

BTC Specific Instance under OECD Guidelines on Multinational Enterprises

Appeal to NCP Steering Board Against NCP's Final Statement

The Corner House for The Complainants

Introduction

1. On 29 April 2003, Friends of the Earth (England, Wales and Northern Ireland), The Corner House, Kurdish Human Rights Project, Platform, Baku Ceyhan Campaign and Milieudefensie¹ (“the Complainants”) submitted a Specific Instance to the UK National Contact Point (NCP) for the OECD Guidelines on Multinational Enterprises against BP over its Baku-Tbilisi-Ceyhan (BTC) oil pipeline [*Letter from Friends of the Earth (England, Wales and Northern Ireland, et al to Mr Duncan Lawson, UK National Contact Point, 29 April 2003*] [1]. The Complaint was simultaneously submitted by NGOs in Germany, Italy, France and the USA to their national NCPs.
2. The Specific Instance held that, in developing the Baku-Tbilisi-Ceyhan oil pipeline,² BP, as part of the BTC Consortium³ that developed and operates the pipeline, contravened the OECD Guidelines by:
 - Exerting undue influence on the regulatory framework for the project;
 - Seeking or accepting exemptions from the three host governments (Azerbaijan, Georgia and Turkey) relating to social, labour, tax and environmental laws;
 - Failing to operate in a manner contributing to the wider goals of sustainable development;

1. Initially Friends of the Earth (England, Wales and Northern Ireland) acted as contact point for the Specific Instance. Subsequently, however, this role was performed by The Corner House..

2. The oil pipeline, now completed, runs for 1,056 miles (1,760 kilometres) from the Azerbaijan capital of Baku, through Tbilisi, Georgia, ending in the Mediterranean city of Ceyhan, Turkey.

3. At the time the Specific Instance was submitted, the BTC was operated by BP Exploration (Caspian Sea) Ltd., which holds 30.1% in the BTC Consortium (the “Consortium”). Unocal Corporation holds 8.9%, ConocoPhillips holds 2.5% and Amerada Hess holds 2.36% through its joint venture – Delta Hess – with Saudi Arabian-owned Delta Oil. Other shareholders included the State Oil Company of Azerbaijan (25%), Norway’s state-owned Statoil (8.71%), Turkish Petroleum (6.87%), AGIP Azerbaijan (a subsidiary of the Italian-owned ENI group) (5%) and Japanese-owned Itochu (3.4%).

- Failing adequately to consult with project-affected communities on pertinent matters; and
 - Undermining the host governments' ability to mitigate serious threats to the environment, human health and safety through clauses in the project agreements prohibiting the host governments from undertaking action with respect to the project except to address an imminent and material threat, thereby precluding any action whatsoever in instances when threats are long-term or when there is a lack of full scientific certainty concerning serious threats to the environment or human health.
3. On 15 August 2007, the NCP issued its Final Statement on the Specific Instance [*UK National Contact Point, "OECD Guidelines for Multinational Enterprises, National Contact Point – Statement, Specific Instance: BTC Pipeline*]. [2] A copy of the Statement was placed on the NCP's website and copies were sent to the Libraries of the House of Commons and the House of Lords [*Letter from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, "UK National Contact Point for OECD Guidelines, Specific Instance: BTC Pipeline", 15 August 2007*]. [3].
4. On 12 September 2007, solicitors Leigh Day & Co, acting for the Complainants, issued a Notice of Appeal on procedural grounds to the Secretariat of the NCP Steering Board [*Letter from Leigh Day & Co, to Mr Andy Weller, NCP Steering Board Secretariat, "NCP Statement on BTC Pipeline – Appeal to Steering Board", 12 September 2007*]. [4] The Complainants argued that:
- The NCP had “conducted itself throughout the Specific Instance process with conspicuous unfairness, favouring the commercial organisations involved at every stage”; and
 - The consultation with the Complainants had been “one-sided, limited and partial, and wholly fails to meet basic standards of fairness or natural justice”.

On 20 December 2007, Mr Weller of the NCP Steering Board Secretariat wrote to Leigh Day & Co acknowledging “the NCP agrees that there were some procedural failings” and recording that “we intend to remove the statement from the NCP's website, without prejudice to the eventual outcome [of the Appeal]” [*Letter from Mr Andy Weller, NCP Steering Board Secretariat, to Leigh Day & Co, "NCP Statement on BTC Pipeline – Appeal to Steering Board for review", 20 December 2007*]. [5]

5. On 13 March 2008, Mr Weller wrote to Leigh Day & Co informing the Complainants that the NCP Steering Board had agreed its Review Procedures and

that “the review you requested on 12 September 2007 can now proceed in accordance with the Review Procedure . . .” [*Letter from Mr. Andy Weller, NCP Steering Board Secretariat, to Leigh Day & Co, “NCP Statement on BTC Pipeline – Appeal to Steering Board for Review”, 13 March 2008*]. [6]

6. This statement is submitted by the Complainants in support of their Appeal.

The BTC Specific Instance: Procedural Chronology of the Complaint

7. In order to assist the Review Committee in obtaining a complete view of the NCP’s handling of the Specific Instance, and thus of the procedural failures that are the subject of the Complainants’ Appeal, we summarise below the correspondence and meetings (of which the Complainants are aware) between BP, the NCP, the Complainants and other bodies relating to the Specific Instance which are relevant to the issues under Appeal. All internal government correspondence to which reference is made is publicly available information that has been disclosed under the Freedom of Information Act.

2003

- 29 April 2003:** Specific Instance submitted to UK NCP.
- 6 May 2003:** Jay Pearson, Vice President, External Affairs, BP, responds to the Complainants on the Specific Instance [*Letter from Mr Jay Pearson, BP, to Mr Nick Rau, Friends of the Earth, “Response to NGO Letters Dated April 29, 2003 Regarding Alleged Breaches of OECD Guidelines”, 6 May 2003*]. [7]
- 8 May 2003:** NCP formally acknowledges to the Complaints that the NCP is in receipt of the Specific Instance [*Letter from Mr Duncan Lawson, UK National Contact Point, to Mr Nick Rau, Friends of the Earth (England, Wales and Northern Ireland), “OECD Guidelines for Multinational Enterprises: Submission on BP Operations in Respect of BTC Pipeline”, 8 May 2003*]. [8]
- 12 May 2003:** Michael Townshend, Chief Executive Office of BTC, responds to the Complainants on the Specific Instance [*Letter from Mr Michael Townshend, The Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co), “Response to NGO letters Dated April 29, 2003 Regarding Alleged Breaches of OECD Guidelines”, 12 May 2003*]. [9]

12 May 2003:

A “Restricted” Memorandum was sent by Duncan Lawson, NCP, to Baroness Symons, Minister for Trade, outlining procedures for dealing with the Specific Instance. The Memorandum notes:

“The ultimate ‘sanction’ that the NCP has is ‘to name and shame’ BP if it has not acted in accordance with the Guidelines and refuses to take remedial action or enter into meaningful dialogue. This is very much a last resort” (emphasis added).

