

BTC SPECIFIC INSTANCE UNDER THE OECD GUIDELINES FOR MULTI-NATIONAL ENTERPRISES

Application for review of the final statement

Summary of recommendations of the Review Committee

The purpose of this note is to provide a summary of the issues under consideration and the findings and recommendations of the NCP Steering Board Review Committee (subsequently agreed by the full Steering Board) in relation to a request from the complainants in the BTC case to review the NCP's final statement. . This note is in response to a request from the complainants to make the Review Committee's findings public and is issued in this summary form following consideration by the NCP Steering Board. The Steering Board considers that it is desirable to issue this note to show transparency and build confidence in the Steering Board's role in considering requests to review NCP cases on procedural grounds.

This note has been shared with the parties in the BTC case prior to any further publication.

Introduction

1. This case is the first review of a UK National Contact Point (NCP) final statement conducted under the procedures¹ adopted by the Steering Board of the UK National Contact Point for the OECD Guidelines for Multilateral Enterprises (although under slightly modified terms as the case pre-dates the agreed procedures). It relates to the BTC pipeline, one of the first specific instances (Complaint) made to the UK NCP in 2003.
2. The Complaint was submitted to the UK NCP² on 29 April 2003. It alleged breaches of a number of the OECD Guidelines by BP and others involved in the construction of the Baku-Tblisi-Ceyhan (BTC) pipeline.

¹ SB5(07) Final dated 12 March 2008. The timetable set out in the procedures was adjusted in the view of the periods of time involved.

² One of the particular difficulties of the complaint process was that different individuals acted as NCP at different times. The final statement was issued after all those involved in the process had moved on, requiring the present NCP to gain information with no direct involvement.

3. The NCP issued a final statement on 15 August 2007: some 5½ years after the Complaint had been filed. The result was to dismiss all alleged breaches of the OECD Guidelines.

Grounds for review

4. The Complainants based their request for review on five grounds:
 - A. Failure to engage critically with the issues or to justify positions taken**
 - B. Improper interference and influence in process by BP**
 - C. Failure to act fairly and misdirection on confidentiality**
 - D. Breach of undertakings to Complainants**
 - E. Failure to disclose or give an assessment of evidence received from third parties**
5. The Review Committee's comments and recommendations on each now follow in summary form.
 - A. Failure to engage critically with the issues or to justify positions taken**
6. The NCP admitted to the Review Committee that the final statement should have included (but failed to do so) an argued rationale supporting each conclusion. The NCP also accepted that there were a number of the specific points made in the final statement where reasons for arriving at these conclusions should have been given. The Review Committee concurred. On the question whether the NCP engaged critically with the issues, although the Review Committee believed that the NCP was seeking to do its best in difficult circumstances, the result was unsatisfactory as it breached procedural requirements by failing to provide a reasoned analysis of its decision. The recommendation that the final statement be remitted to the NCP with instructions to justify and set out its reasons for the conclusions drawn was endorsed by the Steering Board.
 - B Improper interference and influence in process by BP**
7. The Complainants cite a number of e-mails passing between government departments as demonstrating improper collusion to influence the treatment of its Complaint. The Review Committee considered these exchanges and the practice of the NCP to consult Government departments. The Review Committee did not consider this aspect to be grounds for a review; but urged future caution in dealing with officials that may have been subject to lobbying so as to jeopardise the complaint procedure.
 - C Failure to act fairly and misdirection on confidentiality**

8. The Complainants pointed to the NCP's treatment of a BP report of site investigations which was not shared with the Complainants. The NCP accepted frankly that its reliance on the undisclosed BP report was important to its decision-making. The Review Committee considered that the NCP's actions leading to the non-disclosure of the BP report meant that it acted unfairly. The NCP should seek belated consent from BP to the disclosure of the report, failing which the NCP may, to ensure fairness, have to set aside the BP report.

D Breach of undertakings to Complainants

9. The Complainants cite occasions when the NCP did not carry through with action it had proposed to take: described by the Complainants as "breach of undertakings". Generally, the NCP acknowledges that it should have acted as proposed, and notes mitigating factors that may have contributed to the changes of tack. Whilst the Review Committee considered it important the NCP abides by what it tells the parties will happen, it questioned whether any of the specific incidents, of themselves, led to procedural unfairness.
10. The Complainants also raised issues over the handling of some more general issues arising from the Complaint. The Review Committee took the view that the issues in question go beyond the Complaint and therefore will not affect its treatment. The Review Committee suggests that the Complainants summarise for the Steering Board what it considers to be still relevant from its general issues. The Steering Board can then decide how and to what extent it might address the points. None of this should have any bearing on the Complaint itself.

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

11. The Complainants cite a single example of a situation where, they say, the NCP should have disclosed to the parties information "highly pertinent to the Complaint" - information that was subsequently disclosed as a result of an FOIA request. Following examination of the information, the Review Committee makes recommendations about determining whether or not there are grounds for withholding information from the parties, or for otherwise placing conditions on disclosure. The Review Committee considers that the NCP should not be deterred from fact-finding in a specific instance. In relation to this specific case, the Committee did not accept that the NCP's failure to disclose the information was a procedural error.

What the Review Committee recommended and the Steering Board instructed:

- The final statement be withdrawn and re-considered in the light of the review

- That BP be asked to re-consider consent to share the report with the Complainants.
- In the absence of such consent, the NCP considers to what extent it can rely on the report in reaching its decision.
- The new final statement will set out in balanced terms the positions of the two parties, and will set out the reasons for the NCP's conclusions on the points it considers are relevant for its decision.
- That, throughout this process, the parties are kept informed of what the NCP expects to achieve.
- The Review Committee reminds the parties that this review process (which it stresses is not an appeal) addresses only procedural aspects of the handling of the Complaint; and not at all its substance. That remains the exclusive function of the NCP.
- Whether the directions recommended by this review will result in substantive re-appraisal is also for the NCP alone to determine.
- This is not an invitation to re-open the Complaint generally.
- That the NCP makes clear whether it decides to seek information or comments from the parties, and if so, on what topic and when.
- That the NCP should set a realistic but tight timetable for finally concluding this specific instance under the OECD Guidelines, which provide for a way of resolving differences.

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