

Monday, 6 July 2009

1

2 (10.00 am)

3

Discussion re housekeeping

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THE CHAIRMAN: You are all seated an awfully long way away.

5

Good morning, everybody. My name is Chris Ryan and

6

I will be chairing today's hearing with Mrs Chafer on my

7

left and Mr Taylor on my right.

8

This is a hearing where we're going to have closed

9

sessions. Instead of going through the whole rigmarole,

10

if there aren't any members of the public in here -- do

11

we have any members of the public who aren't part of the

12

legal teams?

13

MS PROOPS: I have a mini pupil with me, but she knows that

14

she needs to leave when we go into closed session.

15

THE CHAIRMAN: Right.

16

MS PROOPS: And obviously Mr Michaels would not be

17

attending --

18

MR MICHAELS: And I have Mr Hildyard.

19

THE CHAIRMAN: Mr Hildyard, I understand.

20

For those who are not members of the team,

21

unfortunately part of the hearing will be in closed

22

session and we will be asking you to leave during that.

23

We apologise, but there is no other way we can deal with

24

the confidential information forum without doing that.

25

MS CALLAGHAN: Can I ask for the microphones to be turned

1 on? With the fans on, it's rather difficult to hear.

2 THE CHAIRMAN: I will speak up. Housekeeping: a few issues.

3 Let me just go through what we think we've got. We have

4 the ECGD skeleton, and the closed skeleton, the

5 Information Commissioner's skeleton, the Corner House

6 written submission. We have an appellant statement of

7 fact which, as of Friday, was still not fully agreed.

8 MS CALLAGHAN: It has now been agreed by all of the parties.

9 THE CHAIRMAN: So, what I have here is the group version?

10 MS CALLAGHAN: My solicitor has handed forward both the

11 agreed chronology and statement of facts. That, for

12 obvious reasons, has not yet been inserted into your

13 bundle. Can I ask you please to insert that into the

14 front of open bundle 1, and you will have, together with

15 those documents, an amended index, which is also for

16 insertion at the very beginning of open bundle 1, if

17 there are no objections.

18 THE CHAIRMAN: Let's just quickly do that now. This

19 replaces the index completely?

20 MS CALLAGHAN: Yes, sir.

21 THE CHAIRMAN: And the statement of fact immediately behind

22 tab 1 --

23 MS CALLAGHAN: That's correct.

24 THE CHAIRMAN: -- as new P1, P2, P3, with a chronology

25 immediately after that. So, all of that goes in front

1 of the original page 1.

2 MS CALLAGHAN: That's correct, sir.

3 THE CHAIRMAN: The only other addition we had for the
4 bundles was a new tab 9, the Civil Service Code, came in
5 late last week; we have that in our bundles.

6 We have your timetable, and there was an email on
7 Friday in response to Mr Michaels' request or invitation
8 to us to relook at the redactions, and I floated the
9 possibility that it might be possible to release some
10 paragraphs of Mr Dodgson's witness statement in redacted
11 form. Did you get that?

12 MS CALLAGHAN: I did receive that email, and I have taken
13 instructions. ECGD's position is that we do not
14 agree to those --

15 THE CHAIRMAN: Even with names removed?

16 MS CALLAGHAN: Indeed. If necessary, we are content to go
17 into closed session to address that matter with you.

18 THE CHAIRMAN: We won't do that now, certainly because we
19 are not going to deal with the cross appeal first. So,
20 I don't think there's any point in going through that
21 now. All right, I will flag that up as something we may
22 come back to.

23 Any other housekeeping?

24 MS CALLAGHAN: Yes. I think a number of the parties have
25 some extra documents they would wish the Tribunal to

1 see.

2 THE CHAIRMAN: Why does that not surprise me.

3 MS CALLAGHAN: Can I hand forward, please --

4 THE CHAIRMAN: We have some --

5 MS PROOPS: Yes, if I could just explain. The Tribunal,
6 first of all, has a complete bundle of authorities,
7 which is the white file you each have in front of you
8 now; that is the agreed bundle of authorities.

9 I have also handed up some documents relating to
10 constitutional status of various members of the lender
11 group. That is particularly in response to a point that
12 was made by Mr Michaels in his skeleton on behalf of
13 Corner House, as to whether the members of the lender
14 groups would be the sort of entities with whom we could,
15 in effect, have international relations such as to
16 engage regulation 12.5(a). So, I produced those last
17 night just to assist the Tribunal in understanding the
18 constitution of the relevant entities.

19 It may be that Mr Michaels wants to elaborate on
20 which entities in particular he is referring to, but you
21 have extracts, for example, from EBRD's website, from
22 the IFC's website, from Coface's website..

23 You also have copies of the public information
24 policy produced by the EBRD. It is actually a policy
25 referred to in Mr Dodgson's statement but thus far you

1 haven't actually been provided with a copy of the policy
2 and I have also provided you with a copy of the
3 disclosure policy generated by IFC. You will see there
4 are two versions of the policy: there is a 1998 version,
5 which is the version that would have been in play at the
6 time of the request; and then there is a more recent
7 2006 version, which is, again, a version Mr Dodgson
8 refers to in his witness statement.

9 I have produced those documents to assist the
10 Tribunal on that issue.

11 THE CHAIRMAN: And everyone has them; no one has any
12 objection to us having them?

13 MS PROOPS: You should have one page which is an extract
14 from the DEFRA guidance which deals with the 12.5(a)
15 exception and confirms that it applies to international
16 organisations, but I understand that Ms Callaghan will
17 be providing you with further documents to elaborate on
18 the position of these institutions and their
19 constitution.

20 THE CHAIRMAN: And then we are just going to keep them at
21 one side, not put them into any bundles? I think the
22 bundles are full, so I don't think we can put anything
23 into them.

24 MR MICHAELS: Sir, without wanting to get into submissions
25 it may be helpful, following that invitation, if I just

1 clarify our point in relation to 12.5(a). It is not our
2 position that communications with IFC or EBRD are
3 incapable of falling within exception 12.5(a). Our
4 concern was with regard to the -- effectively, private
5 or quasi private export credit agencies such as Coface
6 and SACE and Hermes. So, it may be that the documents
7 that have just been handed up are no longer relevant.

