IN THE ADMINISTRATIVE COURT

R (WWF and Corner House Research) v Secretary of State for Business, Enterprise and Regulatory Reform

Details of the decisions to be judicially reviewed

1. The decision of the Secretary of State dated 4 March 2004 (but disclosed to the claimant on 13 June 2007) ("the 2004 Decision"), in purported exercise of his power under section 1(1) of the Export and Investment Guarantees Act 1991 ("the 1991 Act"), to grant conditional Export Credits Guarantee Department ("ECGD") support, pursuant to the application of the Interested Party, the Sakhalin Energy Investment Company Ltd ("SEIC"), for the contracts detailed in the schedules to a letter of that date ("the Preliminary Contracts") arising out of the preliminary stages of the Sakhalin II (Phase 2) oil pipeline project ("the Project").
2. The Secretary of State's current and continuing position (evidenced in a letter dated 15 March 2007 and continuing) that the decision of 4 March 2004 constitutes a binding commitment to support the financing of the Preliminary Contracts if the conditions set out in that letter are satisfied, for the purposes of his future decision to grant ECGD support, expected in autumn 2007.

Principal Issues

1. Whether the 2004 Decision was *ultra vires* section 1(1) of the 1991 Act because the Secretary of State unlawfully predetermined the key eligibility criterion of "facilitating" a UK supply.
2. Whether the Secretary of State acted unlawfully by failing to require an environmental impact assessment ("EIA") of the Project prior to granting support in 2004 (and/or by granting support prior to the completion of an EIA).
3. Whether the 2004 Decision was, in any event, *ultra vires* section 1(1) of the 1991 Act because it did not facilitate any supplies by persons carrying on business in the UK of goods or services.
4. Whether the Secretary of State acted unlawfully by failing to consult the claimants prior to taking the 2004 Decision, and subsequently by failing to disclose the 2004 Decision either to the claimants or to the public.
5. Whether the Secretary of State's current position that he has made a binding and legally valid commitment to grant support if the conditions in the 2004 Decision are satisfied is flawed in the light of the points at (1) to (4) above.
6. Whether a final grant of support in 2007 (or thereafter) is precluded by (1) to (5) above.

Pre-reading (1 hour)

Grounds for judicial review and witness statements in support (pages 1-66). Export and Investment Guarantees Act 1991 section 1 (pages 1099-1110). Correspondence at pages 1067-1098.

Orders sought

(a) A declaration that the 2004 Decision has no legal effect and does not bind the Secretary of State to grant support if its conditions are fulfilled; alternatively, quashing of that Decision.

(c) An order prohibiting the Secretary of State from granting support for the Preliminary Contracts.

INTRODUCTION

1. The Export and Investment Guarantees Act 1991 ("the 1991 Act") gives the Secretary of State power (by section 1(1)) to make arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business

   "with a view to facilitating, directly or indirectly, supplies by persons carrying on business in the United Kingdom of goods or services to persons carrying on business outside the United Kingdom". (page 1101)

2. Broadly, the Secretary of State is empowered to lessen the difficulties (such as increased risks of bad debts, and difficulties of enforcement in foreign courts) experienced by UK companies seeking to trade abroad by providing them with approved support by way of (for example) guaranteed credit.

3. This application for judicial review arises out of a purported decision (dated 4 March 2004 but revealed to the claimants on 13 June 2007) ("the 2004 Decision") of the Secretary of State (acting, by virtue of s.13 of the 1991 Act, by the Export Credits Guarantee Department ("ECGD")) to grant financial facilities or assistance pursuant to s.1(1) of the 1991 Act, subject to certain conditions subsequent, to the Sakhalin Energy Investment Company Limited ("SEIC"), a Bermuda-registered consortium whose head office is in Russia and which was originally wholly owned by Shell, Mitsui and Mitsubishi[1], for the development of the Piltun-Astokhskoye and Lunskoye oil and gas fields off Sakhalin Island in Russia's Far East ("the Sakhalin II (Phase 2) Project" or "the Project"). Please see pages 100-102 and 271-272.

4. That purported decision was made in relation to a number of preliminary contracts ("the Preliminary Contracts"), made by SEIC with UK suppliers, relating to the Project (pages 104-139). At the time of the purported decision, the environmental impact assessment ("EIA") required by the Secretary of State pursuant to ECGD's EIA policies was incomplete. A statutory commitment to

[1] In April 2007, a Russian company, Gazprom, bought a majority share in SEIC. The current shareholding is: Gazprom 50% plus 1 share; Shell 27.5%; Mitsui 12.5%; Mitsubishi 10$.

funding, regarded by the Secretary of State as binding, was nevertheless entered into, subject to a condition subsequent of satisfactory EIA. That appears to have been done on the basis that by the time the EIA was complete, the supplies under the Preliminary Contracts would have finished, at which point there would be no 'facilitation' of the relevant exports and, thus, no power to grant support under section 1(1) of the 1991 Act.

5. Construction of the Project commenced in about January 2004 and is now substantially complete. The environmental impact assessment of the Project has, nevertheless, yet to be completed. In the meantime, and as set out in the Witness Statement of James Leaton of WWF-UK ("WWF"), the Project has had a number of very serious environmentally damaging consequences, many of which are now irreversible. In many cases (for example, in relation to the siting of the oil drilling platform) the necessary environmental information was not available at the time an irrevocable decision having substantial environmental consequences was taken (in that example, by the towing out to sea and permanent siting of the platform).

6. This is a matter of grave concern to the claimants because of, in particular, the threat (recognised by the Department for Environment, Food and Rural Affairs ("DEFRA") in its 2005 Departmental Report) to the critically endangered Western Pacific Gray Whale (extract at pages 141-142; full report is at: www.defra.gov.uk/corporate/deprep/2005/2005report.pdf), a species in which the additional loss of just one female per annum could lead to worldwide extinction.

7. The Claimants' concerns in the present case are deepened by the facts that, as set out below, until 13 June 2007 they were unaware of the purported 2004 Decision granting conditional support for the Project; and that they had been repeatedly assured by Government between 2004 and 2007 that no decision to grant ECGD support had yet been made.

8. In the autumn of 2007 the Secretary of State is due to make the final decision whether to grant approved support for the Preliminary Contracts[2].

9. The issues in this case are these:

(i) Whether the Secretary of State has acted lawfully in purporting to predetermine the statutory eligibility criterion (that support would facilitate supply) by means of an undisclosed initial statutory decision which preceded the consideration of matters plainly relevant to approval (eg. environmental impact), and which (a) involved no transparency or due process as regards third party stakeholders (such as the claimants), and (b) would have the consequence that final support would be granted although the statutory criterion could no longer be met.

(ii) Whether in the circumstances the Secretary of State can now lawfully purport to give final support by treating the undisclosed initial decision as having lawfully determined the eligibility criterion.

