, which was protected by the Dutch law implementing Council Directive 79/409/EEC. The plaintiff argued that the Dutch interpretation of the EU law presented an obstruction to the free movement of goods. Since Article 14 of the Directive permits stricter implementation, the legal question revolved more particularly around whether the Netherlands' preventing the importation and consumption of a wild bird, a red grouse, lawfully hunted in the United Kingdom was simply too strict.

The ECJ cited its prior case law and argued that while the Directive aimed at a high level of protection for bird species specifically listed in Annex I, the Dutch law went beyond this protection.<sup>38</sup> In short, the ECJ held that a Member State government couldn't extend its laws to protect species falling outside the concerns of the Directive and particularly when that species fell within another member's territory. While Art 14 of the Directive originally allowed for the implementation of more stringent nature conservation measures, the ECJ does not hesitate to restrict this right, especially when it infringes too deeply on Community free trade norms.

Four years later the Court would have the opportunity to rule on another preliminary reference involving the Wild Birds Directive. The case originated from a French administrative court and resulted from six actions brought by French environmental associations against a local authority questioning the compatibility of a decision to fix hunting dates with the regulations laid out in Art 7 of the Directive.<sup>39</sup> Again, the ECJ referred to its prior case law to reaffirm: first, its earlier interpretation that Art 7 provides

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<sup>36</sup> Article 2 of the EC Treaty (as amended by the SEA in 1987) incorporated the environment as one of the Community's objectives: "...a high level of protection and improvement of the quality of the environment." This general objective is further elaborated under Articles 6, 95 (ex 100a), 161 (ex 130d), 175 and 176 (ex 130s and 130t). Scholars have made persuasive arguments as to why Art 130r should be able to be relied on by individuals in national courts (Doyle and Carney 1999). Yet the ECJ has yet to rule on the direct effect of EU environmental treaty provisions, and has only twice explicitly addressed the direct effect of environmental directives. See Holder 1996: 324. The Court held in Case 361/88 (*Commission v. Germany* 1991 ECR 2567) that directives that fix quality standards (the case dealt specifically with Directive 80/779/EEC on air quality) also confer rights on individuals: "whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely upon mandatory rules in order to be able to assert their rights" (ECJ 1991 at 2601). Surprisingly, this clear statement of rights has not led to further legal action in national courts. Finally, the Court was also asked in a preliminary reference from Italy whether Art 4 of Directive 75/442/EEC on waste confers rights on individuals. The Court answered in the negative (Case 236/92 *Difesa della Cava* 1994 ECR 483, at paragraphs 14-15).

<sup>37</sup> Case 169/89 *Criminal Proceedings against Gourmetterie Van den Burg* [1990] ECR 2143.

<sup>38</sup> The Court refers to its judgment in Case 252/85 *Commission v France* 1988 ECR 2243 which makes a general statement of the importance of EU nature conservation measures.

<sup>39</sup> Case 435/92 1994 ECR 67.

a system of complete protection (para. 9),<sup>40</sup> and second, that it does not allow a Member State to fix closing dates for hunting season that vary by species (paras. 20-22).<sup>41</sup>

All parties did not agree with this interpretation of the Directive. Both the French Government and the French hunting association involved in the case argued that the Court's past case law (Case 157/89 and Case 262/85) provided that staggering of closing dates was compatible with Art 7. The Court did not concur:

Accordingly, the reply to the first question referred should be that pursuant to Article 7(4) of the Directive the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees complete protection of those species during the period of pre-mating migration and that, as a result, methods whose object or effect is to allow a certain percentage of the birds of a species to escape such protection do not comply with that provision (paragraph 13).

Following the Court's interpretation of Article 7 (4), local authorities were given less discretion over hunting regulations and were now required to give greater protection to nature conservation.

National hunting provisions were subject of another preliminary reference originating from Italy in 1994. The *WWF Italia* case<sup>42</sup> concerned Art 9 of the Directive and specifically the question of how far national governments were allowed to derogate (Art 9) from the hunting prohibitions outlined in the Directive (Art 5 and 7). The case involved seven Italian environmental organizations<sup>43</sup> that instigated legal proceedings against the Region Veneto for the annulment of a measure that fixed the hunting calendar. The groups argued that this law, Italian Law No 157 of 11 February 1992 (which transposed the Wild Birds Directive), was in violation of the principles laid down in the Directive by allowing the hunting of certain protected bird species.<sup>44</sup> The defendants in the case, the Italian authorities (Region Veneto) in cooperation with a hunting federation, argued that the hunting regulations in question did not involve Directive 79/409/EEC but instead should focus on the national law in question. While the national court generally agreed with this argument, the judge decided to suspend the proceedings to ask the ECJ for an interpretation of Art 9.

The ECJ did not agree with the defendants in the case. This 1996 ruling was of particular significance as the Court made a clear argument why individuals should be able to invoke the Wild Birds Directive before national courts. And more importantly, why national courts were obligated to respond. The Court relied heavily on its prior case law to make this argument:

Next, where by means of a directive the Community authorities have placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before the courts and national courts were prevented from taking it into consideration as an element of Community law (Case 8/81 *Becker v Finanzamt Muenster-Innenstadt* [1982] ECR 53, paragraph 23). Consequently, wherever

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<sup>40</sup> Case 157/89 *Commission v. Italy* 1991 ECR 57.

<sup>41</sup> Case 247/85 *Commission v. Belgium* 1987 ECR 3029; Case 262/85 *Commission v. Italy* 1987 ECR 3073.

<sup>42</sup> Case 118/94 1996 ECR 1223.

<sup>43</sup> Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l' Ambiente, Comitato Regionale, Lega Anti Vivisezione - Delegazione Regionale, Lega per l' Abolizione della Caccia, Federnatura Veneto, Italia Nostra - Sezione di Venezia.

<sup>44</sup> The Italian law is described in the judgment: "Under Article 1(3) of on the protection of warm-blooded wild fauna and on hunting (GURI No 46 of 25 February 1992, supplement, p. 3, "Law No 157"), ordinary regions (regioni a statuto ordinario) are to adopt regulations governing the management and protection of all species of wild fauna in accordance with Law No 157, international conventions and Community directives. Article 1(4) of Law No 157 wholly transposes and implements Directive 79/409/EEC in the manner and within the time-limits prescribed by that Law" (ECJ 1996, paragraph 7).

the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against any authority of a Member State where that State has either failed to implement the directive in national law by the end of the period prescribed or has failed to implement it correctly (Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839, paragraphs 29 and 30). Moreover, a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means (Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629 and Joined Cases C-13/91 and C-113/91 Debus [1992] ECR I-3617, paragraph 32.)

Further, the ECJ reemphasized its earlier judgments<sup>45</sup> taking a very narrow view of the derogations allowed by the Directive: suggesting that the Italian practices were inconsistent with the objectives of the Directive. This case clearly marks the successful use of the Directive by environmental associations before national courts and also the Court's judicial rulemaking that in effect narrows the derogations that were originally allowable under Community law.

