TO THE PRESIDENT AND MEMBERS OF THE COURT

OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

London, 21st July 2004

Case Number T-2/04

APPLICANTS' OBSERVATIONS ON COMMISSION'S OBJECTION TO ADMISSIBILITY

by

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and

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v.

COMMISSION OF THE EUROPEAN COMMUNITIES, Defendant.

in the matter of an application under Articles 230 and 231 or in the alternative Articles 232 and 233 of the EC Treaty concerning the omission by the Commission to propose to freeze pre-accession aid to Turkey.

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Applicants' Observations in Response to Commission Objections

I. GENERAL OBSERVATIONS

(a) Commission Accountability

1.1 Prior to addressing the Commission's Objections in detail, the Applicants wish to make certain general observations on the questions of Commission (and thus Community) accountability; access to the Community Courts, and what some commentators have identified as a democratic deficit within the Community.[1]

1.2 Under the framework for the recent accession strategy leading to the admission in May 2004 of the new Member States, and the continuing accession strategy in relation to Turkey, the Commission has been given a new and central role in monitoring the fulfilment of the pre-accession criteria for each potential new Member State. Compliance with the Copenhagen criteria, alongside the satisfactory adoption of the *acquis communautaire* and compliance with the candidate's (in this case: Turkey's) individual accession conditions are the fundamental and determining factual and legal criteria for accession to the European Union. The fact that applicants for accession must respect the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (as enshrined in Article 6(1) TEU) finds its expression in Article 49 TEU, which binds the Commission in its actions in relation to accession (*per* Article 5 TEU). In their Application the Applicants have referred to the Commission's new role in this regard as making it "the Guardian of the Accession Process".[2] The Commission's assessment of these criteria also determines Turkey's eligibility for pre-accession aid.

1.3 The Commission's act of 5 November 2003, or the Commission's failure to act, is a legally binding act (or a failure to adopt a legally binding act) by one of the EC Institutions, without requiring the input of any other Community Institution or consultative group, and which must be subject to judicial review by the CFI.[3]

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[1] See e.g.: Mancini and Keeling, *From CILFIT to ERT: The Constitutional Challenge facing the European Court* (1991) 11 YBEL 1; Mancini and Keeling, *Democracy and the European Court of Justice* (1994) 57 MLR 175; and see recently: Ward, *Locus Standi* under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a 'Wobbly Polity' (2003) 22 YBEL 45.

[2] Application, para.5.1

[3] And the Applicants will rely upon the statement of the ECJ that the Community is based upon the rule of law and that all acts which produce legally binding effects must be subject to judicial review: Case 294/83 *Parti Ecologiste "Les Verts" v European Parliament* [1986] ECR 1339 at para.23

(b) Access to justice

1.4 The Applicants call upon the CFI to continue the consistent policy of the Community courts to recognise the evolutionary nature of Community law and decision making processes, including the decisions of the ECJ and CFI themselves. This approach has manifested itself in particular in recognising that new forms of acts which produce legal effects and are part of the Community method of decision making must be capable of review by the Court. Thus the Community Courts look to the function, and not the form, of acts adopted by the Institutions.[4]

1.5 The Applicants recall in particular the wording of the first paragraph of Article 220 EC, that:

> "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed."

And further the ruling of the ECJ in Case 22/70 *Commission v Council* [1971] ECR 263 (at para.40):

> "The objective of this review is to ensure, as required by Article [220 EC (ex 164)], observance of the law in the interpretation and application of the Treaty. It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article [249 EC (ex 189)].
>
> "An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effect."

1.6 In fulfilling its duty to ensure that Community law is observed, the CFI is now faced within its jurisdiction with an ever larger number of measures having legal effect in an ever wider field of application of the Treaty. That field of application of Community law now embraces human rights (see e.g. para.5.11.1 of the Application and the case law set out there), which is further recognised as a founding principle of the European Union and a principle common to all Member States in Article 6 TEU; this includes Article 6 ECHR and the right to a fair trial, which requires access to justice.

