

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

### **Application for review of the final statement**

#### *Recommendations of the Review Committee*

##### **Introduction**

1. This is the first review of a UK National Contact Point (NCP) final statement conducted under the procedures<sup>1</sup> adopted by the Steering Board of the UK National Contact Point for the OECD Guidelines for Multilateral Enterprises. It relates to the BTC pipeline, one of the first specific instances (Complaint) made to the UK NCP in 2003.
2. The Review Committee appointed for the purpose of this review was composed of the following members of the NCP Steering Board:

Jeremy Carver CBE	Consultant, Head of International Law, Clifford Chance
Gary Campkin	Head, International Group, CBI
Simon Carter	Business Relationship Manager, BERR
Mark Griffiths	Senior Policy Advisor on CR issues, BERR
3. The Committee met on 19 June 2008 to conduct the review. For this purpose the Committee considered:
  - the letter from Leigh Day & Co on behalf of the Complainants, Corner House, dated 18 April 2008, with annexes;
  - the NCP's comments thereon (undated, sent on 21 May 2008), with annexes;
  - the Complainants' response to the NCP's comments dated 30 May 2008; and
  - the response from BP in a letter dated 2 June 2008.
4. The Review Committee expresses its appreciation to the Complainants for the thorough and helpful manner in which the issues on which they were seeking a review were set out; and to the NCP for the candour with which it accepted a number of the grounds for the

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<sup>1</sup> 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.

review. We also acknowledge BP's understandable statement that it did not wish to make any comment on the subject matter of the review.

This made the task of the Review Committee considerably easier than it might have been.

### **Summary Recommendation**

5. As was inevitable in the light of the NCP's frank acceptance that its handling of the Complaint had been flawed, the Review Committee considers that there were good grounds for the review. It recommends that the Steering Board acknowledges that there were deficiencies in the process in the BTC Review and remits the final statement dated 15 August 2007 back to the NCP with directions set out at paragraph 33 below.

### **Summary of the specific instance procedure**

6. The specific instance or Complaint was submitted to the UK NCP<sup>2</sup> 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. Details of the Complaint were promptly notified to BP and within government. On 20 August 2003, the NCP confirmed that the complaint was eligible for the purpose of consideration by the NCP. BP responded to the Complaint on 3 March 2004. The Complainants submitted comments on this response on 19 November 2004.
7. It was evident to the NCP from these exchanges that there existed significant factual differences between the parties. It was therefore decided that the NCP would conduct an information gathering visit to the region of the pipeline (Azerbaijan, Georgia and Turkey) in August-September 2005. Having circulated a report of its site investigations, the NCP hosted a meeting between Complainants and BP on 27 October 2005.
8. It is the basic aim of the NCP process to attempt to bring parties together to resolve Complaints mutually. However, it seems to have become increasingly difficult after this meeting for the parties to agree on the record of the meeting or on a follow-up meeting. A core dispute arose around BP's own site visit. On 6 January 2006, BP sent a copy of its report to the NCP, but it was not shared with the Complainants. Eventually, the NCP circulated a draft final statement to the parties on 22 December 2006; but the parties did not agree on its terms. The final statement itself was issued 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.

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<sup>2</sup> 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.

### **Retrospective effect of the new procedures**

9. One general issue arose on this request for review. The NCP process on the Complaint took place wholly before the adoption by the Steering Board of the current procedures for dealing with complaints; prior to the adoption by the Steering Board of this review process; and largely prior to the establishment of the Steering Board. We had to consider whether it was fair to judge the NCP's handling of the Complaint against standards adopted after the task was concluded. Despite concerns about the general nature of retroactive application, the Review Committee considers that in this circumstance it is fair to do so for two reasons. The new procedure was adopted in response to criticism of the old process, criticism which has been largely accepted by the Government in setting up the Steering Board. Moreover, the NCP itself accepted that the review should be conducted against those standards.

