TO THE PRESIDENT AND MEMBERS OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

Case Number: T-(to be allocated)

APPLICATION UNDER ARTICLE 230 EC AND/OR ARTICLE 232 EC

by

Cemender Korkmaz, an individual resident at 12 Rue du Parc, 61100 Flers/France represented by Philip Moser, barrister, of Hailsham Chambers, 4 Paper Buildings, Temple, London EC4Y 7EX, United Kingdom, and Anke Stock, Rechtsanwältin and Registered European Lawyer, Kurdish Human Rights Project, 2 New Burlington Place, London W1S 2HP, United Kingdom, with an address for service in Luxembourg at the Chambers of Veronique de Meester, c/o 20 Avenue Monteney, BO 603, 2016 Luxembourg.

and

THE CORNER HOUSE, a not-for-profit company limited by guarantee under UK law, with headquarters at Station Road, Sturminster Newton, Dorset DT10 1YJ, United Kingdom, represented by Philip Moser, barrister, of Hailsham Chambers, 4 Paper Buildings, Temple, London EC4Y 7EX, United Kingdom, and Anke Stock, Rechtsanwältin and Registered European Lawyer, Kurdish Human Rights Project, 2 New Burlington Place, London W1S 2HP, United Kingdom, with an address for service in Luxembourg at the Chambers of Veronique de Meester, c/o 20 Avenue Monteney, BO 603, 2016 Luxembourg..

and

THE KURDISH HUMAN RIGHTS PROJECT, a United Kingdom registered charity, with headquarters at 2 New Burlington Place, London W1S 2HP, United Kingdom, represented by Philip Moser, barrister, of Hailsham Chambers, 4 Paper Buildings, Temple, London EC4Y 7EX, United Kingdom, and Anke Stock, Rechtsanwältin and Registered European Lawyer, Kurdish Human Rights Project, 2 New Burlington Place, London W1S 2HP, United Kingdom, with an address for service in Luxembourg at the Chambers of Veronique de Meester, c/o 20 Avenue Monteney, BO 603, 2016 Luxembourg..

Applicants

v.

COMMISSION OF THE EUROPEAN COMMUNITIES, B-1049, Brussels, Belgium.

Defendant

1. INTRODUCTION

(a) Basis of application

1.1 This application is brought under Articles 230 and 231 EC and further or in the alternative under Articles 232 and 233 EC by Cemender Korkmaz, a Turkish citizen with a permanent address and permanent leave to remain in France, a landowner in Turkey; The Corner House, a not-for-profit company limited by guarantee under United Kingdom law, and The Kurdish Human Rights Project ("KHRP"), a charity registered under United Kingdom law, for annulment of the Commission's negative decision refusing to make a recommendation to the Council in relation to the Community's pre-accession funding for Turkey by its "2003 Regular Report on Turkey's progress towards accession", published 5 November 2003 (Annex A.1: the contested measure); further or in the alternative for a declaration that the Commission failed to act in failing to define its position and/or failing to make a make a recommendation to the Council in relation to the Community's pre-accession funding for Turkey, pursuant to being called upon to act by the Applicants and others in their letter of 2 September 2003 (Annex A.2).

(b) Nature of orders sought

1.2 Accordingly the Applicants seek:

1.2.1 to have the relevant finding in the said Report declared void; and/or:

1.2.2 the Commission's failure to act declared contrary to the EC Treaty; and in either event:

1.2.3 that the Commission be required to:

1.2.3.1 propose to the Council the freezing of pre-accession assistance pending a resolution of Turkey's failures to comply with the EU accession criteria identified by the Council; and/or

1.2.3.2 act through the mechanisms of the EU-Turkey Association Agreement, the institutions of which are supposed to monitor the Accession Partnership; and/or

1.2.3.3 declare a moratorium on further accession negotiations pending the resolution of the said failures by Turkey.

1.2.4 That the Commission do bear the Applicants' costs of this Application.

(c) Procedural background

1.3 The Applicants and others called on the Commission to act as set out in sub-paragraph 1.2.3 above in their letter dated 2 September 2003. The cause for the said request were Turkey's actions in connection with the construction of a pipeline from the Caspian to the Mediterranean. The only published document from which the contents of the Commission's decision (if any) can be discerned is the said Report of 5 November 2003. The relevant parts are copied for the Court's convenience at Sub-Annex A.1(A) hereto. The Report referred to Turkey's accession criteria, the *acquis* and the Copenhagen criteria,[1] but in relation to the said pipeline stated only that (see Part B.3.1, Chapter 14 on "Energy", commencing page 91):

> "Concerning oil, the construction of the Caspian-Mediterranean pipeline started in 2003, planned to be operational in 2005"

In relation to the Copenhagen criteria, the Commission found that (see Part B.1, "Enhanced political dialogue and political criteria", commencing page 12):

> "Overall, Turkey has made noticeable progress towards meeting the Copenhagen political criteria .... in particular in the course of the last year."

In relation to pre-accession assistance from the EU, the Commission reiterated that this was to facilitate the adoption of the *acquis* and found that (see Part A.2, "Community assistance", commencing page 8) Turkey was benefiting at a current average annual amount of Euros 177 million from Community pre-accession financial assistance; further in 2002 Euros 560 million were granted by the European Investment Bank for major investment projects, including the first loan under the Pre-

[1]In Copenhagen in June 1993 the European Council agreed that the associated countries of central and eastern Europe that so desired should become members of the EU. Accession would take place as soon as a State was able to satisfy the economic and political conditions for membership. Membership requires: (1) that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities; (2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU; and (3) the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. These criteria were expanded upon in the so-called "Agenda 2000" and extended to Turkey (and Cyprus) at the Cardiff European Council in 1998.

Accession Facility. No relevant recommendation was made to the Council to review the pre-accession funding for Turkey.

There were no further or other subsequent definitions of the Commission's decision or non-decision in relation to the Applicants' request.

1.4 The Applicants submit that the said Report is either to be read as a decision refusing on 5 November 2003 to adopt an act and/or that there has been a failure to define the Commission's position, whether within two months of being called upon to act on 2 September 2003 or at all.

1.5 The Applicants' said letter of 2 September 2003 was preceded by a preliminary exchange of correspondence between the Applicants and others and the Commission. By letter dated 3 July 2003 (Annex A.3, with its five Sub-Annexes, A.3(A); A.3(B); A.3(C); A.3(D) and A.3(E)) the Applicants first wrote to the Commission about Turkey's breaches of pre-accession criteria, including the Copenhagen criteria on democracy, the protection of human rights and of minority rights; all of which breaches arose out of Turkey's involvement with the Baku-Tbilisi-Ceyhan Pipeline Project ("the Pipeline Project").

1.6 The Commission initially responded by letter dated 4 August 2003 (Annex A.4), indicating that it would give an assessment of the human rights and minority rights situation in its Regular Report in November 2003. The Applicants then clarified and re-defined their own position by their said letter of 2 September 2003 and called upon the Commission to act as aforesaid. The said letter of 2 September 2003 was augmented by a further letter dated 19 September 2003 (Annex A.5, with its Sub-Annex A.5(A)). The Commission responded only by a short letter dated 8 October 2003 (Annex A.6) referring back to its letter of 4 August 2003. As far as the Applicants are aware, there is no further unpublished or other document from which the Commission decision (if any) could be discerned.

1.7 The Commission's decision/failure to act means that further Community financial assistance of hundreds of millions of Euro will be advanced to Turkey in 2004 and beyond, as well as further hundreds (or thousands) of millions of Euro in assistance from the European Investment Bank for major investment projects. It is the Applicants' case that if the Community's continued pre-accession assistance were suspended and/or the Turkish accession process were suspended, the Pipeline Project could not go ahead. Thus, given the said decision/failure to act, the Applicants submit that such funds will go towards *inter alia* the Pipeline Project, and in any event that as

the Community's continued pre-accession assistance and the Turkish accession process will not be suspended, the Pipeline Project will now proceed in a manner directly detrimental to the interests of the First Applicant and those represented by the Second and Third Applicants, without any effective judicial protection other than by this application, which is seen as an absolute last resort by the Applicants.