10. In summary, the claimants submit as follows:

(i) It was and remains ultra vires for the Secretary of State to have purportedly predetermined the key question of satisfaction of the eligibility criterion. That criterion needs to be satisfied at the time of final approval. The Secretary of State has rightly recognised that it is necessary, for approved assistance to "facilitate" supply, that the supply has not yet been completed. Otherwise, the Secretary of State would be claiming to "facilitate" something which has already occurred. But by predetermining the eligibility question at an initial stage, the Secretary of State has done precisely that. It follows that he cannot now lawfully

[2] That is, a decision as to whether the conditions subsequent set out in the 2004 Decision have now been met.

grant approval for support. That is because the supply has now been completed.

(ii) One reason why there could be no binding approval decision at the initial stage was that highly material considerations needed to be appraised and considered, including the well-understood concept of an environmental impact assessment, which the Secretary of State has properly chosen to incorporate into ECGD's decision-making process. It is however of the essence of EIA that it should be used to ensure that the decision-maker is fully informed at the time of the decision, not merely left as an afterthought to be dealt with as a future condition. The Secretary of State's approach entirely subverted that principle, by purportedly making the (binding, statutory) decision on the application of the statutory eligibility criterion at a time when the decision-maker was not and could not be fully informed of relevant considerations. The only lawful approach to any initial decision was to consider eligibility on a provisional or 'minded to' basis, so that there would be an integrated and open-minded consideration of all issues when the ultimate decision came to be made. It follows that the Secretary of State cannot now treat the initial decision in this case as having validly determined anything, and all matters need now to be considered as at the present time.

(iii) There is a further and independent legal flaw in the Secretary of State's approach. In purporting to predetermine the statutory eligibility criterion of "facilitation", the Secretary of State has considered one necessary aspect – whether the supply remains incomplete and is therefore *capable of* being "facilitated". That is necessary, but not sufficient. The support must *actually* be shown to "facilitate" the UK supply. That means making a concrete difference. The undisclosed initial decision contains no reasoning or appraisal of whether support would make a concrete difference. The Secretary of State, who

declined pre-action opportunities to explain what was addressed beyond the question of incomplete supply, purported to make a predetermination which failed to grapple with the question of actual "facilitation". For this reason alone, it follows that the initial decision cannot lawfully be regarded as constituting a sound platform for any final decision approving support.

(iv) Finally, the initial decision purporting to predetermine the statutory criterion was contrary to law for another independent reason. The Secretary of State's mindedness to take that course, and even (subsequently) the fact that he had done so, was not brought to the attention of those third party stakeholders like the claimants who have made clear their wish to make representations as to whether approval would be appropriate. Alarmingly, even once the initial decision had been made, the Secretary of State (even though he regarded that decision as constituting a binding exercise of his statutory powers) failed to disclose it to the claimants and instead made constant reference to there having been "no decision" yet. This concealment continued up until 13 June 2007 and therefore amply excuses the absence of earlier challenge. In any event, the decision-making is ongoing and the lawfulness of the initial decision is directly relevant to extant decision-making. The lack of transparency and engagement at the time of the initial decision alone vitiate it as being contrary to standards of due process. It follows again, and for this reason alone, that the initial decision provides no lawful basis for the Secretary of State to treat the eligibility criterion as having been predetermined. The Secretary of State must, again, consider all questions afresh at the present time.

(v) For these reasons, the undisclosed initial decision is of no legal relevance or effect and the Court should so declare. The Secretary of State cannot, in the circumstances, now grant final approval. If

necessary, the initial undisclosed decision should be quashed. But in any event, such relief should be given as may be necessary to secure that the final decision-making proceeds on a correct legal footing.

THE FACTS

The decision-making process as seen by stakeholders

11. The decision-making process as seen by stakeholders, including the claimants, until 2007 was as follows.

12. It would appear that SEIC first approached ECGD some time in 2002-3 to discuss support for certain contracts with UK suppliers arising out of the early stages of the Project.

13. On 28 February 2003, ECGD notified a number of government departments that it was currently considering an application for support for the Sakhalin II (Phase 2) Project and that this was considered to be a potentially sensitive case, on which departments' views were sought (page 241). That notification was subsequently obtained by Friends of the Earth ("FoE") by virtue of a Freedom of Information Act ("FoI") request to ECGD.

14. On 23 May 2003, ECGD published details of the Project on its website in a *List of projects with potentially high impacts for which ECGD support has been requested*, and sought comments from the public about ECGD's involvement in the Project (page 244).

15. In September 2003, SEIC published Environmental, Social and Health Impact Assessments ("ESHIA") intended to be in line with international standards. Please see websites below for copies of the full reports:
http://www.sakhalinenergy.com/en/library.asp?p=lib_sel_eia20032005&l=eia_2003#vol1
http://www.sakhalinenergy.com/en/library.asp?p=lib_sel_sia20032005&l=sia_2003

http://www.sakhalinenergy.com/en/library.asp?p=lib_sel_hia2003&l=hiap_2003

16. In about January 2004, construction work on the Project commenced.

17. In a letter dated 6 February 2004, ECGD assured Corner House that ECGD-supported finance for the Project would only be made available "*if the relevant environmental, social and human rights impacts have been properly addressed*"; that ECGD would be consulting recognised Gray Whale experts "*before making any decision*" and that ECGD would only proceed "*if we are confident that the risks to the whales have been minimised*" (page 245).

18. On 14 February 2004, the Minister of State for Environment and Agri-Environment wrote to Wildlife & Countryside Link (an umbrella organisation including WWF) stating that ECGD was "*currently considering*" requests by SEIC for finance but that Government would only agree to support the project if it was satisfied that, among other things, "*the best scientific advice is being followed and that the risks to the whales from the development have been minimised*" (page 246-247).

19. On 26 February 2004, the Minister for Trade and Investment stated in answer to an oral Parliamentary Question ("PQ") that[3] "*before I approve <u>any</u> support for the project .. I will need to be confident that, among other things, the best scientific advice is available not only on the seismic and other environmental issues, but on the whales"* (emphasis added) (page 248-249)

20. On 5 March 2004[4], the Secretary of State was asked in a written PQ[5] "*when a decision on whether to support the Sakhalin II phase 2 will be taken by [ECGD]"*. In reply, the Minister for Trade and Investment stated (by reference to an answer previously given on 26 February 2004) that *"[n]o decision on ECGD cover has yet been taken, pending a full assessment*" (page 250-251)

[3] House of Commons Hansard, 26 February 2004, columns 406-407.
[4] Note the date – the day *after* the confirmation to SEIC of conditional support for the Preliminary Contracts.
[5] House of Commons Hansard, 5 March 2004, column 1197W.

21. In April 2004, the European Bank for Reconstruction and Development announced that the ESHIA was unfit for purpose.

22. On 10 May 2004, the DEFRA Minister again wrote to Wildlife and Countryside Link about the project, stating: "*I can assure you that it is still the Government's intention to seek independent expert advice on the adequacy of any proposed whale protection measures before any decision on whether to support the project is made"* (emphasis added) (page252-253).

