

Holding Funders and Companies to Account – Litigation and Standards

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Abstract

As a result of pressure from grassroots movements and national and international non-government organisations, the majority of the major international finance institutions (IFIs) – such as the World Bank, the major private banks and OECD national Export Credit Agencies – have now committed themselves to ensuring that the projects they back comply with international environmental and social standards. In practice, however, those standards are frequently flouted to the detriment of local livelihoods, human rights and the environment. A brief history of the methods used by NGOs to document such violations in two recent projects – the Ilisu Dam in the Kurdish region of Turkey and BP’s Baku-Tbilisi-Ceyhan oil pipeline – is presented. The case studies focus on the responses of the companies and IFIs involved in the projects and the use made by NGOs of documented material to bring concerns to decision-makers and the wider public and to take cases to the European Court of Human Rights.

The history of infrastructure development funding by the World Bank, national Export Credit Agencies and the private banking sector – IFIs, or International Financial Institutions, in the jargon of the professionalised development community – is often written as a history of “learning by doing”. On this view, improvements in infrastructure development – particularly with regard to reducing social and environmental impacts – have been “institution-led”, with the different IFIs disinterestedly monitoring impacts, neutrally assessing their causes, listening patiently to concerns raised by non-governmental organisations and responding (after due consideration and taking all factors into account) through new policies aimed at addressing the lessons learned.

This narrative does not easily fit the experience of either people directly affected by IFI-funded infrastructure projects or the IFI staff who have been most active in

pushing for environmentally- and socially-responsible lending. This experience points to a history not of “learning by doing” but of “doing by evading” – a history whose dialectic is framed by bureaucratic power rather than benign paternalism and which has been driven by geopolitics, corporate off-loading of risks, local desk politics and the imperative of avoiding institutional liabilities.

In the case of the World Bank, for example, safeguard policies introduced largely in response to pressure from social movements are routinely ignored. Although Bank staff ascribe this to the complexity of the standards, and argue for their simplification (“learning by doing” again), the root cause of non-compliance lies in the institutional priorities of the Bank itself. As the Bank’s own Task Force Management Review¹ noted over a decade ago: “a number of current practices – with respect to career development, feedback to staff and signals from managers – militate against increased attention to project performance management.” In the subculture which prevails at the Bank, staff appraisals of projects tend to be perceived “as marketing devices for securing loan approval (and achieving personal recognition)”, with the result that “little is done to ascertain the actual flow of benefits or to evaluate the sustainability of projects during their operational phrase.” Little or no effort is made to take the borrowing government’s implementation capacity into account when calculating economic rates of return; “poor policy environments”, “institutional constraints”, or lack of “sustained local commitment” – these considerations are often simply ignored in the rush to push projects through and keep them going.²

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1. See, for example: Wapenhans, W., Report of Portfolio Management Task Force, World Bank 1993; World Bank Quality Assurance Group, “Portfolio Investment Program: Reviews of Sector Portfolios and Lending Instruments – A synthesis”, 22 April 1997 (draft internal report).
 2. Since 1993, the Bank has introduced a number of initiatives intended to address the problems identified by Wapenhans. However, far from remedying the problems, they have in many respects made them worse, not least by streamlining business procedures in order to speed up loan approvals and by introducing new rewards for staff who move projects through the approval process at a faster pace rather than for those who comply with policy. Indeed, a succession of internal reports has continued to criticise the culture of loan approval – where staff are rewarded above all for pushing money – as a major cause of project failure and “leakage” (the Bank’s euphemism for graft). In at least one instance, the full findings of one critical report – a 1997 review of the Bank’s project portfolio by the Quality Assurance Group – were never officially shared with Board members. Significantly, the report concluded: “The lessons from past experience are well known, yet they are generally ignored in the design of new operations. This synthesis concludes that institutional amnesia is the corollary of institutional optimism.”

The failure of the Bank's board to exercise proper oversight over projects is also a constant theme of external reviews of the Bank's performance.³ Nor is this lack of oversight restricted to the Bank. In the UK, recently released internal reports from the Department for International Development (DfID) – the Department responsible for overseeing UK lending via the major multilateral development banks – reveal a cavalier lack of interest in the ground realities of the projects that the MDBs fund. Just three months before approving \$600 million in World Bank and European Bank for Reconstruction and Development loans for BP's Baku-Tbilisi-Ceyhan (BTC) oil project, for example, civil servants were unable to offer more than superficial comments on the project's human rights and environmental impacts due to a lack of "detailed and immediate knowledge and experience of the project".⁴ This was despite DfID having received (and responded to) a lengthy Memorandum from local, regional and international NGOs detailing the project's human rights, development and environmental impacts,^{5 6} in addition to evidence from field missions documenting multiple breaches of World Bank safeguard policies.⁷ Subsequently an NGO review of the project's Environmental Impact Assessment (EIA) and Resettlement Action Plan (RAP) found that the project breached World Bank safeguard policies and other international standards on 173 counts.⁸ When DfID finally commissioned a consultant to assess the EIA and RAP, the consultant's terms of reference specifically ruled out consideration of how the project was being implemented on the ground and required on consideration of how the BTC project complied with World Bank safeguard

