

IN THE MATTER OF
THE BAKU-TBILISI-CEYHAN PIPELINE

COUNSEL'S OPINION

N.B.: This is a partially edited version of my Opinion, for the purpose of annexing it to a letter to the Commission requesting action in accordance with the Commission's apparent duty in relation to overseeing the accession process and under Art.4 of Regulation 390/2001 (see also paras. 39-41 herein). The excised passages relate to legal advice as to litigation tactics and a theoretical national action in connection with the pipeline in the event of requests for export credit guarantees (but which have not been requested so far). This Opinion was drafted before the March 2003 Fact Finding Mission to Turkey and therefore has not taken into account the further grave breaches of human rights uncovered and experienced by that mission.

Philip Moser
Barrister
European Law Group
4 Paper Buildings
Temple
London EC4Y 7EX
tel.: +44 (0) 20 7643 5000
fax: +44 (0) 20 7353 5778
philip.moser@4paperbuildings.com

www.4pbeurolaw.com

CONTENTS

Section: Page:

<u>I. INTRODUCTION</u>	3
<u>II. SUMMARY</u>	5
<u>III. THE PROJECT</u>	5
<u>IV. TURKEY AND THE EU</u>	6
<u>V. BREACHES OF EU LAW BY TURKEY</u>	10
<u>VI. TURKEY AND HUMAN RIGHTS</u>	22
<u>VII. INTERNATIONAL LAW</u>	25
<u>VIII. DIRECT ACTION: PURSUING THE CASE BEFORE THE CFI/ECJ</u>	31
<u>IX. JUDICIAL REVIEW: PURSUING THE CASE IN THE ENGLISH COURTS</u>	35
<u>X. THE BTC CONSORTIUM AND EU LAW</u>	36
<u>XI. CONCLUSION</u>	38

[NB: Page numbers will not correspond to this edited version; the same applies to any cross-references in footnotes.]

I. INTRODUCTION

1. I have been asked to give my Opinion in this matter by The Corner House, a research and solidarity group focusing on human rights, the environment and social justice. The Corner House is part of a wider coalition of NGOs concerned with the impacts of the Baku-T'Blisi-Ceyhan pipeline, including Friends of the Earth, the leading environmental campaign and pressure group; the Kurdish Human Rights Project, which works to protect the human rights of all people in the Kurdish regions; Platform, which focuses on researching oil companies; and the Ilisu Dam Campaign, which works to highlight the impacts of infrastructure investment in the Kurdish regions. My initial Instructions are, broadly speaking, to give a general overview and commentary on:
 - (a) the actual or potential lawfulness under international and European law of the Baku-Tbilisi-Ceyhan Pipeline project (“the Project”) and the Host Government Agreement (HGA) and the Inter-Governmental Agreement (IGA) which form the legal basis for the Project;

and

- (b) what steps may be taken, in a legal and forensic context, against the participating Governments and/or the private undertakings (collectively “the BTC Consortium”, which is led by BP and includes at least two UK registered companies¹).

I have concentrated to a large extent on Turkey, as it is an entity capable of being subject to a public law challenge as well as an EU accession candidate. That is not to say that many of the same arguments could not also be applied to the other two States involved. I come to the private law arguments against the BTC Consortium at the very end of this Opinion.

2. I have had the benefit of a consultation with Fiona Darroch of Counsel and Miriam Carrion-Benitez of Counsel, with whom I have been working on this matter. I have also seen a detailed and (with respect) well-argued set of Instructions prepared by Phil Michaels, solicitor, of Friends of the Earth, dated October 2002, for an initial scoping exercise that was then envisaged. So far I have seen relatively limited documentation: I have been shown two HGAs, the IGA and some of the findings of the NGOs’ Fact Finding Mission (FFM), as well some other documents. If I have correctly interpreted my present Instructions, I am to comment generally on the legal background and specifically on the way forward as far as concrete, targeted and effective action by the NGOs is concerned. This is to include suggesting others who might usefully be added to the ‘team’ for their expertise at this stage. Equally, to suggest potential further or other parties (e.g. Turkish private individuals) to any future action. In this connection I have also been tasked with a certain amount of lateral thinking in relation to potential causes of action.
3. Inevitably this Opinion will leave areas untouched; I have yet to see the so-called ‘Turnkey Agreement’, and I have also not yet attended a conference with clients and/or NGOs. This is my initial opinion, based on the bare facts and the basic issues. Further investigation and research will no doubt uncover other possibilities and avenues, and I will of course be happy to advise further as required. I would also be happy to advise in greater depth on some of the legal issues, but there seems to me to be little point at this

¹BP Exploration (Caspian Sea) Limited, which gives an address in Azerbaijan in the HGAs, but which I note has its registered office at Britannic House, 1 Finsbury Circus, London EC2M 7BA; and Ramco Hazar Energy Limited, which gives an address in Dorking, and also has its registered office at 62 Queens Road, Aberdeen AB15 4YE.

stage in producing a dissertation on international and EU environmental law. I have deliberately concentrated on the question of practical steps that can be taken, used examples rather than listed all conceivable treaties and legislation, and have aimed to keep this Opinion relatively manageable in size and scope.