23. On 24 January 2005, the Foreign Office Minister of State for Trade, Investment and Foreign Affairs wrote to Wildlife and Countryside Link promising that "*NGOs and other stakeholders will have adequate time to review and comment on*" supplementary Environmental Impact Assessment information which was to be published (page 254).

24. In November 2005, SEIC published "environmental and social addenda" to the ESHIA, stating that an important focus in the development of addenda had been "to ensure that the project meets the policies and procedures required by the potential Senior Lenders". Please see websites below for full report:

http://www.sakhalinenergy.com/en/library.asp?p=lib_sel_eia20032005&l=eia_addendum

http://www.sakhalinenergy.com/en/documents/doc_lender_soc_1.pdf

25. On 24 January 2006, ECGD wrote to non-governmental organisations (including WWF) instituting a period of consultation on (inter alia) the environmental and social addenda to the ESHIA (page 255). The consultation e-mail sought WWF's comments on the addenda and on "any other aspect of the project".

26. On 3 February 2006, WWF wrote to the DEFRA Minister urging him to reconsider any role that the government might play in contributing to the Sakhalin II project, given that the project threatened the survival of the critically endangered Western Gray Whale (page 256); and on 28 April 2006, WWF

wrote to ECGD setting out 50 outstanding questions about the Sakhalin II project (pages 257-259). On the same date, Corner House, WWF and FoE submitted to ECGD a joint assessment of the Project's compliance with ECGD policies on project acceptability (pages 259(1)-259(41)).

27. On 30 June 2006, ECGD wrote to FoE about the Sakhalin II project stating that it was "*currently in the process of finalising the various assessments and other considerations that together will inform any decision the Department reaches in respect of that project"*. It went on to state that "*[i]n determining whether to provide support ECGD will have regard .. to various types of assessment relating to the project"*. This was a clear statement that no decision had yet been made. The letter also stated that the "*economic, financial, commercial and political risk aspects of the project*" would be taken into account in deciding whether to provide support. (page 260-261)

28. On 10 July 2006, ECGD promised in a letter to the claimant that all fifty of the questions raised in the 28 April letter would be taken into account by ECGD in "*completing its assessment of the Sakhalin II project*" (page 262).

29. On 19 December 2006, ECGD again wrote to the claimant about Sakhalin II. That letter concluded (§9) "*[i]f ECGD determines in due course to provide support for the project, such support will .. be directly linked to the interests of UK exporters*". Once again, this was a clear statement that no decision had yet been taken. (page 263-264)

<u>The undisclosed 2004 "decision"</u>

The Correspondence with Corner House and FoE

30. On 20 December 2006, ECGD responded to a Freedom of Information ("FoI") request from the Corner House in relation to Sakhalin II (page 265-267). That request asked for (inter alia) copies of the documents constituting the application(s) for ECGD support. In response, ECGD supplied redacted copies of two letters (dated 26 December 2003 and 27 January 2004) from SEIC asking

that ECGD "*provide confirmation of conditional ECGD support*" for each of the contracts detailed in the schedule to each letter.

31. Having considered the details of the contracts annexed to the SEIC letters, on 21 February 2007, FoE wrote to ECGD seeking clarification of the legal basis upon which ECGD was still considering support for the Project given that (a) the contracts in respect of which support was sought had already been entered into; (b) the work under those contracts should already have been completed; (c) ECGD's relevant power to grant support arose under s.1 of the 1991 Act only where financial support would *facilitate* the supply abroad of UK goods and services (page 268-269).

32. On 15 March 2007, three years after the confirmation of conditional support, ECGD for the first time suggested that it might have committed itself to providing support to SEIC:

> "*[i]n March 2004 ECGD confirmed to SEIC that, subject to the satisfaction of certain conditions, it would provide support for the financing of payments due from SEIC under those UK supply contracts that met ECGD's eligibility requirements. This letter was issued by ECGD pursuant to the power conferred upon it by s.1(1) of the [1991 Act] with a view to facilitating the supply of goods and services under the relevant contracts. As ECGD is bound by the terms of that letter, it has committed itself to support the financing of the relevant contracts if the conditions set out in that letter are satisfied"* (emphasis added).

ECGD was asserting (a) that it had already exercised its powers under the 1991 Act in relation to the Project and (b) that in doing so it had given a binding commitment[6] to support the relevant contracts. (Page 140)

33. On 20 March 2007 (page 270), FoE asked for a copy of the March 2004 letter; and on 26 March 2007 (page 270a-270b), FoE wrote to ECGD setting out its concern that, in contrast to the many clear assurances it had been given that no decision had yet been taken, ECGD was now suggesting that it had entered into a binding commitment in relation to the Project in March 2004.

[6] Subject to conditions set out in the letter granting support.

34. On 13 June 2007 (almost three months later), ECGD for the first time provided a copy of the March 2004 decision letter granting conditional support. (Page 271-272)

35. In a further letter of the same date (in response to FoE's letter of 26 March 2007), ECGD astonishingly once again asserted that "*No decision has been made to date by ECGD to support the Project* [sc Sakhalin II, Phase 2]*"*, reasoning that "*[p]ending the conclusion of its examination of the Project, ECGD has yet to take a decision on whether the .. conditions* [including §2.1 of the March 2004 letter] *have been satisfied and, consequently, on whether to support the Project*." (page 292)

The 2004 Decision

36. It was now revealed that, unknown to stakeholders and apparently in direct contradiction of the many assurances that no decision had yet been taken, the following correspondence had taken place.

37. On 19 June 2003[7], ECGD had written to SEIC in the following terms:

> "*We refer to our discussions concerning the Project and in particular to your request for confirmation that ECGD support can be made available for certain contracts with UK suppliers arising out of the early stages of the Project. .. For the purpose of enabling ECGD to carry through its initial assessment of such contracts, we attach an application for conditional ECGD support."* (page 273)

38. That letter (which was, as set out above, first disclosed to the claimants on 13 June 2007) went on to set out the conditions on which it was proposed that conditional support would be granted. Those conditions included (at §5.1) the acceptability to ECGD of the measures proposed and/or taken to identify and mitigate any adverse environmental and social impacts arising from the Project. (page 274)

39. The letter also set out (at §6) that:

[7] This letter was seen by the proposed claimant for the first time in December 2006, when it was disclosed by ECGD pursuant to a Freedom of Information ("FoI") request.

"*ECGD is not able to support any contract with a UK supplier where the supplies of goods and/or services under the contract have been completed prior to the time that ECGD agrees to provide conditional support as referred to .. above."* (page 274)

This was apparently directed to the statutory requirement that ECGD support should "facilitate" the relevant supply: see below.

40. Neither the 19 June 2003 letter nor the enclosed application form contained any questions directed to the issue of whether ECGD support would in fact facilitate the UK supplies in question (rather than merely being potentially capable of doing so). For example, (i) while the application form asked for the contract price it did not ask whether any, or all, payments had already been made under the contract; (ii) neither the form nor the letter referred to the requirement that the provision of support should facilitate UK supplies; (iii) in particular, neither the form nor the letter asked why the support was needed or what would happen if support was not granted.