1.7 Furthermore the EC Treaty now encompasses (after the TEU) "a high level of protection and improvement of the quality of the environment" (Article 2 EC) as well as (after the Treaty of Amsterdam) "sustainable development of economic activities" (*ibid*) as fundamental principles of the Treaty and of Community law. Both environmental and sustainable development principles must be integrated into the implementation of Community policies (Art.6 EC), which implementation often (as in the present case) falls to the Commission (pursuant to Articles 3 and 7 EC respectively). This

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[4] See e.g.: Joined Cases 8-11/66 *Noorwijks Cement Accord* [1967] ECR 75 at 91; Cases 789-790/79 *Calpak v Commission* [1980] ECR 79 at para.7.

includes, pursuant to Article 174(1) EC the objective of "promoting measures at international level to deal with regional or worldwide environmental problems", and pursuant to Article 174(2) the precautionary principle.[5] The fact that the European Union is now a signatory to the Aarhus Convention is further evidence of the new status of environmental protection in the Community legal order. Since the environment is not a "natural or legal person" in the traditional sense, the Community Courts are once again called upon to interpret the conditions under which an action is admissible so as to allow access to justice in this new field of Community competence.

(c) Democratic deficit

1.8 The rules of Art.230(4) are further subject to the founding principle of democracy,[6] and the Court has recognised the need to develop rules on admissibility to augment a perceived democratic deficit, see Case T-135/96 *UEAPME v Council* [1998] ECR II-2335, para.89: the preservation of the principle of democracy on which the Union is founded requires the participation of peoples in other ways, when the European Parliament is not involved in the passing of measures producing legal effect. It is submitted that that principle is *a fortiori* where (as in the present case) there is a complete lack of consultation with, or of democratic input from, those affected by the decision in question. The CFI thus constitutes the only democratic corrective for the situation in which the Applicants find themselves.

1.9 The Commission itself in its White Paper on European Governance[7] and the subsequent Laeken Declaration[8] argued for greater participation by civil society in the decision-making processes of the Community, and for participatory democracy to be created from the "bottom up" by groups of people dedicated to the search for the public interest in society. Such representation should also involve the representation and protection of citizens' rights.[9] In the instant case, it is submitted that the Applicants seek representation before the CFI and *ex post* judicial protection where a Community measure breaches fundamental rights.

II. LEGAL FRAMEWORK

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5 The changes brought by Amsterdam entered into force on 1 May 1999; mainstreaming of environmental policies into all EU policies was achieved in the 1998 Communication of the Commission (COM (98) 333 final), and also the Vienna European Council of 11 and 12 December 1998.

6 See Art.6 TEU

7 COM (2001) 428 final 25 July 2001, *European Governance - A White Paper*

8 December 2001, http://www.europa.eu.int/futurum/documents/offtext/doc151201-en.htm

9 *Ibid,* pp.11ff; see also p.27 re the international dimension

(a) Commission definition

2.1 Whilst the Applicants do not take issue with the relevance of the Community legislation rehearsed by the Commission in paragraphs 1 to 4 of its Objection, it is averred that the Commission has taken an unduly narrow interpretation of the legal framework which forms the basis of the Applicant's Application. The Applicants recall the matters set out at paragraphs 1.18.3 and 1.19 of the Application and thus, for example, the Commission's omission to apply, or have regard to, the Environmental Impact Assessment Directive and the EU's obligations under Article 8 of the UN Convention on Biological Diversity of 1992.

III. FACTUAL BACKGROUND

(a) Witness evidence

3.1 Each of the three Applicants has produced a witness statement in support of their Application, and these are also relevant to the question of admissibility. In accordance with Article 44(1)(e) of the Rules of Procedure, the Applicants indicated in the Application the nature of the evidence they intended to offer in support (i.e. witness statements from applicants, see e.g.: Application, paras.2.8, 2.21 and 5.8; and evidence of environmental dangers, see e.g.: para.2.20 and its footnotes). Pursuant to Article 48(1) of the Rules of Procedure, the Applicants now adduce such evidence as Annexes A.9, A.10 and A.11. The reasons for the delay in offering this evidence were: the need for prioritising the preparation of the Application within the time limit; the fact that this time limit spanned the Christmas/New Year period (Application originally submitted 2 January 2004); the fact that the parties' principals and legal advisers were physically in different parts of Europe at that time; the fact that the First Applicant had to be visited in France to obtain his statement; the fact that the Third Applicant experienced severe difficulties in the collection of evidence (and see paragraph 5, page 2, of the statement of Kerim Yildiz, Annex A.11); and the fact that the evidence of the Second Applicant (Annex A.10) involved complex issues of fact and environmental law that could not be compiled in time to meet the two-month time limit for an application. The Applicants also pray in aid the fact that the Court granted the Commission's request for an extension of time for its Defence due to the complex issues involved.