[Restricted Memorandum from Mr Duncan Lawson, UK National Contact Point to Baroness Symons, “OECD Guidelines on Multinational Enterprises, Activities of BP in Azerbaijan, Georgia and Turkey”, 12 May 2003]. [10]

12 May 2003:

The NCP circulates the Specific Instance to the Department for International Development, the Export Credits Guarantee Department, the Department for Trade and Industry, and the Foreign and Commonwealth Office, inviting their comments.

28 August 2003:

NCP confirms eligibility of complaint to the Complainants: “There is no question of the NCP not accepting this complaint on eligibility grounds” *[Email from Mr Duncan Lawson, National Contact Point, to Mr Nicholas Hildyard, The Corner House, “RE: BP complaint under OECD guidelines - country breakdown + urgent request for clarification”, 28 August 2003]. [11]*

2004

8 January 2004:

Email from Ann Herd, Energy Section, Aviation, Maritime and Energy Department, Foreign and Commonwealth Office (FCO) to Alan Michael, FCO, copied to Duncan Lawson, NCP *[Email from Ms Ann Herd, Foreign and Commonwealth Office, to Mr Alun Michael, Foreign and Commonwealth Office, “BTC Pipeline: NGO Complaint/OECD Guidelines”, 8 January 2004] [12]:*

“I spoke with Jay Pearson, BP, about the above letter to from (sic) Friends of the Earth to Duncan Lawson last April: I understand that Jay has also spoken to Duncan Lawson about it . . . Jay felt that HMG owed Friends a response to their letter. BP were happy to proceed without any input from HMG, and correspond direct with Friends, but thought that a lack of it would indicate to them that HMG had a case to answer, and that they (Friends) would certainly latch on to this. I told Jay I would look into the matter, and let him have some sort of response by Monday at the latest – hopefully, by then, Posts will have been able to let us have their comments.”

3 March 2004:

BP submits detailed rejoinder to the Specific Instance to the NCP and the Complainants.

1 April 2004: David Harvey (FCO) sends Duncan Lawson (NCP) an email, forwarding a Restricted FCO telegram detailing “growing concern” over the “lack of Azeri Government capacity in civil emergency planning and crisis response . . . both for pipeline security and in relation to wider security threats” [*Email from Mr David Harvey to Mr Duncan Lawson, UK National Contact Point, “FW: Pipeline Security and Crisis Response”, 1 April 2004*].[13] The telegram states:

“BP has confidence in its own internal crisis and emergency planning which is tested regularly . . . The bad news is that there is no machinery for policy co-ordination or planning input from relevant ministries or agencies beyond the Presidential Apparatus, and no link into the National Security Council. So in a major civil contingency or terrorist attack, apart from the purely military response there would be no civil command structure, no lead agency and probably no effective communication between relevant ministries and agencies. This leaves BP’s own crisis response team exposed, as they laconically put it, to ‘over- or under-enthusiasm’ from the military and other interested agencies getting in the way of an effective response.”

The cover note states:

“Not sure if you have seen already or indeed if this is of interest, given the current (?) Guidelines complaint about BP’s activities in Azerbaijan”.

19 November 2004: The Complainants submit to the NCP a detailed rebuttal of BP’s response, including procedural concerns arising from the UK government now having a financial interest in the BTC pipeline, the ECGD having agreed in February 2004 to support BTC Co [“*Baku-Tbilisi-Ceyhan (BTC) Oil Pipeline Complaint Under OECD Guidelines for Multinational Enterprises, Filed by Friends of the Earth and Others, 29 April 2003, Response to BTC Co Rejoinder, 3 March 2004*”, 19 November 2004].^[14]

2005

29 August-

9 September 2005: NCP undertakes “information gathering” visit to Azerbaijan, Georgia and Turkey.

18 October 2005: NCP circulates to all parties a confidential final report on the NCP’s information gathering visit.⁴

27 October 2005: The NCP hosts a dialogue meeting between BP and the Complainants. The Complainants submitted a written statement

4. The report was sent to the parties on a confidential basis and is not therefore included in the bundle of supporting documents. However the Complainants believe that a knowledge of the document is essential if the Steering Board is to be in a position to assess the procedural importance of the failure of the NCP to insist that BP disclose its response to the Complainants. The Complainants would therefore urge the Steering Board to request a copy.

on the general lessons arising from the Specific Instance requesting that these be included in any Final Statement from the NCP [*“Specific Instance on the BTC oil pipeline brought under the OECD Guidelines on Multinational Enterprises, Statement of Complainants to Dialogue Meeting, 27 October 2005”*].[15] BP agreed to undertake field research to investigate specific complaints made by villagers to the NCP during his field visit, and report back in November 2005. The parties agreed to a follow up meeting in November 2005.

10 November 2005: Miss Eleanor Reid, the newly appointed NCP, wrote to The Corner House, which was acting as the contact point for the Complainants [*Email from Miss Eleanor Reid, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, “BTC Dialogue Meeting”, 10 November 2005*] [16]:

“I understand that at the dialogue meeting which took place on 28 October (*sic*) between yourselves and representatives of BP it was agreed that a further dialogue meeting would be scheduled around the end of November to review progress on the outstanding compensation claims.”

22 November 2005 The NCP emailed The Corner House to inform the Complainants that a second dialogue meeting scheduled for the 28 November 2005 would have to be cancelled due to the previous NCP, Mr Duncan Lawson, being unable to attend [*Email from Ms Eleanor Reid, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, “Re: Electronic version of NGO opening remarks for BP dialogue”, 22 November 2005*] [17]:

“I am afraid that I have heard from Duncan Lawson this morning that he is unable to make the 28 November for the BTC dialogue. I think given Duncan's involvement in this case he should be present, which means we will now have to look for a date in January. I understand that this will be very disappointing to you and I am sorry that it is proving so difficult to find a date on which all the parties are available.”

The NCP also requested further information from the complainants:

“BP have been in touch requesting clarification on a point raised by you in the last meeting. I understand that at the meeting you raised a concern that the nitrogen oxide emissions in the Turkish section of the pipeline are in excess of EU permitted levels. BP said that they would investigate. I would be grateful if you could clarify the precise nature of the allegation.”