41. On 26 December 2003 (pages 107-139) and 27 January 2004 (pages103-106), in response to ECGD's letter of 19 June 2003 (page 279-276), SEIC had provided details of the Preliminary Contracts for which support was sought (pages 103-139). Those were said to be contracts which SEIC had entered into with UK suppliers arising out of the early stages of the Project. SEIC confirmed "*that the supply of goods and/or services by the UK supplier under each of the Contracts remains incomplete"* (emphasis added) (page 103) and asked "*that ECGD provide confirmation of ECGD support for each of the Contracts based on the information set out in the attached schedules"* (page 104). The schedules to the letters did not set out any environmental information about the Project, but merely gave brief details of the UK supplier, the UK goods or services, the contract prices and the commencement and completion dates for supplies (of UK goods or services) under the contract.

42. All the Preliminary Contracts had already been entered into, and all had commencement dates (for the relevant UK supplies) before March 2004 (the

date on which conditional support was given). In two cases, the completion dates were also before this date (see Schedules 21 (pages 128-129) and 23 (pages 132-133) to the 26 December 03 letter, with completion dates of 10 February 2004; in several other cases, the completion date was very soon after March 2004 (see eg Schedule 3 (5 April 2004) (page 112-113), Schedule 5 (29 May 2004) (pages 116-117), Schedule 19 (May 04) (page 124-125) and Schedules 22 (pages 130-131) and 24 (7 May 2004) (page 134-135). Most of the others had completion dates in 2005. All have now apparently been completed. No information was supplied on the question of whether ECGD support would in fact facilitate supplies by the UK suppliers (nor, indeed, as to whether any payments had already been made by SEIC to those suppliers).

43. By a letter dated 4 March 2004 (referred to by ECGD as a "confirmation of conditional support") (page 100-102), ECGD had purportedly granted conditional support to SEIC for the Preliminary Contracts (including the two contracts where the completion date had already passed). The confirmation of conditional support has still not been communicated to the public, nor has it ever been the subject of consultation (either as to the decision to grant support or as to the conditions which should be imposed if support was granted). The support was subject to a number of conditions, including (§2.1) that measures to identify and mitigate any adverse environmental impacts arising from the project should be "acceptable" to ECGD (page 100). Provision was made (§5) for the "withdrawal" of support in certain circumstances – but there was no power to withdraw support on environmental grounds (page 101). There was no discussion in the 4 March 2004 letter of whether the grant of support to SEIC would in fact "facilitate" the UK supplies – nor did the letter express any conclusion on that issue.

44. It is common ground that in granting the (conditional) support set out in the 4 March 2004 letter, the Secretary of State was purporting to exercise his powers under section 1(1) of the 1991 Act. The Secretary of State's position is that the 2004 Decision letter:

"was issued by ECGD pursuant to the power conferred upon it by s.1(1) of the Export and Investment Guarantees Act 1991 with a view to facilitating the supply of goods and services under the relevant contracts"[8]. (page 140)

The Form of the ECGD Support

45. The form of support conditionally confirmed by ECGD to SEIC in this case is known as a "Project Line of Credit". Information on the ECGD website explains the arrangement as follows (page 293-296) :

*"**Lines of Credit***

*An ECGD-supported Line of Credit offers you, the exporter [*here the UK suppliers under the Preliminary Contracts*][9], a quick and easy way of offering a finance package to your buyer [*here SEIC*] when selling capital and project goods or services.*

*You will be paid "cash" after shipment of the goods whilst your overseas buyer [*here SEIC*] will be able to pay for them over several years. With minimum contract values as low as US$25,000 (or the currency equivalent), Credit Lines can help you win entry into new markets overseas.*

A Line of Credit is an arrangement between a bank in the UK and a bank (or other borrower) overseas to make finance available for a series of contracts. The Line will be put in place before your contract is signed, which means that you and the buyer should be able to gain access to the facility quickly.

The Line will specify the currency (or currencies) and overall amount of finance that may be made available, together with any conditions including for example the minimum contract value.

*You [*here the UK suppliers under the Preliminary Contracts*] will be paid from the loan by the UK bank. If later the borrower [*here SEIC*] fails to repay any part of the finance, ECGD guarantees the UK bank that it will be paid in full.*

Different types of Lines of Credit

- General Purpose Lines of Credit (GPLOCs)

..

-Project Lines of Credit (PLOCs)

PLOCs are used when a specific project or identified programme requires purchases from a number of UK exporters. ECGD agrees the amount of finance

[8] ECGD letter to FoE dated 15 March 2007 (page 140).
[9] Although note that it was *SEIC* and not, as this information suggests, the UK suppliers which applied for and was granted conditional ECGD support (by way of a Project Line of Credit).

to be made available under the loan in the context of the project under consideration. The borrower will then nominate individual contracts to be financed under the facility."[10] *(Underlining added.)*

46. (In the present case there was of course no question of ECGD support helping the UK suppliers to "win entry into new markets overseas". The Preliminary Contracts, with UK suppliers, had in all cases already been entered into by SEIC and the supplies in respect of the Project were in some cases complete or nearly complete. Moreover, as noted above, it was the borrower and not the UK exporter who sought ECGD support.)

47. Thus, as the claimants currently understand it[11], the facility or assistance which ECGD decided in 2004 to grant to SEIC (upon fulfilment of certain conditions subsequent) was the guarantee by ECGD of a loan (by a UK bank) to SEIC in the sum of up to 85% of the contract price of the Preliminary Contracts – with the UK suppliers under those contracts to be paid under the loan facility, and SEIC having several years[12] to repay the loan.

48. It is common ground that the requisite guarantee has not yet been underwritten by ECGD.

49. It is at present entirely unclear to the claimants whether the UK suppliers under the Preliminary Contracts have been paid. If they have been paid by SEIC prior to the issue of the ECGD guarantee, there would appear to be nothing remaining for ECGD to guarantee in its forthcoming 2007 decision (and, indeed, nothing to

[10] The document goes on to explain that (i) the amount of credit will be up to 85% of the contract value but the buyer (SEIC) will be required to pay at least 15% directly to the exporter before the starting point of credit under the finance facility; (ii) finance to the borrower (SEIC) will offer credit of between two and five years; (iii) that in order to obtain cover, exporters should in the first instance contact the lending bank in the UK, which would submit the nominated contract to ECGD for approval; (iv) ECGD would then stipulate any conditions and set the interest rate and repayment terms; (v) once the conditions had been met ECGD would instruct the UK bank to issue a Notice of Approval to the borrower (here SEIC). Under 'Next steps' for exporters, the document again refers to "*how [Lines of Credit] can help you win exports in new markets*".

[11] The claimants have asked the Secretary of State to clarify the details of the "project line of credit" in this case: letter before claim, §5.6. The Secretary of State has not done so (whether in its response to the letter before claim or otherwise) (page 1073).

[12] Two to five years – see above.

facilitate from the point of view of UK exports). If, on the other hand, the UK suppliers have not been paid (in some cases well over three years after the *end* of the relevant supplies) because SEIC are waiting for ECGD support, then far from being facilitated, the UK exports in the present case would appear to have been hindered.