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3. US General Accounting Office, "World Bank: Management Controls Stronger, but Challenges in Fighting Corruption Remain", GAO/NSIAD-00-73, Washington DC, April 2000, p.21. *See also*: The World Bank, "Helping Countries Combat Corruption: Progress at the World Bank Since 1997", Washington DC, June 2000, p.2.
 4. Department for International Development, "BTC-FOE Complaint, 25 June 2003", email released under Environmental Information Regulations (EIR) in response to Corner House EIR request.
 5. Baku Ceyhan Campaign et al., "Development, Human Rights and Environmental Impacts of BTC oil pipeline: Memorandum from Concerned Non-Governmental Organisations to Foreign and Commonwealth Office, the Department for International Development, HM Treasury and the Export Credit Guarantees Department", November 2002, available at http://www.baku.org.uk/correspondence/DfID_memo_feb_2003.pdf.
 6. *See*: http://www.baku.org.uk/correspondence/reply_from_Symons_Dec_2002.doc Baroness Symons of the Foreign and Commonwealth Office responded on behalf of all the recipient departments. In her response, she stated: "I am as concerned as you are to ensure that it is carried out with the highest regard to the economic, environmental and social impacts in the three countries through which it runs. I should like to assure you that, based on the information currently available, the UK government is *giving this project due consideration*" (italics added). Other correspondence with DfID and the International Finance Corporation (over which DfID has oversight) is available at <http://www.baku.org.uk/correspondence.htm>
 7. The DfID memo denying adequate knowledge of the project was written in June 2003. Prior to that date, four detailed field mission reports had been made available to DfID by NGOs - see <http://www.baku.org.uk/missions>.
 8. Baku Ceyhan Campaign, Review of BTC Environmental Impact Assessment, http://www.baku.org.uk/eia_review.htm

policies “on paper”.⁹ So much for due diligence. So much for the UK’s purported commitment to a rights-based approach to development.

In this context, those who seek to hold the IFIs to account solely through engagement with the institutions themselves – “speaking truth to power” – or through recourse to internal accountability mechanisms, such as the World Bank’s inspection panel, generally face bitter disappointment. It is not simply that the accountability mechanisms lack teeth, let alone independence; nor that there is an absence of “political will” to enforce the rule. Rather, the vested interests and bureaucratic priorities of the IFIs generate immense political will to block change, to undermine new procedures and to exempt the Bank and its staff from accountability. Ditto the commercial banks that co-finance projects. Ditto the corporations that benefit from IFI funding and which implement the projects. The thrust of policy is not to provide hard and fast rules and mechanisms that would allow for their judiciability – but to seek exemptions, to ensure discretion and to ring-fence from liability. And where that cannot be achieved, to seek to water down existing standards or evolve new financing mechanisms to which they do not apply.

A Hostile Institutional Environment

That hostile institutional environment extends beyond the IFIs themselves to the legal systems in which they are embedded.

As part of their constitution, MDBs like the World Bank enjoy wide legal immunity. And even were such legal immunity to be waived, activists in many jurisdictions would face further hurdles in holding the World Bank as an institution legally liable for the impacts of its projects. Quite apart from establishing a causal link between the Bank’s funding and the specific harm caused, there is the additional burden of establishing that the Bank even has a “duty of care” for those impacted by its projects.

9 BMT Cordah Ltd, Review of the Environmental Assessment of the Baku-Tbilisi-Ceyhan (BTC) Pipeline, Report to DfID, 30 October 2003, p. 2: “The review did not consider issues related to implementation of the project and compliance with formal company/operator compliance systems and documents.”

Litigation against commercial banks faces the same hurdle. Even where banks have signed up to the Equator Principles – a voluntary, industry-wide agreement under which subscribing banks undertake to screen project finance deals for compliance with the IFC’s safeguard policies – a duty of care may be difficult to establish. The more so given that the Equator Principles contain a clause effectively exempting the banks from any liabilities that might be incurred by signing them: “As with all internal policies, these Principles do not create any rights in, or liability to, any persons, public or private . . .”

Corporate lawyers have also been at work to limit the liabilities of companies that benefit from IFI funding. Nevertheless, companies, unlike MDBs and commercial banks, have a clear duty of care to those impacted by their activities, and are thus open to tort action. The successful legal action brought against UNOCAL over its operations in Burma under the US Alien Torts Act has already led BP, UNOCAL and the other oil multinationals who form the company that is building the BTC oil pipeline to insist on a clause in their contract with the three governments through whose territory the pipeline passes that exempts them from all liabilities for human rights abuses caused in the policing of the pipeline. Given that the pipeline, which will take oil from the Caspian through Azerbaijan, Georgia and Turkey to the Mediterranean, passes through or near 11 conflict zones and will be policed in Turkey by the Gendarmerie, a para-military force whose human rights record has been routinely criticised by the European Court of Human Rights, such an exemption is a cause for considerable concern.

As for Export Credit Agencies (ECAs), here, too, the law offers little scope for gaining redress for damages, let alone reparations. Although ECAs are subject to administrative review in a number of European jurisdictions, such review rarely results in more than a decision to fund a project becoming open to challenge. When it comes to the possibility of an action being taken by affected communities to obtain

damages, the “duty of care” hurdle looms as large as with the MDBs and the commercial banks.