8 THE CHAIRMAN: All right, we will come to that in detail.
9 That is helpful.

10 MS CALLAGHAN: Bearing Mr Michaels' helpful clarification in
11 mind, it may well be that some of the materials I am
12 about to hand up are not relevant, but I would wish you
13 to have them --

14 THE CHAIRMAN: Do you want to hold them until after we have
15 dealt with the cross appeal this morning, and --

16 MS CALLAGHAN: Certainly.

17 THE CHAIRMAN: I don't think they are not going to be
18 relevant to what we deal with first.

19 MS CALLAGHAN: Yes.

20 THE CHAIRMAN: There is no speaker system. It is just for
21 recording. It would be easier for people to move
22 forward and sit at the sides. It is not going to cause
23 any objection for people being able to see confidential
24 information --

25 MS PROOPS: The alternative would be to turn the fans off,

1 as Mr Michaels is suggesting, until things get too
2 unbearably hot. That might make things easier.

3 THE CHAIRMAN: If our voices drop at the back, put a hand up
4 and we will understand that means speak up.

5 MS PROOPS: The other matter I wish to check with the
6 Tribunal is that on Friday an email was sent to the
7 Tribunal confirming that the parties now agreed that
8 witness evidence was not going to be relevant to the
9 cross appeal, broadly speaking. I think --

10 THE CHAIRMAN: Dr Wernham.

11 MS PROOPS: It is not just Dr Wernham, it is also the
12 evidence given by Mr Hildyard, it is also the evidence
13 given by Mr Roberts-Mee. All parties are now agreed
14 that, in essence, the critical question for you to
15 address is, having regard to the context of the request
16 document, was the request merely for those parts of the
17 minute of the 5 December meeting that related to PB
18 reports specifically, or did the requests go wider than
19 that, to embrace all of the minutes of that meeting? We
20 say this is actually a simple question of construction,
21 effectively.

22 THE CHAIRMAN: Yes, okay.

23 Any more before we start?

24 MS CALLAGHAN: In relation to that last point, I made clear
25 to the parties that, insofar as the Tribunal would

1 consider that it would be assisted by hearing from
2 Mr Roberts-Mee, the ECGD witness on the cross appeal, as
3 to the content of the minutes, simply in terms of
4 navigating the document and understanding what it
5 contains, then we would be content for you to pose any
6 questions that you might have about the content of the
7 minutes in closed session with Mr Roberts-Mee. So, we
8 make him available for that purpose, to the extent that
9 you would consider it would assist you in answering the
10 question as to the scope of the request.

11 THE CHAIRMAN: Okay. I think we will hear your submissions
12 first of all.

13 There was one other piece of housekeeping. I think
14 Mr Michaels asked whether it was possible to provide an
15 indication, clarification, of which particular parts of
16 the overall report were covered by which exception.

17 MR MICHAELS: That has been done now. We have been provided
18 with that information.

19 THE CHAIRMAN: Is that going to be shared with -- because,
20 for you two, I have -- I have annotated my copy of the
21 version that accompanied the 18 June 2008 letter -- no,
22 not that one, another one.

23 MS CALLAGHAN: That is the only version --

24 THE CHAIRMAN: One of those which showed in boxes the
25 material that was subsequently redacted. I have marked

1 up that where -- to indicate where I think the various
2 exceptions are applying, because sometimes an exception
3 is, as it were, embedded in something which is covered
4 by the more general argument.

5 MS CALLAGHAN: That is correct. And, sir, I think your
6 reference is right, it is the 18 January letter you are
7 referring to.

8 THE CHAIRMAN: Yes, that is the one we should be --
9 Mr Michaels has a version of the redacted -- yes, so we
10 shouldn't find ourselves speaking at cross purposes.

11 MS PROOPS: I wonder if it would be useful just to identify
12 at this stage which exceptions are claimed in respect of
13 which paragraphs, because that is the correspondence
14 that was sent out at the end of last week. Our
15 understanding is that regulation 12.4(e), which is the
16 internal communication exception, is claimed in respect
17 of the entirety of the withheld information both within
18 the report and the minutes.

19 12.5(a) is claimed in respect of parts of -- and we
20 are talking about just the report here --
21 paragraphs 2.1.2 --

22 THE CHAIRMAN: Hold on, I am going to actually mark mine up.
23 It is going to be a bit slow, but I want to make sure
24 that when I look at it I have the point.

25 MS PROOPS: So, we are talking about the partners'

1 information here, partners within the lenders group.

2 THE CHAIRMAN: So, we are on page 13.

3 MS PROOPS: Paragraph 2.1.2.

4 THE CHAIRMAN: Yes.

5 MS PROOPS: There are also passages in paragraph 2.4.1.

6 I am asked --

7 THE CHAIRMAN: Yes, in there, there are three little

8 sections within the boxed --

9 MS PROOPS: Yes. We will, I imagine, be looking at these

10 paragraphs in more detail in closed session --

11 THE CHAIRMAN: I just want to make sure I start by

12 understanding where everyone is going.

13 MS PROOPS: It is in the box on page 23.

14 THE CHAIRMAN: Yes.

15 MS PROOPS: I should just clarify, because Mr Michaels has

16 asked me to do so, that he is unclear as to -- we have

17 confirmed what paragraphs we are talking about, but he

18 is unclear where within the paragraphs --

19 MR MICHAELS: I am not asking for further clarification but

20 just to make clear is that all I know is that there may

21 be a redacted word or a sentence within a chunk of

22 redacted text. Just so you understand what we know.

23 THE CHAIRMAN: Yes.

24 MS PROOPS: If you turn on to page 24, and particularly to

25 paragraph 2.4.2 --

1 THE CHAIRMAN: Yes.

2 MS PROOPS: -- there is a box you will see in the middle of
3 the page.

4 THE CHAIRMAN: Okay.

5 MS PROOPS: And then 2.6, if you look at, in particular, the
6 top of 27, there is a box there. Then --

7 THE CHAIRMAN: Just one word and an initial, yes.

8 MS PROOPS: Then, 3.4.1 -- sorry, 3.4, I apologise, it is at
9 page 40, there is a box at the bottom of page 40. And
10 finally 6 --

11 THE CHAIRMAN: Sorry, on page 40?

12 MS PROOPS: Yes, page 40. Bottom --

13 THE CHAIRMAN: That whole -- you have a box there.

14 MS PROOPS: It is particularly the information that is
15 concerned with the partners. I don't really want to say
16 any more than that in open session.