II. SUMMARY

4. In briefest summary, it is my view that there are two main forms of action which should be pursued:
 - (1) A reasoned request to the European Commission to propose to the Council that it should take appropriate steps against Turkey under the Accession Partnership legislation; in the event of a failure to act, there would follow a direct action in the Court of Justice against the Commission or the Council. The said request, and if necessary the direct action, would be based on Turkey's failure to move towards the Community *acquis*, as it is obliged to do under the accession procedure, but which it has in fact moved away from; this in particular in view of the potential breaches of EC, Human Rights and International law involved in the implementation of the Project.
 - (2) Judicial Review of the UK Government in the event of any grant of export credit guarantees. *[The remainder of this paragraph has been excised, as it relates only to national law advice for the potential applicants in the theoretical event that export credit guarantees are applied for].*

I have also considered other forms of action, but in view of the need for effective and credible measures, my present advice is to concentrate on the two points set out above. That is not to say that there will not in time be opportunities for further action, in particular against the BTC Consortium.

III. THE PROJECT

5. The Corner House and the other NGOs are extremely familiar with the nature of the Project, and I do not propose to set out herein any of the factual background, which may better be found in the reports of the FFM, the extensive press reports and the papers

already with the NGOs. Suffice it to say that this case concerns a pipeline project which is to be built in order 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 out through the Mediterranean. The total cost is set to be in the region of \$2.9 billion. Most or all of this money will come from public funds, notably certain World Bank and European Bank for Reconstruction and Development (EBRD) funds (thus indirectly from the UK taxpayers). Some direct UK Government funding may arise via potential export credit guarantees (ECGs), although apparently there has been no application for such ECGs at this stage. The Project is to have a duration of 40 years. I will elaborate on the facts only where the legal context so demands.

IV. TURKEY AND THE EU

6. Turkey's European Community ambitions, which date from the 1960s, are well known; and it is equally well known that the commencement of Turkey's accession talks was again postponed (to the end of 2004) at the Copenhagen summit last December. However, the new Turkish Government is keen to proceed to accession talks, and one of its first acts was to announce that Turkey would pass a variety of laws in preparation for membership. The relevance to the present case is as follows: of the three countries involved in the Project, Turkey is the only one of which it can be said with any force that it comes within the wider ambit of EU law. Thus, the thinking goes, there may be EU arguments that can be run in order to (a) prevent the implementation of the IGA and/or the Turkish HGA, and thus prevent the Project; or at least (b) create sufficient legal and/or political difficulties in connection with Turkey's accession process to prevent, frustrate or delay the Project.

From Association to Accession

7. The EEC-Turkey Association Agreement was signed on 12 September 1963.² It was designed to achieve an "accelerated economic progress and the harmonious expansion of

²OJ L 361/29 (1963, English special edition)

trade”.³ It took thirty-six years until Turkey become an accession candidate in 1999.⁴ This led to Council Regulation (EC) No. 390/2001,⁵ which forms the legal basis for the so-called “Accession Partnership”. Notably, Article 4 of that Regulation states that:

“Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular where the commitments contained in the EC-Turkey Agreements are not respected and/or progress towards fulfilment of the Copenhagen criteria⁶ 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 granted to Turkey.”

8. This was elaborated upon in Council Decision 2001/235/EC on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership.⁷ Decision 2001/235/EC expressly provides, under the heading “Environment”, that amongst the medium term priorities and interim objectives, Turkey must:
“Adopt a detailed directive-specific transposition programme of the *acquis*⁸; transpose the environmental impact assessment Directive...”
9. The Accession Partnership involved the creation of an Association Council with the power to take decisions relating to the pre-accession framework.
10. There is a vast wealth of material relevant to Accession, and the planned extension of EU Law to candidate countries, particularly in the field of Human Rights, see e.g.: the

³Second recital

⁴At the Helsinki European Council, December 1999

⁵OJ L 058, 28/02/2001

⁶In 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.

⁷OJ, L 085, 24/03/2001, p.0013-0023

⁸The *acquis* is the collected jurisprudence and legislation of EU Law

European Initiative for Democracy and Human Rights (EIDHR). Importantly, there are also various assistance programmes, including financial packages: see, notably, Council Regulation (EC) No. 2500/2001 concerning pre-accession financial assistance for Turkey⁹. Since 1992 the EU (then EC) has included in all its agreements with third countries a clause defining respect for human rights and democracy as “essential elements” in the EU’s relationship with those countries. A list of such material is beyond the scope of this Opinion; suffice it to say that there is no shortage of material documenting the importance of these fundamental principles in (a) the Community legal order, and (b) the relationship with accession candidates.

Direct Effect for Turkish Citizens

11. The European Association Agreements (such as the 1963 one with Turkey) provide that the parties shall be bound by certain (but not all) EU provisions of free movement. These Agreements have been shown to have direct effect in national courts, under essentially the same conditions as other Community instruments, in particular as Directives.¹⁰ What is more, Turkish citizens can rely on rights arising from the Association Agreement in national courts within the EU: see e.g.: Case C-12/86 *Demirel* [1987] ECR 3719.¹¹ It

⁹OJ, L 342, 27/12/2001, p.0001-0005

¹⁰i.e. that is the terms relied upon must be sufficiently clear, precise and unconditional, see: Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 (“It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between member states and individuals.”)