Clearly, if major headway is to be made to hold the IFIs to account under the law, then much political work will be needed to change the legal framework in which they operate.

**Using the Law to Press for Accountability:
Ilisu Dam and Baku-Tbilisi-Ceyhan oil pipeline**

Nonetheless, space does exist to use the law as part of a wider strategy to win change through constructing the political and legal infrastructure for the mechanisms that are needed to enable companies and IFIs to be better held to account under the law.

Two recent campaigns (in which The Corner House, the solidarity group with which I work, along with other NGO colleagues in Britain and internationally, have been active) are illustrative.

Ilisu Dam

The first sprang from a provisional decision in 1999 by Britain’s Export Credits Guarantee Department (ECGD) to grant export credits to the UK construction company, Balfour Beatty, to build the Ilisu Dam on the Tigris River in the Kurdish region of South-East Turkey. Other export credit agencies in Germany, the USA, Italy, Austria, Sweden and Switzerland also gave their provisional backing for the project, which, if built, would have forcibly evicted 78,000 people, mainly ethnic Kurds. The project had no environmental impact assessment, no resettlement plan and was to have been built in a conflict zone, the area being under repressive emergency rule because of the conflict between the Turkish State and the Kurdish PKK guerrilla movement. At the time, only the US Ex-Im bank had any environmental or social safeguard standards: the other ECAs lacked any standards whatsoever.

Working in close collaboration with human rights groups, environment groups, trade unions, parliamentarians, media colleagues and development groups, the campaign succeeded in forcing the financing governments to impose five conditions on the ECA funding, including that the project should meet international standards for resettlement and that the states downstream of the dam – Syria and Iraq – should be consulted over the impacts of the dam on downstream flows of the Tigris.¹⁰

Through extensive field trips involving interviews with villagers, officials and the governments of the downstream states, the campaign documented the failure of the project to comply both with World Bank and other standards and with the international law obligations of the funding states. In Britain, legal opinions were then commissioned with a view to mounting a judicial review of the ECGD's backing of the dam. One focussed on whether support for the project would place the UK in violation of customary international law as established through case law arising from the UN Convention on the Law of Non-navigational Uses of International Waterways (1997).¹¹ The other examined whether the project would lead to human rights abuses and thus a breach of the UK's Human Rights Act, which places a positive duty on the government to prevent human rights violations. Other aspects of the law – this time, company law – were invoked to place additional pressure on Balfour Beatty, and to press for greater corporate accountability. In particular, a shareholder resolution was tabled and lobbied, winning considerable support from institutional shareholders.¹²

The net result was that the company withdrew from the project, leading to the ECGD in turn to withdraw support. More broadly, the campaign was instrumental in forcing the ECGD to adopt a set of environmental and human rights policies, albeit policies whose wording allow for considerable discretion in their implementation. All ECGD

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10. The four other conditions were to: draw up a resettlement programme which reflects internationally accepted practice and includes independent monitoring; make provision for upstream water treatment plants capable of ensuring that water quality is maintained; give an assurance that adequate downstream flows will be maintained at all times; produce a detailed plan to preserve as much of the archaeological heritage of Hasankeyf as possible.
 11. UN Convention on the Law of Non-navigational Uses of International Waterways (1997), <http://www.un.org/law/ilc/texts/nonnav.htm>
 12. Over 40 per cent of the shareholders either voted for the resolution or abstained from supporting the company – sending a powerful message to Balfour Beatty's management. For an account of the shareholder action, see: Geary, K. and Griffiths, H., "Organising a shareholder resolution: The Balfour Beatty Campaign" in Mansley, M and Hildyard, N., *Campaigners' Guide to Financial Markets*, p.96, available from <http://www.thecornerhouse.org.uk/item.shtml?x=51997>

projects are now “expected” to comply with the ten World Bank safeguard policies – the key let-out phrase being “expect”.¹³

Baku-Tblisi-Ceyhan Oil Pipeline

More recently, international and UK groups, including The Corner House, have been campaigning to ensure the rights of those affected by the World Bank and ECA-funded Baku-Tblisi-Ceyhan (BTC) oil pipeline.

Here the legal work has focussed on three areas: challenging the project’s legal regime; taking cases to the European Court of Human Rights; and preparing the ground for any future tort challenge with respect to pollution.

a) Challenging the Project’s Legal Regime

The BTC pipeline is subject to a specially negotiated legal regime, whose impacts on human rights, environmental protection and third party rights to sue in the event of damages have raised considerable concerns. The legal regime consists of two layers of agreements: first an Inter-Government Agreement (IGA) between Azerbaijan, Georgia and Turkey, which has the status of a Treaty; and second, three separate Host Government Agreements between the companies in BTC Co, the consortium which owns and will operate the pipeline, and each of the three countries.¹⁴ The HGAs are defined as private law contracts.