17 THE CHAIRMAN: I will just mark that.

18 MS PROOPS: Then 6.1. Again if you turn to page 49 you will
19 see a box -- you will see partners' information referred
20 to there. So, those are the paragraphs which deal with
21 the partners' information under 12.5(a). 12.5(a) is
22 also claimed in respect of what we have called the
23 Turkey information, which you will find on page 17 of
24 the report, in paragraph 2.2.7.

25 THE CHAIRMAN: I have that on the list. I will just check.

1 (Pause). Yes.

2 MS PROOPS: It is actually a sentence in the first paragraph
3 of that box.

4 THE CHAIRMAN: Yes.

5 MS PROOPS: Finally we move to the legal privilege
6 exception, 12.5(b). The relevant paragraphs here are
7 2.2.5, which you will find on page 15. It is the box
8 towards the bottom of that page. Then 3.7.2, and it is
9 the box towards the bottom of that page.

10 THE CHAIRMAN: Page number?

11 MS PROOPS: Page number 43.

12 THE CHAIRMAN: Yes.

13 MS PROOPS: As we understand it, those are the only passages
14 in respect of which specific exceptions such as 12.5(a)
15 or (b) are claimed -- unless I am corrected.

16 MS CALLAGHAN: Can I clarify, on page 23 of the report --
17 A. Yes.

18 MS CALLAGHAN: -- you will see a box, towards the top of the
19 page, marked "Section 27"; that, of course, equates to
20 12.5(a) of the EIRs, so we also rely on that section
21 there, in addition to the ones marked further below.

22 MS PROOPS: And that is in the context of the partners'
23 information.

24 MS CALLAGHAN: Yes, in the context of the partners'
25 information.

1 THE CHAIRMAN: Yes. That is helpful.

2 MS PROOPS: I don't know if you were proposing to move
3 straight into the session of dealing with the cross
4 appeal but there are a couple of matters I would like to
5 clarify generally with respect to this appeal. You will
6 have seen from our skeleton that the Commissioner has
7 somewhat changed his position from the position that was
8 set out in the decision notice, and that is very
9 specifically in response to the evidence that has now
10 been put before the Commissioner that was not before him
11 at the time he reached his decision. We have, however,
12 reserved our right to change our position still further
13 in the light of further evidence emerging at this
14 hearing, and we continue to adopt the position that we
15 are entitled to change our position in response to new
16 evidence.

17 And also just to highlight, for the benefit of the
18 Tribunal, a slight concern we have about the case that
19 is being advanced by ECGD, particularly insofar as they
20 are advancing a case as to the chilling effect of
21 disclosure of the report and the minutes. And we have
22 a concern on that front because, as the Tribunal has
23 probably appreciated, this is a case where, in fact, the
24 public authority amended its grounds of appeal to delete
25 those grounds that alluded to concerns about chilling

1 effect. If you refer in particular to page 24M of open
2 bundle 1 -- I just want to raise this as an issue to
3 clarify where we stand on it.

4 If you look in particular at paragraph 43 on
5 page 24M, you will see there are deleted passages in
6 that paragraph, which include, for example, sentences
7 that say:

8 "The ECGD made submissions to the Commissioner
9 explaining that the disclosure of the BPU report and the
10 minutes would be likely to inhibit the provision of free
11 and frank advice by the BPU to the underwriting
12 committee."

13 THE CHAIRMAN: And 42(b) is the sort of headline point?

14 MS PROOPS: Yes. And the concern that we have is that
15 evidence about chilling effects and the arguments about
16 chilling effects have now surfaced in ECGD's evidence
17 and in its skeleton, and we simply want to explore the
18 question of the extent to which arguments as to chilling
19 effect are properly before the Tribunal in light of
20 those deletions.

21 THE CHAIRMAN: Are you inviting Ms Callaghan to say
22 something?

23 MS CALLAGHAN: Our position is very simple: we stand by the
24 amendments to the grounds of appeal. We are not seeking
25 to make an argument that one of the effects of

1 disclosure of the requested information would be to
2 cause a chilling effect in the sense of causing a civil
3 servant to change or adapt their advice to ministers in
4 any way. We don't accept that the evidence that we have
5 submitted is inconsistent with that position, but, of
6 course, Ms Proops can explore that in evidence or
7 cross-examination if she wishes to.

8 THE CHAIRMAN: I think the answer is we will hear the
9 evidence and if you think there is evidence irrelevant
10 to the case being pleaded then you will no doubt make
11 your point in closing submissions.

12 MS PROOPS: Our case is that, rightly or wrongly, the
13 witness evidence does start to trespass on arguments
14 about the effect on --

15 THE CHAIRMAN: I think we could spend a lot of time on it
16 now --

17 MS PROOPS: Yes, but if we are all agreed it is not
18 relevant, then that is very helpful.

19 THE CHAIRMAN: Because one of the things I am concerned
20 about at the moment is whether have you set enough time
21 in the timetable for submissions. It looked to me
22 a little bit of a tight timetable on Wednesday to
23 complete all the arguments. So, I will be looking to
24 see if we can't hurry on or at least keep strictly to
25 the timetable on evidence, and as to which we are

1 probably slipping behind our timetable already. So
2 I would be quite keen to get going on the cross appeal,
3 if we have done all the housekeeping -- all the time
4 saving housekeeping.

5 So, on that basis, Mr Michaels, your cross appeal.

6 Opening submissions by MR MICHAELS

7 MR MICHAELS: I think we are precisely on time at the moment
8 and I will try to stay on time.

9 First of all, perhaps I should explain that
10 Corner House is no longer seeking to contend that the
11 decision notice itself ordered disclosure of the minutes
12 of the 5 December underwriting committee meeting, other
13 than in respect of the discussion in the BPU report.

14 So, the parties are, I believe, all of a piece in
15 that we agree that the decision notice itself was
16 limited only to those parts of the minutes that involved
17 a discussion of the BPU report.

18 This cross appeal is, therefore, to that extent, not
19 contingent; it is directly relevant. And it is our
20 principal submission that the terms of the request
21 itself, the request of 8 August 2005, were a request for
22 all of the minutes -- or encompassed a request for all
23 of the minutes of the 5 December meeting.

24 THE CHAIRMAN: Sorry to interrupt you. I think we are going
25 to have a compromise here between heat and noise and my

1 personal preference is to keep room cool, even if we
2 have to put up with a bit of extraneous noise. So, I am
3 sorry, but unless there is a general vote in the body of
4 the court, we are going to have to keep those windows
5 open.