28 November 2005: At the request of the NCP, the Complainants submitted a Memorandum clarifying a number of procedural and other issues arising from the 20 October 2005 dialogue meeting, including:

- a) clarification as to how the general lessons cited by the Complainants in their written statement to the dialogue meeting of 27 October 2005 related to the Specific Instance;
- b) clarification as to why the Complainants raised concerns over permitted nitrous oxide emissions being in excess of European Union standards; and
- c) the Complainants response to the NCP's view, as expressed in the 27 October 2005 dialogue meeting, that it was not within the NCP's remit to make recommendations to the Investment Committee.

[*“BTC Specific Instance under OECD Guidelines on Multinational Enterprises, Complainants Response to Issues Arising from Dialogue Meeting with BP”*, 28 November 2005].^[18]

6 December 2005: NCP meets with Nicholas Hildyard of The Corner House, Hannah Ellis of Friends of the Earth and Tricia Feeney of Rights and Accountability in Development as part of the UK government’s public consultation on the implementation of the OECD Guidelines. The NCP informed Mr Hildyard and Ms. Ellis that BP had undertaken its field research and would report back verbally at the "next dialogue meeting".

8 December 2005: The NCP circulates its draft minutes of the 27 October 2005 dialogue meeting, recording BP’s (by now broken) commitment to report back to the Complainants and the NCP in November [*UK National Contact Point, “Specific Instance on the BTC Pipeline: Dialogue between Complainants and BP, 27 October 2005, Draft Minutes”*, 8 December 2005].^[19] The minutes record:

“BP undertook to follow-up the NCP visit report and the compensation complaints from villagers and report back to the complainants and the NCP at the end of November.”

9 December 2005: The NCP wrote to the Complainants confirming that BP has “no strong objections” to Complainants from outside the UK (the NGOs that had submitted the Specific Instance in other countries) attending the follow up dialogue meeting. At no point is it suggested that BP was unwilling to meet. [*Email from Miss Eleanor Reid, National Contact Point, to Mr Nicholas Hildyard, The Corner House, “Re: Handling of non-UK BTC Complaints”*, 9 December 2005].^[20]

The same day, the Complainants wrote to the NCP expressing their concern that BP had failed to respond, as promised, either to the recommendations as to general lessons or the NCP's report of its information gathering visit by the dates to which it committed [*Email from Mr Nicholas Hildyard, The Corner*

House, to Miss Eleanor Reid, "Specific Instance on the BTC pipeline", 9 December 2005].[21] The Complainants added:

"We understand that BP's own investigations are complete and we see no reason why their findings should not be circulated immediately to the parties."

The Complainants also reported:

"As of yesterday, none of the villagers in Turkey to whom Mr Lawson spoke, with the exception of the Muhtar of Otagli⁵, had been visited by either BP or BOTAS since the October dialogue meeting. Understandably, this has prompted concerns over the thoroughness of BP's investigation: we find it hard to believe that the complaints can be investigated without clarification being sought from those most directly affected, particularly given that Mr Lawson's report was only a summary of the issues raised. In that regard, early circulation of the report is even more critical in order that concerns over its thoroughness can be laid to rest and/or addressed prior to the next meeting."

Documents released through FOIA reveal that Miss Eleanor Reid also wrote to Mr Lawson [the former NCP] on the 9 December 2005 requesting clarification of what precisely was agreed at the dialogue meeting [*Email from Miss Eleanor Reid, National Contact Point, to Mr Duncan Lawson, "FW: Specific Instance on the BTC Pipeline", 9 December 2005*] [22]:

"I am sorry to revert to you on this issue but as I was not present at the meeting and it is not clear from the minutes precisely what was agreed I would welcome your view. The view from the complainants . . . is at odds with BP who inform me that they did not undertake to respond 'within 14 days' to the lessons to be learnt statement. BP say that their undertaking to report back on the villager complaints was made within the context of the next dialogue meeting and it was not agreed that a written report be circulated prior to the dialogue meeting. Do your notes shed any light?"

Mr Lawson responded to Miss Reid the same day [*Email from Mr Duncan Lawson, former National Contact Point, to Miss Eleanor Reid, "Re: Specific Instance on the BTC pipeline", 9 December 2005*] [22]:

"The fun never starts. I will deal with the remainder using the complainants numbering system. (1.) It is my recollection that BP said they would respond to the general lessons but this was made in the context of a wider discussion. I then stated that the general points made by the complainants were not really for a dialogue with BP – who would of course be free to respond if they wish – but more for the IC [OECD Investment Committee]

5. The Muhtar is the head of the village.

and consultation.” (2) The complainants did ask for an independent investigation. BP said that they would prefer to investigate for themselves, at least initially, any (sic) may take the independent option later if necessary. It was agreed that BP would report back at the next meeting – it was anticipated (following a quick roundtable of attendees commitments) that this would happen by the end of November. You will recall this was almost the case except I could not attend. I can’t really comment on the remainder.”

2006

19 January 2006: The NCP told the Complainants by telephone that:

- BP had sent the NCP the report of its investigation into the issues raised by Mr Lawson's September 2005 information gathering visit to Azerbaijan, Georgia and Turkey.
- The BP report had been sent to the NCP on a confidential basis and would not be shared with the Complainants.
- BP's investigation was undertaken in November 2005.
- The NCP's understanding was that BP spoke to the village heads or villagers mentioned in the NCP's information gathering report of August-September 2005.
- The NCP was of the view that agreement between the parties was not a likelihood and the next step would be to issue a statement. The NCP understood that BP did not see any prospect of resolution of the issues.
- It was very likely that the NCP would deal with the Complainants' General Lessons through the Consultation that the government was then conducting on the implementation of the Guidelines. However, as requested by the Complainants, the statement would record the complainants' views and say that that the NCP would deal with the points in the consultation.
- The NCP would consider any requests the Complainants have for points they wish to have recorded in the statement.
- The NCP would consider any requests for documents to be attached to the statement.