IV. RESPONSE TO THE OBJECTION AS TO ADMISSIBILITY

4.1 The Applicants repeat, and rely upon, the arguments as to admissibility already set out in the Application. It would appear from the Objection that the Commission takes issue in particular with the

following:

- The alleged ambiguity as to the decision complained of
- The alleged failure of the First Applicant to call upon the Commission to act
- The alleged inadmissibility because the Commission says the act in question was of a discretionary nature
- Direct and individual concern

The Applicants respond below, adopting for the most part the order in which points were addressed by the Commission in its Objections.

(a) Action for annulment pursuant to Article 230 EC: relevant decision

4.2 Contrary to the Commission's assertion at paras.10 to 15 of the Objection, the subject of the Applicants' Application for annulment is not ambiguous. The Applicants in para.1.1 of the Application are asking the Court of First Instance to annul the Commission's decision refusing to make a proposal[10] to the Council; alternatively are bringing an action for the Commission's failure so to act.

4.3 That the decision in question is properly defined is in fact clear from the Commission's recognition of what the Applicants are seeking at paragraph 13 of the Objection. In the alternative the Applicants are content with the Commission's averral in paragraph 14 of the Objection, namely that the issues in relation to either (a) decision or (b) failure to act are the same for practical purposes. Thus the Applicants have always contended that their application rests on the alternative bases of Article 230 or 232 EC.

4.4 Although the existence of a decision (as opposed to a non-decision) is therefore not vital to the admissibility of the Application, the Applicants nonetheless take issue with the Commission's denial that a decision can exist on the basis of the Report in question. It was the Commission itself that pointed to the Report of 5 November 2003 (Annex A.1) as being the determinative document where "the developments in Turkey surrounding this case" would be assessed (see: Commission letter 4 August 2003, Annex A.4, p.362, fourth paragraph; this in response to a detailed letter from the Applicants dated 3 July 2003, Annex A.3, p.201). It was in fact always the Applicants' case that that Report was a wholly inadequate instrument for this purpose (see letter calling on Commission to act, 2 September 2003, Annex A.2, p.190, third para.). However, in their application for annulment the Applicants are only taking the Commission at its word, since it was the Commission's own stance that

[10] The Application uses the term 'recommendation', but taking the Commission's point that this may be confusing, the Applicants are happy to use the term 'proposal'; as acknowledged by the Commission, the effect remains the same, whichever word is deployed.

an assessment would be made by means of that Report. That assessment has either been made contrary to the interests and submissions of the Applicants (and is thus a decision), or the Commission has failed to act (see section on Art.232 EC below).

4.5 The Applicants further take issue with the Commission's assertion that "factual findings in a report are not acts producing binding legal effects and hence are not capable of being the subject of an action for annulment" (Objection, para.12). The Applicants rely by analogy on the judgment of the Court in Case T-3/93 *Air France v Commission* [1994] ECR II-121, where an oral statement by the spokesman for the Commission that a proposed merger did not fall within Community competence was held to be amenable to review under Article 230 (ex 173) EC. Having cited (at para.43 of the judgment) the consistent case law of the ECJ and the CFI that in order to ascertain whether measures are acts within the meaning of [Article 230] "it is necessary ... to look to their substance", the Court then proceeded (at para.44) to find that the statement *did* produce legal effects (listing these at para.45).

(b) Binding legal effects

4.6 By analogy, it is submitted that it is clear that the substance of the contested decision (or indeed *mutatis mutandis* the failure to act, see below) produced legal effects. The decision not to make any proposal in relation to pre-accession funding for Turkey had a series of effects, where such effects can, it is submitted, be "direct or indirect" (see *Air France*, *op cit,* para.46) and may include effects on third parties (*ibid*, para.59). In the present case, the effect of the Commission's action was to confirm the lawfulness of the actions of Turkey in relation to (a) the BTC Project and (b) the accession criteria (as set out by the Community Institutions themselves and addressed at length in the Application). In particular (and by way of example) the Commission thereby confirmed that Turkey was not moving away from the *acquis communautaire*; that the criteria of the Environmental Impact Assessment were fulfilled and that the human rights of those affected and the protection of minorities in the relevant areas were not compromised. As has been demonstrated exhaustively in the Application, and, as is expanded on in the witness statements appended hereto, the very opposite is the case.