(d) General background

1.8 Apart from the continuing issue of *locus standi* for directly and individually concerned or interested individuals, and for organisations representing individuals or interests directly and individually concerned, this case illustrates the difficulties of regulating the Community system of pre-accession funding, particularly in the case of Turkey. The Applicants are not opposed to Turkish membership of the EU; further the Applicants are not opposed to the economic benefit to be derived by the Pipeline Project. The Applicants are very much opposed to public money from the EU taxpayers being made available to Turkey, where such money has been used and will be used to breach the very conditions the Community has set itself for the award of that money. Further the Applicants are very much concerned at the continuing EU-Turkey Accession Partnership when, through the Pipeline Project, Turkey is moving away from (rather than towards) the *acquis*, and is in breach of the Copenhagen criteria. This in a context where the Commission's action on either the pre-accession funding or the Accession Partnership would have the effect of preventing Turkey moving away from both the *acquis* and the Copenhagen criteria.

(d) The Applicants

1.9 The First Applicant is a Turkish citizen from Posof/Ardahan, and is directly and individually concerned as a landowner in Posof whose rights and interests are adversely affected by the Pipeline Project, and thus by the Commission's decision/failure to act.

1.10 The Second Applicant, The Corner House, is a research and advocacy group dealing with human rights, the environment and social justice. In the present context The Corner House represents those environmental interests, flora and fauna, directly and individually concerned but without the ability to appear before the Court in person. The flora and fauna directly and individually concerned include the Ulas and Alacorak lakes area, and the green turtle, which lives in the region of the oil terminal at Yumurtalik.

1.11 The Third Applicant, KHRP, is a charity which works to protect the human rights of all people in the Kurdish regions and in the present context specifically represents those individuals directly and individually concerned, whose witness statements are to be found at Sub-Annex A.3(A) and Sub-Annex A.5(A).[2]

1.12 The Second and Third Applicants have been working for the past three years to raise public awareness of the social problems, human rights abuses and environmental damage that will be caused by the Baku-Tbilisi-Ceyhan oil pipeline, which is planned to run through Azerbaijan, Georgia and Turkey. In particular, the Applicants argue that public money should not be used to subsidise social and environmental problems, purely in the interests of the private sector, but must be conditional on a positive contribution to the economic and social development of the people in the region.

(e) Direct and Individual Concern/effective protection of rights/access to justice

1.13 The Commission's decision/failure to act in this case, although addressed (or potentially addressed) to the Council, is of direct and individual concern to the First Applicant and/or the Second Applicant and/or the Third Applicant. This is so because the question of pre-accession funding for Turkey is inextricably linked to the said Pipeline Project. Furthermore the Applicants have no other rights of action in national courts or elsewhere to challenge the legality of the contested decision/non-decision. Yet further or alternatively this Court is the only forum for these Applicants, or anyone aggrieved by pre-accession funding decisions of the Community, to review the legality of acts of the Community Institutions.

1.14 The effects of the Pipeline Project, both as to its legislative framework[3] and its implementation[4] are directly detrimental to the rights and interests of the First Applicant and those represented by the Second and Third Applicants, and there is no other access to justice and/or effective judicial protection of the rights of the First Applicant and those represented by the Second and Third Applicants in relation to the said Pipeline Project other than through the European Commission and (if necessary)

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[2]The Applicants point out as particular features of these individuals' experience that: (a) they are directly and individually concerned, as the pipeline project is to pass through their land, which is their only sustainable source of income; (b) there has been no (or no effective) consultation with these individuals; (c) they are receiving no (or no sufficient) compensation, and (d) they have no effective recourse to law.

[3]As set out below, the Pipeline Project has already led to changes in the law in Turkey, which changes currently infringe and abrogate the rights of the First Applicant and those represented by the Second and Third Applicants.

[4]And the Applicants distinguish between apparent implementation as reflected on paper e.g. in purported Environmental Impact Assessments, or declarations as to third party rights, and actual implementation.

the Court of First Instance. This process of calling upon the Commission to act, and the Court of First Instance to order the Commission to act in the event of default, therefore represents the only effective protection of the rights of the Applicants.

1.15 Further, the Applicants are directly affected since, although the decision is/would be addressed to others, it directly affects the First Applicant's legal situation and the legal situations of those represented by the Second and Third Applicants. Alternatively, if the Commission were found to have taken a step which is itself not challengeable, then the Applicants maintain they still have standing, as such a step constitutes a *prerequisite* for the adoption of an act which could be challenged.

1.16 Further, the Applicants are individually concerned, requiring as they do access to the courts and an effective remedy.

1.17 In the premises the Commission's conduct of the monitoring of pre-accession funding is of direct and individual concern to the Applicants, and any of them, entitling them to seek the remedies they seek under Article 230 and/or Article 232 EC.

(f) Summary of Grounds for Annulment/Declaration of failure to act

1.18 In taking the decision/failing to act as it did, the Commission acted in breach of the EC Treaty, and specifically in breach of the substance of Community secondary legislation governing the Commission's conduct in relation to pre-accession funding, that is Council Regulation (EC) No. 390/2001 (OJ 2001 L 058, p.1); Council Decision 2001/235/EC (OJ 2001 L 085, p.13) and Council Regulation (EC) No. 2500/2001 (OJ 2001 L 342, p.1). In particular:

1.18.1 failed in its duty to make a proposal to the Council under Article 4 of Regulation 390/2001 upon Turkey failing to make the requisite progress towards fulfilment of the Copenhagen criteria, which (under Article 5 of Regulation 2500/2001) is an essential precondition for continuing to grant pre-accession funding.

1.18.2 failed in its duty to make a proposal to the Council under Article 4 of Regulation 390/2001 upon Turkey failing to move towards adopting the *acquis* which is an essential precondition for continuing to grant pre-accession funding, under Article 5 of Regulation 2500/2001 and the entire framework of the said Community secondary legislation, including e.g. the reinforcement of administrative and judicial capacity under Annex 4 of Decision 2001/235.

1.18.3 failed in its duty to make a proposal to the Council under Article 4 of Regulation 390/2001 upon Turkey failing to adopt, transpose, implement, enforce or apply the Environmental Impact Assessment Directive which (under Annex 4 of Decision 2001/235) is an essential precondition (alternatively a condition) for continuing to grant pre-accession funding.

1.19 Yet further or alternatively, in failing to make the said proposal on funding the Commission failed in its duty to interpret the said Community legislation consistently with superior rules of international law, which have primacy over provisions of secondary Community legislation; in particular in relation to the EU's obligations under Article 8 of the UN Convention on Biological Diversity of 1992.

1.20 Further or alternatively the Commission failed to give any reasons for its action/inaction.

1.21 The Commission thus acted in infringement of the EC Treaty and the said rules of law relating to its application, contrary to Article 230 EC; and/or failed to act, in infringement of the EC Treaty and contrary to Article 232 EC, when called upon by the Applicants and others to do so.

(g) Summary of Main Supporting Arguments

1.22 The background to the said pleas in law are the Baku-Tbilisi-Ceyhan Pipeline Project Agreements entered into between Turkey and the Pipeline Project companies, headed by BP, whereunder the Turkish parliament has created a 'Prevailing Legal Regime' governing the territory and implementation of the Pipeline Project; which Prevailing Legal Regime abrogates national laws to the benefit of the said oil companies and the disbenefit of the Applicants. In particular, access to justice and the right to land are limited or denied under the said Prevailing Legal Regime; the Copenhagen criteria of human rights, the rule of law and the protection of minorities are weakened; Turkey has moved away from the *acquis*, including the impossibility of ever adopting the principle of supremacy of EC law under the Prevailing Legal Regime, and the Environmental Impact Assessment criteria have been breached.