The summary of the call was confirmed by the NCP in an email to The Corner House, dated 25 January 2006 [*Miss Eleanor Reid, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, "Re; Notes of telephone call", 25 January 2005*]. [23]

27 January 2006: The complainants wrote to the NCP, setting out their procedural concerns over the NCP's acceptance of BP's refusal to disclose its November 2005 report responding to the issues raised by the NCP's information gathering visit [*Letter from The Corner House, Friends of the Earth (England,*

Wales and Northern Ireland, Kurdish Human Rights Project and Platform to Miss Eleanor Reid, UK National Contact Point, “BTC Specific Instance”, 29 January 2005] [24]:

“As Mr Lawson [has] reminded the Parties . . . the Chairman of the Ministerial Council stated at the adoption of the 2000 Guidelines that the ‘success and effectiveness of the Guidelines will depend on the responsibility and good faith of all parties involved with their promotion and implementation’. Whilst the Guidelines do not preclude BP from submitting documents to the NCP on a confidential basis, good faith dictates that BP should have reasonable grounds for withholding documents from the Complainants and that these grounds should be made explicit. In the absence of any grounds whatsoever to suggest that the Complainants cannot be trusted with access to the findings of BP’s investigation into the NCP’s field report, the Complainant view BP’s action as unjustified, evasive of its responsibilities and disrespectful of the spirit of the Guidelines. To allow such behaviour to go unremarked and uncensored would, in the Complainants view, be contrary to the NCP’s duty to ensure that the Guidelines enjoy public confidence as a mechanism for promoting good corporate citizenship.

In withholding its response to the NCP’s field investigation, BP has reneged on previous undertakings made to the Complainants and/or the NCP on two separate occasions:

At the Dialogue Meeting on 27 October 2005, BP clearly promised to “report back to the Complainants and the NCP at the end of November”. This promise is recorded in the draft official minutes, written up by Ms Williamson of the DTI on the basis of contemporaneous notes, and circulated by the NCP for comment on 8 December 2005. The promise was also recorded in notes taken separately by all four⁶ of those who attended the meeting for the Complainants.

As reported by the NCP to Hannah Ellis, Nicholas Hildyard and Tricia Feeney on 6 December 2005, BP subsequently notified the NCP that it would not report back to the Complainants and the NCP in November but would do so verbally at the “next dialogue meeting”. Whilst this undertaking significantly qualified BP’s previous commitment, in that the report back would be verbal, it nonetheless constituted a reiteration of the undertaking to share the results of the company’s own investigations with the Complainants and the NCP.

In the Complainant’s view, BP’s cavalier approach to its undertakings requires a strong response by the NCP if parties to this and other complaints are to retain confidence in the Guidelines. We would therefore expect any statement on the Specific Instance to censure BP for its failure to abide by the commitments made to the NCP.

6. Nicholas Hildyard of The Corner House, Hannah Ellis and Craig Bennett of Friends of the Earth and Rachel Bernu of Kurdish Human Rights Project.

Without access to BP's response to the NCP, both the Complainants and the villagers whom Mr Lawson interviewed are denied the basic right to correct any misunderstandings, errors of interpretation or misrepresentations. We would remind the NCP that the Complainants have previously had occasion to correct misrepresentations by BP – notably of Amnesty's position with regard to the Host Government Agreements.”⁷

The Complainants also expressed their views as to the proper procedural basis for recording BP's unilateral withdrawal from the dialogue:

“The Complainants wish it to be recorded that the breakdown in the dialogue was one-sided and caused by BP's withdrawal from engagement with the Complainants.

The Complainants wish it to be recorded that the NCP brought the dialogue to a close before three of the alleged breaches of the Guidelines – namely, failure to operate in a manner contributing to the wider goals of sustainable development; failure to adequately consult with project-affected communities; and undermining the host governments' ability to mitigate serious threats to the environment, human health and safety – had even been discussed.

The Complainants believe that continuation of the dialogue offered strong prospects for resolving the concerns raised by the villagers, not least through the NCP's willingness to consider independent investigation. We note with deep regret that the termination of the dialogue can only lead to further disillusionment for those affected by the project.”

Finally, the Complainants set out the procedural basis for the NCP including the General Lessons that they had identified through the Specific Instance:

“In the absence of a response, the Complainants would again stress that all the recommendations which they have put forward with regard to the general lessons that might be drawn from the Specific Instance *arise directly* from the Specific Instance.

The Complainants would also reiterate that the official DTI handbook on the Guidelines is explicit that the NCP may make recommendations on the implementation of the Guidelines:⁸

‘In the event of no agreement being reached, the NCP will issue a statement and, if appropriate, make recommendations on the implementation of the Guidelines. This may also apply if a company refuses to enter into discussions.’

7. The misrepresentations referred to are set out in the Complainants' 19 November 2004 response to BP's rebuttal statement of 3 March 2004. They are not detailed here as the Appeal is concerned only with procedural matters.

8. DTI, *Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises – UK National Contact Point Information Booklet*, February 2001, p.15 and p.13 respectively.

The Complainants therefore urgently request that the NCP set out its reasons why it is minded to deal with the Complainants' recommendations on the Guidelines in the now closed UK consultation process rather than in any Statement on the Specific Instance.

The Complainants would also point out that the scope of the UK's Consultation specifically excludes any consideration of the Guidelines themselves and is restricted exclusively to considering the NCP's promotion and implementation of the Guidelines. The Consultation document states:

'This consultation covers the NCP's promotion and implementation of the Guidelines. It sets out actions that the Government proposes to take and asks questions on issues on which it does not yet have a firm view. It does not address the content of the Guidelines themselves, changes to which could only be agreed with the unanimous agreement of all members of the OECD Investment Committee.'

The Complainants consider that any decision by the NCP to deal with their recommended changes to the Guidelines in the Consultation rather than as part of the Specific Instance would constitute a change in the scope of the Consultation.

The Complainants deem it entirely inappropriate (and arguably unlawful) to change the scope of the Consultation after the Consultation has closed and without giving other parties the opportunity to take advantage of the changed terms of reference."

9 February 2006: In response to BP's claims to have undertaken field research in November 2005, the Complainants sent the NCP copies of letters from villagers whom Mr Lawson met during his field trip to Azerbaijan, Georgia and Turkey, attesting that no-one from BP/BTC has visited or contacted them since Mr Lawson's August-September 2005 visit to discuss the concerns they had raised with him [*Letter from The Corner House, Friends of the Earth (England, Wales and Northern Ireland, Kurdish Human Rights Project and Platform to Miss Eleanor Reid, UK National Contact Point, "BTC Specific Instance: Additional Comments with regard to BP's Confidential Report -Villagers deny BP visits and Comments on Letter from BTC to Governor of Atskuri concerning Specific Instance"*, 9 February 2006, with Attachments A-J] [25 +25A-J]. Letters to the same effect were attached from Mayis Gulaliyev, Manana Kochladze and Ferhat Kaya, representing respectively the Azerbaijan, Georgian and Turkey partners of the Complainants. The Complainants also forwarded a letter (plus translation) from Mr Stewart Duncan of BTC to the Governor of Atskuri commenting on the Specific Instance and the Complainants' response. The correspondence addresses the concerns raised by the conflict between BP's version of its contact with villagers and the villagers' own statements.