4.7 Turkey's continued engagement with the BTC pipeline has been made possible by the fact that the Commission did not act as in the Applicants' submission it was obliged to do under the very Community instruments rehearsed in paragraphs 1 to 4 of the Commission's objection. That this is so can be demonstrated by putting the question: what would have occurred if the Commission's decision had been otherwise (alternatively, if the Commission had acted)? In his witness statement, at Annex A.11, Kerim Yildiz of the Third Applicant (an expert on Turkish politics in this area) makes it clear that in his view the Commission's decision on pre-accession funding was "crucial" for the necessary public money to be provided to the BTC pipeline (see para. 9 of the statement, Annex A.11), and that

he has no doubt that Turkey would have reconsidered the terms of the Project agreements if the Commission had acted differently (*ibid,* para.11). This not least since the substance of the Commission decision had the effect of enabling or releasing World Bank and European Bank for Reconstruction and Development (EBRD) monies for the direct financing of the pipeline. The leading BTC company, BP, has effectively admitted that without such support, these pipeline projects would not be realised (see quotation, *ibid,* para.9).

4.8 The said substance of the Commission's decision published on 5 November 2003 also led directly to the removal of an obstacle to EBRD's funding of the BTC Project, which was approved some six days later on 11 November 2003 by the EBRD's board, on which the Commission represents the Community.[11] It is self-evident that a Commission decision to make a proposal under Article 4 of Regulation 390/2001 would have meant a negative EBRD decision on funding, with the known impact on the BTC pipeline project.

4.9 There was further the direct legal effect on Turkey in that it was absolved by the Commission decision from revoking or reviewing the HGA and the IGA (the agreements underlying the BTC project) in order to bring them into line with the *acquis communautaire* and/or the Copenhagen criteria.

4.10 For the avoidance of doubt, the Applicants contend (not least on the basis of the effect referred to in paragraph 4.8 above) that the Commission's proposal alone would have had the said effects (and thus the Applicants deny the point as to contingent impact at paragraph 25 of the Objection); but alternatively, and in any event, the Applicants submit that a finding of inadmissibility on the basis of there being no "direct impact" would mean that *no* applicant could have access to the courts in the present situation and that that outcome would be directly contrary to the principles of access to justice and democracy (see Section I above).

(c) The action for failure to act: Article 232 EC

4.11 The Applicants agree with, and adopt the Commission's characterisation of, their application under this head as being in reference to the Commission's failure to adopt a proposal pursuant to Article 4 of Regulation 390/2001 proposing to the Council to take appropriate steps with regard to pre-accession assistance granted to Turkey.

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[11] See: European Parliament, Reply to oral question H-0123/04 by Baroness Sarah Ludford: The European Bank for Reconstruction and Development (EBRD) Board of Directors, where the European Community is represented by the Commission, approved a loan of $105.8 million in favour of the Baku-Tbilisi-Ceyhan (BTC) pipeline project on 11 November 2003. A further loan of $105.8 million was approved for the account of participants. The EBRD powers are vested in the Board of Governors, which delegates powers to the Board of Directors; the Commission has seats on both boards.

4.12 The Applicants repeat *mutatis mutandis* the facts and matters set out in relation to binding legal effects above.

(d) The status of the individual First Applicant

4.13 The Applicants refute the assertion at para.17 of the Objection that the First Applicant has not called upon the Commission to act. The Commission refers to the letter of 2 September 2003 (Annex A.2) in isolation for its assertion. However, the said letter was part of a course of correspondence between the Applicants and the Commission (as acknowledged by the Commission at paragraph 9 of its Objection). At the outset of that correspondence, on 3 July 2003, those acting on behalf of the Applicants[12] made it clear that they were acting for:

> "...a coalition of NGOs and individually and directly affected Turkish citizens concerned with the impact of the Baku-Tbilisi-Ceyhan pipeline project..."(Annex A.3, p.201).

The said letter exhibited certain witness statements which were expressly said to be samples only (see *ibid*, p.202) and the nature of the individuals concerned was there identified with precision. The letter of 2 September 2003 calling upon the Commission to act was written on behalf of the same client base, and is accordingly signed:

> "...for and on behalf of all the members of the coalition and the individuals concerned" (Annex A.2, at p.193)

The First Applicant is one of those concerned individuals. The Rechtsanwältin and Registered European Lawyer who signed the letter of 3 September 2003 was at that time acting directly for all potential applicants; only in the course of the Application itself (and in order to comply with the Rules of Procedure) was there a change in legal representation. Being based in France, the First Applicant has decided not to rely on anonymity and makes this application openly. For the avoidance of doubt, the First Applicant is not a member of, nor associated with, either the Second or Third Applicant.