¹¹The European Court of Justice held that it could interpret provisions of Association Agreements on a reference from a national court under EC Treaty Art.177 (now 234): D, a Turkish national, came to Germany on a visitor's visa to join her Turkish husband who was working in Germany. She challenged an order that she should leave Germany on the expiry of the visa. She claimed that she had a right to stay under the Association agreement between the EEC and Turkey. *Held*, that (1) the court had jurisdiction to give preliminary rulings on the interpretation of Association Agreements and (2) a provision in an Association Agreement is *directly effective* when it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. However, the provision relied on by D was not sufficiently precise and unconditional to be capable of governing directly the movement of workers. It followed that EC law could not prevent the application of German law which resulted in her being refused residence. See also: *Narin (Unal) v Secretary of State for the Home Department* [1990] Imm. A.R. 403 (CA: Association Agreement *but not* Ankara Agreement, a Treaty, created rights for Turkish citizen in English law); Case C-237/91 *Kus* [1992] ECR I-6781; Case C-355/93 *Eroglu* [1994] ECR I-5113; Case C-434/93 *Bozkurt* [1995] ECR I-1475 (sufficiently close link with Member State to rely on Agreement); Case C-171/95 *Tetik* [1997] ECR I-329; Case C-37/98 *Savas* [2000] ECR I-2927; Case C-262/96 *Surul* [1999] ECR I-2685 (Ruling on Decision of EC-Turkey Association Council).

must however be remembered that such direct effect is only available in actions against the State, emanations of the State or undertakings assimilated to the State or exercising quasi-State powers.¹²

12. For present purposes the Association Agreement itself unfortunately does not take matters much further, as it does not incorporate provisions of state aid, environmental or human rights law, and contains no sufficiently precise provisions on competition law.

Duty on the Commission

13. The relevant Regulation (which is directly applicable law without need for implementation) and Decision (which is potentially directly effective¹³) also do not create self-standing causes of action, as there is no provision within them sufficiently clear, precise or unconditional to give rise to any individual rights, or indeed addressed to individuals at all. However, they are a clear expression of Turkey's accession obligations, including in the environmental and human rights fields. Importantly in my view they also clearly impose administrative duties upon the Community Institutions (notably the Commission and Council) to monitor and if necessary react to developments in Turkey's progress towards, or (I would add) *away from*, accession.
14. I will return below to the Commission's duty in this regard and the forensic and campaigning possibilities arising therefrom, when I come to consider the practical steps that could be taken by the NGOs and others (see Section VIII).

V. BREACHES OF EU LAW BY TURKEY

Actual Breach?

15. One of the questions posed in the Friends of the Earth paper was whether Turkey could be said to be in breach of EU law at present. I state at the outset that in my view the answer to that must be 'no'. Turkey is not yet subject to or obliged to follow EU law at

¹²See generally: Case 152/84 *Marshall v Southampton & SW Hampshire Area Health Authority* [1986] ECR 723; Case C-91/92 *Dori v Recreb* [1994] ECR I-3325. On companies assimilated to the State, see: Case C-188/89 *Foster v British Gas* [1990] ECR I-3313 (BG was then a nationalized industry).

¹³On the direct effect of Decisions, see generally: Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825

anything other than the international level, and even if that conclusion were wrong there would certainly be no judicial forum in which Turkey's potential breaches of any relevant duty could be punished or other conduct enforced.¹⁴

16. At least to some extent, of course, Turkey is gradually introducing laws conforming to EU law into its national framework. Any such breaches could however only be justiciable in Turkish courts for the time being. I note that an opinion is being obtained from Turkish lawyers as to any possible action in Turkey (whether based on national, European or international law). I obviously cannot comment on what would or would not be possible in Turkey. Anecdotal evidence would suggest that commencing proceedings in Turkey would be of limited utility.
17. Thus, on the main questions raised in the papers I have seen, whether Turkey is in breach of EU law *now*, and whether such breaches (if they existed) would be a bar to accession, I must answer in the negative. As Article 307 of the EC Treaty of 1957 (as amended) states:

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, that Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established....”

This is no more than the expression of the practical reality that for all matters arising *before* accession, the only remedy is negotiation prior to accession.¹⁵ There is also the eventual elimination of incompatibility *after* accession, but there is no fixed time frame, and by definition any issue that could not be negotiated away in time is likely to take a long time to resolve. The remedy is thus a political one only, not a legal one.

¹⁴e.g. the ECJ or the CFI have no jurisdiction; the position is *a fortiori* in relation to national courts, which have no jurisdiction to enforce the adherence to EU law even of other current Member States

¹⁵The examples are legion, ranging from the famous banana quotas, protecting Caribbean producers, to - more recently - the hunting of lynx in Latvia or the Chernobyl-style nuclear reactor in Temelin in the Czech Republic, which existing EU Member Austria remains implacably opposed to, but which could not be negotiated away in the accession talks (useful by way of illustration: such a reactor could not have been built within the EU, but upon Czech accession it will continue to operate in the EU).