The following two 1996 preliminary rulings resulted from criminal proceedings and illustrate the Court's expansion and reemphasis of the general protection provided by the Directive (Art 1 and 2) and when this is can be extended in light of stricter national measures (Art 14). In the *Vergy* case,<sup>46</sup> a French man was charged with having offered for sale and sold a live bird that was protected by conservation legislation in France. The species in question was a dwarf Black Canadian goose<sup>47</sup> and it was born and raised in captivity. The defendant argued that the French legislation did not apply to such species, and if it did, it was contrary to the Wild Birds Directive. The French court stayed the proceedings and asked the ECJ for an interpretation of the Directive. In response, the ECJ held that the Directive does allow for the prohibition of trade/sale of species not listed in Annex III, but only those species that are naturally occurring in the wild state of the European territory. Further, birds that are born and bred in captivity are not within the scope of the Directive. Finally, the Court again cited Case 252/85 to argue that Member States are required to provide "complete protection," to the species listed in the Directive, regardless of whether their natural habitat is in the Member State in question. This ruling provided greater clarity and precision to the real protection provided by the Directive. Furthermore, it illustrates that the Court is at times willing to uphold national conservation legislation even when it restricts trade: a ruling that is counter to the ECJ's earlier decision in *Van den Burg*.

The *Van der Feersten* case,<sup>48</sup> a preliminary reference from the Netherlands, gave the ECJ another opportunity to decide on the scope of protection and in particular, the compatibility of more stringent national measures. Mr. Van der Feersten was charged with possessing a bird that was imported from Denmark where it received no conservation protection, but that was protected by Dutch law. Further, the sub-species of the bird did not occur in the wild in Netherlands or within the European territory. The species however did occur within the European territory. In order to decide the case, the Dutch court asked whether the Directive protected such non-European subspecies and whether this measure was

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<sup>45</sup> The Court cites its previous case law stating that derogations must be implemented in a clear and concise way and refer to specific national provisions (Case 252/85 Commission v France 1988 ECR 2243; Case 262/85 Commission v Italy 1987 ECR 3073; Case 247/85 Commission v Belgium 1987 ECR 3029; Case 339/87 Commission v Netherlands 1990 ECR 851). Further, the national legislation that in principle limits hunting, but then doesn't remain vigilant to regional rules that are in violation, is incompatible (Case 157/89 Commission v Italy 1991 ECR 57).

<sup>46</sup> Case 149/94 1996 ECR 299.

<sup>47</sup> The species name is *branta canadensis minima*.

<sup>48</sup> Case 202/94 1996 ECR 355.

considered a strict national measure that was allowable under Art 14 of the Directive, and if so is it allowable even when the bird is not protected in Denmark. The Court upheld the Dutch law by answering the first question in the affirmative (making the subsequent questions redundant):

It follows that, if the scope of the Directive were to be limited to those subspecies which occur within European territory and did not extend to non-European subspecies, it would, as the French and Netherlands Governments and the Commission essentially argue, be difficult to implement the Directive in the Member States, with the consequent risk that it might not be uniformly applied within the Community. Such an outcome would run counter to the aim of providing effective protection for European avifauna and could also give rise to distortions of competition within the Community (paragraph 16).

The ruling expanded the scope and meaning of the Directive. In effect, the ruling extended the Court's earlier judgments of wide protection, but went one step further by suggesting situations in which certain non-European birds could receive protection (despite the Directive's clear limitations to only "...the species of wild birds naturally occurring in the European territory of the Member States").

While the previous preliminary rulings dealt with the Directive's hunting provisions, allowable stricter national measures, and general protection, it wasn't until a preliminary reference from the United Kingdom, in the *Lappel Bank* case,<sup>49</sup> that environmental groups were able to bring up the issue of the Special Protection Areas (SPAs) provided for in the Directive (Art 4). The case concerns the relative freedom Member States have to take into account economic reasons when designating SPAs. The Royal Society for the Protection of Birds (RSPB) initiated the legal action in order to dismantle a decision by the Secretary of the State of the Environment to exclude a portion of the Medway Estuary and Marshes, the Lappel Bank area, from SPA designation. The Estuary and Marshes are home to various waterfowl and serve as an important area for breeding and migration. The Secretary of State's decision to exclude this 22 hectare mudflat at Lappel Bank was made for economic reasons:

"...taking the view that the need not to inhibit the viability of the port and the significant contribution that expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude that area from the Medway SPA"(para 14, Case 44/95).

The Secretary of State argued that this decision was consistent with Article 2 of the Directive which stated: "Member States shall take the requisite measures to maintain the population of the species referred to in Art 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of *economic* and recreational requirements" (Art 2, Council Directive 79/409/EEC, emphasis added). The RSPB argued that the Directive did not allow for economic considerations to be regarded when classifying an SPA. A lower court and then an appellate court upheld the Government's decision. As a final resort, the RSPB appealed to the House of Lords. In order to decide the case, the House of Lords asked the ECJ for a correct interpretation of Art 4. In particular, whether economic reasons could be taken in consideration in the designation of SPAs. The ECJ's negative answer was legendary.

The Court again cited its past case law and stated quite clearly that economic interests could not override ecological objectives when constructing Special Protection Areas:

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<sup>49</sup> Case 44/95 1996 ECR 3805.

“...having regard to the aim of special protection pursued by Article 4 and the fact that, according to settled case-law (Case C-435/92 *APAS v Préfets de Maine-et-Loire and de la Loire Atlantique* [1994] ECR I-67, paragraph 20), Article 2 does not constitute an autonomous derogation from the general system of protection established by the directive, it must be held (see paragraphs 17 and 18 of *Santoña Marshes*) that the ecological requirements laid down by the former provision do not have to be balanced against the interests listed in the latter, in particular economic requirements” (ECJ 1996 paragraph 25).

This ruling flew in the face of the legal argumentation submitted by the UK and French governments. They both argued that Member States were obligated, when designating SPAs, to “take account of all the criteria mentioned in Article 2 of the Birds Directive, which is general in scope, and, therefore, inter alia, of economic requirements” (paragraph 21). The ECJ’s response came in one sentence: “Those arguments cannot be upheld” (paragraph 22). Further, the ECJ clarified its previous case law which had allowed for exceptions in the case of a general interest: “in the context of Article 4 of that directive, considered as a whole, economic requirements cannot on any view correspond to a general interest superior to that represented by the ecological objective of the directive” (ECJ 1996 paragraph 30).<sup>50</sup>

Scholars recognize the *Lappel Bank* decision as having far reaching consequences (e.g. Holder 1997; Harte 1997: 169). The significance is threefold. First, it illustrates that the Court will not hesitate to dismantle economic arguments posited by Member State governments in favor of Community nature conservation measures. This ruling further develops the Court’s case law, which places environmental protection as one of the “Community’s essential objectives”: a finding the Court made in 1985 before Community decision makers decided to do so two years later in the Single European Act (Case 240/83 *ABDHU*, ECJ 1985 ECR 531). As one scholar aptly put: “the case demonstrates the emergence of a Pan-European Environmental Law where environmental considerations may be recognised as more important than balancing the national interests of individual Member States” (Harte 1997: 169). Second, this ruling illustrates very clearly how Community environmental law can provide national environmental organizations with another opportunity for legal action when they have exhausted domestic legal routes and that the ECJ will be favorable to such claims.