6 March 2006: The NCP wrote to The Corner House stating [*Email from Miss Eleanor Reid, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, "NCP contact details", 6 March 2006*] [26]:

“We expect to have a draft statement in the BTC Specific Instance in around 20 working days.”

12 May 2006: Following further requests to the NCP for clarification as to how the Complainants’ General Lessons would be dealt with, Mr Bob Box, the newly appointed NCP, responded in an email, stating:

“The view of the NCP remains that it is more appropriate to address the Complainants' recommendations in respect of the general operation of the Guidelines in the broader context of the Stakeholder Consultation rather than confining them to the Statement on the Specific Instance. We take the view that the Statement should cover only issues raised on the implementation of the Guidelines in the specific instance in question, and not on the implementation of the Guidelines more generally.”

[*Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, "Re: BTC Specific Instance – draft NCP statement", 12 May 2006*]. [27]

31 May 2006: **The Complainants responded to the NCP’s email of 12 May, stating:**

“We believe that the effect of the NCP’s decision of 12 May is to leave the Complainants in limbo with no place for their recommendations on general lessons arising from the BTC Specific Instance to be heard:

- a) The deadline for submissions to the Consultation ended over five months ago and the Complainants do not therefore have the option of putting their recommendations on the general lessons into the Consultation.
- b) Even if they did, the scope of the consultation is too narrow to allow the Complainants to raise two of their recommendations, since they address the content of the Guidelines and not their implementation.
- c) The NCP has in effect widened the scope of the consultation, without giving all interested stakeholders the chance to comment. No publicity was given to this change. It is not enough to just inform Corner House / RAID of the change in scope. It is necessary to inform all interested parties so that the full range and weight of views can be heard.

Your decision does not therefore resolve the issue at hand. Rather it unfairly closes one door whilst pointing us to another that is firmly shut.

We would again request that you set out the basis for your decision and your proposals for resolving the obstacles that clearly now stand in the way of our recommendations being addressed.”

[Email from Mr Nicholas Hildyard, The Corner House, to Mr Bob Box, UK National Contact Point, “Re: BTC Specific Instance – draft NCP statement”, 31 May 2006] [28]

19 July 2006:

Following the final response of the Government to its consultation on the role of the implementation of the Guidelines, the Complainants wrote to the NCP again requesting clarification as to how the NCP intended to deal with the General Lessons arising from the Specific Instance *[Email from Mr Nicholas Hildyard, The Corner House, to Mr Bob Box, UK National Contact Point, “Re: BTC Specific Instance – draft NCP statement”, 19 July 2006] [29]:*

“We have now read the Government response to the UK Stakeholder Consultation [issued on 13 July 2006]. We note that the response does not address in any regard the detailed general recommendations made by the BTC Complainants for improving or clarifying the content of the Guidelines, contrary to what we had been led to expect from your email.

We also note that the Government now agrees that where clarifications or improvement to the Guidelines are identified, they should be brought to the attention of the OECD Investment Committee (para 17), a power which the NCP had previously argued was not available to it.

Given the above, we urgently seek assurance that the NCP will now include consideration of the general lessons identified by the Complainants in its Statement on the Specific Instance and that it will bring such clarifications and improvements to the attention of the Investment Committee where it deems them to be of merit, citing its reasons for accepting or rejecting the said recommendations as appropriate.”

18 August 2006:

The Complainants wrote to the NCP to complain that no reply had been received to their letters of 31 May 2006 and 19 July 2006, despite the Department of Trade and Industry (DTI) being committed to a target of replying to correspondence within 15 working days. *[Email from Mr Nicholas Hildyard, The Corner House, to Mr Bob Box, UK National Contact Point, “Further request for reply to letter of 31 May 2006 and subsequent correspondence”, 18 August 2006]. [30]*

5 October 2006:

The Complainants wrote to Robert Walter MP [the MP representing the constituency in which The Corner House is based] seeking his assistance in making a complaint to the Parliamentary Ombudsman over the failure of the NCP to reply

to the Complainants' letters of 31 May 2006, 19 July 2006 and 18 August 2006 [*Email from Mr Nicholas Hildyard, The Corner House, to Mr Robert Walter MP, "Complaint to Parliamentary Ombudsman: Department of Trade and Industry Failure to reply to letters", 5 October 2006*].^[31]

17 October 2006: A formal complaint was submitted via Mr Walter to the Ombudsman [*Complaint to Parliamentary Ombudsman, 17 October 2006*].^[32]

10 November 2006: The NCP replied to the Complainants' letters of 31 May, 19 July, 18 August 2006 [*Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, "OECD Guidelines on Multinational Enterprises", 10 November 2006*].^[33]

On the NCP's intentions with regard to addressing the "general lessons" to be learned from the BTC Specific Instance for improving the content of the Guidelines, the NCP wrote:

"I can confirm that the statement on the BTC Specific Instance will record but not offer any consideration of the general issues identified by the complainants.

As your e-mail of 19 July notes, the Government has agreed that where clarifications or improvements to the Guidelines are identified, they should be brought to the attention of the OECD Investment Committee - paragraphs 17 and 18 of the Government's 13 July response to the consultation on the UK National Contact Point's promotion and implementation of the Guidelines refer.

The envisaged process is as follows. The NCP will prepare a document outlining areas (including those identified by the BTC complainants) of the Guidelines that might be clarified or improved for the Steering Board to consider. Once the Steering Board has taken a view, the NCP will prepare recommendations for Ministers. Given that it is Governments that have signed up to the Guidelines, Ministers must approve any approach that might be made to the OECD for discussion about their possible amendment. Thereafter, the NCP shall formally contact the OECD Secretariat to request that the Investment Committee is given an opportunity to discuss suggested amendments to the Guidelines - including implementation guidance. I can confirm that the NCP has already informally advised the OECD Secretariat of such a possible approach from the UK.

Part of your concern appears to be that you failed to make comments on the general issues as part of the consultation process because the timing was such that no decision had been taken as to whether to deal with these issues in the Specific Instance by the time the consultation ended. It is unfortunate that the time for submitting comments in the consultation process and consideration of the Specific Instance coincided in this way to make you feel that you had lost your chance to make representations. There is no reason to believe that the ongoing consideration of the Specific

Instance precluded you from making representations in the consultation. However, as mentioned above, the NCP is aware of your concerns and will take them into consideration when preparing its views for the Steering Board. I can therefore assure you that your concerns will be given proper consideration in this process.”