Theoretical or potential breach

18. I am of course aware that in the context of campaigning for human rights and the environment, political and legal remedies go hand in hand. I am of the view that in this respect the fact that there is no directly actionable breach at present does also represent an opportunity, by using the available arguments in the context of the accession provisions, as I will set out further below. For this purpose it is therefore still useful to consider whether Turkey would be in breach (now and/or potentially later) if it were already subject to the Community *acquis*.
19. *Environmental Impact Assessment*: To some extent the HGA is an example of Turkey anticipating the introduction of EU law, and in one important respect this agreement purports to contain provision for an Environmental Impact Assessment in accordance with Community law. The HGA states (at Section 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)...”
- This is a condition which Turkey was wise to incorporate into the HGA, since (at least on paper) it eliminates the most obvious theoretical *current* breach of EU law.
20. If Turkey were already a Member State of the EU, the Project would be subject to the terms of the Environmental Impact Assessment Directive, which applies to public and private projects likely to have a significant impact upon the environment, and which (as amended) 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”¹⁶
21. The States and Consortium parties to the IGA and HRA have apparently initiated their own version of an EIA. I have not seen a full draft, nor indeed a final version. On the evidence available however, it would appear that this particular “EIA” would itself be

¹⁶Directive 85/337 as amended by Directive 97/11, Annex I, para.16. I am informed that 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.

open to challenge if EU law applied. For instance, it appears that the consultation requirements have not been fulfilled comprehensively, and in part not at all,¹⁷ so that the Project's promoters would be in breach of Article 6. In addition there could be other potential breaches, such as e.g. a breach of the requirement to warn other potentially affected Member States under Article 7.¹⁸

22. The final version of the said "EIA" would have to be subjected to close scrutiny prior to a more comprehensive verdict on its (potential or theoretical) lawfulness. Suffice it to say however that its conformity with the true requirements of EU law seems dubious at best.¹⁹
23. Again, such non-compliance with EIA provisions is more political than real at present, and not in itself a bar to accession, but I place this in the same category of "opportunity", which I will consider below.
24. "*Prevailing Legal Regime*": As for the most obvious *potential* breach of EU law, this relates to the IGA's and the HGA's overriding of all present and future laws that might stand in the way of the Project. Thus the IGA *itself* purports to be the "overriding legal regime":

IGA Art. II, para.5

"Each State hereby represents and warrants that the terms and conditions of this Agreement ... will be effective as the prevailing legal regime of the State respecting the MEP Project under its domestic law."²⁰

¹⁷See 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.

¹⁸e.g. Greece, whose territorial waters are closest to the Project's oil terminal, and oil would of course pass through the Mediterranean and past the coastlines of at least four Member States (five with Gibraltar/UK) in far greater frequency than without the pipeline.

¹⁹In this regard, and generally with a view to establishing the actual or potential trans-boundary effects of the Project, I have requested the NGOs' views on all the possible effects *within* EU territory; I await the outcome of their deliberations. One consultant one might in due course consider on the question of the adherence or otherwise of the Project EIA to EU law would be Professor Peter Kunzlik (also of 4 Paper Buildings), an expert on this area of the law (I would also mention one of his PhD students, Emily Reid, who is working on related topics, and Martha Grekos, a pupil barrister in my Chambers with relevant expertise).

²⁰A condition that - e.g. - Turkey has already fulfilled in its national law.

25. This finds expression in the HGA by way of a stabilisation clause,²¹ where if anything threatens the so-called “Economic Equilibrium” of the Project (a catch-all phrase for any adverse factors), then Turkey and the other states shall:

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 (whether the Change is specific to the Project or of general application) in Turkish Law (including any Turkish Laws regarding takes, health safety and the environment). ... 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 ... Turkish Law.”

In other words, 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.

26. If EU law applied, this would conflict directly with the State’s duty to implement, enforce and abide by EU law, e.g. on the environment: both as to *past* law (i.e. the *acquis*) and future law. Whilst on a private law level, Turkey might be brought into breach of its HGA obligations, on a public law level there can be no doubt that Turkey’s supranational obligations would override the terms of this ‘stabilisation clause’.²² In practice, the conflict would become apparent as soon as someone sought to rely on an existing adverse law based on EC legislation, or sought to apply a new Directive or Regulation.
27. To illustrate the extent to which the said clause would conflict with Turkey’s EU law obligations, one need only look to the pronouncements of the ECJ on the so-called ‘supremacy’ or ‘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*. In Community case law, direct effect and supremacy were established in Cases 26/62 *Van Gend en Loos*²³ and Case 6/64 *Costa v ENEL*²⁴ respectively. In *Van*

²¹The nature of this controversial clause is very well described by Phil Michaels in his FoE Instructions, page 8.

²²And I note that Phil Michael’s diligent research has not uncovered any example of such a clause within the existing EU States.

²³[1963] ECR 1

Gend, the ECJ held that the Netherlands could not, by a national law, increase the rate of import duty payable on goods originating in Germany, because Article 12 of the EEC Treaty (a standstill clause prohibiting any increase in such duties) had direct effect within the national legal order and took precedence over the later Dutch statute. In a much-quoted passage, the ECJ explained that:

“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”.²⁵ (emphasis added)

In *Costa v. ENEL*, the ECJ explained that,

“By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have created a body of law which binds both their nationals and themselves.