4.14 Accordingly the Court has jurisdiction over the First Applicant as a natural person who (through his representatives) called upon the Commission to act.

(e) Act in question not of a discretionary nature

4.15 The Applicants deny that the act in question was of a discretionary nature as claimed by the

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[12] And for the avoidance of doubt, since the Commission refers to the headed paper used, the Applicants point out that headed paper of Applicants' representatives is not determinative of who may apply: for example, if applicants use lawyers to represent them, the applicants will still be the clients, not the law firms whose paper is used.

Commission at paragraphs 20 and 21. The Commission's decision/failure to act in its Report of 5 November 2003 was the result of an investigation and decision-making process conducted in accordance with the duties and obligations set out in the Community's own instruments containing the pre-accession criteria, as set out in the Application. Those instruments are self-evidently binding on the Commission, so that there is certainly no discretion whether or not to abide by them. Furthermore, it is clear from the wording of the relevant parts of Council Regulation 390/2001 (as set out, e.g., at para.1 of the Objection) that - unlike the Council - the Commission is given *no* discretion as to its proposal. It is submitted that the natural and proper reading of Article 4 of the Regulation in particular is that where commitments contained in the EC-Turkey Agreements are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Commission has a *duty* to make a proposal to the Council.

4.16 Thus it is submitted that in view of the compelling evidence presented to the Commission in the said letter of 2 September 2003, the Commission had a duty to make a proposal. That point is *a fortiori* in the case of the application for failure to act under Article 232 EC, since if the Commission is right and there was no decision *at all*, whether in the 5 November Report or at any time, then the Commission must clearly have been in breach of its duty to act. Thus the Commission has failed to act in circumstances where there was a legal obligation for the Commission to adopt an act which had legally binding consequences. In neither case is this a matter where there was a discretion whether or not to act. The Commission rather had a duty to ensure that the general principles of law, especially respect for fundamental human rights, were observed within the Community legal order itself.

4.17 Thus the act in question was not of a discretionary nature and the application is admissible for this reason also. The Applicants further respectfully submit that in circumstances where the Commission has failed to ensure that the general principles of law, especially respect for fundamental human rights, were observed within the Community legal order, it now falls to the CFI to ensure that the said failure is remedied, where the CFI has the like duties and obligations as the Commission in this respect.

(f) Direct and individual concern required

4.18 The Applicants agree with the basic premise of the Commission's submission at paragraph 22 of its Objection that where the decision would not be addressed to the Applicants they will nonetheless have *locus standi* if there exists direct and individual concern. The Applicants do also submit however that the Court should consider the question of *locus standi* (and thus whether they have a direct and individual concern) in the light of the general principles adumbrated in Section I above. In particular in the case of the Second Applicant: if a natural or legal person can never be deemed to have representative direct and individual concern in relation to the violation of Community law principles

on the protection of the environment, within the Community legal order itself, then there can never be any (let alone any effective) judicial protection of the flora and fauna ostensibly protected by Community law.

(g) Direct and individual concern of the three Applicants

4.19 By way of general response to the Commission's assertions at paras. 23 to 27 of the Objection, the Applicants repeat the facts and matters above, where it has already been demonstrated how the Commission decision led (or will lead) to the consequences of which the Applicants complain (see in particular paras.4.7 to 4.10 above). The Applicants submit further, or in the alternative, that the case of *Greenpeace* relied upon by the Commission (Objection, para.24) was decided in a different legal framework and climate, and the Applicants repeat paragraph 1.7 above.[13] In relation to direct effect, the Applicants rely again by analogy upon the *Air France* case (*op cit*), where the Court cited the case of *Plaumann* (relied upon there, as in the present case, by the Commission) and held that:

> "...since the contested statement enabled, in law and in fact, the proposed operation to be put into effect immediately, it was such as to bring about an immediate change in the market or markets concerned..." (para.80)

Which equates in the present case to the legislative framework being confirmed in place; public funding for the BTC project proceeding and the Applicants' interests being individually affected as is further set out below. There was no need for intermediate measures to achieve these effects, so that it was not a purely preparatory measure. The Commission had the duty and the initiative to act and could have altered the course of events by its decision, so that it was not a purely confirmatory measure.