Under the agreements, which are specifically aimed at guaranteeing the “freedom of petroleum transit”, a formulation that effectively claims rights for oil itself,¹⁵ the three governments have all but surrendered sovereignty over the pipeline route to the oil

13. For more information on the Ilisu Dam campaign, see: <http://www.ilisu.org.uk>; and Geary, K. and Hildyard, N., “Holding Investors to Account”, *Human Rights Dialogue* 2.9 (Spring 2003), <http://www.carnegiecouncil.org/viewMedia.php/prmID/944>

14. The Agreements are available from http://www.caspiandevlopmentandexport.com/ASP/PD_BTC.asp

15. See: Preamble to Inter-Government Agreement, <http://www.caspiandevlopmentandexport.com/Downloads/BTC/Eng/agmt4/agmt4.PDF>; Reyes, A.S., “Protecting the ‘Freedom of Transit of Petroleum’: Transnational Lawyers Making (Up) International Law in the Caspian”, *Berkeley Journal of International Law* 24, (forthcoming June 2006) (manuscript on file with author).

consortium.¹⁶ Under the Host Government Agreements, the BTC consortium is exempt from *any* obligations under Azerbaijani, Georgian and Turkish law (aside from the Constitutions of the three countries) where local law conflicts with the terms of the Agreements. In signing the Agreements, the host governments have thus effectively abrogated their executive and legislative powers to protect their citizens from potential environmental damage and associated health and safety hazards, or to improve the regulatory regime.¹⁷ By locking themselves into a frozen and drastically weakened regulatory environment, the governments are less able to respond to new environmental and other threats or to an evolving understanding of risks posed by the pipeline.

Although BP accepts that the agreements trump local law,¹⁸ it insists that they set out a more stringent and coherent environmental and social regulatory regime than would otherwise be available. In fact, the Agreements replace “hard” law with voluntary, vague, and unenforceable corporate guidelines. Under the Inter-Government Agreement, the “floor” requirements for the project are a set of non-binding, loosely-worded and largely technical petroleum industry pipeline “standards”.¹⁹ Where these “standards” conflict with local environmental and labour law, the “standards” win out.^{20, 21} According to Amnesty UK, the effect is to replace “hard” law with “soft” industry guidelines, with the environment and human and labour rights the losers.²²

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16. For detailed analysis of the legal implications of the agreements, *see*: Carrion, M., “Preliminary Analysis of the Implications of the Host Government Agreement between Turkey and BTC Consortium”, Baku Ceyhan Campaign, October 2002, http://www.baku.org.uk/publications/preliminary_legal_analysis_oct_02.pdf; Leubuscher, S., “The privatisation of justice: international commercial arbitration and the redefinition of the state”, 2 June 2003, <http://www.fern.org/pubs/reports/dispute%20resolution%20essay.pdf>; Amnesty International, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project*, London, May 2003; Reyes, A.S., “Protecting the ‘Freedom of Transit of Petroleum’: Transnational Lawyers Making (Up) International Law in the Caspian”, *Berkeley Journal of International Law* 24, (forthcoming June 2006) (manuscript on file with author).
 17. Center for International Environmental Law, “The Baku-Tbilisi-Ceyhan Pipeline Project Compromises the Rule of Law”, Washington DC, October 2003.
 18. BTC, “Citizens Guide to the BTC Project Agreements: Environmental, Social and Human Rights Standards”, available from http://www.caspiandevelopmentandexport.com/ASP/PD_BTC.asp. The Guide acknowledges (p.6) that the project’s legal regime grants investors the power to “supersede provisions that directly conflict with project agreement requirements.”
 19. Inter-Government Agreement, Article 4, available from <http://www.caspiandevelopmentandexport.com/Downloads/BTC/Eng/agmt4/agmt4.PDF>. The standards specified are “international standards and practices within the Petroleum pipeline industry”. Although the Agreement sets a floor by requiring that such standards should “in no event be less stringent than those generally applied within member states of the European Union”, BP has acknowledged in meetings with NGOs that there are no “petroleum pipeline industry standards” (EU or otherwise) covering social and human rights – and that such standards as exist are primarily technical.
 20. For details of the legal hierarchy created by the project agreements, *see*: BTC Co., “Briefing note on environmental standards, Applicability and Enforcement, Supplementary Lenders Information”, Final, June 2003, [http://www.caspiandevelopmentandexport.com/Files/BTC/English/SLIPs/Part%20A/Legal%20Status%20of%20IGAs-HGAs/Content/BTC%20Briefing%20Note%20on%20Environmental%20Standards.%20Applicability%20and%20Enforcement\(ENG\).pdf](http://www.caspiandevelopmentandexport.com/Files/BTC/English/SLIPs/Part%20A/Legal%20Status%20of%20IGAs-HGAs/Content/BTC%20Briefing%20Note%20on%20Environmental%20Standards.%20Applicability%20and%20Enforcement(ENG).pdf).