### **Grounds for review**

10. 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**
11. The Review Committee's comments and recommendations on each now follow.
- A. Failure to engage critically with the issues or to justify positions taken**
12. The Complainants assert that the NCP is required to justify its decisions with reasons, and failed to meet this requirement. While noting that the OECD Guidelines and the UK procedures at the time did not expressly require it, the NCP has accepted that the final statement should have included an argued rationale supporting each conclusion. The NCP goes on to admit a number of the specific points where reasons should have been given, and the Review Committee sees no reason to add to this.
13. The NCP challenges, however, the claim that it failed to engage critically with the issues, citing the fact that it had attempted to produce a balanced draft of its final statement, reflecting the position of both parties and setting out reasons. The Complainants challenged numerous factual assertions in the draft as inaccurate. BP declined to accept any statement other than a bare assertion that the Complaint was unfounded. The NCP

embarked upon a review of the factual challenges; but then seems to have abandoned the task, eventually issuing its final statement..

14. While the Review Committee believes that the NCP was seeking to do its best in difficult circumstances and did try to engage critically with the issues, the result was unsatisfactory for the Complainants in that it breached procedural requirements in failing to provide a reasoned analysis of its decision to reject the Complaint. This failure was not mitigated by the fact that a more reasoned draft of the statement had been provided to the parties. Parties to any fair process are entitled to see that their positions have been addressed, whether they are accepted or not.
15. The Committee recommends that the final statement be remitted to the NCP with instructions to justify and set out its reasons for the conclusions drawn. While it is appropriate to seek the comments of the parties to the final statement that the NCP proposes to issue and ideally to arrive at an agreed text, where - as here - the parties have failed to arrive at a common position, the NCP should proceed to issue a final statement as its own document, as foreseen in the Commentary to the OECD Guidelines.. The NCP has acknowledged this in paragraph 18 of its comments.

**B. Improper interference and influence in process by BP**

16. The Complainants cite a number of e-mails passing between government departments as demonstrating improper collusion to influence the treatment of its Complaint. These exchanges between BP and officials were disclosed to the Complainants pursuant to FOIA requests subsequent to the process.
17. The NCP notes that it is common practice for the NCP to request FCO assistance about the subject matter of a Complaint, and acknowledges that it did so in this case as part of a proper inter-departmental process. It rejects the notion that bias resulted, or even that there was an appearance of bias in the exchanges.
18. The Review Committee does not consider that this ground for review has been made out. However, today legal restraints may mean that all stakeholders seeking to exert influence need to be conscious of the risks that this may invalidate a process; and those who may find themselves the target of such lobbying need to appreciate the risks of passing on such exchanges. The NCP should continue to seek information and clarification from within government in respect of matters reasonably within the knowledge of the officials concerned. Those officials should not feel constrained in discharging their responsibilities and job-related tasks. But it would be prudent when doing so to caution those asked against contacts with the parties to the Complaint which might jeopardise the complaint procedure.

### **C. Failure to act fairly and misdirection on confidentiality**

19. The Complainants point specifically at the NCP's treatment of BP's report of site investigations as demonstrating procedural error and unfairness. They feel that by treating the report as confidential, the NCP failed to 'balance' the contending interests of confidentiality and transparency. The NCP should, they say, not have relied on the BP report. They claim that the NCP failed to treat the Complainants fairly, and failed even to acknowledge the Complainants' own evidence rebutting what they understood of BP's report as redacted in the final statement..
20. While accepting the prominence that the Guidelines accord to the need for transparency, the NCP points out that the Guidelines recognise that confidentiality should be respected. The NCP has, it is said, "a considerable discretion" to determine whether confidentiality should be applied to information. It points to a misunderstanding over what had been agreed at the meeting on 27 October 2005 about BP's findings. And it admits frankly that it has been unable to discover written confirmation at the time as to whether BP withheld permission for the report to be shared with the Complainants. Nevertheless, it cites the prior practice to request permission to share information; so that it would have been unreasonable to change this "retrospectively". On this basis, the NCP rejects the charge of misdirection.
21. The Review Committee is not satisfied that the Complainants' claim of unfairness can be dismissed. BP's report, when received by the NCP in January 2006, should in principle have been shared with the Complainants unless it was provided on a confidential basis, which is recognised in the OECD Guidelines where the NCP is required to take appropriate steps to protect sensitive business information. Nothing in BP's letter of 6 January 2006 suggests that BP would have objected. The NCP could at the least have sought confirmation in writing that BP agreed to its being sent to the Complainants. It did not do so. Instead, it informed the Complainants by telephone that BP's report had been sent on a confidential basis and would not be shared with the Complainants. Having submitted local evidence on which the Complaint was based, the Complainants were left in the dark as to how that evidence had been answered.
22. The NCP's decision not to disclose the BP report would not have been fatal if the NCP had not decided to rely upon the report without any acknowledgment that other evidence had been received (both before and after BP site visit took place). But it was evident that the NCP did want to rely on the report. A belated attempt to cure the problem was made by Ian McCartney MP, then Minister for Trade Investment and Foreign Affairs, when he wrote to BP on 26 June 2007 urging BP to agree to the report being disclosed.