THE LEGAL FRAMEWORK

The 1991 Act

50. The Secretary of State's power to grant support in cases such as the present is set out in section 1 of the Export and Investment Guarantees Act 1991, which provides:

> "*The Secretary of State may make arrangements under this section with a view to facilitating, directly or indirectly, supplies by persons carrying on business in the United Kingdom of goods or services to persons carrying on business outside the United Kingdom*" (emphasis added).

51. The arrangements which may be made under section 1 are

> "*arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business"*,
>
> and such facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans (subsection (4)). (page 1101)

52. It is common ground that in granting the (conditional) support set out in the 2004 Decision, the Secretary of State purported to exercise the power set out in s.1(1) of the 1991 Act for the statutory purpose of "facilitating" supplies of goods and services under the Preliminary Contracts: see paragraph 44 above.

53. The Secretary of State's approach to "facilitation" of UK exports in the present case appears to have been that the "facilitation" requirement would always be satisfied provided only that at the time of the conditional support, the supply of UK goods or services under the relevant contract "remained incomplete".

54. It is, further, common ground that (in the absence of the conditional support letter in 2004) it would now be too late for the Secretary of State to grant support for the Preliminary Contracts, since supplies under those contracts are now complete and there would, therefore, be no facilitation of UK supplies.

ECGD policies on Environmental Impact Assessment

55. ECGD has signed up[13] to the Organisation for Economic Co-operation and Development ("OECD") *Recommendation on Common Approaches on Environment and Officially Supported Export Credits*. The Recommendation requires (§8) that in Category A projects such as the present (that is, projects having the potential to have significant adverse environmental effects)[14], Members should require an EIA (page 301). By §13, Members are to evaluate the information resulting from the EIA before deciding whether to request further information or to "decline or provide official support" (emphasis added) (page 302).

56. Similarly, ECGD's own *Case Impact Analysis Process* ("CIAP") sets out (at §9.4) that in High potential impact cases such as the present, to complete its impact analysis, ECGD "requires the information normally contained in a formal EIA", namely, detailed assessments of all the potential environmental and/or social impacts of the project[15] (page 325). §9.5 of CIAP, referring to §16 of the OECD Recommendation, states that ECGD should seek to make environmental

[13] In a press release dated 18 December 2003 (http://www.gnn.gov.uk/content/detail.asp?ReleaseID=103866&NewsAreaID=2&NavigatedFromSearch=True, accessed 26 July 2007) and headed *UK Secures Higher OECD Environmental Standards for Scrutinising Capital Goods Exports*, ECGD announced the Recommendation, stating that "*ECGD has been leading the way in setting high standards for evaluating the environmental impacts of projects, and fellow Export Credit Agencies have today agreed to adopt many of those measures",* and that one of the *"key improvements that ECGD has been instrumental in getting adopted"* was "*Increasing transparency by explicitly requiring environmental information on projects with high potential impacts to be disclosed publicly, prior to a decision on ECA support*".

[14] Category A, in principle, includes projects in sensitive sectors or located in or near sensitive areas. An illustrative list of sensitive sectors and sensitive areas is set out in Annex I to the Recommendation, and includes (§8) pipelines, terminals, and associated facilities for the large-scale transport of gas, oil and chemicals. (page 307-309)

[15] CIAP refers to World Bank guidelines on the expected contents of an EIA and to EU guidance on how to assess and EIA: see §9.4.

impact information available at least 30 calendar days "before a final commitment to grant official support" is given (page 325). Thus, like the OECD Recommendation, ECGD's process requires EIA to *precede* the commitment to support.

57. That EIA is to precede commitment is, moreover, clearly set out in ECGD's *Case Handling Process – Information Note*[16], which sets out the following sequence of events:

(a) a "preliminary indication of the possibility" that ECGD support "might be considered", stating whether the proposed payment or repayment terms are "acceptable in principle" but not involving a detailed assessment of the case: such indications are said to be given "entirely without commitment" and to "carry a reminder that ECGD will need to consider the case in greater detail to satisfy itself on various matters (including environmental and other impacts) before any commitment can be considered" (emphasis added) (page 339);

(b) a formal application for support, made where the potential customer "judges that they have a reasonable prospect of securing a deal" and wish ECGD to "undertake a detailed assessment with a view to providing a commitment of cover" (emphasis added) (page 340);

(c) consideration by ECGD's Business Principles Unit, which examines the completed application forms and uses this and other information "to identify any environmental, social and human rights issues that the case may present and categorise the case into one of three categories; it is stated that in cases categorised as having High potential impacts ECGD will require the information normally contained in a formal environmental impact assessment[17] (page 341);

[16] Available on the ECGD website.
[17] And/or social impact assessment and/or resettlement action plan.

(d) in Sensitive Cases (such as the present), consultation with other Government Departments as soon as the requirement for EIA has been confirmed (page 344);

(e) in High potential impact cases (such as the present), publication by ECGD of information (including the source of the environmental or social impact assessment reports) "at least 60 days before decisions to commit cover are taken" (page 344);

(f) a decision by ECGD on whether to provide support. The Note states that ECGD "will …decline cases where the adverse impacts identified cannot be mitigated to ECGD's satisfaction and thus are considered to outweigh the potential benefits of providing support" (page 345);

(g) in order to monitor implementation (ie post-issue of support) the imposition of conditions or covenants, determined "on a case-by-case basis" in relation to "any .. environmental concerns identified" (emphasis added) (page 345);

(h) the review by ECGD of monitoring reports on compliance with post-issue conditions and covenants, and the use of "such leverage as [ECGD] may have" to "bring the appropriate parties together to address the problem" where these reports indicate that remedial action is required in relation to "significant adverse effects" (page 346).

GROUNDS FOR REVIEW

Grounds for review

Ground 1: predetermination

58. In determining whether a particular UK supply is eligible for ECGD support, the Secretary of State is required to determine whether such support will "facilitate"

that supply. As he has recognised, it is thus a necessary[18] eligibility requirement that the relevant UK supply should not yet have been completed – otherwise, the Secretary of State would be claiming, after the event, to "facilitate" a supply which had already occurred (without any ECGD support).

59. By purporting to make a binding statutory predetermination of the eligibility question at an initial stage, the Secretary of State has unlawfully predetermined the key question of satisfaction of the eligibility criterion. That criterion must be satisfied as at the date of the final grant of ECGD support rather than at some earlier date prior to the final grant of support[19].

60. The Secretary of State cannot now lawfully grant ECGD support for the Preliminary Contracts – because the supplies under all those contracts are now complete.

Ground 2: pre-EIA commitment

61. The Secretary of State acted unlawfully by entering into a purportedly binding (but undisclosed) commitment, in the purported exercise of his statutory powers[20], to support the Preliminary Contracts without first carrying out an EIA in relation to the Project. In particular, he acted unlawfully by de-coupling or dislocating the two elements of his decision (namely (1) facilitation; (2) environmental impacts) so as to allow the Project to go ahead, and the supplies under the relevant contracts to be completed, without the relevant environmental information being available in order to avoid the dual difficulties that (A) as at March 2004, it was not possible to give final support because EIA had not been completed; (B) by the time EIA had been completed, there would be no power to grant support (no "facilitation") because the supplies under the relevant contracts would have come to an end.