2. FACTUAL BACKGROUND

Part 1: Community Legislative background

(a) Regulations and Directive:

2.1 The object of this Application is to achieve judicial review of the manner in which the Community Institutions allocate Community public money to Turkey under the Accession Partnership. The main relevant Community instruments underlying the Institutions' duties and the criteria for Turkey's accession under the Accession Partnership are Council Regulation (EC) No. 390/2001,[5] Council Decision 2001/235/EC[6] and Regulation (EC) No. 2500/2001.[7]

2.2 Regulation 390/2001 provides for the establishment of an Accession Partnership in Article 1, stressing *inter alia* the need for Turkey to develop the taking up of the *acquis*.[8] Under Article 2 it is provided that (acting on a proposal from the Commission), the Council shall decide on the principles and conditions to be presented to Turkey. By Article 4 the Regulation provides that:

> "Where an element that is essential for continuing pre-accession assistance is lacking, in particular when commitments contained in the EC-Turkey Agreements are not respected and/or progress *towards fulfilment of the Copenhagen criteria is insufficient*, the Council, acting by a qualified majority *on a proposal from the Commission*, may take appropriate steps with regard to pre-accession assistance to Turkey." (*emphases added*)

2.3 Decision 2001/235 reiterates at Recital (3) that:

> "Community assistance is conditional *on the fulfilment of essential elements*, and *in particular on progress towards fulfilment of the Copenhagen criteria*. Where an essential element is lacking, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance." (*emphases added*)

Article 1 of this Decision refers back to Article 2 of Regulation 390/2001, and provides that the relevant principles, priorities, intermediate objectives and conditions

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[5]On assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership; OJ 2001 L 058, p.1.

[6]On the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey; OJ 2001 L 085, p.13.

[7]Concerning pre-accession financial assistance for Turkey and amending certain previous Regulations; OJ 2001 L 342, p.1.

[8]Recital (7)

contained in the Accession Partnership with Turkey are set out in the Annex of Decision 2001/235. Under Point 2 of the Annex, the said Decision provides that the EU expects Turkey to adopt a programme for the adoption of the *acquis* by the end of 2001, and under Point 4.1 (priorities and intermediate objectives in the "short term", i.e. 2001):

> "Environment
> - Adopt a detailed directive-specific transposition of the *acquis.*
> - Transpose the environmental impact assessment Directive.
> [...]
> Reinforcement of administrative and judicial capacity
> - Improve the capacity of public administration to adopt, to implement and to manage the *acquis*..."

And under Point 4.2 (medium term):

> "Environment
> - Implementation and enforcement of the EU environmental *acquis* in particular through the development of framework and sector legislation, together with the strengthening of the institutional, administrative and monitoring capacity to ensure environmental protection.
> [...]
> - Implement and enforce the environmental impact assessment directive."

2.4 In Regulation 2500/2001 the Council set out the mechanism for the implementation of assistance, which is to be carried out by the Commission, but in Article 5 provided that all allocation of funding remains subject to Article 4 of Regulation 390/2001.[9]

(b) Commission's duty

2.5 It follows that it is the Commission's duty to monitor the Turkish accession process and further its duty to report if the implementation of the *acquis* (and particularly in the environmental field) is not achieved or if progress towards the Copenhagen criteria is not made. The Copenhagen criteria the Applicants rely on in particular are: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities. As will be established below, the manner of Turkey's participation in the Pipeline Project breaches all those criteria, and moves

[9] According to the current version of the "Memorandum of Understanding" between the Commission and the World Bank (and others), Regulation 2500/2001 and the accession programme for Turkey are also expressed to be the basis for EU/IFI cooperation in funding accession preparation in Turkey. "Fostering the adoption of the EC *acquis*" is an express objective in that Memorandum (see point 1(i)).

Turkish law away from the *acquis*, and it is submitted that the Commission had a duty to act and recommend action, at least in relation to pre-accession funding. That the Commission has failed to do.

(c) Direct connection funding decision/Applicants' rights

2.6 The Applicants rely on the wording and content of the said Community instruments to show the Community legislature's view that there exists a direct and immediate connection between funding decisions and development towards or away from the *acquis* and the Copenhagen criteria. The Applicants rely on the same connection *mutatis mutandis* in the present action, to show that any adverse decision on pre-accession funding and/or the accession process in relation to Turkey would have an inevitable direct effect on implementation of the *acquis* and development towards the Copenhagen criteria.

2.7 It is further emphasised that such an inevitable direct effect would include the direct effect of remedying the breaches of accession conditions in relation to the Pipeline Project, and thus the loss of rights and damage to their interests suffered by the Applicants.

2.8 Thus the Commission decision on pre-accession funding, although apparently only indirectly linked to the Applicants' interests, is in fact in direct correlation to the same. The principal of the Second Applicant, Kerim Yildiz, of 2 New Burlington Place, London W1S 2HP, United Kingdom is an expert in the socio-political consequence of pre-accession assistance in Turkey and its effect on the Pipeline Project. The Applicants will adduce written and/oral testimony from Mr. Yildiz to confirm to the Court of First Instance that, on the facts, there exists such a direct and immediate link.

Part 2: The Pipeline Project

(a) The Pipeline

2.9 The Baku-Tbilisi-Ceyhan pipeline project involves a 1760 km pipeline which is planned to carry Caspian oil from Baku in Azerbaijan via Tbilisi in Georgia to Ceyhan in Turkey, with oil being loaded onto tankers at the marine terminal of Yumurtalik near Ceyhan. It will then be transported through the Mediterranean. The pipeline is proposed by a consortium of oil companies named the BTC Company, which is led by

BP. The total cost of this project is in the region of $2.95 billion and a significant proportion of the money is now expected to come from public funds, including certain World Bank and European Bank for Reconstruction and Development (EBRD) funds.

2.10 For details of and concerns about the Pipeline Project the Court of First Instance is respectfully referred to Sub-Annex A.3(B) hereof, containing the extensive reports of the Fact Finding Missions completed by representatives of the Applicants and others in 2002 and 2003.

2.11 The Pipeline Project raises many serious political, environmental and human rights issues. This is primarily due to the form and effects of the two instruments that provide the legal basis for the Pipeline Project: (1) the so-called Inter-Governmental Agreement (IGA), an international Treaty between the three states concerned, Turkey, Georgia and Azerbaijan (Annex A.7), and (2) the so-called Host Government Agreements (HGAs), a private law contract with public law characteristics made between each national Government (for present purposes Turkey), BP and the other BTC companies (the Turkey HGA is at Annex A.8). This public/private contractual construction is one which is increasingly common in large infrastructure projects, but apparently only outside the EU. It has been the subject of serious and well-publicised human rights concerns, expressed by the Applicants and other NGOs, such as Amnesty International.

(b) Prevailing Legal Regime

2.13 The three states concerned entered into the IGA on 18 November 1999 to give the legal and commercial terms of the Pipeline Project the support of an international law framework. Article II, Clause 1 of the IGA obliged Turkey to:

> "...promptly and properly present this Agreement ... to its national parliament for ratification and/or adoption in order to make it effective under its Constitution as the **prevailing legal regime** of such State in respect of the [Pipeline] Project under its domestic law and a binding obligation under international law." (**emphasis added**)

Amongst other provisions, Article VIII of the IGA deals with Dispute Resolution including the exclusive jurisdiction of an *ad hoc* Tribunal under the Energy Charter Treaty 1994. The IGA became effective, after being duly ratified by each of the three state parliaments, on 21 June 2000.