Concern has also been expressed about the human rights implications of the Agreements' "stabilisation" clauses. Under the HGAs, the host governments are bound by the HGAs to compensate the BTC Consortium for *any* changes in the law that the three countries may introduce over the 40-year lifetime of the project (including changes aimed at improving protection of human rights or the environment) where such changes adversely affect the profitability of the project.²³

The broad, sweeping nature of the BTC's stabilisation clauses led Amnesty and other human rights groups to warn that the clauses were likely to have a "chilling effect" on the State's adherence to human rights standards in that the fear of having to pay compensation may cause the three states not to implement new human rights obligations.²⁴

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21. See, for example, Host Government Agreement (Turkey), Appendix 5, Paras 3.3 / 4.2, available from <http://www.caspiandevlopmentandexport.com/Downloads/BTC/Eng/agmt3/agmt3.PDF>: "If any regional or intergovernmental authority having jurisdiction enacts or promulgates environmental standards relating to areas where Pipeline Activities occur, the MEP Participants and the Government will confer respecting the possible impact thereof on the Project, but in no event shall the Project be subject to any such standards to the extent they are different from or more stringent than the standards and practices generally prevailing in the international Petroleum pipeline industry for comparable projects".
22. Amnesty International, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project*, May 2003.
23. See: Host Government Agreement (Turkey), Article 7.2 (vi) and (xi), <http://www.caspiandevlopmentandexport.com/Downloads/BTC/Eng/agmt3/agmt3.PDF>; Georgia Host Government Agreement (HGA), Article 7.2 (vi) and (x), <http://www.caspiandevlopmentandexport.com/Downloads/BTC/Eng/agmt2/agmt2.PDF>; Azerbaijan HGA, Article 7.2 (vi) and (x), <http://www.caspiandevlopmentandexport.com/Downloads/BTC/Eng/agmt1/agmt1.PDF>. The Turkey HGA states:

"The Government hereby covenants and agrees (on its behalf and acting on behalf of and committing the State Authorities) that throughout the term of this Agreement:

"if any domestic or international agreement or treaty; any legislation, promulgation, enactment, decree, accession or allowance; any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, privileges, exemptions, waivers, indemnifications or protections granted or arising under this Agreement or any other Project Agreement it shall be deemed a Change in Law under Article 7.2(xi).

"the State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in Turkish Law (including any Turkish Laws regarding Taxes, health, safety and the environment)."

For further analysis of new legal instruments such as HGAs and their implications, see: Hildyard, N. and Muttitt, G., "Turbo-Charging Investor Sovereignty: Investment Agreements and Corporate Colonialism", in *Destroy and Profit: Wars, Disasters and Corporations*, Focus on the Global South, Bangkok, 2006, <http://www.focusweb.org/pdf/Reconstruction-Dossier.pdf>, and <http://www.thecornerhouse.org.uk>.

24. Amnesty International, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project*, May 2003, <http://www.amnesty.org.uk/business/btc/>

Amnesty also warned that other clauses in the Inter-Government Agreement and in the HGAs could further freeze out action by the three governments to protect the public interest. In particular, Amnesty and others have expressed concern about:

- the HGAs's stipulation that the pipeline may be shut down only in the event of an "imminent, material threat";
- the specific denial within the Inter-Government Agreement that the project has any public purpose (thus preventing governments from invoking a public interest defence for intervening to protect the public);²⁵ and
- the wording of the clauses relating to security along the pipeline route, which could be used to justify severe human rights abuses.²⁶

In response, BP (along with its Consortium partners) has adopted a "Human Rights Undertaking", in which it undertook not to invoke the compensation clauses in the HGA in the event of new laws being introduced for human rights or environmental reasons – a commitment it has since qualified by stating that invocation of the stabilisation clause would be dependent on whether or not BTC Co. deemed new legislation to constitute "rent-seeking".²⁷ Legal opinion, however, is divided on the efficacy of this Deed Poll undertaking,²⁸ not least because it is signed only by the BTC Co. and does not form part of the bundle of documents that constitute the prevailing legal regime. Indeed, the HGAs and Inter-Government Agreement remain unaltered. The governments are thus dependent on BP and its partner companies

25. Inter-Government Agreement, Article II, 8 (II), available from <http://www.caspiandevlopmentandexport.com/Downloads/BTC/Eng/agmt4/agmt4.PDF>: "the MEP [Main Export Pipeline] Project is not intended or required to operate in the service of the public benefit or interest".

26. Amnesty International, *Human Rights on the Line: The Baku-Tbilisi-Ceyhan pipeline project*, May 2003, p.5, <http://www.amnesty.org.uk/business/btc/>. Article 12 (Security) of the Turkish HGA requires the State Authorities to "ensure the safety and security of the Rights to Land, the Facilities and all Persons within the Territory involved in Project Activities and shall protect the Rights to Land, the Facilities and those Persons from all Loss or Damage resulting from civil war, sabotage, vandalism, blockade, revolution, riot, insurrection, civil disturbance, terrorism, kidnapping, commercial extortion, organised crime or other destructive events." The inclusion of the broad concept "civil disturbance" could be used to justify serious human rights breaches at the hands of the state in its attempts to ensure the stability of the project. The companies are absolved from any damages, including human rights abuses, arising from the security forces' actions.