4.20 Further by way of general remark: if an analogous situation arose in a Member State (by way of example, a decision by the UK Government to grant Export Credit Guarantees to Turkey), then it is submitted that the Applicants, and each of them, would have the standing and the ability to commence judicial review proceedings in the national court to challenge the national authority's decision.[14] In this instance, where the Commission's decision is in dispute, these Applicants have no such opportunity to use their national court. As such, they find themselves applying to the CFI, not only as their only

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[13] See generally: Scott, *Law and Environmental Governance in the EU* (2002) 51 ICLQ 996; Macory and Turner, *Participatory Rights, Transboundary Environmental Governance and EC Law* (2002) 39 CMLRev 489, esp. at 519.

[14] In UK national law applicant(s) need show only sufficient interest in the matter of the application (s31(3) Supreme Court Act 1981). Individuals, e.g. the First Applicant, able to demonstrate 'victim status' (see s6 Human Rights Act 1998) may make supplementary applications. Re 'sufficient interest' of the individual, see: *R (Edwards) v Environment Agency & aor & Rugby Ltd (Interested party)* [2004] EWHC 736 (Admin); Generally, the court will adopt a liberal approach to standing; groups such as the Second and Third Applicants (responsible bodies with serious interest in the subject matter raising issues of real concern) will be afforded liberal access to the national court, see: *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386; *R v HM Inspectorate of Pollution, ex p Greenpeace Ltd* [1994] 4 All ER 329.

effective means of access to justice, but also as the only court competent to regulate the Commission's exercise of its Treaty powers.

The First Applicant

4.21 The overall case of the First Applicant is coloured by the fact that his fundamental rights in relation to access to justice cannot be exercised in an effective manner: see the final paragraph of his witness statement, Annex A.9, as confirmed by the view of the Third Applicant's witness statement, Annex A.11, statement of Kerim Yildiz, paragraphs 21 to 26: even where applicants appear to be able to try to obtain justice in local courts, in reality they are doomed to fail, both due to the so-called "prevailing legal regime" (see Application paras.2.13-2.21) and the practical hurdles described by Mr. Yildiz.

4.22 The First Applicant has found his land expropriated without adequate or any compensation (see witness statement, Annex A.9), in a situation where Community law recognises his entitlement to protection of his human rights,[15] and particularly his rights to property under Article 1 Protocol 1 ECHR. He belongs to a fixed class of individuals whose land has been confiscated without compensation, and the First Applicant repeats that his particular situation (as set out further in his witness evidence at Annex A.9) is analogous to the situations of the Applicants in the cases of *Extramet* and *Codorniu (*see Application, para.4.5.1, footnote 41). Further or alternatively the First Applicant recalls the principles set out in Section I above and submits that the circumstances of this case differentiate him from the examples on admissibility cited by the Commission in its Objection.

The Second Applicant

4.23 The Second Applicant represents the interests of the flora and fauna affected by the BTC Project and the consequences of the Commission's decision. Unlike the situation in the *Greenpeace* case, the Second Applicant does not claim to have *locus standi* on the basis of the fact that the persons whom it represents are individually concerned by the contested decision.[16] The Second Applicant does not represent "persons"; it represents the particular environment affected by the BTC Project. Nor could the Second Applicant represent any other "persons" in this regard: the only natural or legal person capable of bringing an action in this context would be an organisation such as Second Applicant.

4.24 Moreover, the Second Applicant finds itself in a special situation as regards the environmental dangers

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[15] And see by analogy the Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727

[16] As was the case in Case C-321/95 P, *Greenpeace* [1998] ECR I-1651, at para.29

of the BTC project, in that it has followed the project closely over a period of years, and has organised and participated in several fact finding missions. This is clear e.g. from para.1.3 of the witness statement of Nicholas Hildyard, the director of the Second Applicant (Annex A.10):

> "Since 1999, a prime focus of my work has been monitoring the potential and actual impacts of the Baku-Tbilisi-Ceyhan (BTC) oil pipeline. I have participated in four fact finding missions to the region (Azerbaijan, 2001; Turkey, 2002, 2003, 2004) and have extensively analysed the Environmental Impact Assessment (EIA) for the Turkish section project."