2.14 Appendix 2 of the IGA, and thus part of the 'Prevailing Legal Regime' is the HGA between Turkey and the BTC Company (led by BP). *Inter alia*: Article 3.1 thereof provides that the Agreement shall last for 40 years from the date of the first shipment of Petroleum (with a 20 year extension); Article 4 thereof is a grant of rights by the state authority to the Pipeline Project participants; Article 5 provides Government guarantees; Article 18 deals with dispute resolution and provides that all disputes under the HGA are to be referred to an ICSID arbitration panel;[10] Article 24.10 provides that the HGA shall be governed by English law.

2.15 *Stabilisation clause:* Crucially for present purposes, the HGA contains a '**stabilisation clause**',[11] where if anything threatens the "Economic Equilibrium"[12] of the Project, then Turkey and other states have a legal obligation to take "all actions available" (including legislation) to restore the said Economic Equilibrium(HGA, Art.7.2(xi)):

> "...take all action available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change in Turkish law (including any Turkish laws regarding taxes, health and safety and the environment) occurring after the later of (1) the Effective Date[13] or (2) the date that the Government has fulfilled its obligations under Section 7.1[14] or 7.2(i),[15] as applicable, including changes

[10]In Switzerland; note that there is a Guide published with the HGA by the Pipeline Project participants that claims that this Article does not prohibit third parties from seeking remedies in domestic courts for loss or damage suffered as a result of breach of HGA standards; as set out below, it is the Applicants' case that any third parties can now only apply under the applicable domestic law, that being the Prevailing Legal Regime, which in practice denies them any access to justice.

[11]On stabilisation clauses generally see e.g. Professor Thomas Wälde, University of Dundee, CEPMLP Internet Journal, Volume 1-9, "*Stabilising International Investment Commitments: International Law versus Contract Interpretation*", to be found on the Internet at: http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/article1-9.html.

[12]"Economic Equilibrium means the economic value to the Project Participants of the relative balance established under the Project Agreements at the applicable date between the rights, interests, exemptions, privileges, protections and other similar benefits provided or granted to such Person and the concomitant burdens, costs, obligations, restrictions, conditions and limitations agreed to be borne by such Person." (HGA Appendix 1)

[13]I.e. the date of execution of the IGA (Article 3.1).

[14]7.1: "The Government hereby covenants and agrees that it shall promptly ensure the taking of all actions and the ratification, enactment and promulgation of all laws and decrees that are or may become necessary under Turkish law to continue in force and fully implement the terms of this Agreement and all other Project Agreements and to authorise, enable and support the activities and transactions contemplated by all Project Agreements. In this regard, the Government shall consult with and keep the [Project] Participants informed respecting the development of any necessary laws or decrees and the status of all actions which are or may be necessary in order to comply with the foregoing."

> resulting from the amendment, repeal, withdrawal, termination or expiration of Turkish law, the enactment, promulgation or issuance of Turkish law, the interpretation or application of Turkish law (whether by the courts, the executive or legislative authorities, or administrative or regulatory bodies), the decisions, policies or other similar actions or judicial bodies, tribunals and courts, the State Authorities, jurisdictional alterations, and the failure or refusal of judicial bodies, tribunals and courts, and/or the State Authorities to take action, exercise authority or enforce Turkish law (a "Change in the Law"). Without limiting the foregoing, any legislative action or any interpretation or application of, or decision with respect to, Turkish law by a judicial tribunal or court to the effect that this Agreement constitutes a special administrative contract granting a concession shall be conclusively deemed to be a Change in the Law. The foregoing obligation to take all actions available to restore the Economic Equilibrium shall include the obligation to take all appropriate measures to resolve promptly by whatever means may be necessary, including by way of exemption, legislation decree and/or other authoritative acts, any conflict or anomaly between any Project Agreement and such Turkish law."

And ancillary to this is Article 7.2(vi) HGA which provides that the Government agrees that:

> "...if any domestic or international agreements or treaty: any legislation, promulgation, enactment, decree, accession or allowance, any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project .... it shall be deemed a Change in the Law under Article 7.2(xi)"

In short, the State is obliged to exempt the Project from any current or future laws that may adversely affect it, or indeed obliged to change or repeal such laws altogether. Indeed, Turkey is apparently obliged to 'correct' any contrary findings by the Turkish courts, if these courts have failed to recognise the prevailing legal regime of their own motion.[16]

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[15] 7.2(i): "The Government hereby covenants and agrees (on its behalf and acting on behalf of and committing the State Authorities) that throughout the term of this Agreement: from time to time after the date hereof the State Authorities shall accomplish all notifications and complete all parliamentary, legislative or other actions, ratifications and enactments required to cause any written extension, renewal, replacement, amendment or other modification of this Agreement, the [IGA], and all other Project Agreements to become effective as the prevailing legal regime of the Republic of Turkey with respect to the Project and as the binding obligation of the State Authorities under Turkish law, and with respect to the [IGA], under international law. In this regard, the Government shall consult with and keep the [Pipeline Project] Participants informed respecting the development of any necessary laws or decrees and the status of all actions which are or may be necessary in order to comply with the foregoing.

[16] The only reference to any access to justice for third parties in the 'prevailing legal regime' is under Article 11.2 HGA, but this clause appears under the heading "LIMITATION OF LIABILITY". It is submitted that it does so with good reason, as the Project companies will have *no* liability to third parties under 11.2 *unless* it can be shown that the loss or damage was not "caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority"; since (under the 'prevailing legal regime') any failure, including a failure

2.16 This 'stabilisation clause' should also be read in conjunction with the assertion in the HGA (at Art. 21) that:

> "The Parties hereby acknowledge that it is their mutual intention that no Turkish Law now or hereafter existing (including the interpretation and application procedures thereof) that is contrary to the terms of this Agreement or any other Project Agreement shall limit, abridge or affect adversely the rights granted to the MEP Participants or any other Project Participants in this or any other Project Agreement or otherwise amend, repeal or take precedence over the whole or any part of this or any other Project Agreement."

2.17 Article 10.1(iii) - 10.2 HGA provides that any failure by the Turkish authorities, whether due to action or inaction, to maintain the 'Economic Equilibrium' will result in "prompt and effective compensation" payable by Turkey to the BTC Company.

2.18 *60-Year Corridor of Jurisdiction:* This combination of clauses in the IGA and HGA effectively establishes the primacy or supremacy of the Project Agreements and the Prevailing Legal Regime over all other applicable laws. It creates a **corridor of exclusive jurisdiction** running the length of Turkey (from its northern border with Georgia to its Mediterranean coast near Yumurtalik) which is set to last for 60 years; non-justiciable at either national or international level except between the Project Participants themselves. This corridor is also impervious to changes in the law, which would include, most pertinently, any environmental or other laws to be introduced in any potential Turkish accession to the EU,[17] or any post-accession EU legislation, in the event that Turkey's accession occurred before about 2060.[18]

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by the courts, to insulate the Project companies from such claims is a breach of the Project Agreements, Article 11.2 is in fact useless to the individual complainant for all practical purposes, particularly given the prevailing legal culture in the pipeline areas, and especially the Kurdish areas. At the very least, Article 11.2 HGA makes it extremely onerous (and almost certainly practically impossible) for the individual to succeed, as the complainant would have to discharge the onus of showing that the loss or damage was not caused by (or "arose from" *(sic)*) such a breach by the state.

[17]Although (exceptionally for the Project Agreements) Article IV HGA makes reference to EU standards in relation to petroleum industry practices, it is submitted that this reference is (a) vague, (b) not binding, (c) not justiciable at the suit of third parties, (d) not automatic, and (e) (and in any event) relates only to the operation, maintenance, etc. of the pipeline facilities themselves.