27. BP, "Response to NCP Request Filed by Friends of the Earth Against Project", unpublished March 2004, p.20. BP states: "The economic equilibrium clause will not apply unless . . . the Project files an arbitration claim against the Government [a decision the Project is unlikely to take] absent evidence that Government action is motivated by rent seeking behaviour and not environmental or social benefits". The company's response to Friends of the Earth was written after the promulgation of the Deed Poll.

28. A deed poll is a legal document binding only to a single person or several persons acting jointly to express an active intention. It is strictly speaking not a contract because it only binds one party and expresses an intention instead of a promise.

deciding whether or not the stabilisation clauses would be invoked – further reinforcing the one-sided nature of the agreements.^{29, 30}

The consortium has also sought considerable protection for itself in the event of a pipeline leak – which many consider an inevitability, particularly given the choice of an anti-corrosion coating used on the pipeline’s field joints that has been widely criticised as inappropriate.³¹ The rights of individuals to sue for damages that arise from the operation of the pipeline are minimal and the chances of a fair hearing are slim. In addition, individuals are likely to have to act against not only the companies but also their own national governments, since the Host Government Agreements place the onus on the states to ensure that the pipeline is operated safely. In all three countries, such a challenge by ordinary citizens – particularly if it is probable to result in major costs to the state – is likely to result in political pressure being exerted on the courts.

Indeed, whilst the Agreements have created legal certainty for the companies, they have been able to do so only by causing legal mayhem for ordinary citizens. The layer upon layer of agreements, coupled with the hybrid public/private nature of the contracts, have severely muddied the waters of redress for third parties, potentially denying citizens access to justice.

Despite such concerns being raised by campaigners, the World Bank and other International Financial Institutions backed BP and signed off on funding for the

29. For further concerns, see: Baku Ceyhan Campaign et al., “Review of BTC Environmental Impact Assessment”,

<http://ifitwatchnet.org/doc/btcch2.pdf> and other documents at <http://www.baku.org.uk/legal.htm>

30. Other examples of the one-sided nature of the agreements include the HGAs’ clauses on termination of the contract, which permit the oil companies to terminate the HGA at any time but only allow the governments to terminate in exceptional circumstances.

31. The coating in Azerbaijan and Georgia has itself been the subject of heated controversy, an internal BP report warning that it would both crack and peel away from the pipeline, leading to corrosion and rupture. The coating has never been used in any operational pipeline of a similar design anywhere else in the world. It was not tested in field conditions before being selected by BP, and the selection tests have been revealed to be flawed. For details, see: Memorandum of Michael Gillard *in* Trade and Industry Select Committee, Ninth Report, Session 2004-05, 4 April 2005, Implementation of ECGD’s Business Principles, Written Evidence, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we07.htm>; Memorandum of House of Commons, Trade and Industry Committee, Written Evidence, Appendices Mortimore D., “Response from Derek Mortimore to ECGD submission” *in* Trade and Industry Select Committee, Ninth Report, Session 2004-05, 4 April 2005, *Implementation of ECGD’s Business Principles*, Written Evidence, Appendix 4, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we05.htm>; Memorandum of the Baku Ceyhan Campaign *in* Trade and Industry Select Committee, Ninth Report, Session 2004-05, 4 April 2005, Implementation of ECGD’s Business Principles, Written Evidence, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we04.htm>; Gillard, M., “Government admits failing BP pipeline was experimental engineering”, <http://www.baku.org.uk/publications/corrosion.pdf>

pipeline. In doing so, they also backed the use of HGA-type contracts. Yet by allowing companies to supersede the state's national and international human rights and environmental obligations, as built up through years of domestic and international negotiation and civil society pressure, HGAs also threaten to undermine the comprehensive international, national and local legal frameworks that have been patiently and painfully established over the years – a comprehensive framework which, as UN Secretary-General Kofi Annan has stated, “makes the modern world a far better place to live than before.”³²

Indeed, by lending their support to HGA-type project agreements, governments and multilateral institutions are taking foreign direct investment and corporate accountability in a direction that is precisely the opposite of that being encouraged by the UN. In that regard, the July 2003 report by the UN Commission on Human Rights on *Human Rights Trade and Investment* specifically recommends that investment agreements – far from overriding human rights law – should include among their objectives “the promotion and protection of human rights”.³³ It also recommends that States should “avoid the situation where a requirement to pay compensation might discourage States from taking action to protect human rights.”

In conjunction with the Kurdish Human Rights Project and an affected landowner from Turkey, The Corner House has filed a case challenging the Agreements in the European Court of Justice. The pleadings argue that by signing the BTC Inter-Government and Host Government Agreements, Turkey has breached its obligations under its EU Accession Partnership, which obliges it to move towards the European Community's *acquis* (the body of Community law, obligations and treaties that binds