The final case I will discuss represents another example of NGO activism and introduces the question of how far Member States can derogate from protective measures for the purposes of recreational criteria – in particular, the capture and breeding of wild birds by bird fanciers. The preliminary reference arose in an action brought by two Belgian bird groups<sup>51</sup> against the Belgian Regional Government of Wallonia.<sup>52</sup> The historical and legal background to this 1996 ruling is of particular significance as it illustrates the NGO – national court – ECJ relationship that can develop with the consequence of forcing Member States to comply with EU regulations.

As outlined in the facts and background to the case, the national practice in question involves *tenderie*, the act of capturing small birds, especially finches, for the purposes of breeding and display. This activity has long been a pastime in the Belgian Region of Wallonia. One party to the main proceedings referred to *tenderie* as a “deeply rooted ancestral practice.” Further, it was this national practice that led the Belgium government in the late 1970s to submit a reservation regarding allowable national derogations to both the Bern Convention on the conservation of European wildlife and habitats in

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<sup>50</sup> The two governments cited the Court’s *Leybucht Dykes* decision (Case 57/89 *Commission v. Germany* 1991 ECR 883) that stated exceptions to Art 4 were possible for reasons of general interest, yet these were specifically related to reasons of public health and safety. The Case involved work within a SPA that was necessary to protect a fishing village at risk of flooding.

<sup>51</sup> The conservation groups are the Belgian Ligue Royale Belge pour la Portection des Oiseaux ASBL and the Société d’Études Ornithologiques AVES ASBL.

<sup>52</sup> Case C-10/96 1996 ECR 6775

1979 and also the Wild Birds Directive.<sup>53</sup> Upon the entry into force of the Directive, the Wallonia regional government adopted an Order that allowed the regional authority to determine annually the number of species that could be captured. Subsequently, this regional law was the subject of Art 226 infringement proceedings and in a 1987 decision, the ECJ declared the law inadmissible under EU law.<sup>54</sup> In an attempt to correct the regulation, the Wallonia government adopted another Order in 1990 that provided greater specification of fixed numbers of wild birds that bird breeders could capture.<sup>55</sup>

Throughout this period, national authorities and environmental groups continued to scrutinize the regional authority, even without pressure from the Community to do so, and in 1991 the Belgian Conseil d'État annulled this regional law on the grounds that it infringed Community obligations laid out in the Birds Directive.<sup>56</sup> A similar fate awaited three more legislative attempts by the regional government between 1991-1994.<sup>57</sup> This NGO-national court activism illustrates how litigants cooperating with national courts can attempt to force compliance with Community laws, despite the lack of national government action to do so.

Yet resolution of this on going litigation-legislation conflict came to a halt in 1994 when the Conseil d'État drew the ECJ back into the circle. Again, two bird groups were responsible for bringing the legal action against the regional authorities, and in this case the question focused very specifically on whether capture of wild birds for the purpose of breeding and reproduction in captivity constituted an "other satisfactory solution" within the allowable derogations of the Directive (Art 9), for the purposes of the bird fancier to replenish its breeding population. Essentially, the Wallonia regulation allowed for a five-year transitional period in which bird capture was permitted, an action the bird groups argued was unnecessary for successful breeding. Since the national court had some reasonable doubt as to the scope of Art 9 on this issue, it stayed the proceedings and asked the ECJ for an interpretation.

In its legal argumentation before the Court, the Belgian government argued that Art 9 of the Directive did authorize the capture of protected bird species to enable bird fanciers to stock their aviaries, where breeding and reproduction of the species in captivity is possible but no yet feasible on a large scale. The ECJ did not concur.

In line with the observations of both the Commission and the plaintiffs (the Belgian bird groups), the Court argued that while Art 9 of the Wild Birds Directive and the previous case law<sup>58</sup> clearly allow for the capture and sale of wild birds for recreational purposes in fairs and markets, this has limitations. Member States may derogate from the prohibition on killing or capturing protected species laid down in Art 5 "only if there is no other satisfactory solution": in which the Court has previously held that

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<sup>53</sup> The Belgium government argued that 'the capture of birds for recreational purposes... will continue in the Walloon region', albeit ostensibly 'without prejudice to the Community provisions' (See Advocate General Fennelly's opinion, 1996 ECR 6775).

<sup>54</sup> Case 247/85 *Commission v Belgium* 1987 ECR 3029.

<sup>55</sup> On 13 September 1990, the Walloon Regional Executive adopted an Order on restocking by bird breeders permitting the capturing of fixed numbers of wild birds of each of 13 species, totalling 40 580 specimens.

<sup>56</sup> This Order was annulled by the Conseil d'État by a judgment of 11 June 1991, several months after the capturing season was over.

<sup>57</sup> A similar fate awaited the restocking Orders of 26 September 1991 and 8 October 1992, (11) both annulled by judgments of 4 November 1994 in each case, the Conseil d'État held that the capture of the birds in question was prohibited under the Directive, that the Walloon region was obliged to prove that there was no other satisfactory solution, and that it had failed to do so. In particular, the Conseil d'État did not consider that capture in the wild was justified pending the outcome of studies on the feasibility of breeding which the Walloon Regional Executive had ordered. Similarly, the regional government adopted another Order on 14 July 1994, which was subsequently annulled by the Belgian Conseil d'État on 7 October 1994. The Government persisted by adopting a new Order on 13 October 1994 authorizing the capture of the same quantities and species of birds as those covered by Annex XIII to the first Order (in the light of the need to supply bird breeders in order to accelerate the development of breeding). The Conseil d'État was quick to react and by judgment of 14 October 1994, ordered that implementation of this second Order be suspended immediately.

<sup>58</sup> See Case 262/85 *Commission v Italy* 1987 [ECR] 3073.



breeding and reproduction constitute such a solution.<sup>59</sup> However, the Court argued that the capture of birds to replace captive bird populations that could successfully be bred in captivity, if it weren't for limited facilities, could not be authorized by the Directive. Despite continued opposition by both the Belgian national and regional governments to have this practice regulated by Community law, the ECJ, activated by environmental activists and the willingness of a national court to engage the EU legal system, was able to shift the competence over this area of nature protection to the supranational level.