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.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights.”²⁶

28. However each Member State incorporates Community law into its laws and constitution,²⁷ once it joins the EU it accepts these constitutional obligations. Thus rights

²⁴[1964] ECR 585

²⁵At [1963] ECR 1 at 12

²⁶At [1964] ECR 585 at 593-594

²⁷e.g. in the UK, Laws LJ’s analysis in *Thoburn v Sunderland CC* [2002] EuLR 253 was that in the European Communities Act 1972 Parliament had created a ‘constitutional statute’, immune

created by Community law cannot be unilaterally abrogated, whether to benefit all or even (perhaps especially) to benefit only a few.

29. The (binding) case law of the ECJ has continued to reinforce the concepts of primacy and supremacy of EU law over anterior *and* posterior national law. A further, classic, example suffices: In Case 107/77 *Amministrazione delle Finanze dello Stato v. Simmenthal*,²⁸ 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.²⁹

30. The House of Lords put it as follows in *R v Secretary of State for Transport ex parte Factortame and others* (“*Factortame I*”)³⁰, where Lord Bridge, in a classic passage explaining the impact of EU law on national Parliamentary sovereignty, said this:

“Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based upon a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no

to implied repeal (and it should be added: incapable of express repeal without the UK being in breach of its Community law obligations).

²⁸[1978] ECR 629

²⁹Judgment, paras.21-2

³⁰ [1991] 1 AC 603

more than a logical recognition of that supremacy.”³¹

31. The supremacy of EU law means that for so long as a Member State continues to be a member of the European Union, the national courts of that State must give effect to the commitment entered into upon accession, by according precedence to Community legislation over conflicting national legislation. It is noteworthy that the language of the HGA and IGA is diametrically opposed to that of the fundamental principles of EU law set out above.
32. The authorities confirm both of the conclusions on the IGA/HGA reached above, i.e.: as to their status *at present* and any status *upon accession*. Until accession, there can be no relevant conflict with EU law because the ‘triggering event’ has not occurred. If Turkey were presently in the EU, the position would be that the agreements would be incompatible with any conflicting EU law, and any Turkish court would be under a duty to set aside the conflicting provisions not only of the HGA but also of primary Turkish law. Upon Turkish accession, the position would *prima facie* be the same, but due to the international Treaty status of the IGA, Article 307 EC (see above) would in my view operate to protect the “Prevailing Legal Regime” until eventual abolition by Turkey. Hence it remains an issue for negotiation in the accession process.
33. Subject to any exceptional *extra-territorial effect* therefore, there is a clear potential breach of EU law, but it is currently purely theoretical. However, it should be noted that **in their totality the IGA and HGA represent a clear *move away from the acquis of Community law by Turkey***. I will return to this theme below.

Extraterritorial EU Environmental Law?

34. Before finally leaving the question of whether there might be a *present* breach of EU law, at least by the candidate State Turkey, there is the question of the reach of EU law beyond the borders of the EU to consider. By way of analogy, in the field of EU competition law the territorial scope of Community law has been effectively extended beyond the borders of the EU itself. In Joined Cases 89,104, 114, 116, 117 and 125-129/85 *Åhlström v Commission* (“*Wood Pulp*”)³² it was suggested that the public international law ‘effects doctrine’ be applied to competition law, which by its very nature concerns agreements that could be made anywhere in the world but the *effects* of

³¹ At 658G-659C.

³²[1988] ECR 5193

which would be felt within the EU.³³ Although the ECJ shied away from the effects doctrine and found on the basis of EC-internal “implementation” of agreements, the result was a *de facto* extraterritorial application of EU law, applying competition rules to American and Scandinavian wood pulp producers.³⁴

35. The Commission has certainly not hesitated in applying its competition rules extra-territorially where it has perceived a threat to “an essential means under the Treaty for achieving the objectives of the Community” (i.e. avoiding distortion of competition in the common market).³⁵ The Commission went so far as to state that in such circumstances:

“...there are no reasons of comity which militate in favour of self restraint in the exercise of jurisdiction by the Commission.”³⁶

36. Could the same be applied to environmental principles of EU law? On the face of it one would assume that environmental law ought to rank at least as highly as competition law in the hierarchy of importance. Indeed, the ECJ has acknowledged that environmental protection does indeed constitute one of the EU’s “essential objectives”.³⁷ Furthermore it is self-evident that environmental *effects* could be felt within the EU even if the source of pollution or damage were situate in a third country.

37. *[This paragraph has been excised, as it relates to forensic/tactical advice for the potential applicants].*

38. There are [...] certain EU law measures that will by their very nature have extraterritorial elements. Prime amongst these are the two principal measures of EC nature conservation law, Council Directive 79/409 (on Wild Birds)³⁸ and Council Directive 92/43.³⁹ They are

³³Suggested in that case by the Advocate General Darmon

³⁴Paras 16-18 of the judgment. The ECJ concluded that “...the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law.”