The Second Applicant is in a literally unique position to represent the interests of the affected habitats and wildlife before the CFI.

4.25 Thus, not only is the *Greenpeace* case distinguishable on one or both of the grounds above, the Second Applicant also clearly has a direct, individual and genuine interest in the geographical region concerned, its environment, and this particular case. That interest is that of the Second Applicant, not of any other person or persons, and its position is in this context directly affected by the Commission decision.

4.26 Of particular concern to the Second Applicant is the impact of the Project on a number of species and habitats subject to special protection under Community legislation or international conventions to which the Community is a party, and which should be (but were not) taken into account by the Commission in its decision making process (see Hildyard, Annex A.10, para.2.1). These include the green turtle, the loggerhead turtle and the Nile soft-shelled turtle (*ibid*, para.2.2 and its subparagraphs), protected under the CITES Convention, the Bern Convention and the Bonn Convention, to which the Community is signatory (see para.2.2.4 Annex A.10 for detailed citations); further the Yumurtalik lagoons, with one or the rarest birds in the world, the white-headed duck, protected under Bonn, Bern and CITES (para.2.3.1). It is an obvious point that the neither the turtle nor the duck can apply to the CFI. These creatures are of direct concern to the Second Applicant, however, and it has applied to the CFI accordingly.

4.27 The protection of the environment, and of the fundamental principles of Community law adumbrated in paragraph 1.7 above, constitutes a special case in the Community legal order: the main beneficiaries of what are in effect fundamental rights will by definition have no voice in Community processes. Instead, they are reliant upon legal persons, in the shape of environmental protection groups, to uphold the aims of Community law on their behalf. Otherwise the effectiveness of one of the fundamental principles of Community law would be jeopardised.

4.28 The Second Applicant repeats the matters set out in Section I above and the arguments set out in paragraphs 3.1, 3.2 and 4.1 of the witness statement at Annex A.10. It is submitted that the evolution

of Community law has moved on since the ECJ's judgment in *Greenpeace* over six years ago. The Court, not constrained by previous judgments of the Community Courts, is called upon by the Second Applicant to find that the Second Applicant has the requisite direct and individual concern to have *locus standi* in this matter.

The Third Applicant

4.29 The particular situation of the Third Applicant is that it represents the interests of those who cannot apply openly to the CFI because of a fear of reprisals, so that the Third Applicant is the conduit for these applications by natural persons. Thus the Third Applicant also does not claim to have *locus standi* on the basis that the persons whom it represents are individually concerned. The Third Applicant seeks *locus standi* on the *sui generis* basis that certain individuals whom it represents are prevented by some of the very breaches of their human rights that they complain of from applying directly themselves.

4.30 The Third Applicant's argument is summarised at para.3 of the witness statement of Mr. Yildiz (Annex A.11), and the fact that the anonymous applicants' fears are not unfounded is borne out by the detention and arrest of an associate of the Third Applicant who was collecting statements for this Application to the CFI: see *ibid,* para.5. In the words of the Third Applicant's witness (at para.8 *ibid*): "In the absence of my acting as a conduit, they will thus be denied access to justice". Given the particular field of operations of the Third Applicant (*ibid*, para.2), it also has a direct and individual interest in the contested Commission decision/failure to act.

(h) No national remedy

4.31 In relation to paras.40-43 the Applicants merely repeat that they have no access to national courts, which it is submitted constitutes an important factor in the Court's decision-making process. It is also pointed out that the Commission has not addressed the point that in relation to a review of the Commission's own decisions, the CFI is of course the *only* Court to which these Applicants can apply.

V. CONCLUSION

5.1 The Applicants respectfully submit to the CFI that for the reasons set out above:

- The Commission's objection to admissibility be dismissed.
- The Commission be ordered to pay the Applicants' costs.

Philip Moser
Barrister

Henry Miller
Solicitor

Lawyers for the Applicants

Dated:

SCHEDULE OF ANNEXES

Annex, type and paragraph where first mentioned and described Page

Annex A.9: Witness Statement of Cemender Korkmaz, First Applicant
(First referred to and described in para.3.1 at page 7 above)

Annex A.10: Witness Statement of Nicholas Hildyard of the Second Applicant
(First referred to and described in para. 3.1 at page 7 above)

Annex A.11: Witness Statement of Kerim Yildiz of the Third Applicant
(First referred to and described in para. 3.1 at page 7 above)