6 MR MICHAELS: I hope to deal with this briefly because
7 I wish to put it in three ways. The first way is purely
8 by reference to the terms of the request itself. And if
9 I can ask you to open up open bundle to page 62. We
10 will need to keep that in front of us I think for most
11 of this cross appeal. And our submission will be simply
12 that, read straightforwardly, request (a)(iii) --

13 THE CHAIRMAN: Sorry, I am behind you, take us to the page
14 again.

15 MR MICHAELS: Page 62, in the first tab. It is open
16 bundle 1.

17 Our principal and straightforward submission will be
18 that, read straightforwardly, request (a)(iii)
19 encompassed the entirety of the minutes of the relevant
20 meeting, the 5 December meeting.

21 We secondly say that, to the extent that there was
22 any ambiguity in the terms of the request, then there
23 was an obligation on the ECGD to provide advice and
24 assistance to Corner House. It is common ground that no
25 such advice and assistance was provided, and in light of

1 that we will therefore say that there is a need to
2 resolve any ambiguity in favour of Corner House.

3 The third point we make is that even if the request
4 itself -- or to the extent that the request itself is
5 ambiguous, we say it is relevant to look at the
6 remaining terms of the request, i.e. the surrounding
7 requests -- sorry, we say it is relevant to look at the
8 subsequent course of conduct in terms of the request for
9 the internal review and the complaint to the Information
10 Commissioner and say that, in this particular context,
11 that is something that the Tribunal needs to take into
12 account.

13 I think the legal position, there is considerable
14 common ground here, the starting point is the terms of
15 the request itself, and the entitlement to the
16 information is defined through the precise terms of the
17 request.

18 I don't propose to take you to regulation 5 of the
19 Environmental Information Regulations but that I think
20 is where the common ground comes from.

21 We also say, and I believe this is also common
22 ground, that the meaning of the test is to be determined
23 objectively. It is dependent neither on the subjective
24 intention of the request to Mr Hildyard nor on the
25 subjective interpretation of the person receiving the

1 request, the ECGD.

2 It is for that reason that the parties have agreed
3 there was no need to have any witness evidence in
4 relation to this cross appeal today.

5 The authorities, to the extent that the Tribunal
6 needs to be taken to them, are Berend and Boddy.

7 I don't think we need to spend much time on the
8 authorities, which I understand to be agreed. If I can
9 ask you to look briefly at Boddy, tab 14.

10 THE CHAIRMAN: The authorities bundle, yes?

11 MR MICHAELS: In the authorities bundle, yes. Tab 14.

12 I don't propose to take you through this in any detail
13 but the relevant passage I will ask you to turn to is on
14 page 10, paragraph 25, and this was in the context of
15 a query as to the approach to be taken to the meaning of
16 the request under the Environmental Information
17 Regulations. It is therefore particularly relevant:

18 "The Tribunal's conclusions on this aspect of the
19 appeal is that the correct approach to the law is
20 a request for information ought should be taken at face
21 value i.e. it should be read objectively."

22 And then:

23 "The Tribunal's view is that the obligation of
24 regulation 9 has two aspects to it in this context."

25 I propose to come back to advice and assistance in

1 a moment but if I could ask you to read the next six
2 lines of that, so you will have it in mind when I come
3 back to advice and assistance.

4 If I could ask you to turn forward two tabs in the
5 authority bundle to the case of Berend, and without
6 labouring the point, at paragraph 46 on page 15, this
7 was an appeal in the FOIA context, but the principle,
8 broadly, is the same. Paragraph 46:

9 "The Tribunal is satisfied that the request should
10 be read objectively. The request is applicant- and
11 motive-blind and as such public authorities are not
12 expected to go behind the phrasing of the request.
13 Indeed, the section 45 code at paragraph 9 specifically
14 warns against consideration of the motive."

15 Now, that is looking at it slightly from the
16 perspective of the public authority, i.e. there is no
17 need for them to go behind the wording of the request;
18 and we would say it can be looked at equally from the
19 other side of the lens.

20 They are not entitled to go behind the wording of
21 the request, certainly in order to narrow the request,
22 as we say they have done here.

23 Turning back then to the request itself, on
24 page 62 of the open bundle, the relevant part of the
25 request is paragraph (a), which is headed "The Business

1 Principles Unit's Assessment of the BTC Project".

2 Mr Hildyard then asked specifically for a copy of
3 the BPU's assessment report on the BTC project as
4 prepared for the underwriting committee. He then asked
5 for a list of all the meetings held to discuss the BPU
6 assessment report, including attendees. He then asked
7 for all notes and all minutes of meetings held to
8 discuss the BPU's assessment report.

9 Including any written comments or appraisals.

10 Then there then is a further request over the page
11 in relation to correspondence, also on the BPU
12 assessment report.

13 The only aspect of the request that is before this
14 Tribunal is (iii). Simply read on its own terms we say
15 that the request to (a)(iii) simply means the minutes of
16 meetings at which the BPU report was discussed. What is
17 asked for, deconstructing that slightly, is the written
18 records, i.e. the notes or the minutes, of a defined
19 class of meetings. That defined class is meetings held
20 to discuss the BPU's assessment report. The request at
21 (iii) does not explicitly or implicitly contain any
22 limitation.

23 THE CHAIRMAN: You say it is not the minutes to the extent
24 that they discuss the BPU assessment report --

25 MR MICHAELS: Precisely --

1 THE CHAIRMAN: You say if the BPU assessment report is part
2 of the business, then the whole minute --

3 MR MICHAELS: Precisely, sir. What is requested is the
4 records of a defined class of meetings. The records are
5 the minutes or the notes and the defined class are the
6 meetings that were held to discuss the BPU's assessment
7 report. Had Mr Hildyard wanted to ask for notes of
8 meetings to the extent that those meetings are concerned
9 with the BPU assessment report, he could and, I suggest,
10 would have done so. He didn't. His request may not be
11 grammatically the most elegant, but it is clear and
12 precise.

13 Similarly --

14 THE CHAIRMAN: It does lead, doesn't it, to the logical
15 conclusion, which I think one of the other parties has
16 raised, that, almost regardless of the content of the
17 rest of the discussion, the whole of the minute has to
18 be disclosed, and there could be, you know, argued to
19 the ridiculous of quite extraordinary and irrelevant
20 things being disclosed.

21 MR MICHAELS: We don't shy away from that suggestion, sir.
22 The point that is put to us is that the request could
23 have been -- the meeting could have included a range of
24 discussions on, say, staffing issues, which plainly have
25 nothing to do with the BTC pipeline. That is the case.