³⁵See: *Aluminium Imports from Eastern Europe* [1985] OJ L92/1; [1987] 3 CMLR 813

³⁶*ibid*

³⁷Case 240/83 *Procurateur de la République v Association de défense des Bruleurs d’huiles usagées* [1983] ECR 531 at 549

³⁸OJ 1979 L103/1

³⁹OJ 1992 L206/7

however by their terms expressly limited to the territory of the current Member States. For present purposes therefore these must fall into the same category of *theoretical or potential* breaches of EU law as, e.g., the EIA regime.

“*Moving away from the Acquis*”

39. As pointed out above, whilst there may be no directly actionable breach of EU law by Turkey, it is my view that there exists at least a good arguable case that Turkey is in breach of its accession obligations. Specifically, Turkey is obliged by its commitment to the Accession Partnership to work towards adopting the *acquis*.⁴⁰ It is now an accepted *nostrum* that this includes in particular the *acquis* in the field of environmental law. It certainly expressly includes the EIA Directive, and thus the lawful application of any purported adherence to the EIA regime.⁴¹ Even more importantly in my view, there is that part of the overall EU law *acquis* that includes the supremacy of EU law.⁴² By introducing now a measure that is *prima facie* contrary to the fundamental principle of the overriding nature of EU law, even if Turkey has thereby got in “under the wire” before accession, **Turkey’s action is in my view certainly contrary to the spirit and quite probably contrary to the letter of the Accession Partnership.**

40. Put at its simplest, under the Accession Process Turkey is obliged to move towards the *acquis*. Instead, by the adoption of the IGA and HGA rules for the Project, and by the way the EIA has been carried out, Turkey has moved *away* from the *acquis*.

41. The Commission appears to be a “guardian” of the accession process, and under Art.4 of Regulation 390/2001⁴³ it is the Commission’s duty to take the appropriate action in view of Turkey’s apparent development away from the accession principles. That action ought in my view to be a proposal to the Council, as provided for by Art.4. There would then be a duty on the Council to consider that proposal and act accordingly. If the Council chose not to act, it would in my view nonetheless have to obey the EU’s own administrative law rules in doing so (i.e. the duty to give reasons; the principle of proportionality, etc). It would be argued that Turkey’s move away from the *acquis* was such a fundamental breach of the spirit and letter of the

⁴⁰See paras. 6 and 7 above

⁴¹See paras.18 to 23 above

⁴²See paras. 27 to 31 above

⁴³See paras.7 and 13 above

Accession Partnership, demonstrating the opposite of progress towards the Copenhagen criteria, that the Commission and then the Council could not reasonably decline to act by taking the appropriate steps.

42. The forms that such proposed “appropriate steps” might take are Protean. An obvious measure would be a cut in or partial suspension of the financial assistance programmes linked to accession. At the very least, the Council could call upon Turkey to seek to remedy the HGA/IGA’s deficiencies in relation to EU law. In the ideal scenario, such remedy would have to occur prior to Turkish accession taking place at all. I could speculate further, but at this stage the outcome would really be a question of lobbying and politics rather than strict law, and I shall refrain from straying too far into the province of the NGOs involved.
43. Thus the *theoretical or potential* breaches of EU law come back into play via the mechanism of the Accession instruments themselves. Before considering the forensic options open in the event of inaction by the Community Institutions, one should also briefly consider the legal issues arising other than from pure Community law, i.e. human rights law and international law.

VI. TURKEY AND HUMAN RIGHTS

The Council of Europe and the ECHR

44. The materials on Turkey and human rights are of course legion, and go well beyond the scope of this Opinion and indeed this case. Turkey is however a Member of the Council of Europe and thus a signatory of the European Convention on Human Rights (ECHR).
45. Again, the question of Turkish domestic human rights law is one for experts in Turkish law. It ought of course to be open to any Turkish citizen to seek redress for breaches of his or her human rights in the Turkish courts. The case law of the ECourtHR in Strasbourg suggests that this is far from certain in practice.
46. An illustration of this, which is also directly relevant to the present case, are the Turkish compensation cases, typically involving Turkish farmers and others whose land was expropriated to build hydro-electric dams. Such compensation was variously hard to obtain, late in being paid out and/or inequitable in amount (for instance because inflation

had eaten away at the payment between assessment and payment, see: *Aktas v Turkey*⁴⁴).

47. Such cases may well need to be brought again, in the national Turkish jurisdiction, once land seizures for the pipeline go ahead. Although very important for the individuals concerned, these cases are however highly unlikely to make any significant impact upon the Project itself. Historically, the compensation is not generous and (by definition) these cases are not brought until construction has begun and usually not concluded until long after completion of a project.⁴⁵ This therefore seems an unlikely vehicle for the kind of action envisaged by the NGOs. Compensation will however certainly be a live issue in any action: see further below.

Human Rights under EU Law

48. Human Rights and the provisions of the ECHR, also constitute a fundamental principle of Community law. The ECJ has so held consistently since Case C-260/89 *ERT*, these being fundamental rights, the observance of which the Court says it will ensure.⁴⁶ Thus, when acting in conformity with Community law principles, Community Institutions must also have regard to the ECHR and the Strasbourg case law.