[18]It should be noted here that the Pipeline Project companies (but not the Government participants) have recently entered into a so-called "Deed Poll" under English law, claiming that they will not rely on the full effects of the IGA and HGA, including the compensation provision. The Deed Poll also purports to state that third parties can have access to national courts in the event that the BTC companies are in breach of domestic law. However, the Deed Poll is a private instrument only and does not alter or affect the Prevailing Legal Regime. Under the Prevailing Legal Regime (with the unlikely exception of Article 11.2 HGA; *supra*) there *can be* no relevant law upon which these third parties can rely in their local courts. That is because such laws would have been replaced by the Prevailing Legal Regime of the Project Agreements. It is submitted that the whole purpose of the HGA/IGA jurisdictional structure is intended to achieve the very object of limiting, and in fact eliminating, claims by third parties.

2.19 *Environmental Impact Assessment:* One specific purported compliance with Turkey's Accession Partnership deserves to be highlighted. In purported compliance with its accession obligations (or the accession criteria) Turkey has included in the HGA provision for an Environmental Impact Assessment in accordance with Community law. The HGA states (at Article 3.10) that:

> "Creation of the EIA shall also be in accordance with the principals [*sic*] of EC Directive 85/337/EEC (as amended by EC Directive 97/11/EC)..."

The Environmental Impact Assessment Directive, which applies to public and private projects likely to have a significant impact upon the environment, in its amended form requires an EIA (*inter alia*) for:

"Pipelines for the transport of gas, oil or chemicals with a diameter of more than 80mm and a length of more than 40km"[19]

2.20 As is set out in greater detail in the Report of the Fact Finding Mission at Sub-Annex A.3(B), the said EIA was not carried out in accordance with the law.[20] At Sub-Annex A.3(E) is a Note prepared by the Second Applicant on nine separate breaches of the relevant provisions of the EIA Directive, i.e.:

(1) Construction of the BTC Pipeline began before an EIA was approved.[21]
(2) Inadequate assessment of impact on flora and fauna.[22]
(3) Failure to address indirect impacts on climate.[23]
(4) Failure to reduce or remedy risk of oil spills at Ceyhan and re decommissioning.[24]

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[19]Directive 85/337 (OJ 1985 L 175, p.40) as amended by Directive 97/11 (OJ 1997 L 73, p.5), Annex I, para.16. The pipeline has a diameter of 42" (i.e. 10,668 mm) in Azerbaijan, converts to 46" (i.e. 11,684 mm) as it enters Georgia and reverts back to 42" diameter in Turkey (page 1, *Advisory review of the ESIA Reports for the BTC Oil Pipeline and the SC Gas Pipeline in Georgia*, EIA Commission, Dutch Environmental Ministry, 22.11.2002). The pipeline is of course also significantly longer than 40km.

[20]See e.g. the findings of the Fact Finding Mission that only *half* of the rural communities allegedly consulted were in fact consulted. In particular, one village allegedly consulted by telephone has no telephone and is in fact deserted (Sub-Annex A.3(B), page 34).

[21]Sub-Annex A.3(E), page 1.

[22]Sub-Annex A.3(E), page 1; Note in particular the threat to the Ulas and Alacorak lakes area, and the threat to the Green Turtle (for further information, the Applicants will rely on "Environmental Impact Assessment Report - Turkish Section of the Baku-Tbilisi-Ceyhan Pipeline: Quality Assessment", Central European University, Budapest, 2003).

[23]Sub-Annex A.3(E), page 2.

[24]Sub-Annex A.3(E), page 2.

(5) Inadequate assessment of alternatives.[25]

(6) Inadequate consultation.[26]

(7) Failure to address transboundary impacts of tanker traffic and to inform affected EU Member States.[27]

(8) Failure to consult with authorities and public in affected Member States.[28]

(9) Failure to consult on transboundary impacts.[29]

2.21 *Expropriation of land/no genuine compensation:* Using the powers under the Prevailing Legal Regime, the Pipeline Project participants (and in this case Turkey) have been expropriating landowners, including the First Applicant and those represented by the Third Applicant, along the pipeline corridor route. At Sub-Annex A.3(A) are the witness statements of expropriated landowners. Access to justice is limited or non-existent. Even where compensation is available, this is derisory in amount. The First Applicant's experience has been that he was expropriated of his land in the Ardahan district. He received compensation which was well below the market value of his land. The Applicants will rely upon the written and/or oral evidence of the First Applicant to verify and amplify the said facts.

(h) *Harassment and arrests*

2.22 As set out in detail in Sub-Annex A.3(B), those of the Applicants' representatives who have sought to investigate the implementation of the Project Agreements have themselves been subject to harassment. The Fact Finding Mission that produced the report at the said Sub-Annex A.3(B), including *inter alia* a member of the Bar of England and Wales, was itself detained by the Turkish authorities. An agent of the Third Applicant, Mr. Ferhat Kaya, was arrested and sentenced to 6 months imprisonment by the Erzurum State Security Court on the 9 October 2003, shortly after returning from a journey to Italy, where he had publicised the breaches of human rights in connection with the Pipeline Project at a press conference at the Senate in Rome.[30]

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[25]Sub-Annex A.3(E), page 3.

[26]Sub-Annex A.3(E), page 3.

[27]Sub-Annex A.3(E), page 4; note in particular the interests of neighbouring Greece, with its Mediterranean coastlines around Crete and Rhodes.

[28]Sub-Annex A.3(E), page 4, and again Greece in particular.

[29]Sub-Annex A.3(E), page 5.

[30]The said prosecution was brought in relation to words allegedly spoken by Mr. Kaya at a meeting in Turkey, which words allegedly concerned a Kurdish group and the Turkish prime minister, but the Third Applicant

3. CHRONOLOGY OF EVENTS LEADING TO APPLICATION

3.1 The Commission's failure to act and/or negative decision in this case has to be seen in the context of the correspondence already referred to in the Introduction at Section 1 above. The Applicants repeat paragraphs 1.3 to 1.7 above.

3.2 Thus the Commission (after initial contact and reasoned response by the Applicants containing the matters now relied upon) was called upon to act by letter dated 2 September 2003. The Commission decided by the Report published 5 November 2003 to take no action and/or in any event failed to define its position by 2 November 2003, alternatively at any time.[31] In each event the Commission was in breach of the timetable laid down by the fifth paragraph of Article 230 EC and the second paragraph of Article 232 EC respectively.

3.3 This Application is therefore brought under Articles 230 to 233 EC and is brought no later than 2 January 2004, thus being within the time limit.

4. ADMISSIBILITY

4.1 *Applicants directly and individually concerned:* In all the circumstances set out above, the Applicants submit that they are directly and individually concerned, and thus have standing to bring this application, where:

4.1.1 The First Applicant is a natural person of Turkish descent who has been living in France for more than 31 years. He owns land in Posof/Ardahan which was partly expropriated by the Turkish State for the construction of the Pipeline Project. He was not consulted about the impact and potential dangers of the Pipeline Project or about the procedure of the expropriation. He received compensation for the loss of his land which however does not reflect the land's current market value. Due to the combined legal effects of the IGA and the HGA, as aforesaid,[32] he has no recourse to justice in Turkey in relation to the legitimacy of the expropriation of his land. Further, he has no recourse to justice in relation to the continued Community funding by way of pre-accession assistance, save by this application.

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believes that the arrest stems primarily (or at least in large part) from Mr. Kaya's involvement with this Application to the CFI.

[31]The Applicants will if necessary rely upon the ECJ's judgment in Case 302/87 *'Comitology Case'* [1988] ECR 5615 that a refusal to act does not put an end to the failure to act (para.17).

[32]Summarised at para.2.18 above and footnotes there referred to.

