

# **General Lessons Arising from Specific Instance on the BTC oil pipeline brought under the OECD Guidelines on Multinational Enterprises**

## **Submission to Steering Board for UK National Contact Point**

**25 February 2009**

### **Background**

As part of their submissions to the NCP on the Specific Instance on the BTC oil pipeline brought under the OECD Guidelines on Multinational Enterprises, the Complainants drew attention to a number of “general lessons” for the Guidelines arising from the case.

Although the NCP declined to consider these lessons within its Final Statement on the Complaint, the NCP nonetheless undertook<sup>1</sup> to prepare a document for the Steering Board to consider, outlining areas of the Guidelines (including the issues identified by the BTC complainants) that might be clarified or improved. The NCP recorded: “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 that the for consideration by the Steering Board, and subsequently, subject to Ministerial approval, the OECD Investment Committee.”

Subsequently, in July 2008, the Review Committee of the Steering Board assessed the NCP’s procedural handling of the Specific Instance. In its report, the Review Committee addressed the issue of the “General Lessons” raised by the Complainants:

“The Complainants also ask the Steering Board to direct that the new final statement should record accurately the substance of its "General Lessons". Our understanding is that, in the course of the Complaint, the Complainants raised a number of issues applicable beyond the scope of the actual Complaint. They wished to develop these: either to the NCP in the course of this Complaint or as submissions in the wider consultation which led to the creation of the Steering Board. The Complainants say they were led to suppose they could do so in the Complaint, and then were denied the opportunity.

“What seems clear is that these issues go beyond the Complaint and therefore will not affect its treatment. Some of these issues have no doubt been addressed in the course of the reforms to the NCP and its processes. The Steering Board is not closed to the idea of a review of its own and the NCP's processes. We suggest that the Complainants be invited to summarise for the Steering Board what it considers to be still relevant from its general issues. The Steering Board can then decide

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1. Email from NCP to Corner House, 29 November 2006.

how and to what extent it might address the points. None of this should have any bearing on the Complaint itself.”

The Complainants are grateful to the Review Committee for making this proposal. This submission summarises the general issues that the Complainants believe remain relevant. They relate to:

- The handling of single Complaints that are submitted in multiple jurisdictions and the need for clearer guidance from the OECD Investment Committee;
- The need to clarify the Guidelines’ approach to the content and aim of consultation
- The potential conflict of interests where a Government becomes involved in a project that is subject to a Complaint under the Guidelines and the need to complete the complaints procedure prior to government support being approved for a project;
- Questions arising as to whether documents and views obtained by the NCP relating to a specific instance should be shared with the parties to the Complaint for their comment.

These lessons are summarised below. The Complainants would be happy to assist the Steering Committee by providing further details should this be deemed necessary. The Complainants would also request permission to make further submissions once the BTC Specific Instance has been concluded, should further general lessons emerge.

### **The handling of single Complaints that are submitted in multiple jurisdictions and the need for clearer guidance from the OECD Investment Committee**

The BTC Specific Instance was lodged simultaneously by non-governmental organisations in the UK, France, Italy, Germany and the USA. The complaint was later also submitted in Belgium.

Because the lead company in the consortium is British, the NCPs in the countries where the Specific Instance was submitted, collectively decided in 2004 that the UK would “take the lead” in handling the case.

As a result, the Complainants were under the firm impression that the UK would handle the case on behalf of all the NCPs. This view was also apparently shared by the NCPs outside of the UK.

However, despite this understanding, the UK NCP decided unilaterally in 2005 that it would only deal with the UK complainants. Non-UK complainants were thus excluded from participating in the UK process except as observers. This decision was not apparently communicated by the UK to the other NCPs until January 2006.

The UK’s unilateral decision to go back on its agreement to act as lead NCP on the Specific Instance effectively left the non-UK complainants in limbo, delaying the handling of their complaints by their own NCPs by a full two years. The complainants view this a deeply detrimental to the credibility of the Guidelines as a

process, which requires swift and transparent procedures if parties are to have confidence in their effectiveness as a means of improving MNE conduct.

Despite improved procedures being introduced in the UK in 2007, the UK NCP has continued to fail to keep its NCP colleagues informed of its handling of the Specific Instance, resulting in yet further confusion and, worse still, in erroneous information being used as the basis for decision-making by NCPs. Italy, for example, was not informed that the UK's final statement on the case had been withdrawn following admissions by the UK NCP that it was procedurally flawed.

The case highlights what the Complainants believe to be a fatal lack of effective co-ordination between NCPs, to the detriment of the credibility of the Guidelines as a process and to the rights of Complainants.

The Complainants believe that the OECD Investment Committee should clarify as a matter of urgency how multi-jurisdiction complaints should be handled. The Complainants would recommend that, in future:

- NCPs faced with multi-country Specific Instances set down in writing how the case will be handled, by which NCP and on what basis – and that this be communicated to the parties;
- NCPs should issue a public notice where they withdraw their statements.

### **The need to clarify the Guidelines' approach to the content and aim of consultation**

The OECD Guidelines enjoin corporations to consult with those affected by their operations.<sup>2</sup> No guidance is contained in the Guidelines, however, as to the procedures that should be followed if such consultation is to be acceptable.

The Complainants note the wide gap in expectations with regard to consultation that was evident in the implementation of the BTC project and believe that all parties would have been well served by stronger guidance in the MNE Guidelines.