### **The Effects on Supranational and National Policy**

Natural conservation remains an integral part of EU environmental policy. Strategic action by national environmental organizations and the judicial rulemaking function of the Court have expanded the scope and competence of EU law in this area of environmental protection. What began as a piece of secondary legislation providing general protection for particular bird species and granting considerable national control over the regulation, has evolved into a set of rules (ECJ precedent) that in effect dismantle national practices that take a weak view of protection. Further, this ECJ precedent has entered the national legal system by way of national court application and acceptance of these rulings, which has subsequently enabled new legal claims that might not otherwise have been possible under national law. This dynamic has expanded EU competence in this area of law. Thus, similar to the Court's case law in the area of gender equality, through the process of litigation (in particular, the ECJ's clarification and interpretation of EU secondary legislation), EU environmental law has become more binding and precise and it has expanded in scope (see Cichowski 2001).

I now turn to the policy impact of these rulings. As earlier suggested, we might expect that the extent to which the Court's rulings expanded the scope of secondary legislation rather than a Treaty provision, there is a greater possibility that Member State governments can limit or reverse the impact of these rulings. Member States that are dissatisfied with the direction of the Court's rulings are able to change this outcome through secondary legislation alone, rather than attempting to revise the Court's interpretation of the Treaty: a much more daunting task (e.g. Pollack 1998; Stone Sweet and Caporaso 1998). The following sections explore this dynamic by examining the impact of the Court's nature conservation litigation on both EU and national policy change.

#### Supranational Consequences: Member State Governments Retaliate through Legislation

The Habitats Directive of 1992 was born out of this litigation.<sup>60</sup> In particular, its specifications and requirements for habitat protection resulted from the significant difficulties Member State governments experienced in implementing similar provisions of the Wild Birds Directive. Yet unlike other legislative outcomes of ECJ litigation, this piece of secondary legislation did not expand EU competence by codifying the Court's expansive interpretation of the EU law.<sup>61</sup> For comparison, I will briefly highlight this dynamic in another area of EU law: gender equality.<sup>62</sup> The Pregnancy Directive in effect codified the Court's interpretation of a general principle of equal treatment as embodied in Art 141 and subsequently the Equal Treatment Directive in the *Dekker* Decision: the Court held that discrimination from employment opportunities on the basis of pregnancy was incompatible with this principle of equality. This interpretation of both the Treaty and secondary legislation strengthened the

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<sup>59</sup> See Case 247/85 *Commission v Belgium* 1987 [ECR] 3029 paragraph 41.

<sup>60</sup> Directive 92/43/EEC OJ 1992 No L 206/7. See Holder 1997 and Baldock 1992.

<sup>61</sup> In the area of gender equality, it is well known that the Pregnancy Directive codified the ECJ's *Dekker* decision which created pregnancy and maternity rights in Community law (e.g. Cichowski 2001; Ellis 1993: 66)

<sup>62</sup> This comparison draws heavily from research appearing in Cichowski 2001.

Commission's legislative proposal and diminished Member State governments' power to control the direction of EU social protection. Given the Court's interpretations and the subsequent creation of pregnancy rights, Member States would have to amend the Treaty to change this outcome. Clearly, Member States attempted to offer minimal protection in the Pregnancy Directive, but generally it would have been exceedingly difficult to turn back this interpretation that the Treaty provided a general principle of equal treatment that had to be protected by national courts.

The Court and the Commission have not wielded the same amount of policy power in the area of nature protection. While the Court's case law pursuant to both Art 226 and Art 234 has clearly expanded the scope of the Community competence in the area of nature conservation, Member State governments have successfully constrained the impact of these rulings and ultimately retained control over the direction of the policy area. This outcome is traceable to the EU rule that is the subject of ECJ interpretation. Again, Member States have only to pass subsequent legislation to correct or change an ECJ ruling that expanded the meaning and scope of the Wild Birds Directive. Thus, it is not surprising that in the face of costly rulings that began to encroach on national government control over land use and habitat protection, Member States acted.

The Habitat Directive was the target of this Member State action. This piece of secondary legislation had been on the negotiating table for some time and was developed with the purpose of creating a "coherent European network of special areas of conservation (Natura 2000)."<sup>63</sup> The aim of the Directive is far reaching and broadens the scope of Community nature conservation beyond the protection of birds and their habitats as provided by the Wild Birds Directive: "to maintain or restore, at favorable conservation status, natural habitats and species of wild flora and fauna of Community interest" (Art 2 (2)). As the legislative proposal required Member States to designate special areas of conservation far surpassing earlier regulations regarding bird habitat, the degree of Member State control over designation of special protection areas remained contentious throughout the negotiations (Wils 1994). In particular, a particularly expansive ECJ decision regarding the Wild Birds Directive would eventually lead Member States to amend the proposal in a direction that both changed the Birds Directive and provided greater Member State control over decisions to designate and alter protected habitat in the future.

In 1991, the Court held, in the *Leybucht Dyke* decision that Art 4 (4) of the Wild Birds Directive provides protection, regardless of national economic interests/costs, in designated habitats.<sup>64</sup> At issue was the legality of a dyke that was being built in Germany in an area that had been designated as bird habitat. Although the Court agreed that construction of the dyke for the reason of protecting inhabitants from the risks of floods was lawful, the Court's argumentation clearly defined what exceptions were allowable. First, it held that pollution and deterioration could only be justified on exceptional grounds that correspond to a general interest that is "superior to the general interest represented by the ecological objective of the directive" (paragraph 22). Public health and safety is such a superior interest than can justify the loss of protected habitats and species.<sup>65</sup> Second, that the economic interests mentioned in Art 2 of the Directive are not allowable reasons (paragraph 22).<sup>66</sup>

This decision diverged greatly from the argumentation of Member State governments. In their argumentation before the Court, both the British and German governments argued that Art 4 must be interpreted to mean that the national authorities are to be given wide latitude in "weighing different interests" including social and economic concerns when deciding on potential changes to a designated

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<sup>63</sup> The Commission's proposed the Directive in 1988 and it received considerable negotiating from Environmental ministers in the Council until its passage in 1992 (COM (88) 381). The Habitats Directive draws from the Convention on the Conservation of European Wildlife and Natural Habitats, Bern 1979, UKTS 56 (1982). The Directive is generally duplicative of this international agreement, yet provides for greater enforcement capabilities as a piece of binding EU law.

<sup>64</sup> Case 57/89 *Commission v Germany* 1991 ECR 924.

<sup>65</sup> This test is now known as the *Lebucht Dyke* criteria (see Holder 1997: 1479). See paragraph 23 of the decision.

<sup>66</sup> The Court took a similar position in various other judgments: Case 247/85 1987 ECR 3029; Case 262/85 1987 ECR 3073.

area.<sup>67</sup> The Court did not concur. In particular, the ECJ was clear to state that the arguments put forth in the case regarding the economic interests of fisherman were “in principle incompatible with the requirement of the provision” (paragraph 24). This ruling represented the culmination of ECJ precedent that had slowly diminished the ability of Member State governments to place economic priorities over nature conservation. The message was heard loud and clear.