4.1.2 The Second Applicant is a legal person and represents the interests of the directly affected flora and fauna, and in particular that affected by the breaches in relation to environmental impact assessments as set out by Nicholas Hildyard, principal of The Corner House, at Sub-Annex A.3(E). It is recognised that these flora and fauna have no standing themselves, but the Applicants submit that since legal persons can have standing in this Court, and since the interests and need for protection of flora and fauna are recognised by the Community legal order,[33] it is necessary for the Community Courts to grant such interests a voice and access to the courts, thus allowing the courts to review the legality of the acts of the Institutions.[34]

4.1.3 The Third Applicant represents those other individuals whose witness statements appear at Sub-Annex A.3(A) and Sub-Annex A.5(A). The Third Applicant claims the same interest as those individuals, who are themselves directly and individually concerned, but represents them in this action as a direct application by these individuals would (a) be practically impossible, and (b) would further endanger their legal position and personal safety in Turkey. Thus it is submitted that in order to allow the courts to review the legality of the acts of the Institutions in such circumstances, groups such as the KHRP must be allowed to represent the interests of the affected individuals.[35]

4.2 Where "the Applicants" are referred to below, such references shall, where necessary include the environmental interests represented by the Second Applicant and the anonymous individuals represented by the Third Applicant.

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[33]See e.g. most relevantly the Environmental Impact Assessment Directive, Council Directive 85/337/EEC (OJ 1985 L 175, p.40)(as amended); also, e.g. International Conventions: the Berne Convention on the Protection of European Wildlife and Natural Habitats 1979, of which the EU is a signatory; also the UN Convention on Biological Diversity of 1992 (EU signatory), and esp. under Article 8, where the signatories promise "as far as possible" to:

> "...promote the protection of ecosystems, natural habitats and the maintenance of viable populations, of species in natural surroundings."

[34]The Applicants rely in this regard on Case 294/83 *Les Verts v European Parliament* [1986] ECR 1339 para.23.

[35]The Applicants repeat the footnote immediately above.

4.3 *Addressees of any decision:* The Applicants aver at the outset that it is not necessary for them to be the actual addressee of the decision/non-decision, see e.g.: Case C-107/91 *ENU v Commission*.[36]

4.4 *Direct concern: decision directly affects Applicants' legal situation*: although addressed (or potentially addressed) to another Institution, the Commission's decision whether or not to recommend the suspension of pre-accession funding directly affected the legal situation of the Applicants and left no discretion either to the immediate addressees, or the subsequent recipients of the funds in question. Once made, the decision/non-decision led automatically to the said consequences for the Applicants,[37] and/or constitute a *sui generis* act that set a course of action binding on Institutions and Members States and ultimately led to the said consequences.[38] Alternatively the possibility for the said pre-accession funding to have any other effect or be given any other effect was purely theoretical.[39] In any event, once the Commission, in the exercise of its powers, failed to reduce or suspend pre-accession assistance, the Applicants were deprived of any real possibility of protecting their rights and interests. The Applicants rely in this regard on the ruling of the Court of Justice in Cases C-403/96P and C-404/96P *Glencore Grain v Commission*.[40]

4.5 *Individual Concern:* It is submitted that it follows axiomatically from the above that the First Applicant is individually concerned, and the Applicants rely on the same facts *mutatis mutandis* in relation to the Third Applicant's members and the interests represented by the Second Applicant, where in relation to the latter it is submitted there must either exist individual concern as a corollary to direct concern, or that the same must be implied to guarantee the effective judicial protection sought.

4.5.1 Further or alternatively, the fact that the measure in question is one of general scope is (it is submitted) irrelevant, since the individual Applicants are affected by reason of their particular attributes and circumstances which

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[36][1993] ECR I-599, a decision under Art.148 Euratom, which is however exactly equivalent to Art.232 EC; see also Case C-68/95 *T Port v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, para.59: both Art 230 (review of act) and Art 232 (failure to act) now require merely "direct and individual concern" for individual actions to be brought.

[37]And see e.g. Case 92/78 *Simmenthal v Commission* [1979] ECR paras.25 and 26.

[38]And the Applicants would rely in this case by analogy on Case 22/70 *Commission v Council* [1971] ECR 263, para.53.

[39]And see e.g. Case 62/70 *Bock v Commission* [1971] ECR 897, paras.6 to 8

[40][1998] ECR I-2405 and I-2435 respectively, at paras.53 to 54.

differentiate them from all other persons,[41] and which (a) in the case of the First Applicant and those represented by the Third Applicant relates to their ownership of land in the pipeline corridor, and their being deprived of proper access to justice in relation to their property rights and civil/human rights;[42] and (b) in the case of the interests represented by the Second Applicant relates to the peculiar vulnerability and unique situation of the creatures (such as the green turtle) and the habitats (such as the Mediterranean marine habitat off Yumurtalik or inland wetlands) concerned.

4.5.2 Yet further or alternatively, the Applicants are entitled to be found individually concerned in that otherwise they would be denied any legal remedy enabling them to challenge the legality of the contested decision/non-decision, with no rights before national or any other courts. The Applicants rely upon the ruling of this Court in Case T-177/01 *Jégo Quéré v Commission*,[43] and say that in order to ensure effective judicial protection in cases such as the present, a natural or legal person is to be regarded as individually concerned by a Community measure of general application (such as the granting of pre-accession funding) if the measure in question directly affects his, her or its legal position, in a manner both definite and immediate, by restricting his/her/its rights (as in the present case: loss of property and no access to justice; loss of habitat); and that the number of others in the same position is irrelevant.

4.5.3 In the further alternative the Applicants rely upon Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7

[41]See e.g.: Joined Cases 67, 68 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, para.14; Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, para. 13; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853; Case C-41/99P.

[42]And the applicants rely on the European Convention on Human Rights as part of the Community legal order and/or the legal traditions common to all Member States; in particular on Articles 6 and 13 ECHR (right to fair hearing/right to effective remedy), which include a right to access to justice, in order to enforce their right to protect their property under Protocol 1, Article 1 ECHR.

[43]Judgment, 3 May 2002, para.51; the Applicants do so notwithstanding the current appeal in that case pending in the Court of Justice (Case C-263/02P), in relation to which the Applicants submit that the respondents in that appeal should succeed and the ruling of this Court be upheld. Alternatively the Applicants will if necessary maintain that in the context of all the other arguments for admissibility advanced herein, they are to be seen as directly and individually concerned within the meaning given to that phrase in the ECJ's judgment in Case C-50/00P *Unión de Peqeños Agricultores v Council*, judgment 25 July 2002, para. 44.; further or alternatively the Applicants will rely on the findings of the ECJ in that case at paras. 38 to 41 and say that *UPA* is distinguishable from the present case, in that the Applicants' complaint cannot be brought before a national court of a Member State under any circumstances, whether or not the Member States establish a new system of legal remedies.

December 2000[44] and on Articles 6, 13 and 14[45] of the European Convention on Human Rights[46] to found their right to access to justice and an effective remedy before a court of competent jurisdiction. In this regard it is stressed again that in relation to the acts of the Institutions with which this case is concerned this Court is the only court of competent jurisdiction. The Applicants will rely in particular on the ruling of the Court of Justice in Joined Cases T-116/01 and 118/01 *P&O v Commission*,[47] at para.209, where in an analogous context the ECHR and Article 47 of the Charter, the EC Treaty and the common legal traditions of the Member States are invoked by the Court of Justice in order to render judicial review by the Community courts effective.