1 And in this case, that request would have been a request
2 for the full minutes of these meetings.

3 At that stage -- there are two responses to that.
4 The first is that the situation is not, sir, quite as
5 you put it. There would have been no obligation to
6 disclose. There would have been an obligation to
7 consider the request and then to decide whether or not
8 the information so requested, i.e. the full minutes of
9 the meetings, was required to be disclosed.

10 And, for instance, in the context of a staffing
11 issue, one imagines that there may well have been (a),
12 no public interest in disclosing that information, and
13 (b), there may well have been a range of public
14 interests, including the regulation 13 data protection
15 ones, against such disclosure.

16 But the second point is that leads one
17 straightforwardly into the position whereby the public
18 authority is required, in a context where it considers
19 that a requester may be asking for more than actually he
20 wishes to see, to come back with advice and assistance,
21 and to say to the requester, "Mr Hildyard, we do have
22 minutes of this meeting, they cover a whole range of
23 issues. It looks to us as if you are interested in the
24 BTC pipeline; are you content for us to process your
25 request on that basis or are you, in fact, asking for

1 the full set of these minutes that cover a range of
2 other projects and the ECGD staffing issues?"

3 So, we don't shy away from the logic of our case,
4 and we think there are straightforward answers to that.

5 We would also say that, to the extent that it is
6 permissible to look at the wider conflicts of the
7 request, we would invite the Tribunal to look at
8 paragraph (ii) of the request. It simply asks for
9 a list of all meetings held to discuss the BPU's
10 assessment report. And it is notable that precisely the
11 same language is tracked in (iii) of our request. What
12 is therefore sought in (iii) is all of the records of
13 that defined class of meetings. To the extent that the
14 context of the wider request can be looked at all, then
15 we would say that the wider context, specifically (ii),
16 is of assistance to us.

17 The third point we would make, and I think to some
18 extent the Tribunal has already drawn that out, is that
19 the ECGD's construction of request (a)(iii) requires
20 significant rewording of the request as it was actually
21 put.

22 The ECGD invites the Tribunal to determine that the
23 request means that Mr Hildyard sought information
24 contained in notes or minutes of meetings which related
25 to discussions about the BPU report. Without taking you

1 to it, I will read that from the reply, from the ECGD to
2 this cross appeal, at paragraph 17:

3 " ... or, they put it differently at paragraph 38,
4 'information contained in the form of minutes but which
5 relates to a discussion of the BPU report'."

6 Now, either of those formulations could have been
7 put my Mr Hildyard in his request but they do, in each
8 case, we respectfully suggest, require a significant
9 rewording of the request as it has been put.

10 Our first submission is that the request itself is
11 clear, and unambiguous, we say, although I will come
12 back to ambiguity in a moment, and encompasses the
13 entirety of the minutes of any meeting that was held to
14 discuss the BPU's assessment report which, of course,
15 include the 5 December meeting.

16 We do though say that, to the extent there was any
17 ambiguity, and this is put in the alternative, then it
18 is clear, both from the legislation and from the
19 decisions of the Tribunal, that there was an obligation
20 on the ECGD to provide advice and assistance to
21 Mr Hildyard to help him reduce the ambiguity or clarify
22 the requests, to make clear what it was he was actually
23 seeking.

24 I have already taken you, sir, to the reference in
25 the case of Boddy, at paragraph 25, and from which we

1 saw that:

2 "Where a request is made, a judgment needs to be
3 made on whether it is reasonable to provide advice and
4 assistance in light of the wording of the request, and
5 that if advice and assistance is required the public
6 authority must provide it to a reasonable extent.
7 Therefore, if the request is unclear or ambiguous, then
8 the obligation on the public authority to provide advice
9 and assistance comes into play and the request should be
10 clarified with the applicant for information."

11 That was a decision in an EIR context, and the basis
12 for that is to be found both in the domestic
13 regulations -- and if I could ask you to turn very
14 briefly to tab 1, regulation 9 -- 9.1:

15 "A public authority shall provide advice and
16 assistance so far as it would be reasonable to expect
17 the authority to do so to applicants and prospective
18 applicants.

19 Then 9.3 makes reference to the code of practice:

20 "To the extent that the public authority complies
21 with the code of practice in relation to the provision
22 of advice and assistance in the particular case it shall
23 be taken to have complied with paragraph 1 in relation
24 to that case."

25 If I could invite you to turn to that code of

1 practice, which is at tab 31 of the authorities bundle,
2 towards the very back, I would only ask you to turn to
3 page 11 of that internally, and paragraph 16, under the
4 heading "Clarifying the Request", and simply if I can
5 invite you to read the first five lines of paragraph 16.

6 THE CHAIRMAN: And the following sentence:

7 "Authorities should be aware that the aim of
8 providing assistance is to clarify the nature of the
9 information sought, not to determine ..."

10 MR MICHAELS: Indeed, sir. That must be the case.

11 THE CHAIRMAN: You go on to say one of the penalties for not
12 doing so is that, in the case of ambiguity, it will be
13 construed against the public authority that it has
14 failed to comply with that obligation.

15 MR MICHAELS: I do say so, sir. And I say that in part in
16 reliance on the regulations, but I would also invite you
17 to look at the directive --

18 THE CHAIRMAN: But -- sorry, just on that, there is nothing
19 specific that you can draw our attention to that says
20 that that is a consequence --

21 MR MICHAELS: Not in the code of practice, no.

22 Simply to finish this point, if I could invite to
23 you look at tab 2, which is the directive leading to the
24 Environmental Information Regulations. On the
25 fifth page, above article 4, the Tribunal will find

1 article 3.5, which provides that:

2 "For the purposes of this article, Member States
3 shall ensure that officials are required to support the
4 public in seeking access to information."

5 And just underneath, (c):

6 "Member states shall ensure that public authorities
7 inform the public adequately of the rights they enjoy as
8 a result of this directive and, to an appropriate
9 extent, provide information, guidance and advice to this
10 end."

11 And we say it must follow from the logic of the
12 directive that, where a requester asserts his right of
13 access to environmental information, and there is any
14 ambiguity in that information, and the public authority
15 then fails to provide advice and assistance so as to
16 clarify the scope of that request, it cannot be open to
17 the public authority to rely on a narrower
18 interpretation of the request which would substantially
19 deprive the requester of his right under European law.