Human Rights in UK Law

49. ***[This paragraph has been excised, as it relates only to theoretical national law advice for the potential applicants].***

Breaches of Human Rights by Turkey

50. Again, for the purposes of this broad review I will not go into a detailed analysis of the facts and the law, but the aspects of human rights law that are plainly engaged in this case

⁴⁴(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, as *per* Article 1 of the First Protocol of the ECHR.

⁴⁵Compensation regarding compulsory taking of land is usually calculated according to market value and the ‘no scheme’ principle, i.e. that the scheme/project proposed is taken out of the equation when valuing the land; another reason why the compensation route is particularly unrewarding

⁴⁶ [1991] I-2951, at para.41

are Article 6 (the right to a fair hearing); Article 8 (family life) and Article 1 of Protocol 1 (right to enjoyment of one's property) of the ECHR. Individuals along the length of the Project face expropriation, dislocation and a struggle for their claims to their property and/or compensation to be heard, whether fairly or at all.

51. That there will be questions over compensation in particular in the present case is clear from the findings of the Fact Finding Mission, which in its analysis of the HGA comments that

“The only reference to compensation is to compensation for the [BTC] consortium.

Compensation to the State or to third parties is not provided for and thus the consortium is exempt from all liability for loss and damage. Local populations have no right to an independent Tribunal in the event of disputes or claims for damages.”⁴⁷

52. The HGA/IGA being a curious hybrid of international and commercial agreements, there is considerable uncertainty from whom the individuals would claim compensation. The BTC Consortium has been declared immune from claims (as set out above). Thus it appears that the claim would be against the Turkish state, which granted the exemption. Turkish lawyers will no doubt advise on the relevant procedures, but Turkey's past record in compensation cases is poor.⁴⁸
53. Whilst the only forum for the human rights law breaches themselves will be a Turkish court and - ultimately - the ECourtHR in Strasbourg, these questions of actual or future human rights violations will also be directly relevant to any collateral challenge to the Project under Community law (re Turkey's accession obligations) or UK law (re the UK Government's obligations under the HRA).

VII. INTERNATIONAL LAW

International Law per se

54. There has been some uncertainty in the discussions in the papers I have seen as to the public or private status of the IGA/HGA. Broadly speaking, it seems clear to me that the IGA is an international Treaty, falling within public international law principles. By its

⁴⁷FFM Preliminary Report

⁴⁸See the summary in the FFM's Preliminary Report under the heading “Turkey's resettlement record”

own terms it has also become national law in the three States signatory. Thus the three signatories could take action at the international level *against one another* if they so chose. This seems highly unlikely. Action could also be taken in the national courts on this basis, on the likelihood and utility of which I have already commented above.

55. The HGAs are essentially commercial agreements, for the building of a pipeline. However, since one party in each case is a State, and since the State party in each case uses (and in part delegates) its public powers (in accordance with the IGA) to give the Project a status that is effectively 'above the law', a curious hybrid emerges. The HGA is apparently not justiciable in the national courts. Whilst in principle this would appear to offend against principles of natural justice (and indeed Art.6 ECHR), since the only obvious forum for a challenge would be the Turkish/Azerbaijani/Georgian courts, there seems little practical point in pursuing this line of argument here.
56. Thus I do not see that an exact analysis of the agreement structures would have any utility. In the absence of a direct challenge to the IGA and/or HGA in a national or international forum, questions such as the justiciability of treaties and defences of 'Act of State' and the like will not arise. I will point out however that as for the private company participants in the Project, even if the HGA has public law elements, companies such as BP, engaged in a commercial project, cannot thereby be elevated to public bodies. Beyond this, the question of the exact status of each instrument can in my opinion be left to one side for the time being. Suffice it to say that there is no viable challenge that the NGOs or individuals concerned could mount in international tribunals, such as the International Court of Justice.
57. *Wildlife Conventions*: That there would be international law arguments to bring is beyond doubt. There exist a wealth of international agreements to protect the environment, which have been ratified by Turkey in particular and which could potentially have effect in the context of the Project. The area that appears to me by far the most promising is that of wildlife and nature conservation. I am awaiting a report from the NGOs on the possible impact of the Project on the various habitats and other flora and fauna along the pipeline route. There are several global wildlife conventions that could potentially be invoked, if an appropriate forum were found.⁴⁹

⁴⁹See e.g.: International Convention for the Protection of Birds 1950; Ramsar Convention on Wetlands of International Importance 1971; World Heritage Convention 1972; 1979 Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention)

58. *[This paragraph has been excised, as it relates to forensic/tactical advice for the potential applicants].*

59. Of particular relevance in this regard would be the Berne Convention on the Protection of European Wildlife and Natural Habitats 1979, of which the UK, Turkey and the EU are signatories, which includes e.g. the injunction (in Chapter IV “Special Provision for Migratory Species”, Art.10);

“1. The Contracting Parties undertake, in addition to the measures specified in Articles 4, 6, 7 and 8, to co-ordinate their efforts for the protection of the migratory species specified in Appendices II and III whose range extends into their territories.”⁵⁰

This would provide an international law duty on the Community Institutions to uphold the said principles in the context of its dealings with Turkey, i.e. in the Accession Partnership. An analogous argument could be run against the UK Government in any potential action (see below on the practical possibilities). A further possible argument along the same lines is provided by the UN Convention on Biological Diversity of 1992. Again, The EU, the UK and Turkey are signatories, and under Article 8 they promised “as far as possible” to:

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

Importantly, the so-called “jurisdictional scope” (Art.4) includes:

“...in the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within its national jurisdiction or beyond the limits of national jurisdiction.”⁵¹

The argument therefore runs thus: the Project (a process or activity) has effect beyond the boundaries of Turkey: the working assumption being that a migratory bird is threatened (and there may be more potential effects) *within* the EU. Thus there is a further potential connecting factor for any inner-EU challenge, in Luxembourg or the national court.