[18] Although not sufficient: see ground 3 below.
[19] In this case by the underwriting of the requisite guarantee.
[20] Under section 1(1) of the 1991 Act.

62. **Failure to act in accordance with policies**: the Secretary of State has failed, without justification, to act in accordance with ECGD's stated policies in relation to environmental assessment. The Secretary of State could not, in accordance with those policies, exercise the s.1(1) powers and enter into a binding commitment to support the Project (as it is common ground that he did in 2004[21]) before EIA was complete. (It is common ground that as at March 2004 ECGD did not have sufficient environmental information to make a final decision on whether to support the project – hence ECGD's decision to impose condition 2.1 rather than granting support outright). The Secretary of State has given no reason (let alone any good reason) for departing from ECGD's EIA policies, despite having had the opportunity to do so when responding to the letter before claim.

63. **Failure to conduct EIA unlawful as a matter of principle**: as a matter of principle, and based upon European and domestic authority on EIA, it is impermissible to take a binding decision to support a project while leaving EIA to be dealt with as a condition subsequent:

(i) The purpose of imposing EIA requirements (as ECGD has chosen to do) is to ensure that adverse environmental impacts are prevented "*at source, rather than subsequently trying to counteract their effects*" (EIA Directive[22], first recital). Accordingly, it is a fundamental requirement that EIA should be undertaken "*prior to a decision to authorize or undertake a proposed activity"*[23].

(ii) Environmental impacts are to be assessed at the earliest possible stage in the decision-making process[24]. It is illegitimate, therefore (in a case

[21] See ECGD letter to FoE of 15 March 2007.
[22] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. (page 348-357)
[23] See eg Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo (Finland) on 25 February 1991 ("the Espoo Convention"), Article 2(3). SEIC has stated (Executive Summary of Phase 2 ESIA Process, Nov 2005, para 8.1 p14) that it "embraces the benefits of seeking to act in the spirit of [Espoo]". See also Article 2 of the EIA Directive, requiring EIA "before consent is given".
[24] See *Wells* (Case C-201/02), *Barker* (Case C-290/03) and *Commission v UK* (Case C-508/03) in the ECJ.

such as the present where EIA is required), to postpone consideration of some environmental impacts and mitigation measures until after authorisation is granted, because the decision will not then have been taken with full knowledge of likely significant impacts[25].

(iii) Thus, a decision-maker which applies an EIA requirement cannot rely on conditions and undertakings as a surrogate for the EIA process[26]. But that is exactly what the Secretary of State has purported to do by the 2004 Decision.

64. **Unlawful dislocation of eligibility from environmental impact**: it was unlawful for the Secretary of State to separate consideration of eligibility ("facilitation") from consideration of environmental impacts:

(i) The Secretary of State was constrained by two principles. The *first* (a prospectivity principle) was that formal approval of support pursuant to the Secretary of State's statutory power[27] must precede the completion of the contractual obligation by the UK supplier, otherwise (even on ECGD's view) there would be no "facilitating" and thus no power to grant support. The *second* (a prematurity principle) was that[28] formal approval could not occur until after EIA had been completed.

(ii) On the face of it (that is, so far as the process was made known to the claimants and other stakeholders), the Secretary of State was acting lawfully: he stated that no decision had yet been taken, and that was consistent with the prematurity principle.

(iii) It has now come to light that: (a) formal applications for ECGD support were in fact made by SEIC in 2003; (b) at that time, the

[25] See eg *R v Rochdale MBC ex p Tew* [1999] EWHC Admin 409; [2000] Env LR 1; *R v Cornwall County Council ex p Hardy* [2001] Env LR 25.
[26] See eg *R (Jones) v Mansfield DC* [2003] EWCA Civ 1408, Dyson LJ at §38; *Bellway Urban Renewal Southern v Gillespie* [2003] EWCA Civ 400 (especially Laws LJ at §48).
[27] Under section 1(1) of the 1991 Act.
[28] As set out in ECGD's policies on EIA, above.

prematurity problem (on EIA) meant that support could not yet be granted, yet the prospectivity principle (on "facilitating") meant that support could only be granted before the end of the contracts; (c) astonishingly, the Secretary of State sought to have it both ways, by a quasi-decision, purportedly pursuant to his statutory power, with conditions subsequent. This could not satisfy prospectivity (because there was no final grant of support), but at the same time surrendered prematurity (because the EIA had not yet been completed). It was also conspicuously unfair and an abuse of power, being concealed and flatly inconsistent with public statements.

(iv) The legal consequence is that the purported 2004 Decision is invalid and a nullity. The Secretary of State can still grant proper decisions to support contracts relating to the Project, but only insofar as such support would "facilitate" UK exports (and, in particular, only if the relevant contractual supplies are not yet complete[29]).

65. In his response to the letter before claim (pages 1083-1095), the Secretary of State argues that he was not obliged to require EIA before making a binding decision on the project (and/or before the project was carried out). That argument is put forward on the basis of general statements in ECGD's Case Impact Analysis Process ("CIAP") and Case Handling Process Information Note to the effect that, respectively, the CIAP is "not a statement of what will be done in every case as [ECGD] will exercise its professional judgment on the basis of the actual circumstances of each individual case" (page 1087); and (as to the Information Note) that "it is difficult to provide a succinct statement that will cover every circumstance" (page 1087) - although the Note adds that it "seeks to illustrate the general process adopted for handling cases" (page 1087). As to this, the claimants submit as follows:

[29] It would appear that all supplies under the Preliminary Contracts *are* now complete, so that the Secretary of State could not now lawfully grant support for any of those contracts.

(i) It is accepted that there is no binding statutory requirement requiring an EIA to be carried out in the present case (cf, for example, the situation where a local planning authority is obliged to do so), and it is no part of the claimants' case to suggest otherwise.

(ii) In the present case, however, the Secretary of State has (properly and for good reasons) chosen to incorporate the well-understood requirement of environmental impact assessment into his procedures for granting approved support to UK suppliers.

(iii) A decision-maker who chooses to incorporate environmental impact assessment into its procedures in this way must then carry out such assessment properly (just as a decision-maker who chooses[30] (a) to embark on consultation; (b) to accord a hearing or (c) to give reasons must do so properly[31]).

(iv) In particular, such a decision-maker must ensure that EIA is carried out prior to a binding decision in relation to a particular project (and/or prior to the substantial construction of that project).