20 Sir, in response to your question, we make that
21 submission in reliance on the directive, rather than on
22 specifically the code of practice, which merely
23 implements that part of the directive.

24 Then, the final point we wish to make here, and this
25 really is a final afterwards point, as it were, because

1 we say that we must get home on the first two, we say
2 that the subsequent course of conduct in relation to
3 this request is relevant in that, even after the request
4 was first made for information, and a response to that
5 request was provided, it ought to have become clear to
6 the ECGD at two critical stages subsequently that what
7 was sought was the request of the full minute of the
8 underwriting committee.

9 We say that is relevant for two reasons that I will
10 come to, but if I can invite you, first of all, to turn
11 to those two stages. First of all, at page 192 of the
12 open bundle, first open bundle, this is the request for
13 an internal review on behalf of Corner House, following
14 their refusal to release information, some of the
15 information. And towards the foot of that page, fourth
16 paragraph from the bottom:

17 "Corner House are particularly concerned that ECGD
18 revisit its decision in respect of its reliance on
19 section 36 FOIA."

20 At that stage, of course, ECGD were maintaining
21 their reliance on FOIA on EIR:

22 "Without prejudice to the breadth of its request
23 from the internal review, the elements of ECGD's
24 decision in Corner House is particularly interested in
25 having reviewed are as follows ..."

1 The first item is the items redacted from the BPU
2 review, and the second item is a minute from the
3 underwriting committee meeting of 5 December 2003.

4 Now, at that stage, Corner House is explicitly
5 inviting, very explicitly inviting the ECGD to
6 reconsider its position in respect of the entirety of
7 that minute. There is no scope for ambiguity at that
8 stage whatsoever. A precise document is named, us
9 having been informed of the identity of that document in
10 response to the initial request.

11 Now, the ECGD says that a request cannot be expanded
12 by a request for an internal review or, presumably, by
13 a compliant to the Information Commissioner.

14 Well, that can be approached in different ways, but
15 our starting position is that it cannot be the case
16 that, simply because a request was poorly phrased -- and
17 that is not a concession we make; that is an alternative
18 argument if it is not accepted that the request was
19 adequately phrased to cover when we wanted. If the
20 request was poorly phrased or ambiguous, that it cannot
21 be open to a requester to clarify his request, as has
22 happened here at the internal review stage.

23 All that would happen then is that the public
24 authority, on the ECGD's case, would be permitted to
25 say: well, you are now asking for something that goes

1 beyond the scope of your request, I am afraid you have
2 go back to stage one and make that request again, and
3 then we will consider it, and then we will make you
4 exhaust our internal review process before we decide
5 whether or not to release this information to you.

6 And I don't speculate on making that assertion; that
7 is, in fact, precisely what the ECGD have said. And if
8 the Tribunal turns to page 283 of the open bundle,
9 within the body of the letter that the deputy chair
10 referred to at the beginning, the 18 January letter --
11 and this is, of course, 18 January 2008, some two and
12 a half years after the original request. And,
13 paragraph 70 and 71, the ECGD is dealing with the point
14 put to it by the Commissioner, that the request was
15 broader in scope than the ECGD had thus far considered.

16 What the Tribunal says is that at the time it was
17 clear that the information in the remainder of the
18 minute was not within scope. That was their
19 understanding. Didn't consider whether it ought to be
20 released.

21 It then goes on to say that:

22 "Section 50(2) of FOIA provides a list of exceptions
23 to the Information Commissioner's duty to make
24 a decision."

25 One of those exceptions is that the complaint has

1 not exhausted any complaints procedure provided by the
2 public authority.

3 And at paragraph 71:

4 "It is ECGD's view that the complainant would have
5 to submit a request for the additional information in
6 the minutes and, once in receipt of the ECGD's response,
7 the complainant would have to exhaust ECGD's internal
8 appeals procedure before the complainant would be able
9 to raise a complaint with the ICO about this particular
10 information."

11 So, even here, two and a half years after the
12 request, ECGD is, with respect, we say, playing
13 procedural games, and saying that the only way
14 Mr Hildyard could get this information would be to go
15 all the way back to square one, make a fresh request for
16 information, go through the ECGD internal appeals
17 procedure, and then go to the ICO with, one can only
18 speculate, a further two and a half or three years'
19 delay.

20 So, we put the argument on common sense grounds
21 there, having regard to the wider objective of the
22 directive which I don't think I need to take this
23 tribunal to. But I can if asked to. But we would also,
24 to make the point legally, a slightly narrow point,
25 that, in fact, as the Tribunal is aware, there are no,

1 as it were, procedural obligations on the way in which
2 the requester needs to put a request for information to
3 a public authority. Of course, a request for
4 environmental information need not even be in writing.
5 And in this case, we would say that the request for an
6 internal review that specifically asks for the minute of
7 the 5 December meeting ought, at that stage, to the
8 extent there was any inclarity in the original request,
9 be treated as a further request for information in
10 respect of that minute. And, of course, that never
11 happened.

12 Certainly what we say is that the terms of the
13 internal review ought to have provided a very clear
14 signpost to the ECGD that something had gone wrong with
15 its internal thinking; that there was at least
16 a question, at least a question, about the extent of the
17 original request, and that, therefore, they ought to, at
18 that stage, be providing clear advice and assistance in
19 conformity with the code of practice.

20 THE CHAIRMAN: So, you are not saying that becomes the
21 request, you are saying that that triggers, if had not
22 been triggered by any ambiguity, which you don't admit,
23 but if it had not been trigger by that in the original
24 request, you are saying that it was certainly triggered
25 by the request for internal review?

1 MR MICHAELS: We put it both ways in fact, sir. The first
2 way we put it is that the duty to provide advice and
3 assistance ought to have been clearly indicated -- it
4 ought to have been indicated at the first level if there
5 was any ambiguity, but certainly by the stage of the
6 internal review, and then the complaint to the
7 Information Commissioner, which mirrors the same
8 wording, seeking also that minute. But we also do put
9 it in the alternative, and I accept that this is
10 a bolder submission, but that the request for an
11 internal review ought to be treated in that context as
12 a fresh request for information, and that there is no
13 bar on the Information Commissioner or the Tribunal
14 reading a request for an internal review that does
15 encompass a request for further information in that
16 context.