Prior to this ruling, the wording of Art 4 of the Wild Birds Directive had permitted considerable uncertainty as to the degree of protection required within designated special protection areas (SPAs) minimizing the impact of EU regulations on national land use policies. However, this “absolutist interpretation” or “robust decision” in effect significantly constrained national government flexibility to undertake construction in designated bird areas in the future – a degree of latitude that had prior to this ruling been available to some degree for “economic and recreational requirements” under Art 2 of the Directive (Nollkaemper 1997: 277; Holder 1997: 1479). The potential impact of the ruling was twofold. First, the Court’s interpretation of the Directive strengthened EU competence over national nature conservation regulations. The ruling in effect would have required numerous Member States to provide more extensive protection to SPAs than was currently embodied in national legislation.<sup>68</sup> Second, the decision strengthened Community control over national land use planning: an issue with considerable economic implications and thus, heavily guarded as an issue to be addressed at the Member State level (Krämer 2000: 131).

Member State retaliation came in the form of Art 7 of the Habitats Directive. In late 1991 following this ruling, certain Member States, including the UK, proposed an amendment to the Commission’s proposal for the Habitats Directive. In particular, Art 7 of this new Directive would bring the Wild Birds Directive in line with the less restrictive exceptions that were proposed to be added to the text of Article 6(4) of the Habitats Directive (namely, that economic and social reasons could justify national government derogations from protection).<sup>69</sup> Scholars observe that these amendments effectively reversed the *Leybucht Dyke* decision (Baldock 1992: 144; Holder 1997: 1479).<sup>70</sup> Following the passage of the Directive in 1992, Member States were now given greater latitude to authorize development in special protection areas as laid down by both the Habitats Directive and also in reference to habitats and species still requiring special protection under the Wild Birds Directive. Scholars have argued that as environmental law, the Habitats Directive is a “poor piece of legislation,” to the extent that it creates large loopholes allowing development in protected areas (Nollkaemper 1997: 286). This legislative act shifted the control over national conservation measures back into the hands of Member States.

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<sup>67</sup> See the decision at paragraphs 13-15 for the UK argument. And paragraph 12 for the German argument.

<sup>68</sup> For example, in the UK, SPAs are essentially SSSIs which are designated under the Wildlife and Countryside Act and the 1987 Department of Environment Circular on nature conservation. These national regulations give local authorities greater latitude in approving development than is compatible with this Court ruling (Baldock 1992: 144).

<sup>69</sup> In its original version, Art 4 (4) of the Wild Birds Directive read: “Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.” Article 7 of the Habitats Directive replaces the obligations arising from Art 4 (4) by the criteria laid out in Art 6(2), (3), and (4) of this new Directive. In particular, Art 6(4) states: “If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature....” The second subparagraph of Art 6(4) does exclude “priority” habitat and species from this exception stating that loss can only be justified on grounds of “human health or public safety” (essentially the *Leybucht* criteria, see following Footnote).

<sup>70</sup> Although, it is interesting to note that the Habitats Directive also in effect codified the Court’s *Leybucht* criteria in the case of priority habitats and species (e.g. endangered versus those habitats and species receiving general protection). This is evident in Art 6 (4) of the Directive justifying loss to these endangered habitats only in the case of human health and public safety (Holder 1997: 1479).

## National Consequences: Non-compliance and Litigation

How have these ECJ rulings and subsequent secondary legislation impacted nature conservation claims in the national legal systems? The Community's nature protection laws have consistently received inadequate attention and improper implementation at the national level (CEC 1993). This is illustrated by the Court's extensive Art 226 and Art 234 case law involving the Wild Birds Directive. Yet even though this litigation has given the ECJ an opportunity to expand the scope of EU competence in this area, the Habitats Directive is an example of how Member States can limit this impact. In the following two sections I explore the impact of the Habitats Directive on national policy change and the national litigating environment.

### *Implementation of the Habitats Directive*

The Habitats Directive entered into force on June 1994. However, much like the Community's other nature conservation measure (the Wild Birds Directive), Member States were not fulfilling their obligations, even with the safeguard of greater national control over protected sites. The Commission published a report in 1998 citing that "a number of Member States had not notified the Commission of all, or in some cases, any of the measures required to implement the Directive" (CEC 1998, 16<sup>th</sup> annual report: 22). The Commission continues to receive a large number of complaints concerning unsatisfactory implementation (of both the Wild Birds Directive and now the Habitats Directive). Beyond general failures to report national implementing measures, the main issues of contention remain the designation of protected areas and authorization of infrastructure projects in designated sites (Article 6 and Article 12 to 16) (CEC 1998, 16<sup>th</sup> annual report: 22 and 25).

Infringement proceedings have abounded as evidenced from a 1997 Commission report surveying the implementation of EU nature provisions (CEC 1997, 15<sup>th</sup> report). In a June 1997 ruling pursuant to Art 226, the ECJ found that Greece had not fulfilled its obligations by failing to notify the Commission of implementing measures (Case C- 329/96). Similarly, Germany was the subject of Art 226 proceedings that resulted in a 1997 ECJ ruling (Case C- 83/97). Two cases involving Italy and Portugal were also referred to the Court, but were discontinued when the national governments implemented sufficient measures (Case C-142/97 and C- 88/97). Beyond these general failures to report, infringement proceedings continue against France for failure to implement Article 6 (Case C-256/98) and against Finland for problems with the protection of areas in the Åland islands. Proceedings were also opened against Spain for failure to comply with Art 16 of the Habitats Directive. Problems have also involved the protection of species, as well as sites. The Commission has decided to bring infringement proceedings against Greece for endangerment to the loggerhead turtle, which is afforded protection under the Habitats Directive (CEC 1998, 16<sup>th</sup> annual report: 25).

What national policy change that has evolved, has done so slowly and commenced in reaction to infringement proceedings as illustrated by a 1998 Report by the Commission (CEC 1998, 16<sup>th</sup> annual report). Following the earlier mentioned 1997 ruling, Germany adopted new legislation in 1998. Further, Spain issued a new Royal Decree in June 1998 that attempts to bring national legislation in line with Art 16 on conditions for derogating from the obligations to protect certain species. Finland passed a decree in November 1998 with the intent of bringing national legislation in line with both the Wild Birds Directive and the Habitats Directive, yet the Commission is still reviewing whether it protects the province that was earlier in question. However, some Member States such as Greece have taken further cajoling from both the Commission and the Court to implement these measures: the ECJ's earlier ruling fell on deaf ears, and the Commission has since pursued the implementation of the ruling with Greek authorities on the basis of Art 171 of the Treaty (CEC 1998, 16<sup>th</sup> annual report: 22).