32. Annan, K., UN Secretary-General, Speech to United Nations Millennium Summit, September 2000.

33. United Nations Commission on Human Rights, Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9, 2 July 2003, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.9.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.9.En?Opendocument). The principle recommendations are summarised at pp.3-4 and pp.30-32, with a fuller discussion in “Section III: The Human Rights Implications of Investment Liberalisation”, pp.17-24. The Report recommends: “(a) *Including the promotion and protection of human rights among the objectives of investment agreements*. Given States’ international responsibilities with regard to the promotion and protection of human rights, States should consider including an explicit reference to the promotion and protection of human rights among the objectives of investment liberalization agreements; (b) *Ensuring States’ right and duty to regulate and the flexibility to induce new regulations to promote and protect human rights and the environment*. Broad interpretations of expropriation provisions could affect States’ capacity and willingness to regulate for health, safety or environmental reasons. Therefore interpretations, or even explicit declarations by parties to agreements, that recognize and protect States’ responsibility to fulfil human rights are encouraged; (c) *Promoting investors’ obligations alongside investors’ rights*. There is a need to balance the strengthening of investors’ rights in investment liberalization agreements with the clarification and enforcement of investors’ obligations towards individuals and communities.”

all Member States within the European Union); instead, by agreeing to freeze legislation, it has moved away from the *acquis*, triggering the Commission's duty to act, which it has failed to do.

The European Court of Justice has yet to respond as to whether or not it will accept the application.

b) Human Rights Violations and the European Court of Human Rights

The second area where legal challenges have been mounted to the Baku-Tblisi-Ceyhan oil pipeline is in that of human rights abuses, notably in relation to resettlement. Although no-one will be moved by the pipeline, what the World Bank terms “economic displacement” will occur as some land is temporarily used for the project during construction and cannot therefore be farmed by affected communities. Levels of compensation, however, have been well below market price; consultation has been inadequate and in many cases non-existent; those affected by the project were misled over their legal rights; and there has been no effort to inform affected villagers of the dangers posed by the oil pipeline.

In 2004, as a direct result of the project – which, according to NGO analysis, violates World Bank and other international standards on 173 counts³⁴ – a number of applications by affected villagers in Turkey have been made to the European Court of Human Rights, alleging multiple violations of the European Convention on Human Rights, including Article 1 of Protocol 1 (the right to peaceful enjoyment of property), Article 14 (convention rights to be secured without discrimination), Article 13 (the right to an effective remedy) and Article 8 (the right to respect for private and family life).³⁵ Specific problems raised in the applications included:

- Minimal or no consultation prior to BTC commencing;
- Documents being circulated in English, despite villagers being Kurdish or Turkish speakers;

34. Baku Ceyhan Campaign et al., “Review of BTC Environmental Impact Assessment”, http://www.baku.org.uk/eia_review.htm

35. In November 2005, the European Court of Human Rights rejected 30 of the applications. No grounds were given for the rejection: however, a common feature of the cases was that all the applicants had accepted some form of compensation from BOTAS, the Turkish state pipeline company constructing the pipeline in Turkey. At the time of writing, the Court has yet to pronounce on the remaining eight applications.

- Failure to inform landowners and communities of the dangers of the pipeline;
- Landowners being misinformed about their legal rights – for example, many were told that, if they went to court, they would receive no compensation or reduced compensation or that they had no right to challenge the compensation paid;
- Problems obtaining legal advice and representation because local lawyers have been employed by BOTAS, the Turkish state pipeline company building the Turkish section of the project;
- No negotiation on the level of compensation – despite negotiation being a requirement of the Turkish Expropriation law;
- Use of Article 27 of the Expropriation Law, a provision which allows land to be expropriated for military purposes or in “national emergencies”, as a threat to coerce villagers into signing over their land;
- Cases of landowners granting BOTAS power of attorney after signing blank pieces of paper;
- Meetings being held in Turkish when the landowners spoke Kurdish as their first language;
- Cases of landowners being told of the amount they would receive in compensation only *after* they had signed over their land;
- Cases of compensation being far less than landowners were originally promised;
- Generalised failure of compensation to reflect the true value of the land expropriated and the losses incurred;
- Complaints that a significant proportion of compensation has been eaten up by travel costs to attend meetings with BOTAS;
- Cases of landowners being threatened where they refused to accept the compensation on offer;
- Cases of land being entered without compensation first being agreed and paid;

- Cases of the pipeline route being altered without compensation being paid for the affected land;
- Cases of villagers not being informed that they were eligible for compensation for use of common land through a fund set up under the project's Resettlement Action Plan;
- Cases of villagers – particularly poorer tenants – having to leave their villages in search of employment because the compensation they received was too low to allow them to continue farming;
- Promises of community development programmes – such as medical centres – that never materialised;
- Villagers having to pay towards community development schemes that have been implemented;
- Concerns regarding the environmental hazards inherent in living or working on land in such close proximity to the pipeline.

Intimidation of those critical of the project – or seeking to secure their rights – has also been widely reported, with villagers stating that they were fearful of questioning the land acquisition procedures because “it was a state project”. Local human rights defenders have also been subject to harassment or worse. Ferhat Kaya was detained in May 2004 and allegedly beaten up and tortured³⁶ as a direct result of his work in documenting cases of abuses related to land expropriation. Subsequently, 11 police officers were charged with mistreatment under Article 245 of the Turkish Penal Code (as amended). The police officers were acquitted. At the same time, Mr. Kaya was charged with assaulting and insulting police officers under Article 266 of the Turkish Penal Code and damaging police property under Article 516 of the Turkish Penal Code.