17 The result, of course, of all this is that a request
18 was made, we say, for the full minutes of the 5 December
19 meeting. A complaint was made about that to the
20 Information Commissioner, and, for reasons that we no
21 longer need to go into at the moment, although it
22 appears it was a simple error by the Information
23 Commissioner, the Commissioner only ordered partial
24 disclosure of those minutes.

25 The Commissioner's pleaded position is that it

1 intended to order disclosure of the whole but, for
2 whatever reason, it did not do so.

3 Therefore, if the Tribunal finds that the request
4 did encompass, as we say, the full minutes, then, and we
5 have accepted this is the appropriate procedural way
6 forward, it will need to hear further evidence in
7 respect of the remaining aspects of the underwriting
8 committee meeting, i.e. those that do not concern
9 explicitly the BPU report.

10 So, sir, within time, those are my submissions.

11 THE CHAIRMAN: Right.

12 MS PROOPS: It is probably sensible if I go first.

13 THE CHAIRMAN: Yes, carry on.

14 Opening submissions by MS PROOPS

15 MS PROOPS: I can take this very swiftly. We essentially
16 adopt all the submissions that have been made by
17 Mr Michaels. There are just a few further points
18 I would like to add.

19 In my submission, a helpful starting point for
20 analysing the cross appeal is the directive. The reason
21 for that is that the directive highlights in clear terms
22 the very generous approach that must be adopted to
23 requests for environmental information. There are
24 a number of paragraphs I would like to refer to you in
25 this context. If we start with the preamble to the

1 directive, starting the tab 2. And it is the preamble,
2 so if we start with the first paragraph in the preamble,
3 if I can invite you to read that paragraph.

4 (Pause)

5 There is emphasis there on increasing public access
6 to environmental information, and that is an imperative
7 that one obviously also sees in the AARHUS convention
8 which this directive is, in effect, designed to
9 implement.

10 If you turn to paragraph 16 in the preamble, and
11 I would then invite you to read that paragraph, you will
12 see there an emphasis on disclosure being the general
13 rule, exceptions being construed narrowly.

14 If you look at article 1(b), in the top left-hand
15 corner on the third page:

16 "The objectives of the directive are to ensure that,
17 as a matter of course, environmental information is
18 progressively made available and disseminated to the
19 public, in order to achieve the widest possible
20 systematic availability and dissemination of
21 environmental information."

22 And then we see, again, the point about exceptions
23 being construed narrowly in article 4.1.

24 What all of these provisions demonstrate is just how
25 generous the approach to the disclosure of environmental

1 information must be under the directive, and that is an
2 approach which must also be reflected in the approach to
3 the regulations. And we say it would be very strange
4 if, despite all those provisions we have seen about
5 disclosure to the widest extent possible, construe
6 exceptions narrowly, it was open to a public authority
7 in effect to approach a request for environmental
8 information in a narrow and, we would say, self-serving
9 manner.

10 Our primary case, in common with Corner House, is
11 that, if you look at the request on page 62, it is clear
12 from its expressed terms, judged objectively, that the
13 request is for all of the minutes of the meetings at
14 which the BPU report was discussed. So, on its face,
15 (a)(iii) is not limited simply to those parts of those
16 minutes of those meetings where the BPU is specifically
17 being discussed. And, indeed, we would invite you to
18 consider the first sentence of the request letter where
19 it says:

20 "We are writing to request the following
21 environmental information held by ECGD in relation to
22 the Baku-Tbilisi-Ceyhan pipeline."

23 Now, that preamble effectively suggests there is
24 a wide interest in the project as a whole, and we say
25 that -- sorry, it is page 62, and it is the second

1 sentence of the request letter.

2 So, the preamble doesn't say "We are writing to you
3 to request the following information about the BPU
4 report", it says, "We are writing to request the
5 following information in relation to the BTC pipeline",
6 so the preamble suggests a wide interest, if you like.
7 And we say that preamble should infuse the way you
8 construe (a)(iii).

9 As it happens, we say you don't need to look at the
10 preamble because (a)(iii) is clear on its face.

11 THE CHAIRMAN: You mustn't ignore the subheading which comes
12 in which, having said that the general scope is the BTC
13 oil pipeline, then begins to narrow it down.

14 MS PROOPS: Well, there is argument to say that what the
15 title does is suggest that there is a interest in
16 information, particularly about the BPU assessment.
17 However, if you look at the actual request, it is clear
18 from its wording that it is not simply seeking disclosure
19 sure of the minutes where the BPU is being discussed.

20 As Mr Michaels pointed out, the request could have
21 been formulated in that way, but it wasn't. So, that is
22 our primary case, in common with Corner House.

23 The secondary case is that this request is
24 ambiguous, because, on the one hand, in (a)(iii), it
25 seems to be requesting all the minutes of the meetings,

1 but on the other hand there are references both in the
2 title and in (a)(iii) to the BPU's assessment.

3 Now, we say, in common with Corner House, that where
4 there is ambiguity it is not open to the public
5 authority in effect to adopt the most narrow
6 construction available. That is a self-serving approach
7 which would cut across the objectives of the directive
8 and the regulations. And we agree with Corner House
9 that the correct approach is, where there is ambiguity
10 in a request, the burden is on the public authority to
11 start its obligations under section 16, and that would
12 entail engaging with the applicant to say: we think
13 there is some ambiguity here; can you just make clear,
14 are you only after the minutes where the BPU report is
15 being discussed or do you want the minutes more broadly,
16 as your request arguably seems to suggest?

17 We say, as it happens, that had that exercise been
18 conducted, the inference you should draw is that
19 Corner House would have come back and said, "No,
20 actually, we want all of the minutes". And we ask you
21 to draw that inference, not least from the content of
22 the review documents that you have already been taken to
23 and also the complaint to the Commissioner.

24 So, had the question been posed -- which we say, if
25 there was ambiguity, it should have been -- it is quite

1 clear what the answer would have been.

2 However, we actually agree with Corner House that
3 you ought not to go that far, you don't need to go that
4 far, because the simple point is: where a public
5 authority has failed to discharge its duties under
6 section 16, it is, in fact, bound by the broadest
7 construction. It can't rely on its own failures or hide
8 behind its own failures under section 16 to adopt
9 a self-servingly narrow construction.

10 I understand that another point that may be put
11 against Corner House is that the EIR, in common with
12 Freedom of Information Act, is concerned with requests
13 for information not requests for documents, and it is
14 often a mistake that people fall into in terms of
15 talking about document rather than information. And we
16 are all aware that the regulations are concerned with
17 the disclosure of environmental information.