Another issue that has received considerable Member State implementation error is the requirement to submit the lists of special protection areas. All Member States failed to meet the June 1995 deadline. This failure is somewhat unsurprising given the fact that Member States are still experiencing difficulties with the designation of special protection areas required by the Wild Birds Directive, despite it being in force for almost twenty years (see CEC 1998, 16<sup>th</sup> annual report: 21).<sup>71</sup> It is also important to note that the designation of protected habitat under the Habitats Directive is still quite legally distinct from the Birds Directive and presents a greater challenge. Designation of SPAs under the Birds Directive is effectively a national level decision whereas the Habitats Directive introduces a step-by-step approach involving both national authorities and the Commission with the aim of constructing a Community wide nature protection network (*Natura 2000*). The initial designation of sites begins with a list compiled by Member States that is then reviewed and approved by the Commission with the ultimate aim of creating Community wide management plans (possibly even contractually bind ones) to protect a wide variety of both habitats and species (CEC 1997, 15<sup>th</sup> annual report).

By 1997, Member States had made some progress in providing the Commission with lists for designated areas. Belgium and Greece sent notification to the Commission that they had compiled complete lists. The Commission reported that Portugal, Austria, the Netherlands, Italy, the United Kingdom and Sweden had sent in “fairly comprehensive” lists, but deemed them to still be incomplete (CEC 1997, 15<sup>th</sup> annual report: 63). By the end of 1997, Luxembourg still had not designated any sites and Germany had only compiled lists for two regions or *Länder*. Similarly, France had refused to even begin the process of designating sites for reasons that the Habitats Directive contains unclear criteria, yet by the end of 1997 had shown some compliance by sending a list including over 500 proposed sites: a list the Commission eventually deemed “insufficient” (CEC 1997, 15<sup>th</sup> annual report: 63).

In the following year, the Commission began to act and throughout the year instigated infringement proceedings against these Member States. By the year-end, the Commission announced that it had dropped proceedings against Greece and Portugal for either completely or partially failing to submit lists. Similarly, the Commission was able to suspend infringement proceedings with Austria, Denmark, Italy, Luxembourg, the Netherlands, Spain and Sweden who all sent comprehensive lists of sites that were currently being studied. However, France, Germany and Ireland still failed to submit lists and the Commission has since decided to bring actions against these Member States (CEC 1998, 16<sup>th</sup> annual report: 22-23).

Generally, Member States have been slow to implement the Habitats Directive. Failure to submit lists of proposed SPAs effectively stops the forward movement of the *Natura 2000* network laid down by Directive 92/43/EEC (CEC 1998, 16<sup>th</sup> annual report: 25). The Commission working with the ECJ has valiantly pushed forward to try to rectify this situation (as illustrated through the infringement proceedings). Further, the Commission has also begun to maintain a very strict policy regarding the grant of Community funding for conservation of sites in light of these violations (CEC 1998, 16<sup>th</sup> annual report: 25).

Generally, as we have seen with both the Birds Directive and subsequently the Habitats Directive, Member States are hesitant to let the EU regulate certain aspects of nature conservation (in particular, designation of protected areas) and they have been successful at retaliating against EU organizations who have reduced Member State control over these decisions (e.g. the ECJ’s *Leybucht Dykes* decision and

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<sup>71</sup> Art 4 of the Wild Birds Directive pertaining to the designation of SPAs was the subject of five infringement proceedings in 1998 alone. The Commission continues with Art 171 proceedings against Spain to secure full implementation of the Court’s earlier *Santofia Marshes* decision. Proceedings against France in connection with the Seine estuary continue (Case C- 166/97) and the Commission has referred two more cases against France involving the *Marais Poitevin* (Case C-96/98) and the *Basses Corbiès/Vingrau* (Case C-374/98). Further, proceedings continuing against France in connection with the *Baie de Canche* and the *Plaitier d’Oye*, the *Plaine des Maures* and the *Basse Vallée de l’Aude*. Finally, the Commission has also brought an action against the Netherlands in connection with the *Waddenzee* area (Case C-63/98). (CEC 1998, 16<sup>th</sup> annual report: 23).

subsequently the amended exceptions allowable under the Habitats Directive). In the next section, I explore another avenue of national level impact: that is, how national courts and individuals are accepting or rejecting these new claims.

### *National Litigation and New Legal Claims*

While the Habitats Directive clearly represents an expansion in the scope of EU nature laws (from birds to all species of flora and fauna and habitats deemed worthy of protection) and perhaps an attempt at Community control over the future direction of conservation – the real national policy effect of the Directive has been the expansion in Member State control over opting out of conservation regulations (e.g. exemptions laid out in Art 6(4), economic and social reasons). However, while national policy makers retain the control over how they want to implement a directive into the national legal system, individuals acting through national courts and ultimately the ECJ can subsequently alter the meaning and scope of these national laws. For example, in the area of nature protection we saw how the ECJ in coordination with national courts and national environmental organizations was able to expand both the meaning and scope of the Birds Directive and subsequently upgrade national laws that were not in conformity.<sup>72</sup>

Although not the main focus of the case, the earlier discussed *Lappel Banks* decision had implications for how the British courts applied the Habitats Directive to national law. Again, the controversy arose when the Royal Society for the Protection Birds (RSPB) contested the decision by the British Secretary of State of the Environment to authorize the exclusion of Lappel Bank (an area containing species and habitat qualifying for protection) from SPA designation for the purposes of development. In its argumentation before the ECJ, the British government stated that Art 6 (4) of the Habitats Directive must be interpreted as allowing economic considerations to be a part of the initial classification decisions, as well as the stage of derogation since “to hold otherwise would be to impose an unnecessary administrative burden on a Member State” (Holder 1997: 1471). The ECJ did not concur. Instead, the Court argued that while Art 6(4) clearly justified development in protected areas for economic reason, this exception did not extend to the original classification of the designated land. The ECJ’s interpretation of the Habitats Directive essentially means that even though a Member State might plan to develop an area for economic reasons permitted by the Directive, it must *first* designate the site as a SPA if it meets certain ornithological criteria, linking it to the European network of protected areas (*Natura* 2000).

This interpretation was radically different than the position taken by both the British government and the judges in two British courts that heard the case before it finally reached the House of Lords on final appeal (and subsequently reached the ECJ by way of a preliminary reference).<sup>73</sup> Prior to this ruling, national courts and local authorities agreed that economic considerations could play a role in designating sites. Unfortunately, the Lappel Banks area could not be saved despite this decision (due to development

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<sup>72</sup> See discussion earlier in the Chapter.

<sup>73</sup> The RSPB had originally filed for an application for judicial review with the Divisional Court, Queen’s Bench Division on 8 July 1994. This was refused. The Court of Appeal similarly rejected the appeal against this judgment on 18 August 1994. On final appeal, the House of Lords referred a set of questions to the ECJ regarding the interpretation of both the Wild Birds Directive and the Habitats Directive so that it might resolve the dispute (paragraph 8 Advocate General Fennelly’s opinion, Case 44/95 1996 ECR 3805. The RSPB’s involvement with the Lappel Bank area actually preceded these cases, as the group in 1990 had made a request for judicial review regarding an environmental impact assessment carried out by the Government for the area (*R v Swale*, Queen’s Bench Division, 5 February 1990). The group claimed the granting of planning permission to the Medway Ports Authority to develop Lappel Bank was in violation of the Town and Country Planning Regulation 1988 (which implemented Council Directive 85/337/EEC on environmental impact assessments). The court did not concur and further, scholars have criticized the national judge’s decision to give only side reference to the Community law behind the national law in question (Grant 1991: 151).

going forward while the case was on appeal). However, authorization of developments in the UK would in the future take place in the shadow of this ruling (Harte 1997: 178). Yet from a comparative perspective, the ECJ ruling is not so radically different than practices found in other Member States. The ECJ's *Lappel Banks* decision is largely in line with the logic German courts apply when assessing planning decisions (Winter 1997: 179). The ECJ's ruling in this case in effect upgraded the British courts' minimalist (relative to other Member States) interpretation of the Habitats Directive.