Significantly, because the legal regime for the project requires compliance with the World Bank's resettlement project, any ruling by the European Court of Human Rights that the villagers' rights had been infringed would also amount to a ruling that

36. In his complaint to the Prosecutor, Ferhat Kaya alleged that he was “beaten up and tortured by the police”. The case lodged by the Prosecutor against the 11 police officers was for “ill-treatment”.

the project violated World Bank standards, raising questions about how the funders had interpreted those standards in the light of their own obligations to comply with them.

c) Preparing the Ground for Future Tort Actions

A further area where campaigners have been using the potential for court action to bring pressure to bear for greater corporate and IFI accountability is over the threat of pollution from the pipeline.

In February 2004, the UK's *Sunday Times* reported that BP had been warned by its own consultant³⁷ that the anti-corrosion coating system used on the pipeline's field joints for the Azerbaijan and Georgia section was unsafe and would leak. The system, which it now emerges (despite initial denials) has never previously been used on a similar operational pipeline anywhere else in the world, has since suffered extensive cracking and peeling. Internal BP reports strongly suggest that the remedial measures adopted by the company have failed to correct the problem, which, it has been argued, is intrinsic to the coating system employed.

Significantly, the IFIs funding the project were never informed by BTC Co. of the concerns raised within BP and learned of them only through the press – after they had agreed to fund the project.

In 2004, the UK parliament requested further information on the problem, as part of an inquiry into the project, resulting in a considerable volume of documentation being put into the public domain.³⁸

37. "BP Caspian Developments, AGT Pipelines Project, Review of Field Joint Coating Specification No 410088/00/L/MW/SP/015 (issue 02.10.02)", unpaginated, Appended to Mortimore D., "Response from Derek Mortimore to ECGD submission" in Trade and Industry Select Committee, Ninth Report, Session 2004-05, 4 April 2005, *Implementation of ECGD's Business Principles*, Written Evidence, Appendix 4, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we05.htm>.
Reviewing the specification for the selected coating, Mr Mortimore warned: "I am at a loss to understand why this specification has been issued. Purely as a coating it is under developed and incomplete. As a field joint coating specification, it is utterly inappropriate as it does not confirm a protective system that can be successfully applied in all the conditions under which this pipeline will be constructed, nor does it confirm the integrity of the protection for the design life of the pipeline."

38. Trade and Industry Select Committee, Ninth Report, Session 2004-05, 4 April 2005, *Implementation of ECGD's Business Principles*, Written Evidence <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we01.htm>

The Corner House has since written to all the directors of all the oil companies that form part of the BTC consortium alerting them to their legal duty of care and warning them:

“We further wish to inform you, as a matter of courtesy and as evidence that you have been put on notice of [your company’s] potential liability, that we have collected the publicly-available material on the coating and will make it available to anybody who might wish to bring legal proceedings at any time in the future against [name of company] as a result of any damage they or the environment may suffer as a result of leakage from the BTC oil pipeline and the accompanying South Caucasus gas pipeline, which uses the same coating.”

BP has since replied stating that the pipeline is being constructed by BTC Co, not BP. The Corner House has responded reminding BP and the other companies that under the terms of the pipeline agreements, each company in BTC Co. is “jointly and severally” liable for any damages. The letter concludes;

“BP Plc.’s directors should be under no illusions that the company, along with its other partners in BTC Co, would not be cited as a defendant in any case brought subsequent to a leak from the pipeline.”

The NGOs involved in campaigning on the BTC project have also stated publicly that they intend to continue monitoring other aspects of the project, documenting violations of the project agreements and the IFI funding conditions, and seeking redress.

Looking to the Future

Both the Ilisu Dam and the Baku-Ceyhan campaigns have yielded valuable lessons in the extent to which the law can be used to push for greater corporate and IFI accountability.

One of those lessons – particularly pertinent in the context of this meeting – is the need to work with those affected by projects to document as fully and contemporaneously as possible the losses and violations of standards that result from

projects. Such documentation is critical to making any legal case for damages, judicial and administrative review, and applications to regional and other human rights courts. Here, the anthropological community has much to offer – and I would appeal to anthropologists to work with affected communities to build this capacity.

Together with other initiatives aimed at holding funders and companies to account for the impacts of their activities, the Ilisu and Baku-Ceyhan campaigns also highlight areas of the law where changes must be won if progress is to be made in ensuring that the rights of those adversely affected by IFI-funded projects are to be ensured. Extending the duty of care to IFIs and commercial banks is just one example.

For, in the end, standards, safeguard policies and the like mean little if they are not judiciable. As the UK lawyer, Lord Brennan, has noted with respect to the European Charter of Fundamental Rights:

“Rights without remedies are of no value. Indeed, the declaration of them without remedies triggers a rapid decline of trust in the system of judicial protection.”³⁹

Winning the right to remedy will, however, depend on more than fine words. It will depend on the ability of the oppressed to challenge those who would deny them access to justice; on the willingness of like-minded groups to join them in solidarity; and on jointly campaigning for change. Not so much “learning by doing” as “doing by organising, organising and organising”.

39. Lord Brennan, “European Law: what future?”, *The European Advocate*, Journal of the Bar European Group, 2003.