

IN THE INFORMATION TRIBUNAL

APPEAL NO. EA/2008/0071

BETWEEN

EXPORT CREDITS GUARANTEE DEPARTMENT

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

MR NICHOLAS HILDYARD on behalf of CORNER HOUSE

Additional Party

APPELLANT'S STATEMENT OF FACTS

1. ECGD is the UK's Export Credit Agency. It is a separate Government Department whose existence and powers are derived from the Export and Investment Guarantees Act 1991. Its principal role is to facilitate the export of goods and services from the United Kingdom and to assist overseas investment made by United Kingdom entities. It does so by issuing financial guarantees to banks and credit insurance policies to exporters. In the course of its operations it does not provide any direct lending.
2. During 1999-2000, ECGD reviewed its mission and status. In December 2000, ECGD adopted a set of Business Principles to guide its business practice and policies. It established a Business Principles Unit ("BPU") in 2001. The Business Principles require ECGD, when considering support for a project, to assess not only payment risks but also the underlying quality of the project, including environmental, social and human rights aspects.

The BPU is responsible for advising on whether prospective business for which ECGD support is sought complies with ECGD's Business Principles.

3. ECGD has published a Case Impact Analysis Process, which seeks to ensure that, as far as possible, all cases supported by ECGD are compatible with its Business Principles and that relevant decisions on ECGD support have taken into account Government policies on the environment, sustainable development and human rights. Information provided by applicants and obtained from other sources is initially analysed to categorise the potential impacts of a case.
4. All cases categorised as High Potential Impact are automatically assessed as potentially sensitive cases. At an early stage, ECGD provides other Government Departments with the opportunity to comment on potentially sensitive cases and contribute to the ECGD risk assessment process. In addition, since 2003, ECGD posts prior notification of High Potential Impact cases on its website, enabling all interested parties to submit comments to it.
5. The Baku-Tbilisi-Ceyhan pipeline project (known as the BTC pipeline project) was a project to construct a 1,760km long pipeline to transport crude oil from the coast of the Caspian Sea to the Mediterranean. It begins at Baku in Azerbaijan, passes through central Georgia close to Tbilisi, and terminates at Ceyhan, a port on the Turkish Mediterranean coast. The BTC pipeline is owned and operated by a consortium of energy companies led by BP. The total project cost was estimated at approximately US\$3.4 billion. The first oil from the pipeline was exported in June 2006.
6. The BTC pipeline project was assessed in accordance with ECGD's Case Impact Analysis Process and was categorised as High Potential Impact. The BPU carried out an assessment of the environmental, social and human rights impacts of the project. Its due diligence process was carried out from August 2002 until December 2003, and included:
 - a. A site visit by ECGD's Business Principles Adviser, with environmental specialists from other export credit agencies, over 13 days to Azerbaijan, Georgia and Turkey;
 - b. Meetings with, and comments received from, interested third parties including those arising out of ECGD's public disclosure procedure;

- c. Discussions with officials in other Government Departments, including the Foreign and Commonwealth Office (“FCO”), the Department for International Development (“DFID”), and the Department for Environment Food and Rural Affairs (“DEFRA”); and
 - d. The work product of the lenders’ environmental working group on the project, supported by input and advice from the lenders’ independent consultants and local legal advisers.
7. Under ECGD’s public disclosure procedures, a brief account of the project was published on ECGD’s website over the period 19 May to 10 November 2003. The ECGD took into account material comments on the BTC project made by interested third parties (including several NGOs) in reaching its decision.
8. In December 2003, the BPU completed the BPU Report and its related recommendations. ECGD’s Underwriting Committee met to consider this Report and other aspects of the project on 5 December 2003.
9. On 17 December 2003, ECGD agreed to provide cover in respect of UK procurement for the BTC Project subject to a number of conditions. ECGD provided its support in February 2004 by issuing a guarantee in respect of a US\$106 million loan facility used to finance the supply of goods and services from the UK exporters. ECGD underwrote a total exposure of up to US\$150 million (including interest). ECGD published a Note of Decision in December 2003 at the time it decided to grant support for the project, explaining the reasons for its decision.
10. On 8 August 2005, the complainant, Mr Nicholas Hildyard on behalf of Corner House, asked ECGD to provide information held by it under the EIR. The request was large and complex and was in three sections. Mr Hildyard sought:
 - a. A copy of the BPU Report on the BTC project as prepared for ECGD’s Underwriting Committee;
 - b. A list of all meetings held to discuss the BPU’s assessment report, including attendees;

- c. All notes and/or minutes of meetings held to discuss the BPU's assessment report, including any written comments or appraisals;
 - d. All correspondence with BP and/or BTC Co relating to the BPU's assessment report.
11. ECGD responded to the request on 13 December 2005, providing a large amount of information which included a redacted copy of the BPU Report and the minutes of the meeting on 5 December 2003 (which were inadvertently disclosed). ECGD declined to disclose the redacted sections of the BPU Report which consisted of the BPU's own assessments of the BTC Project, citing exemptions under sections 27, 36 and 42 of FOIA and the exception under Regulation 12(4)(e) of the EIR.
 12. On 8 February 2006, the complainant sought an internal review of ECGD's decision to withhold the items redacted from the BPU Report, information redacted from the Minutes, and the full text of three emails. ECGD provided the results of its internal review on 14 November 2006, releasing some further information that had been wrongly withheld but finding that it had otherwise correctly applied the exceptions and correctly applied the public interest test.
 13. On 20 December 2006, the complainant made a complaint to the Information Commissioner under section 50 of FOIA and Regulation 18 of EIR concerning, inter alia, ECGD's refusal to release the redacted items of the BPU Report and the Minutes, and the length of time taken to carry out the internal review. The Information Commissioner commenced his investigation in September 2007. On 19 October 2007, ECGD provided the Commissioner with the information being withheld and provided detailed reasons for its non-disclosure.
 14. On 13 November 2007, the Commissioner's staff met with ECGD representatives to review ECGD's reasons for withholding the information. In a letter of 18 January 2008, ECGD clarified points raised at the meeting, and stated that some of the information being withheld from the BPU Report under Regulation 12(4)(e) of the EIR was also exempt under Regulation 12(5)(a) (international relations). ECGD also disclosed a further small amount of information to the complainant on 19 March 2008.
 15. The Information Commissioner issued his Decision Notice on 28 July 2008.