On the procedural grounds for agreeing to BP withholding its report from the Complainants, the NCP stated:

“BP requested that its written response to Mr Lawson's field visit remain confidential and be kept from the complainants. The NCP has merely complied with the request of the company. The decision of the NCP is consistent with guidance on "Implementation in Specific Instances". I particularly draw your attention to the final sentence of paragraph 4a) on page 36 of the OECD Guidelines for Multinational Enterprises: 'However, information and views provided during the proceedings by another party will remain confidential, unless the other party agrees their disclosure.'”

On the lawfulness of the NCP's proposal to deal with the Complainants' recommendations arising from the complaint within the framework of the government's consultation rather than as part of the NCP's statement on the Specific Instance, the NCP stated:

“The view of the NCP remains that it is more appropriate to address the Complainants' recommendations in respect of the general operation of the Guidelines in the broader context of the Stakeholder Consultation rather than confining them to the Statement on the Specific Instance. We take the view that the Statement should cover only issues raised on the implementation of the Guidelines in the Specific Instance in question and not on the implementation of the Guidelines more generally.”

17 November 2006: The Complaint to the Parliamentary Ombudsman was withdrawn in the light of the NCP's reply of 10 November 2006.

The Complainants wrote to the NCP requesting clarification as to whether or not the Complainants would have the opportunity to comment on the document that the NCP was preparing for the Steering Board prior to it going to the Steering Board. The Complainants also requested “that a note summarising the actions you have proposed [in the letter of 10 November 2006] be included in the NCP's statement on the BTC Specific Instance” [*Email from Mr Nicholas Hildyard, The Corner House, to Mr Bob Box, UK National Contact Point, "Re: OECD Guidelines on Multinational Enterprises", 17 November 2006*].^[34]

29 November 2006: The NCP confirms that (a) “the NCP will seek comments on the document before it is submitted to the Steering Board”; (b)

“the NCP statement on the BTC Specific Instance will include the actions proposed” [Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, “Re: OECD Guidelines on Multinational Enterprises”, 29 November 2006].[35]

22 December 2006: The NCP sent The Corner House, as lead NGO for the Complainants, a draft of the NCP’s proposed statement on the case, requesting “*comments of a factual nature*” by 12 January 2007, later extended by mutual agreement to 30 January 2007 [Email from Mr Bob Box, UK National Contact Point, to The Corner House, “BTC Specific Instance – Draft Final Statement” and Attachment “N000P9H”, 22 December 2006].[36 +36A]]

2007

4 January 2007 The Corner House requested clarification as to the procedures that would be followed prior to publication of the Final Statement [Email from Mr Nicholas Hildyard, The Corner House, to Mr Bob Box, UK National Contact Point, “Query as to Process”, 4 January 2007].[37] Specifically, it asked the NCP:

“Will the Complainants be shown the next draft of the Statement to ensure that their comments have been taken into account before it is issued? And will the NCP respond with reasons where comments have not been taken into account?”

11 January 2007 The NCP replied to The Corner House’s email of 4th January, stating:

“I can also confirm that the answer is yes to your two earlier questions - You will be shown the next draft of the statement and also be advised of the reason why any comments have not been incorporated therein.”

[Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, “Re: Urgent request for response re deadline and process”, 11 January 2007].[38]

25 January 2007 DTI releases 4 October 2006 draft of NCP draft statement, as requested by The Corner House under the Freedom of Information Act [Letter and disclosures sent by Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, “Freedom of Information Act Request 06/0645”, 25 January 2007] [39]

29 January 2007 The Corner House submitted, on behalf of the Complainants, a response to the draft Statement, identifying 28 factual errors. [*Email from Nicholas Hildyard, The Corner House, to Mr Robert Box, UK National Contact Point, including attached letter (dated 30 January 2007 but sent 29 January 2007) and Annexes 1-4, 29 January 2007*]. [40 +40A-B]

The Corner House also raised procedural concerns relating, in particular, to the NCP's reliance on the undisclosed and contested BP report to exonerate the company. The Corner House argued that relying on an undisclosed and contested report violated the principle of fairness to which the NCP process was officially committed.

Further evidence was supplied affirming that BP had not visited the villagers in November 2005 as allegedly stated by BP to the NCP – and confirming that numerous problems remained unresolved. Video statements by the villagers had also been recorded but the NCP did not avail himself of these.

31 January 2007 After receiving an earlier (October 2006) draft of the Statement, released under FOIA, Corner House submitted further comments on the current December 2006 Draft, highlighting further factual errors [*“Complainants further comments on draft statement”, 31 January 2007*]. [41]

14 March 2007 The NCP sends a partial response to the comments submitted by The Corner House on 29 January 2007 [*Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, “BTC Specific Instance – Draft Final NCP Statement”, 14 March 2007*]. [42]. The NCP stated:

“I can confirm that your submission is being carefully examined. However, I thought it would be helpful to provide you with the response of the NCP to some of the alleged factual misrepresentations that are the subject of the third section of your submission.”

No comments were offered on other sections (for example those on procedure) or the concerns raised in them by Corner House.

The NCP:

- Acknowledged that a number of questions and issues remain “*unresolved*” and proposed a further dialogue meeting with BP;
- Confirmed that the issue of project standards (do they or do they not conform to EU standards, as claimed by BP?) was “*currently under investigation*”.

- Confirmed that BP had been asked for “*an update on a number of outstanding issues in respect of villager complaints in Turkey*”.

Despite acknowledging that there were unresolved issues and that further reports and investigations were being undertaken, the NCP never informed Corner House of the outcome of the steps that the NCP stated he was taking.

31 March 2007

The Corner House responded to the NCP’s letter of 14 March 2007, again pointing to factual errors in his comments, some (but by no means all) of which were subsequently corrected in the Final Statement [*Letter from Mr Nicholas Hildyard, The Corner House, to Mr Bob Box, UK National Contact Point, 31st March 2007*].[43]

The Corner House noted that no reply had yet been received to the procedural and other factual issues raised in its letters of 29 and 31 January 2007.

4 April 2007

The NCP acknowledged The Corner House’s letter of 31 March 2007 and stated “I will reply substantively as soon as possible” [Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, “Re: BTC Specific Instance – Response your letter of 14 March 2007”, 4 April 2007].[44]

15 August 2007

There was no further contact from the NCP until the UK National Contact Point for the Guidelines (the NCP) wrote to The Corner House on 15th August 2007 (received 20 August 2007), enclosing the final statement on the Complaint, including (as an Annexe) the previously undisclosed and contested report by BP [*UK National Contact Point, “OECD Guidelines for Multinational Enterprises, National Contact Point – Statement, Specific Instance: BTC Pipeline*]. [2]The Statement and the Annex were posted by the NCP on the Government’s Society and Business website - <http://www.societyandbusiness.gov.uk/ocddoc/N0000M4A.doc>.