However, other cases remain untouched by the arm of the European legal system and thus, illustrate how both Member States and national courts can retain control over the application of EU nature laws in the national legal system. In a similar case in 1999, a British Court of Session held that the stage of designating Special Areas of Conservation (SACs), as required by the Habitats Directive, could involve taking into account pre-existing recreation areas in limiting the boundaries of the designated area.<sup>74</sup> The issue at hand involved the development of a funicular railway at Caingorm, Britain's largest ski area. The applicants in the case, the environmental groups WWF and RSPB, along with disputing the required consultation for the development, they also argued that the initial boundaries of the SAC had been inaccurate by taking in account of the skiing facilities (in particular, economic and recreational criteria): an act that was incompatible with the Directive. The Court of Session did not agree. Instead, the British court held that while the boundaries of a SAC must be based on ornithological criteria, in its view, such criteria could involve taking account of the impact of a pre-existing ski area on the habitats in the designation decision (Chalmers 2000: 127). Clearly, this national court ruling is in complete disregard of the ECJ's *Lappel Bank* decision: a ruling that interpreted the Habitats Directive in a way that made economic and social reasons inadmissible in the criteria utilized to designate protected areas. However, as the *Lappel Bank* case also illustrates, the tenacity of national environmental organizations may prove to ultimately change the outcome of this national court decision.

The recent development of the A20 Motorway (Baltic Sea Motorway) in Germany provides another illustration of how EU nature laws are realized in the national legal system. The project at issue involved the construction of a motorway the length of approximately 300 km that will create an east-west link connecting the Baltic Sea ports of Rostock and Stralsund. This project is part of a larger transportation plan (involving 17 projects) and has been given priority by the German government for the reasons of boosting the economy in the Meklenbur-Western Pomerania.<sup>75</sup> The proposed A20 motorway would transverse two protected areas in Germany: the Trebel and Recknitz Valley and the Valley of the River Peene. Both areas were home to many rare and endangered birds and had previously been designated as protected areas under both the Birds Directive and subsequently the Habitats Directive. In order to build the proposed motorway, Germany invoked Art 6 (4) of the Directive and fulfilled the three conditions that would allow the plan to move forward despite the protected designation. First, Germany found that no other alternative measures existed; second, they had planned adequate compensatory measures and finally, they submitted a request to the Commission for an opinion on the compatibility of the projects with the Habitats Directive.

The Commission's ultimate decision to approve the development through both protected valleys reportedly did not come without some "internal strife" (Nollkaemper 1997: 273).<sup>76</sup> Yet, the logic behind the Commission's opinions seemed to suggest that Community nature laws could be balanced against, and ultimately deemed secondary to, "imperative reasons of overriding public interest," of which high

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<sup>74</sup> *Re the Petition of WWF-UK & the Royal Society for the Protection of Birds* (1999) 1 CMLR 1021.

<sup>75</sup> Paragraph 1.3, Opinion on the intersection of the Peene Valley by the planned A20 motorway pursuant to 6(4) of Directive 92/43/EEC, OJ EC 1996 L 6/14.

<sup>76</sup> Opinion on the planned A20 motorway in Germany which will intersect the Trebel and Recknitz Valley, OJ EC 1995, C 178/3, 27 April 1995. The Commission originally did not approve the proposed plan through the Peene Valley, but ultimately authorized the project on 12 December 1995 after Germany revised the plans. See also 'Spat over Motorway Construction Programme in East Germany' European Report, 22 April 1995.

unemployment was included.<sup>77</sup> This was the practical application of the exemption that Member States had been careful to insert into the Habitats Directive: a reaction to the ECJ's extensive case law that had consistently expanded EU nature protection in spite of conflicting national economic and recreational interests. Yet the question of whether Article 6 (4) requires Member States to balance economic and ecological interests, remains unanswered: as it still remains sufficiently unclear whether a "reason of overriding public interest" must be considered a part from or in connection with the magnitude of the effects on the ecosystem.<sup>78</sup> Much like the vague provisions included in the Wild Birds Directive, this question will no doubt be the subject of future national and ECJ litigation.

Further, it is interesting to explore the impact of these EU nature laws in Member States that have comparatively strong nature conservation regulations. Have they implemented EU law in line with more expansive ECJ interpretations? Or are these national practices similarly the subject of derogations from a high standard of protection? Generally, the Danish government has stood out as a leader in timely and complete implementation of EU environmental laws (e.g. Liefferink and Andersen 1998). Indeed, public debate in Denmark over the last few decades has criticized EU regulations as presenting a threat to the potentially high-level of protection embodied in national legislation.<sup>79</sup> Further, the near absence of both national and ECJ case law (either Art 234 or Art 226) questioning Danish environmental law for failing to meet the requirements of EU law, would suggest there have been few implementation errors.<sup>80</sup> Despite this comparatively strong record, Denmark does not have a perfect level of compliance in the area of nature conservation, especially on the issue of special protection areas.

Despite the 1981 deadline for the full implementation of the Wild Birds Directive (including Art 4 on SPAs), designation of a SPA was not made legally binding in Danish law until 1994. Prior to this, Danish authorities were given considerable latitude in allowing development in previously designated areas and even did so despite Community officials' awareness of the violations.<sup>81</sup> Further, without a legally binding instrument, national environmental groups systematically encountered difficulties in filing claims before national courts.<sup>82</sup> Finally in 1994, following considerable public outcry and complaints arising from a bridge project involving two major bird areas, national implementation improved (Pagh 1999: 309). Designation of SPAs became legally binding through a Statutory Order (No 407, 1994) and

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<sup>77</sup> Opinion on the Trebel and Recknitz Valley, para 4.2-4.6. Opinion on the Peene Valley, para 4.2.

<sup>78</sup> See Nollkaemper 1997 for an in-depth discussion of the limitation and legal ambiguities of balancing economic interests in the Habitats Directive.

<sup>79</sup> This issue was often at the center of public discussions surrounding the Danish referenda of 1986, 1992, 1993 and 1998 (Pagh 1999: 301).