(v) Thus, the Secretary of State, having chosen to impose EIA requirements, was required (as reflected in the OECD Recommendation and in ECGD's own policies) to ensure that EIA pre-dated the binding decision[32] to support the Project (and/or the substantial building of the Project) and vague words in an ECGD policy such as[33] that "it is difficult to provide a succinct statement that will cover every circumstance" cannot undermine this central, fundamental and well-understood principle of EIA. To require an environmental assessment

[30] In the absence of any relevant obligation.
[31] See Fordham, *Judicial Review Handbook*, 4th ed 2004 at §60.1.20(A) and (B); §62.3.12 and cases there cited.
[32] In purported exercise of the power in s.1(1) of the 1991 Act.
[33] Case Handling Process – Information Note, §1.

after the event is to deprive the EIA process entirely of its protective purpose and effect.

(vi) In the present case the Secretary of State has not put forward any reason (let alone any good reason) for departing from the procedures which he has stated will generally be followed or from the key requirement that EIA should precede the event.

Ground 3: no facilitation

66. There is a further and independent legal flaw in the Secretary of State's approach. The Secretary of State is only entitled to provide ECGD support if the provision of such support is within the statutory purpose of "facilitating" UK exports[34] of goods or services. That means making a concrete difference to relevant UK supplies. It is necessary for the Court (rather than the Secretary of State) to determine, on the evidence, whether the support was, or was not, within the statutory purpose: cf *R v Foreign Secretary ex p World Development Movement* [1995] 1 WLR 386, DC, *per* Rose LJ at 401H. This is a question of law.

67. (It should be noted that it is common ground that SEIC is not a UK supplier. The approved support sought by SEIC was to fulfil the statutory purpose by facilitating supplies by UK suppliers under the Preliminary Contracts.)

68. In this case, the Secretary of State, when (purportedly) exercising his power under s.1(1) of the 1991 Act (by issuing the 2004 Decision), has purported to fulfil the statutory requirement that UK supplies be "facilitated" by requiring only (a) that there should in fact be a supply of goods or services by a person carrying on business in the UK; (b) that at the time of granting support, the supply of those goods or services should "remain incomplete", without considering *at all* the question (c) of whether the provision of support would in

[34] That is, supplies by persons carrying on business in the UK of goods or services to persons carrying on business outside the UK: 1991 Act, s.1(1).

fact facilitate – make a concrete difference to - the UK supplies under the Preliminary Contracts. The fact that those supplies remained incomplete established only that *if* full payment under the Preliminary Contracts had not yet been made by SEIC to the UK suppliers (but not otherwise), the provision of ECGD support was *capable* of facilitating UK supplies.

69. That the Secretary of State's position is as set out in the preceding paragraph has been put to him squarely, twice, in the letter before claim (§5.7 and ground (g) page 1073 and 1079) and he has not suggested otherwise, notwithstanding that the response to that letter purported to set out "a number of errors and misapprehensions" in the letter before claim (see §5 of the response – page 1084). The 2004 Decision itself contains no reasoning or appraisal of the question of "facilitation" (that is, of whether support would make a concrete difference to the relevant UK supplies).

70. In these circumstances, it is impossible to see how the 2004 Decision could fall within the statutory purpose of "facilitation", especially given that no consideration appears to have been given to (i) the question of when payments under the Preliminary Contracts fell due and of what payments had already been made; (ii) the fact that the borrower, SEIC, was wholly owned by Shell, Mitsui and Mitsubishi; (iii) the fact that the Project, and the relevant supplies, would have gone ahead even without ECGD support (as, in the event, it has in fact done – no guarantee having yet been given); (iv) the fact that the relevant supply contracts had already been entered into, and in some cases the supplies had been completed or substantially completed, before the 2004 Decision. There is, moreover, the troubling question of whether payment has now been made to the relevant UK suppliers: if not, as set out above, far from facilitating supplies by UK suppliers, ECGD's intervention would appear to have hindered them.

71. In all the circumstances, there has been no facilitation of any UK supply by the UK suppliers under the Preliminary Contracts and the 2004 Decision was outside the statutory purpose and was *ultra vires*. Moreover, any future decision

to grant support in relation to the Preliminary Contracts would also be *ultra vires* on the same basis.

Ground 4: consultation

72. The Secretary of State has embarked (for example on 24 Jan 2006 – see above) on consultation with stakeholders including WWF and has purported to engage openly with them, but entirely failed to consult the claimants or others before purportedly exercising his power under s.1(1) of the 1991 Act to grant (conditional) ECGD support in 2004.

73. Having embarked upon such consultation and engagement with stakeholders, the Secretary of State was and is under a duty[35] to conduct it fairly and properly[36], in accordance with the well-established requirements[37] of (a) consultation at a time when proposals are still at a formative stage; (b) the giving of sufficient information about the proposals to permit of intelligent consideration and response; (c) the giving of adequate time for consideration and response and (d) the conscientious taking into account of the product of consultation in finalising any proposals.

74. These requirements (and particularly that of consultation when proposals are at a formative stage) will be violated if a decision-maker decides in principle, prior to consultation, to adopt a particular policy proposal and is, thereafter, concerned only with the implementation of that policy[38].

75. In the present case, the Secretary of State's decision, regarded by him as binding, that the Preliminary Contracts were eligible in principle for approved support denied the claimants the opportunity to be heard on the questions of, for example, (a) whether eligibility should be predetermined; (b) whether it was

[35] See also ECGD's consultation policy (page 358-360), which provided inter alia that "ECGD will consult prior to major decisions being taken and give sufficient time for comments to be submitted and considered by ECGD".
[36] *R v North and East Devon Health Authority* ex parte *Coughlan* [2001] QB 213.
[37] The so-called "Sedley requirements" – see Fordham, op cit, at §60.6.2.
[38] *R (Parents for Legal Action Ltd) v Northumberland County Council* [2006] EWHC 1081 (Admin) at §§36-37; *Sardar v Watford Borough Council* [2006] EWHC 1590 (QB) at §29.

appropriate to make a funding decision prior to completion of EIA and to leave over EIA to be dealt with by means of conditions subsequent; (c) whether the purported confirmation of conditional support fell within the statutory purpose of "facilitation"; (d) what the conditions for the conditional support should be[39], and what provision should be made for the withdrawal of support; (e) whether there were existing environmental impacts which had not been acceptably mitigated (condition 2.1) and which could not now be remedied (so that condition 2.1 would be impossible to fulfil and, therefore, ECGD should not consider the Project further); (f) whether there were reasons of principle (apart from condition 2.1) – such as the risk to the western gray whale inherent in the Project and acknowledged by DEFRA - why ECGD should not confirm conditional support.

76. The Secretary of State (a) failed to consult when proposals were at a formative stage (by making an 'in principle' statutory eligibility decision, regarded by him as binding, which he then failed, over a period of more than three years, to disclose); (b) failed to give adequate information to allow an intelligent response (because the 2004 Decision was not disclosed); (c) failed to allow adequate time for consultation (because prior to March 2004 there was no consultation on the Secretary of State's proposal to make a binding 'in principle' eligibility decision); (d) failed to take consultation responses conscientiously into account before making his 'in principle' decision in 2004 (-there having been no consultation on that decision, there could be no responses).