The procedural requirements governing the NCP’s handling of Specific Instances brought under the Guidelines

Transparency, accountability and fairness are basic requirements for the proper conduct of the process under the OECD Guidelines. All three have been recognized

by the UK government as central to the UK NCP's procedures for handling Specific Instances.

The OECD itself stresses the critical role played by the NCP and the importance of due process in the handling of complaints (known as "Specific Instances") [OECD, "National Contact Points for the OECD Guidelines for Multinational Enterprises", http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.htm]:

"Because of the central role it plays, the effectiveness of the NCP is a crucial factor in determining how influential the Guidelines are in each national context. While it is recognised that governments should be accorded flexibility in the way they organise NCPs, it is nevertheless expected that all NCPs should function in a visible, accessible, transparent and accountable manner" (emphasis added).

The UK has committed itself to acting in accordance with these requirements [UK National Contact Point Information Booklet, <http://www.societyandbusiness.gov.uk/oecd/doc/UKNCPbookletdocD.pdf>, p.9].

In its response (published on 13 July 2006) to its Consultation of the NCP's Promotion and Implementation of the Guidelines [*Government Response to the Consultation of the National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises*], <http://www.societyandbusiness.gov.uk/oecd/doc/Hfile32038.pdf>], the Government also made "a series of commitments as to how it would improve implementation of the Guidelines" (emphasis added) [*The Stakeholder Consultation*], <http://www.societyandbusiness.gov.uk/stakeholder3.htm>]. The then Minister of State for Trade, Investment and Foreign Affairs, The Rt Hon Ian McCartney, stated:

"The Government wants the new NCP to work with businesses, employees and other parties to deal with issues raised under the Guidelines. I believe that this approach, allied with the changes set out in the Government's response, will deliver a more open and transparent system in which all organisations can put their faith in encouraging responsible business activities overseas" (emphasis added).

[*Written Ministerial Statement, Minister of State for Trade, Investment and Foreign Affairs: The Rt Hon Ian McCartney, OECD Guidelines for Multinational Enterprises, 13th July 2006*, <http://www.societyandbusiness.gov.uk/oecd/doc/Ifile32039.doc>].

With regard to the issuing of Final Statements by the NCP on a Specific Instance, the Government committed to "justify its decisions and any recommendations that it makes" [*Government Response to the Consultation of the National Contact Point's*

Promotion and Implementation of the OECD Guidelines for Multinational Enterprises”, <http://www.societyandbusiness.gov.uk/oecddoc/Hfile32038.pdf>, paragraph 57].

Most recently, the new procedures adopted by the UK NCP in March 2008 stress the importance of ‘fairness’:

“If you consider that the NCP, in coming to a final decision, has not followed the correct procedure or failed to treat you with appropriate fairness, you may request a review.”

[“Review Procedures”, para 3.2.2, Annexed to Letter from Mr Andy Weller, NCP Secretariat, to Leigh Day and Co, “NCP Statement on BTC Pipeline – Appeal to Steering Board for Review”, 13 March 2008]. [45]

Grounds of Appeal

The Complainants appeal the Final Statement and the handling of the Specific Instance on 5 grounds:

A. Failure to engage critically with the issues or to justify positions taken

The NCP is required to justify its decisions and to give reasons for them. The Final Statement patently fails to meet this requirement.

The NCP’s Final Statement is astonishingly sparse. There is no attempt at a proper analysis of the facts. Nor is there any real attempt to give reasons. The NCP’s analysis of the issues and its conclusions take up less than two pages of text and consist of nothing more than generalised statements of the NCP’s conclusions. There is little or nothing by way of reasoning or analysis of the Guidelines, the relevant principles underlying the Guidelines or the facts. Such reasons cannot possibly be adequate in the context of a four year process in which detailed complaints were raised.

Indeed, the NCP Statement fails to make any serious attempt to engage critically with the issues. For example:

- The accuracy, completeness and reliability of the BP report is accepted without question (“BTC Co’s response to the NCP field trip report on villager complaints was commendably thorough and in all but a handful of cases concluded that the complaints made by the villagers were without foundation”). This completely misses the point. The question is not whether BP thought that the complaints were without foundation. The real issue is what the NCP’s considered view was, having heard both sides. On this issue, the NCP Statement is silent.
- On the issue of exemptions sought and obtained by BP to environmental and other legislation, the NCP again misses the point. Whether or not BP sought and obtained exemptions is a simple question to which there is a simple “yes” or “no” answer. Either it sought them or it did not. The issue is not

addressed in the Final Response. Instead, the NCP makes a number of unsubstantiated assertions with regard to project standards – assertions that are irrelevant to assessing the simple question as to whether or not exemptions were obtained.

The NCP's states baldly that "the Partnership Agreements (sic) with the HGs do not prevent them from taking action to address serious environmental or health/safety issue". No explanation is given or justifying legal analysis proffered.

B. Improper interference and influence in process by BP

In the email of 8 January 2004 from Ann Herd, Energy Section, Aviation, Maritime and Energy Department, Foreign and Commonwealth Office (FCO) to Alan Michael, FCO, provides clear evidence that BP discussed the Specific Instance with Ms Herd, who is not a party to the complaint, after the Specific Instance had been accepted as eligible and the proceedings were thus underway, Ms Herd writes: "I spoke with Jay Pearson, BP, about the above letter to from (sic) Friends of the Earth to Duncan Lawson last April".

The conversation and the exchange of information took place without the Complainants having been consulted and without their permission.

The email makes it clear that BP sought to persuade Ms Herd, a civil servant, to take a course of action in response to the Specific Instance that BP perceived would be in the company's interest: "Jay felt that HMG owed Friends a response to their letter. BP were happy to proceed without any input from HMG, and correspond direct with Friends, but thought that a lack of it would indicate to them that HMG had a case to answer, and that they (Friends) would certainly latch on to this."

Ms Herd responded positively to BP's request: "I told Jay I would look into the matter."

The email indicates that the company sought improperly to influence the proceedings by suggesting a course of action by the UK government aimed at heading off an anticipated response by one of the Complainants. The email thus suggests an unhealthy collusion between "HMG" and BP. Such an approach is impermissible and unlawful. The Court of Appeals ruling in *Regina (Corner House Research) vs Secretary of State for Trade and Industry* is pertinent in this regard, stressing as it does the need for the public to be reassured that decision-making in government is not being determined by "privileged access" rather than fair and open consultation. As Lord Philipps of Worth Maltravers MR wrote:

"Procedural issues . . . are often of greater importance than issues of substantive law. It is in our judgment a matter of general public importance if a division of a department of state publishes and adopts an open consultation policy of general application and then reverts to a timeworn practice of privileged access."