4.6 In the alternative the Applicants submit that if it were held that the decision/non-decision in question was not in itself challengeable (which is denied), then the Applicants repeat all the grounds for jurisdiction above and aver that at the very least the pre-accession funding decisions of the Commission are in the present context a prerequisite for an act that could be challenged (i.e. the relevant decisions of the Council), so that this Application should be allowed to stand in that event also.[48]

5. GROUNDS FOR ANNULMENT/DECLARATION OF FAILURE TO ACT

(a) Commission duty

5.1 *Commission as 'Guardian of the Accession Process' and duty to act:* The Applicants recall the legislative framework that binds the Institutions under the EU-Turkey Accession Partnership process set out in Section 2, Part 1 above. It is submitted that in the premises the Commission is the **Guardian of the Accession Process**, and that in particular since the Council cannot act under Article 4 of Regulation 390/2001 without a Commission recommendation, the Commission is **obliged** to make a relevant recommendation where Turkey has acted in a way that either moves its laws

[44]OJ 2000 C 364, p.1; and see the Opinion of AG Tizzano in Case C-173/99 *BECTU v Secretary of State for Trade and Industry* of 8 February 2001, e.g. at para. 28, where he stated *i.a.* that: "...in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored".

[45]Article 14 ECHR (prohibition of racial discrimination) specifically in the case of the Third Applicant, the burden of the breaches falling disproportionately on the Kurdish population.

[46]As applied by the Court of Justice in Case 222/84 *Johnston* [1986] ECR 1651, para.18

[47]Judgment, 5 August 2003.

[48]And the Applicants rely in this context on Case C-282/95P *Guérin Automobiles v Commission* [1997] ECR I-1503.

away from the *acquis*; renders insufficient Turkey's progress towards the Copenhagen criteria, or otherwise breaches the pre-accession conditions set by the EU. Thus, whatever the general duty or discretion of the Commission in making recommendations to the Council: in the particular case of the EU-Turkey Accession Partnership there is a duty, rather than a mere discretion, for the Commission to act and recommend appropriate action to the Council in the said circumstances.

(b) Legal basis

5.2 *Funding subject to adoption of acquis/Copenhagen criteria:* The key provision for present purposes is the said Article 5 of Regulation (EC) 2500/2001. By cross-reference to Article 4 of Regulation (EC) No. 390/2001, Article 5 of Regulation (EC) 2500/2001 expressly incorporates the requirement that Turkey must meet the Copenhagen criteria. By reference to "all other related agreements and decision" Article 5 also includes *inter alia* the requirement to work towards the *acquis*, particularly in the environmental field, as contained in Annex 4 of Decision 2001/235. Thus current EU financing of the programmes and projects in Turkey is by the said Article 5 expressly made *"subject to compliance with the commitments*" of the Copenhagen criteria, adoption and implementation (which should already have happened) of the Environmental Impact Assessment Directive standards and the *acquis*.

5.3 *Commission bound by Community legislation:* The Commission and the other Community Institutions are self-evidently already bound by their own legislation in this field. That includes the duty to monitor and act on any failures by Turkey to meet its accession obligations (or fulfil the accession criteria).

(c) Breaches/Failures by Turkey

5.4 By its actions in relation to the Pipeline Project Turkey is unarguably failing to meet the Copenhagen criteria, failing to implement EU EIA standards and failing to move towards the *acquis.* This may either be seen as a breach of Turkey's accession obligations, or a failure to meet the Accession Partnership conditions. The effect remains the same. In fact, the Project Agreements have entrenched a legal framework that represents the *opposite* of the *acquis*, as is evident from the facts already set out above. The same follows inevitably from the imposition of the Prevailing Legal Regime itself, even before any part of it is implemented. Each implementation or application of the Prevailing Legal Regime constitutes a further breach. Thus, not only has Turkey moved away from the *acquis*, it will be *unable* fully to adopt the *acquis* for the length of the Project Agreements, that is some 60 years.

5.5 As already stated above, EU pre-accession funding is *conditional* upon certain *essential elements and conditions*, as set out in Article 4 of Regulation 390/2001 and Article 5 of Regulation 2500/2001, including:

(1) Progress *towards* the Copenhagen criteria; *and*
(2) Movement *towards* the adoption of the *acquis*.

Turkey has failed (and continues and threatens and intends to continue to fail) in both regards, thus (far from progressing towards these goals) it has under the Prevailing Legal Regime moved *away* from:

(1) (i) protection of human rights;
(ii) the rule of law;
(iii) the protection of minorities,

and

(2) (i) fundamental principles of EC law, notably the potential possibility of supremacy of EC law in Turkey;
(ii) EU law on Environmental Impact Assessment.

(1) Copenhagen criteria
(i) Human Rights

5.5 *Article 6 ECHR (right to a fair hearing) and Article 13 ECHR (right to an effective remedy)*: under the Prevailing Legal Regime, and as explained in Section 2, Part 2 above, there is no (or no realistic) redress for individuals or any third parties in the national courts. This in direct and blatant contravention of the rights of access to courts enshrined not only in the European Convention on Human Rights, but also in the EU's Charter of Fundamental Rights and the common legal traditions of the Member States.[49] This is *a fortiori* in the cases of the First and Third Applicants, where the fact that the relevant breaches fall disproportionately on the Kurdish population, and these Applicants in particular, also constitutes a breach of Article 14 ECHR (prohibition of discrimination).

5.6 *Article 1 of Protocol No. 1 ECHR (right to enjoyment of one's property):* The application of land seizure measures under the Prevailing Legal Regime deprives landowners of their Article 1, Protocol 1 rights. Such landowners include the First Applicant, and includes both those who are being deprived of their land without any

[49] And see e.g. Joined Cases T-116/01 and 118/01 *P&O v Commission*, cited *supra*.

compensation and those who are so deprived without any proper compensation or procedure. That includes cases, such as the grievances in the present Application, where compensation is either hard to obtain, late in being paid out and/or inequitable in amount (see, e.g.: *Aktas v Turkey*[50]). This is again *a fortiori* in the cases of the First and Third Applicants and the breach of Article 14 ECHR.

(ii) Rule of law

5.7 Self-evidently the abrogation of the general rule of Turkish law for the entire length of the pipeline corridor, and replacing this with a Prevailing Legal Regime designed ultimately to benefit the Pipeline companies is a blatant and severe movement away from the rule of law. The Applicants rely on the facts and matters already set out in Section 2 above, and the evidence contained in the Annexes and Sub-Annexes there referred to. The Applicants repeat that the very act of ratifying the IGA and HGA constituted a significant abrogation of the rule of law in Turkey, where the rules governing the national courts themselves are now made subject to the interests of the "Economic Equilibrium", and those courts' rulings rendered inferior to the interests of the private oil companies, headed by BP, who benefit from the Pipeline Project.

(iii) Protection of minorities

5.8 Since the pipeline passes for a significant section of its length through regions inhabited by the Kurdish minority, that minority is affected disproportionately by the consequences of construction, operation and eventual decommissioning of the pipeline, while at the same time deriving little to no economic benefit from the Pipeline Project. Since the breaches of human rights and the rule of law adumbrated above fall disproportionately on the Kurds, this constitutes a further disadvantage to that minority, both *de facto* and *de jure*. Further, the Applicants point to the breaches committed in the course of the purported EIA and enumerated in part 6 of Sub-Annex A.3(E) hereto. The Applicants will also rely upon the witness statements at Sub-Annexes A.3(A) and A.5(A), and the evidence of Mr. Yildiz of the Third Applicant.

(2) The *Acquis*

(i) Supremacy of EU Law

[50](2002) 34 EHRR 39; See also e.g. *Akkus v Turkey* (2000) 30 EHRR 365; *Aka v Turkey* (2001) 33 EHRR 27; on the principle that there must be no confiscation without compensation, see also: *(Former) King of Greece v Greece* (2001) 33 EHRR 21, *re* Article 1 of the First Protocol of the ECHR.

5.9 Upon accession, Turkey would have to accept the supremacy of EU law, and the movement towards the *acquis* must have this overarching objective in mind.[51] With the implementation of the Prevailing Legal Regime Turkey has now created a corridor of jurisdiction where EU law not only cannot apply at present, but could not apply even upon accession, for a period of around 60 years. Thus, Turkish courts and the Turkish Government will under the Prevailing Legal Regime be obliged to disapply any EU Regulation (e.g. on the environment) and not implement any EU Directive, in relation to the pipeline corridor and the Pipeline Project companies.