77. The failure to consult the claimants prior to making the initial eligibility decision in 2004 was unlawful and for this reason too, the 2004 Decision provides no lawful basis for the Secretary of State to treat the eligibility criterion as having been (pre-) determined.

Other concerns

[39] For example, whether condition 2.1 should require risks to be "minimised" rather than just "acceptably mitigated".

78. In its letter before claim (pages 1067-1081), WWF raised a number of other potential grounds for judicial review, relating largely to environmental aspects of the 2004 Decision. For the present, pending any further decision on whether the conditions in the 2004 Decision have been satisfied, the claimants accept the assurance in the response to the letter before claim that every environmental matter[40] (other than those set out above) "*remains at large and undetermined*". The fact that certain grounds in the letter before claim are not raised above should not, therefore, be taken as indicating that the claimants accept the Secretary of State's position in relation to them is satisfactory or lawful.

Standing

The Claimants

79. Globally, WWF (formerly the World Wildlife Fund) is the world's largest and most experienced independent conservation organisation, having some five million supporters worldwide and working in more than 90 countries. WWF-UK is a registered charity. Its aim is to stop the degradation of the planet's natural environment, and to build a future in which humans live in harmony with nature, by (i) conserving the world's biological diversity; (ii) ensuring that the use of renewable natural resources is sustainable and (iii) reducing pollution and wasteful consumption.

80. Corner House Research is a non-profit making company limited by guarantee. It is a non-governmental organisation supporting democratic and community movements for environmental and social justice and has a long-standing interest in the role of export credit agencies (as evidenced by, for example, its successful application for judicial review, in 2005, of ECGD's consultation on changes to its anti-corruption procedures: *R (Corner House) v Trade and Industry Secretary* [2005] 1 WLR 2600 [2005] EWCA Civ 192, CA[41]). It has been

[40] Including, for example, the question of whether support will be refused, as promised by the DEFRA Minister in February 2004, unless the risks to the western gray whale have been "minimised" (rather than, as condition 2.1 might suggest, merely "acceptably mitigated").
[41] In which Corner House's standing was eventually conceded by ECGD.

campaigning on the Sakhalin II project in correspondence with ECGD since 2002: see further the witness statement of Nicholas Hildyard.

Standing

81. In its response (dated 23 July 2007) to the letter before claim, ECGD argued (§7) that WWF did not have standing to challenge the 2004 conditional support decision because (a) every matter in which the WWF had a proper interest "*remain[ed] at large and undetermined"*; (b) ECGD did not accept that WWF had standing to challenge the 2004 decision "*as to the eligibility, in principle, of the contracts for consideration for ECGD support"*. (page 1085)

82. Insofar as the present grounds relate to environmental impact assessment (ground 2) and consultation thereon (ground 4) it would appear that ECGD would accept - and it is in any event plain - that WWF has a sufficient interest. To the extent that the grounds relate to 'facilitation', (i) the 2004 decision was an important step on the way to the final grant of support and (ii) the grounds are inextricably linked in that they all relate to the lawfulness of ECGD's approach to facilitation. In any event, WWF clearly has a sufficient interest on the basis of well-established principles set out in (for example) *R v Foreign Secretary ex p World Development Movement* [1995] 1 WLR 386, DC at 392G to 396B[42]. Further, Corner House (which was not a proposed claimant at the date of the letter before claim) additionally has a sufficient interest in all the grounds: see further the witness statement of Nicholas Hildyard.

Timing of challenge

83. The response to the letter before claim argues that a judicial review challenge to the 2004 decision would be premature (a) because, it asserts, "*no decision to support the project has been made*" (§6) and (b) because "*every matter on which*

[42] Standing should not, in any event, be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case: *World Development Movement* at 395F.

the WWF could have a proper interest in challenging in relation to the decision remains at large and undetermined" (§7). (page 1084-1085)

84. As to (a), this is simply not so. The 2004 Decision *was* a decision to support the Project[43] (albeit subject to conditions subsequent); was (purportedly) made pursuant to the Secretary of State's power set out in s.1(1) of the 1991 Act[44]; and is regarded by the Secretary of State as binding[45]. As to (b), the claimants are content to accept (pending the final decision) ECGD's assurance that any substantive environmental point which WWF wishes to make about the Project may still be made and taken into account in evaluating whether condition 2.1 of the 2004 letter is met[46]. But the present claim challenges ECGD's decision on the question of *facilitation* of UK exports (that is, as ECGD puts it, of "*the eligibility, in principle, of the contracts for ECGD support*"). That eligibility decision[47] was made in 2004 and ECGD does not assert (despite being given the opportunity to do so by a letter from WWF dated 25 July 2007 – see §3(i) of that letter), and indeed cannot now assert[48], that it intends to revisit it[49].

85. Despite ECGD's (unreasoned) suggestion to the contrary in its latest letter, dated 7 August 2007, the present challenge on the grounds set out above is, therefore, not premature. The question of whether the 2004 Decision binds the Secretary of State to grant support (if its conditions are satisfied) is one which is ripe for determination now. Indeed, that question *requires* clarification now if the Secretary of State is not to proceed to the final decision on a false basis.

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[43] Specifically, the Preliminary Contracts.
[44] ECGD letter to FoE dated 15 March 2007.
[45] Ibid.
[46] The claimants are, for example, content to accept that the Secretary of State will honour Ministerial assurances that support will be refused (pursuant, presumably, to condition 2.1) unless (i) the best scientific advice has been followed by SEIC and (ii) the risks to the whales from the development have been minimised (rather than merely acceptably mitigated). Of course, were the Secretary of State to fail to act in accordance with those assurances when making his decision (expected in autumn 2007) on whether condition 2.1 was fulfilled, that might well give rise to grounds for challenge of that decision.
[47] Which, as set out above, was purportedly made pursuant to the Secretary of State's statutory power, and which is regarded by the Secretary of State as binding.
[48] Given that the relevant contractual supplies have now all ended.
[49] Indeed, it could not do so given that the relevant supplies are now at an end so that, even on ECGD's case, there would be no 'facilitation' and therefore no power to support.

86. ECGD has not sought to argue that the claimants' challenge to the 2004 Decision is faced by any problem of delay. This is perhaps unsurprising in light of the chronology set out above. The claimant has acted promptly and in any event within three months of notification to it, on 13 June 2007, of the 2004 Decision. It thereby (a) acted in time, because the grounds for the claim first arose on the date of communication of the uncommunicated 2004 Decision (see *R (Anufrijeva) v Home Secretary* [2004] 1 AC 604, especially *per* Lord Steyn at §§28-30); further or alternatively (b) had good reason to extend time, given that until notification of that decision it was entirely, and for good reason, ignorant thereof.

REMEDY SOUGHT

87. For the reasons set out above, the Court is invited to grant permission and subsequently the claimants' application for judicial review and to make the following orders:

(i) A declaration that the 2004 'decision' has no legal effect and does not bind the Secretary of State to grant support if its conditions are fulfilled; alternatively, quashing of the 2004 Decision.

(ii) An order prohibiting the Secretary of State from granting support for the Preliminary Contracts.

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