Specifically, he noted: "Failure to share information with the other parties will undermine both the outcome of the NCP's determination and the integrity of the NCP process overall." In the event, BP agreed that redacted portions of it might be quoted in the final statement.

23. The NCP has accepted frankly that its reliance on the undisclosed BP report was "an important factor in the decision-making process", and that accordingly the NCP failed to act fairly.
24. The question remains as to how the NCP can cure the problem. The better way is to seek belated consent from BP to the disclosure of the report despite their declining to do so last year. Without it, the NCP may - to ensure fairness - have to set the report aside altogether or reconsider the weight it attaches to it. The result will be for the NCP alone to decide.

#### **D. Breach of undertakings to Complainants**

25. The Complainants cite three 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. As a general proposition, the Review Committee feels it is important that, in its treatment of any Complaint, the NCP abides by what it says will happen to all parties in the process; or - if circumstances change - explain why and with what effect. Under the conditions of this extended BTC Complaint, the Complainants's frustration over these points was understandable.
26. Nevertheless, we question whether any of the specific incidents, of themselves, led to procedural unfairness. The parties should have been given a copy of the final statement as a draft before it was issued. The Complainants should have been told why the NCP had decided not to proceed with a final statement in the more balanced form than in draft. The NCP should have made clear how the Complainants' "General Lessons" were to be addressed. But it is not evident that any of these failures amounted to a procedural error affecting the handling of the Complaint.
27. Specifically, the Complainants have asked that the Steering Board should "direct the NCP to give reasoned responses to all of the factual and procedural comments" as set out in their submissions. We wish to underline that the final statement is, and remains, a matter for the NCP; and the Steering Board will not substitute its judgment on the substance of a complaint for that of the NCP. The procedural defects noted in the report will lead the NCP to reconsider the Complaint, including the submissions made in the course of this review. Clearly, reasons should be given for the decision made. Whether

and to what extent the NCP considers it necessary to treat each and every comment by the Complainants is not for the Steering Board to say.

28. 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.
29. 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 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**

30. 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", which it had obtained from the FCO. The NCP confirms that the information received was pertinent; and says it was appropriate to obtain such information from another government department. The NCP believes the information did not result in "bias towards BP".
31. The present procedure followed by the NCP is to achieve transparency by disclosing all information received from the parties or third parties, unless a good case for confidentiality has been made out. We cannot assess whether such a case might have been made for the information obtained from the NCP. The fact that disclosure has subsequently been made pursuant to an FOIA request suggests no particular confidentiality was attached to the information.
32. For the future, the sensible course for the NCP would seem to be to ask at the time all its informants whether there are grounds for withholding the information from the parties, or for otherwise placing conditions on disclosure. The NCP should not, we believe, be deterred from fact-finding in a specific instance which has reached that stage. In this Complaint, we do not accept that the NCP's failure to disclose the information from the FCO was a procedural error.

## **Future directions**

33. If the Steering Board accepts these recommendations, it will direct the NCP to fulfil its undertaking to withdraw the final statement, which will need to be re-considered in the light of this review. A particular issue concerns the BP report. In paragraph 24, we suggest that the NCP invite BP to re-consider consent to share the report with the Complainants. Without it, the NCP may wish to consider to what extent it can rely on the BP report in arriving at 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. We recommend that, throughout this process, the parties are kept informed of what the NCP expects to achieve.
34. Finally, the Review Committee considers it right to remind 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. We recommend that the NCP makes clear whether it decides to seek information or comments from the parties, and if so, on what topic and when. Above all, it is recommended 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.

**Jeremy P Carver**

**Gary Campkin**

**Simon Carter**

**Mark Griffiths**

**1st July 2008**