<sup>80</sup> As discussed in Chapter 2, there were no Art 234 preliminary references from Denmark before 1998. One case involving EU waste laws has since been filed (Case 209/98 *Contractors Association, Waste Section v City Council of Copenhagen*). Further, there have been few ECJ rulings pursuant to Art 226 involving Denmark, other than those pertaining to conflicts arising between more protective Danish environmental regulations and EU free trade rules (e.g. *Danish Bottles* case as discussed in Chap 2).

<sup>81</sup> See discussion in Pagh 1997: 309. One example involves the Danish authorities original attempts to comply with the Wild Birds Directive. In 1983, (already 2 years past the deadline), the Danish government submitted a list of preliminary designation of SPAs to the Commission. In 1985, the Commission informed Denmark that this was insufficient to implement the Directive because it lacked a legally binding instrument and only provided general guidance to local authorities. The Danish government responded arguing that a final designation would be submitted, but one that only included minor revisions. However, no final designation was adopted. And in the following years, the Danish Nature Appeal Board authorized numerous construction projects in certain SPAs for economic and recreational reasons (Pagh 1999: 309). This decision was based on the exceptions laid out in Art 2 of the Wild Birds Directive, but was clearly inconsistent with the ECJ's interpretation of this provision (e.g. *Santoña Marshes* Case 355/90 and *Lappel Banks* Case 44/95).

<sup>82</sup> Environmental organizations had attempted to bring legal proceedings invoking the Wild Birds Directive against a decision by local authorities to approve a bridge project that would span two protected areas, the Öresunds Bridge. The Eastern High Court dismissed the case in 1994 on the grounds that the allegations were political and not judicial (e.g. not sufficiently precise). See discussion in Pagh 1999: 310.



the Danish government implemented a very strict procedure for intervention in SPAs. While this may bode well for future projects, Denmark's implementation record continues to be less than perfect. Danish authorities have since wrongfully interpreted Art 6(4) the Habitats Directive to justify approval of multiple projects that encroach protected areas (for economic reasons), without engaging the Commission in the consultation and approval procedure (as mentioned in the German case above) that is mandated by the Habitats Directive.<sup>83</sup>

## CONCLUSIONS

This case law analysis illustrates that nature conservation is an evolving area of EU law. National environmental organizations, national courts, Member State governments and EU organizations have all contributed to what today is an expanding set of EU rules governing national conservation measures. Institutional evolution in this area began with the activism of national and transnational environmental groups demanding European wide solutions to deteriorating national wildlife and habitats. Responding to this political pressure, Member State governments began to develop at least some European wide protective measures to address these concerns (the Wild Birds Directive). Despite this attempt at Community regulation, the pervasive non-compliance that ensued reflected the true intention of national authorities to maintain control over this sensitive and sometimes costly national issue. The judicial rulemaking of the ECJ would begin to change this.

Activated by environmental groups utilizing both the Commission's complaint procedure and legal action in national courts, the ECJ over time has come to expand the precision, scope and enforceability of EU nature conservation law. These rulings enhanced EU competence in this legal domain: new rules are created and they become institutionalized at the EU level redefining what is lawful behavior at the national level. Yet ultimately, Member States have been able to retaliate against these expansive ruling. Due to the legal instruments invoked in these cases (secondary legislation), Member State governments have been able to reverse costly decisions by adopting subsequent secondary legislation, the Habitats Directive. The immediate national consequence has been to weaken Community control over national conservation decisions.

From a comparative perspective, the impact of the Court's judicial rulemaking suggests a generalizable pattern.<sup>84</sup> First, the findings suggest that EU rulings can provide litigants with new opportunities before national courts to pressure for and achieve national policy change to secure compliance with EU laws. This side steps the problems of limited access that third parties have to enforcement proceedings, which are primarily controlled by the Commission (e.g. Macrory 1996; Macrory and Purdy 1997). For example, in the area of sex equality, pregnant workers in Spain were able to use national courts to secure protection that was not currently provided in Spanish legislation (a minimalist transposition of the Pregnancy Directive) (See Cichowski 2001). Similarly, national environmental organizations in Italy utilized national courts to bring legal action against local authorities with the consequence of dismantling national hunting practices that were not in conformity with the Wild Birds Directive. Second, the extent to which these disputes involve vague aspects of EU law in which the Court subsequently provides clarity, these rulings can expand the precision, scope and enforceability of EU law. The ECJ's case law in the area of both pregnancy rights and nature conservation had this effect.

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<sup>83</sup> This includes a 1995 decision to authorize a shipping company to route a high speed ferry through an SPA. Also, in 1997, the Danish Environmental Protection Agency (EPA) approved the expansion of the Tune Airport despite close proximity to two SPAs. However, following a complaint to the Commission, the Danish EPA agreed to reevaluate the decision on the Tune Airport after admitting that it had forgotten to take into account the procedures laid out in the Habitats Directive (Pagh 1999).

<sup>84</sup> See Cichowski forthcoming (PhD Dissertation) for a detailed comparison of ECJ's gender equality and environmental case law and its subsequent impact on supranational governance. In particular, the dynamic relationship between litigation and its subsequent impact on EU policy development and transnational mobilization in these two areas of law.

Third, the subsequent supranational and national policy impact of these decisions is acutely linked to the legal basis of the ruling. While both legal domains illustrate how expansive ECJ rulings can provide the basis for subsequent secondary legislation, the legal domains varied in the relative power of Member State governments to control the trajectory of these policy developments. In the area of sex equality, ECJ rulings that involved Treaty based principles enhanced the power of EU organizations *vis a vis* Member State governments in subsequent policy evolution. Despite the costly impact of numerous rulings in this legal domain, there was a higher degree of difficulty associated with reversing such a decision (a Treaty amendment versus proposing new secondary legislation). On the other hand, in the area of nature conservation where rulings involved the interpretation of secondary legislation, Member State governments were quick to retaliate against a particularly expansive ECJ ruling by enacting subsequent legislation to reverse the decision.

Finally, the enforcement and utilization of ECJ rulings by national courts and a willingness of national courts to engage the EU legal system highlights how this policy trajectory can change despite Member State opposition. As evidenced in both legal domains, ECJ rulings can enhance the power of national courts in their own legal system *vis á vis* the executive and legislative branches by providing the opportunity for review of national legislation. It is this action that ultimately can change the direction of both national and EU policy, despite the original intentions of national governments. The Court's preliminary rulings involving the Wild Birds Directive are a case in point.

It is through this dynamic process that Member States have discovered that overtime EU rules have expanded in precision, scope and enforceability. EU sex equality law has become less intergovernmental: as policy decisions are shifted away from national government executives. Certain Treaty based rights are established and through the actions of individuals and organizations these rights are expanded in a direction that leads those governed by these rules down a path that becomes increasingly hard to change (see Pierson 1996). On the other hand, in the area of nature protection, Member State governments have diminished or at least delayed the impact of expansive rulings. While such intervention has minimized the immediate policy consequences of these rulings and perhaps slowed the process of integration, the general trajectory is not easily reversed once the rules are created. The cycle begins again. Through the action of individuals, national courts, and the ECJ, these EU rules can be changed.

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