*[Regina (Corner House Research) v Secretary of State for Trade and Industry, 2005, para 140].***[46]**

C. Failure to Act Fairly and Misdirection on Confidentiality

The NCP's Final Statement relies heavily on BP's November 2005 report to rebut the serious allegations made against it. That report had never previously been shown to the complainants and made its first appearance as an "edited" annex to the NCP's Final Statement.

Although the Guidelines allow for the parties to keep certain information, such as "sensitive business information", the Commentaries stress the need for NCPs to "strike a balance between transparency and confidentiality" and in any event as a matter of basic legal principle, must act fairly and even-handedly between the parties, so that the Complainants have a fair chance to respond to BP's points, before they appear in the Final Statement:

"Transparency is recognised as a general principle for the conduct of NCPs in their dealings with the public (see para. 8 in "Core Criteria" section, above). However, paragraph C-4 recognises that there are specific circumstances where confidentiality is important. The NCP will take appropriate steps to protect sensitive business information. Equally, other information, such as the identity of individuals involved in the procedures, should be kept confidential in the interests of the effective implementation of the *Guidelines*. It is understood that proceedings include the facts and arguments brought forward by the parties. Nonetheless, it remains important to strike a balance between transparency and confidentiality in order to build confidence in the *Guidelines* procedures and to promote their effective implementation."

[OECD, "*The OECD Guidelines on Multinational Enterprises, Part 3: Commentaries*", para 19, p.61,
<http://www.oecd.org/dataoecd/56/36/1922428.pdf>]

In agreeing to allow BP to keep its November 2005 report from the Complainants, the NCP failed to strike the "right balance" between transparency and disclosure. Moreover, the NCP's reliance on the undisclosed (and contested) November 2005 report breached basic principles of fairness.

In response to the Complainants objections, the NCP cited para 3.4 of the OECD Guidelines which states:

"Information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure."

[*Email from Mr Bob Box, UK National Contact Point, to Mr Nicholas Hildyard, The Corner House, "OECD Guidelines on Multinational Enterprises", 10 November 2006*]. [33]

The NCP is wholly wrong to rely on this sentence to justify agreeing to BP's withholding the report. The sentence must be read in context. The full paragraph states:

"In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained.

At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.”

[*OECD Guidelines on Multinational Enterprises, “Procedural Guidance: National Contact Points – Implementation of Specific Instances”*, para 4a, <http://www.oecd.org/dataoecd/56/36/1922428.pdf>]

The provision relating to non-disclosure of “information and views provided during the proceedings” clearly applies only to the question of making such information and views public “at the conclusion of the procedures.” It does not entitle a party to withhold information from another party during the proceedings. It only entitles such information to be withheld from the public at the conclusion of the proceedings.

Indeed, it would be contrary to the tenets of natural justice were the Guidelines to be interpreted otherwise. As a matter of basic fairness, the Complainants should have been given the opportunity to see and comment on this important report before the Final Statement was published. It was wholly unfair to give BP the opportunity to comment on the Complainants’ representations, but not to extend the same duty of fairness to the Complainants.

It is clear from the passages of the BP report that have now been released that no commercial considerations were at issue. Moreover, the NCP’s Final Statement gives no indication that BP withheld the document on grounds of commercial confidentiality, nor have such arguments ever been asserted by BP or the NCP to the Complainants. On the contrary, the Statement remains completely silent on the issue and does not even mention that BP’s report was not made available to the Complainants or that villagers denied having been visited by BP.

Even if the NCP had been correct to accept that BP was entitled to keep the report confidential (which the Complainants reject absolutely), the requirement to act fairly should have led the NCP to discount the undisclosed report in its Final Statement. The Complainants note that this is already the established practice with at least one other NCP. In The Netherlands, statements from the Dutch NCP are based only on documents that are available for both parties. Although the Complainants drew the NCP’s attention to this practice, the NCP’s Final Statement offers no arguments to justify having rejected this approach.

The Final Statement included BP’s previously undisclosed report (in edited form) as an Annex but did not include written statements made by the Complainants and their partners in December 2005 and again in January 2007 to the effect that BP had not, as claimed, addressed the problems reported to the NCP during his field visit, nor even visited the villages concerned to assess their complaints.

As a matter of basic fairness, these statements should have been reproduced in full as Annexes in the Final Statement. They were not. Instead, the NCP, in clear breach of the procedural requirement for fairness, chose only to reproduce BP's report, and it did so without having given the Complainants any chance to comment.

D. Breach of Undertakings to Complainants

The Complainants have a right to expect that undertakings made to them by the NCP with respect to process are honoured. The NCP consistently broke such undertakings throughout the Complaint. Three examples, all relating to the Final Statement, are indicative:

- The NCP breached an undertaking of 11 January 2007 to show the Complainants the Final Statement prior to its publication.
- The NCP breached an undertaking of 11 January 2007 to respond with reasons as to why comments made on the draft statement had not been incorporated before any final statement was issued.
- The NCP breached undertakings of 10 November 2006 and 29 November 2006 that “the statement on the BTC Specific Instance will record but not offer any consideration of the general issues identified by the complainants” and that the statement would include “the actions proposed” with respect to the Complainants’ General Lessons. Such actions included “[preparing] a document outlining areas (including those identified by the BTC complainants) of the Guidelines that might be clarified or improved for the Steering Board to consider” and, conditional on obtaining Ministerial approval, remitting the Steering Board’s recommendations to the OECD Investment Committee.

E. Failure to disclose or give an assessment of evidence received from third parties

The OECD Guidelines and the accompanying commentary place a high value on the transparency of the NCP.

During the course of the Specific Instance, the NCP was sent Foreign and Commonwealth Office (FCO) telegrams that FCO officials perceived to be of relevance to the Specific Instance – for example, that sent by David Harvey on 1 April 2004. These were not disclosed to the Parties and were obtained by the Complainants only through a Freedom of Information Act request. The information in the telegrams, however, was highly pertinent to the Complaint and transparency would require that the Parties were both informed and invited to comment.

Remedies

The Complainants seek that the Steering Board:

- Remit the Final Statement back to the NCP with a requirement that the procedural issues identified are addressed;
- Require that any statement by the Steering Committee as to handling of the Complaint is annexed to the Final Statement.