⁵⁰Appendices II and III include a very long list of potentially affected birds

⁵¹This passage was relied upon - apparently successfully - in the English High Court in the *Greenpeace* case (op cit) [2000] EuLR 196 at 208

[This section has been excised, as it relates purely to national law advice for the potential applicants].

International Law via EU Law

63. Not unlike the position regarding human rights law, international law too has relevance through the ‘indirect’ route of EU law.⁵² 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.”

The ECJ has also confirmed that secondary 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 must therefore apply *mutatis mutandis* to the relevant Directive and Regulation founding and governing the conduct of the EU-Turkey Accession Partnership.

VIII. DIRECT ACTION: PURSUING THE CASE BEFORE THE CJ/ECJ

[This section has been excised, as it relates to forensic/tactical advice for the potential applicants].

⁵²In the right circumstances, international treaties can also have direct effect: see e.g. Case C-416/96 *El-Yassini v Secretary of State for the Home Department* [1999] ECR I-1209, citing the Turkish migrant case of *Demirel* (op.cit., para.11); but again, enforcing in the national court is not possible as the country “in breach” would be the not-yet-Member Turkey

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

IX. JUDICIAL REVIEW: PURSUING THE CASE IN THE ENGLISH COURTS

[This section has been excised, as it relates to potential national actions only, and only in relation to the theoretical question of any future export credit guarantees, not any present action or EU law matters].

X. THE BTC CONSORTIUM AND EU LAW

76. Thus far I have concentrated largely on the States parties to the IGA/HGAs, and particularly on Turkey, for the obvious reason that most of the arguments to be brought in this case relate to public law, and the States parties are those susceptible to public law challenges. Turkey, more particularly, is also the only State party that comes even within the widest ambit of Community law. As far as the BTC Consortium are concerned, they are largely insulated from any court action *within* the three contracting states, and any challenge there could anyway only be a matter for the relevant national law. As for court action *outside* the three contracting states, there is no obvious connecting factor to give - e.g. - the UK courts jurisdiction in any realistic scenario based on the legal principles considered in Sections V, VI or VII above.⁵⁵

Pursuing BP in the EU Courts

77. Having said that, the elusive chance of pursuing BP (most probably through BP Exploration (Caspian Sea) Limited) in the EU courts remains one of the most effective potential weapons against the Project.
78. *Competition law: Arts. 81 and 82 EC:* Although at present there is insufficient information before me to come to a clear view, there is at least a potential action against the BTC Consortium members under the competition law provisions of the EC Treaty: Article 81 (ex Article 85), which prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the EU; and Article 82 (ex 86) which prohibits the abuse of a dominant position.
79. At present only the conditions for Article 81 EC could be complete, in that the HGA potentially represents an agreement restricting or distorting competition within the EU.

⁵⁵I have e.g. considered and rejected the use of the so-called 'horizontal direct effect' - or indeed 'triangular direct effect' - of EC environmental directives as being an interesting academic subject but with insufficient realistic prospects of success in this case.

Despite the fact that the agreement would have been made outside the EU, and would largely be put into effect outside the EU, the implementation or effect of the agreement could be felt within the EU. One would rely on the *Wood Pulp* principle (op cit, para.34) in this regard, to bring the whole concerted practice within the ambit of EU law. I stress however that such speculation is currently purely theoretical, as it would require detailed analysis of the effect of the agreement on the relevant market within the Community. It may well be however that once the Project was up and running, the consequences of the BTC Consortium's involvement with the Project could have the relevant effect within the Community (and thus may well have that potential effect *now*). This situation will have to be monitored. If a scenario could be developed whereby an Art.81 complaint to the Commission could be threatened, then this could serve as a strong deterrent to investors to proceed with the Project.

80. The question of any infringement of Art.82 are presently even more remote. However, if access to the Project's oil did serve to give the BTC consortium a dominant position in its market (which would have to be determined with greater clarity than at present), then this aspect too should not be entirely discounted.
81. Bearing in mind the need for realistic and credible action however, I would not advise any present proceedings against the BTC Consortium itself. I suggest instead to keep the matter under review.

XI. CONCLUSION

82. I hope that this Opinion is sufficiently clear and self-explanatory, but the clients and their advisers should not hesitate to contact me in the event that further clarification should be required. I look forward to receiving the material relating to the projected effects of the Project and indeed, if possible, any information on migratory birds. I also look forward to the projected NGO/counsel meeting with interest. I point out that it would help greatly if there were some indication in advance of the meeting as to any likely legal questions that the participants would wish to air.

PHILIP MOSER
15 January 2003