The Complainants therefore believe that the UK should press the Investment Committee to issue guidance based on an assessment of emerging international good practice, as exemplified by: the OECD's Development Assistance Guidelines; the United Nations Development Assistance Framework<sup>3</sup>; and sectoral guidelines contained in the recent reports of the Extractive Industries Review<sup>4</sup> and the World Commission on Dams.

In particular, the Complainants would urge the Investment Committee to look beyond consultation as a means of "selling a project" to consultation as the basis for a

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2. OECD Guidelines, Chapter V, Paragraphs 2a and 2b. The Guidelines urge that MNE's should "engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation".

3. The United Nations Development Assistance Framework, <http://www.un.org/in/undaf.htm>

4. Extractive Industries Review, Striking a Balance, [www.eir.org](http://www.eir.org). The main recommendations of the review with regard to consultation are at Annex 6 of this statement.

participatory approach to decision-making, aimed at obtaining general public acceptance for a companies operations.

In that regard, the Complainants would draw the Investment Committee's attention to the following recommendations drawn from the above reports:

1. THE UNITED NATIONS DEVELOPMENT ASSISTANCE FRAMEWORK: Adopted by 18 UN Agencies, the UNDAF views participation in decision-making as a right and states: “[S]upporting policies and legislation that protect and promote the rights of local communities to participate in the processes are essential. . . ensuring full participation of all groups in the development process are priorities.”<sup>5</sup>

2. THE WORLD COMMISSION ON DAMS: The World Commission on Dams' (WCD's) strategic priorities specifically aim to ensure that dams enjoy *demonstrable public acceptance* and, in the case of indigenous communities, *free prior informed consent*, through transparent, participatory decision-making processes. Contrary to assertions by the World Bank, this recommendation would not give veto rights to individuals: “Where independent review and mediation fail to foster an agreement, alternative options should be considered or the project should go to arbitration . . . Where a settlement does not emerge, the State will act as the final arbitrator, subject to judicial review.”<sup>6</sup>

3. THE EXTRACTIVE INDUSTRIES REVIEW  
“To help ensure that local communities receive benefits from extractive industry projects, the WBG should: require companies to engage in consent processes with communities and groups directly affected by projects in order to obtain their free prior and informed consent.”<sup>7</sup>

### **The potential conflict of interests where a Government becomes involved in a project that is subject to a Complaint under the Guidelines and the need to complete the complaints procedure prior to government support being approved for a project**

If the Guidelines are to enjoy public confidence, it is essential, in the Complainants' view, that the proceedings are untainted by any potential, actual or perceived conflict of interest.

In the BTC Specific Instance, the Complaint was submitted prior to the UK (and other countries where the specific had been lodged) becoming involved in the project that was the subject of the Complaint. The delay in reaching closure on the Complaint, however, has meant that the UK government is now a party to the BTC project (via its funding through both ECGD and the IFC and EBRD), whilst at the same time being

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5. The United Nations Development Assistance Framework, <http://www.un.org.in/undaf.htm>, p.10

6. World Commission on Dams, op. cit. 18, pp.210 and 281, [www.dams.org](http://www.dams.org).

7. Extractive Industries Review, Striking a Better Balance, Executive Summary, p.3, [http://www.ifc.org/ifcext/eir.nsf/AttachmentsByTitle/FinalMgtResponseExecSum/\\$FILE/finaeirmanagementresponseexecsum.pdf](http://www.ifc.org/ifcext/eir.nsf/AttachmentsByTitle/FinalMgtResponseExecSum/$FILE/finaeirmanagementresponseexecsum.pdf).

responsible for processing the Specific Instance. The Complainants would stress that they have no reason (or desire) to impugn the integrity of the NCP handling the Complaint. However, the appearance of a conflict of interest is undesirable and could only too easily serve to dent public confidence in the Guidelines. It should thus have been avoided.

The Complainants also believe that speedier processes of Specific Instances would act to enhance the due diligence of those government departments responsible for oversight of the public money that projects receive. In that respect, it is significant that three months prior to endorsing over \$300 million in loans for the project, the UK's Department for International Development (DfID) was unable to offer more than superficial comments on any aspects of the Specific Instance due to a lack of "detailed and immediate knowledge and experience of the project".<sup>8</sup>

The Complainants believe that DfID, along with other government departments, would therefore have benefited greatly from the information gathering exercise subsequently carried out by the NCP and that, had this been completed prior to funding, mitigatory measures could have been agreed that would have directly benefited all parties.

The Complainants therefore believe that Investment Committee consider introducing a binding timetable to handling Specific Instances and that cases where government involvement is envisaged in a company or project that is subject to a Complaint be "fast tracked". Consideration should also be given to government involvement in such circumstances being contingent on the Specific Instance being resolved or the company being exonerated of any breaches of the Guidelines.

**Questions arising as to whether documents and views obtained by the NCP relating to a specific instance should be shared with the parties to the Complaint for their comment.**

In the process of assessing the BTC Specific Instance, the NCP quite properly sought the views of other government departments (ECGD, DEFRA, FCO and DfID) and of UK embassies in the three countries through which the BTC pipeline passes.

As a result of Freedom of Information requests, the Complainants have obtained many of the comments, and accompanying documentation, that were sent to the NCP.

The Complainants believe that such comments and documents should be made available as a matter of course to the parties to a Specific Instance in order that they should be able to comment and, in particular, correct errors of fact or interpretation. The Complainants believe this to be of singular importance if the NCP is to have as full and accurate view of the issues raised in a Complaint as possible.

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8. Email, BTC Complaint, 25.6.03.

The Corner House  
25 February 2009