5.10 This development against adoption of the fundamental principle of supremacy of EU law is **a clear move *away* from the *acquis***, and thus a further blatant breach of Accession Partnership conditions and the conditions for funding contained in Article 4 of Regulation 390/2001.

5.11 *Other examples of moving away from the acquis:* The move away from eventual supremacy of EU law is the most blatant example of Turkey's moves away from the *acquis*, and itself would suffice for present purposes. For the avoidance of doubt, the Applicants submit that Turkey's moves away from the *acquis* are in fact various. They include:

5.11.1 *Human Rights*: Human Rights and the provisions of the ECHR constitute an independent, fundamental principle of Community law. The ECJ has so held consistently since Case C-260/89 *ERT,* these being fundamental rights, the

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[51] To illustrate the overarching nature of supremacy in the context of the *acquis*, and the extent to which the Prevailing Legal Regime would conflict with Turkey's EU law obligations, see the consistent rulings of the ECJ on the supremacy/primacy of Community law, whereby there are not only directly effective rights for citizens but (as a corollary) there are also duties created for the *Member States*; see: Case 26/62 *Van Gend en Loos* [1963] ECR 1 *(*"the Community constitutes *a new legal order of international law for the benefit of which the States have limited their sovereign rights*, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals"*, para.12)* and Case 6/64 *Costa v ENEL* [1964] ECR 585 ("The integration into the laws of each Member State of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question", at p.594). However each Member State incorporates Community law into its laws and constitution, once it joins the EU it accepts these constitutional obligations. Thus rights created by Community law cannot be unilaterally abrogated, whether to benefit all or (especially) to benefit only a few. The ECJ has continued to reinforce the concepts of primacy and supremacy of EU law over anterior *and* posterior national law, e.g.: in Case 107/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629 the ECJ held that *any* national court (and not merely a constitutional supreme court) was under a duty to disapply a rule of national law that conflicted with Community law rights, whether the national law was *prior* or *subsequent* to the Community rule.

observance of which the Court says it will ensure.[52] Thus, in committing the human rights breaches referred to above Turkey is *mutatis mutandis* moving away from the *acquis*.

5.11.2 *International Law:* international law too is an integral part of the *acquis*, as the ECJ held in Case C-162/96 *Racke v Hauptzollamt Mainz:*[53]

> "As far as the Community is concerned, an agreement concluded by the Council with a non-member country in accordance with the provisions of the EC Treaty is an act of a Community Institution, and the provisions of such an agreement form an integral part of Community law."

And secondary Community legislation must be interpreted in the light of international law, see: Case 61/94 *Commission v Germany:*[54]

> ".....the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements."

This applies to the said Directive and Regulation founding and governing the conduct of the EU-Turkey Accession Partnership and pre-accession funding.

5.11.3 The applicable source of international law the Applicants rely on is the UN Convention on Biological Diversity of 1992, of which the EU and Turkey are signatories. Under Article 8 UNCBD 1992 Turkey (and indeed the EU) promised "as far as possible" to:

> "...promote the protection of ecosystems, natural habitats and the maintenance of viable populations, of species in natural surroundings."

The comments made in relation to the purported EIA assessment in Section 2, Part 2, para.2.19 following are repeated. These actions constitute a breach of Article 8 of the said UN Biodiversity Convention, and thus a further move by

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52 [1991] I-2951, at para.41; and see now the case law of the ECJ on the Charter of Fundamental Rights, cited *supra.*

53[1998] ECR I-3655, at para.41, citing the Turkish migrant case of *Demirel* (op.cit., para.11)

54[1996] ECR I-3989, at para.52

Turkey away from the *acquis* insofar as it reflects international law commitments of the Community.

5.11.4 In the context of this Application, the contested decision/non-decision by the Commission is by the same token a breach of the said commitments of the EU itself under the Biodiversity Convention and also forms a separate and discrete ground for invoking the Commission's duty to act to prevent funding.

(ii) The EIA Directive

5.11 As part of, and in addition to, Turkey's move away from the *acquis*, there is the distinct case of a failure to follow the rules of the EIA Directive, contrary to the Accession Partnership condition to adopt the Community EIA rules, and indeed the application of the EIA rules under the HGA itself (see variously *supra*). The facts and matters set out at Section 2, Part 2, para.2.19 following are again repeated, and it is submitted that Turkey is again in blatant breach of the relevant commitments, is thus presently in breach the accession conditions and has failed to move towards the *acquis*; all in contumelious default of the *"essential elements and conditions"*, as set out in Article 4 of Regulation 390/2001 and Article 5 of Regulation 2500/2001

5.12 For this reason also (alternatively this reason alone) Turkey's conduct has triggered the Commission's duty to act by recommendation to the Council as requested by letter dated 2 September 2003 (Annex A.2).

(d) Grounds for annulment/declaration

5.13 *Failure to fulfil duty*: The said clear breaches of the essential preconditions for funding, and each of them, triggered the Commission's said duty to recommend action to the Council. All the above breaches are *a fortiori* where the very public money, in the form of pre-accession assistance, the allocation of which is supposed to be subject to the EU legislature's condition is in fact applied to further the breach of those very conditions. In breach of the said duty the Commission has decided not to make a recommendation and/or has failed to act at all.

5.14 *Failure to follow own legislation/failure to give reasons:* It is self-evident that Regulations 390/2001 and 2500/2001 bind the Commission. The Commission has thus failed to follow the EU legislature's own rules on pre-accession assistance and is in breach of the substantive provisions thereof. Further or alternatively there has been a complete failure to give any reasons for the Commission's action/inaction.

5.15 *Need for action:* It is emphasised that there can be no clearer failure by Turkey to fulfil the criteria put in place by the Community itself as the legal basis for funding. Equally, there can be no clearer case for the Commission to act to recommend the cutting or suspension of pre-accession funding. It is submitted that that recommendation must now be made, if necessary by Order of this Court.

6. FORM OF ORDER SOUGHT

6.1 IN THE LIGHT OF THE FOREGOING SUBMISSIONS the Applicants respectfully request that the Court of First Instance do grant them:

(1) An Order to declaring void the relevant finding in the said Commission Report of 5 November 2003;

and/or

(2) A Declaration that the Commission has failed to act, contrary to the EC Treaty;

and in either event:

(3) An Order that the Commission do propose to the Council the freezing of pre-accession assistance pending a resolution of Turkey's failures to comply with the EU accession criteria identified by the Commission;

and/or

(4) An Order that the Commission do act to address the Turkish breaches of accession conditions through the institutions of the EU-Turkey Association Agreement;[55]

and/or

[55] And/or make report to the like effect to the other Institutions, and the Applicants point to the Commission's duty to report to the European Parliament, the Council and the Economic and Social Committee on the implementation of pre-accession assistance (Article 11 of Regulation 2500/2001), which report is to be made not later than 30 September of each year.

(5) An Order that the Commission recommend to the Council the declaration of a moratorium on further accession negotiations with Turkey pending the resolution of the breaches of accession conditions by Turkey.[56]

and

(6) That the Commission do bear the Applicants' costs of this Application.

[56] In the alternative, the Court of First Instance may consider that the Commission should at least inform the Association Committee and other concerned bodies within the framework of the EC-Turkey Association Agreement, which are tasked with the monitoring of the implementation of the Accession Partnership, and which do so irrespective of whether or not negotiations have been opened (see Annex 7 of Decision 2001/235).

Schedule of Annexes
Pursuant to Part IV, Point 2 of the Practice Directions of the Court of First Instance

Annex, Type and Paragraph where mentioned and first described Page No.