18 However, as a matter of practical realities, it will
19 often be easiest for an applicant to identify the kind
20 of information they are seeking by identifying relevant
21 documents, or in this case relevant minutes.

22 Now, we would say that if you look at this request
23 it is clear that the information that is being sought is
24 the information contained within the minutes of the
25 meetings at which the BPU report was discussed. And

1 that would include the entirety of the minutes and the
2 entirety of the information within those minutes.

3 So, for all those reasons, we endorse the cross
4 appeal that has been brought by Corner House.

5 MS CALLAGHAN: Sir, it is now common ground between all of
6 the parties that the decision notice only required ECGD
7 to make partial disclosure of the minutes, in other
8 words to disclose those parts of the minutes which
9 concerned a discussion of the BPU report. But
10 Mr Michaels, on behalf of Corner House, has submitted
11 this morning that that was not, in fact, the intention
12 of the Information Commissioner. And to the extent that
13 the Tribunal is prepared to accept that submission or to
14 make a factual finding about it, then I am going to need
15 to deal with that submission this morning.

16 Mr Michaels has submitted as part of his submissions
17 this morning that although the decision notice is clear
18 on its face that it only required ECGD to make partial
19 disclosure of the minutes, nevertheless he has said that
20 was not the intention of the Information Commissioner.
21 That position is not accepted by ECGD, and, to the
22 extent that the Tribunal is prepared to accept
23 Mr Michaels' submission on that point, then I am going
24 to need to address you on that.

25 MR MICHAELS: Sir, would it be helpful if I clarified --

1 THE CHAIRMAN: I thought it was -- did I mishear, that it is
2 not common ground that we are only looking at the
3 request?

4 MS CALLAGHAN: I had thought it was common ground.

5 THE CHAIRMAN: That we are only looking at the request?

6 MS CALLAGHAN: But, of course, Mr Michaels has submitted
7 this morning, contrary to anything that ECGD can accept,
8 that it was the intention of the Commissioner to make
9 wider disclosure.

10 MS PROOPS: If it assists, there is a dispute operating
11 behind the scenes as to whether the Commissioner
12 effectively communicated to ECGD that he viewed the
13 request narrowly.

14 Now, our case is that that is simply not a matter
15 with which you need to concern yourself --

16 THE CHAIRMAN: I thought you had agreed that that no
17 longer --

18 MS PROOPS: Yes, because whether the Commissioner intended
19 to reflect the position differently in his decision
20 notice or not, what matters is in the decision notice.
21 We are all agreed that, in effect, the decision notice
22 doesn't address the question of the breadth of the
23 request. And, therefore, the critical question for you
24 is: how broad is this request; and does it go wider than
25 just the discussion of the BPU minutes?

1 THE CHAIRMAN: Because if we construe it widely, as
2 Mr Michaels invites us to, to that extent the decision
3 notice is wrong.

4 MS PROOPS: Precisely. And it doesn't matter what the
5 Commissioner intended. So, I accept Mr Michaels made
6 reference to the Commissioner's intention. Our position
7 is that it is entirely irrelevant what he intended,
8 though there is a private dispute as to whether he did
9 or did not intend to say what he said in his decision
10 notice. It is irrelevant so far as the Tribunal's
11 deliberations are concerned.

12 MR MICHAELS: It might be helpful if I --

13 THE CHAIRMAN: Just see if you can clarify, because ...

14 MR MICHAELS: I am entirely content with that approach.

15 I don't require the Tribunal to make any finding of fact
16 about the Commissioner's intentions in issuing his
17 decision notice whatsoever. I was merely referring, at
18 the conclusion of my submissions, to the position of the
19 Commissioner as is understood from its pleadings, but it
20 is not necessary, for the reasons that Ms Proops
21 explains, for the Tribunal to decide the point. The
22 Tribunal need concern itself only with the terms of the
23 request.

24 THE CHAIRMAN: We are on a pure construction exercise.

25 MR MICHAELS: And the construction of the request, rather

1 than the construction of the decision notice.

2 MS PROOPS: We are all agreed as to the construction
3 position.

4 THE CHAIRMAN: Is that helpful?

5 MS CALLAGHAN: It is helpful, but can I add it is not simply
6 a private dispute as to the expressed intention of the
7 Commissioner before the notice was issued. I can make
8 construction arguments about the declared intention as
9 the Information Commissioner as expressed within the
10 terms of the decision notice. But if this Tribunal is
11 content to ignore any issues of the intention of the
12 Information Commissioner, as expressed within the four
13 corners of the decision notice, then I don't need to
14 address you on that point.

15 THE CHAIRMAN: I don't think you do need to address us on
16 that point. We are looking at a pure construction
17 exercise on the request.

18 Opening submissions by MS CALLAGHAN

19 MS CALLAGHAN: Thank you, sir. In that case I will move to
20 those parts of my submissions.

21 It is agreed by ECGD that the meaning and the scope
22 of the request is to be interpreted objectively, or, as
23 the Tribunal put it in the case of Boddy, to be taken at
24 face value. Further, it is accepted that the case law
25 of the Tribunal indicates that a request is to be

1 interpreted without reference to the subjective
2 intention of the person requesting the information. It
3 is applicant- or motive-bound.

4 Mr Michaels has already taken you to the cases of
5 Boddy and Berend, which we also rely on.

6 ECGD contends that on an objective interpretation of
7 the request Mr Hildyard was seeking information which
8 was limited to a discussion of the BPU report. ECGD
9 relies on two main arguments in support of its
10 interpretation. The first relates to the express
11 language of the request and the second is a legal
12 argument.

13 If I can begin by looking at the language of the
14 request, and again ask the Tribunal to look at page 62
15 of the open bundle, which is the request itself, and we
16 say that, interpreting this request objectively and
17 taking it at face value, the words of the request limit
18 the request to environmental information concerned with
19 the BPU assessment report.

20 Can I address first of all the very first sentence
21 of the request. It says:

22 "We are writing to request the following
23 environmental information held by the ECGD in relation
24 to the Baku-Tbilisi-Ceyhan (BTC) oil pipeline."

25 Quite clearly here Mr Hildyard is seeking first of

1 all environmental information, and second of all which
2 relates to the BTC pipeline. So already the request is
3 limited in those two fundamental respects.

4 But then, as, sir, you have already pointed out, the
5 request is broken into three parts, each of which
6 addresses a different element or feature of the BTC
7 pipeline. So part (a) is concerned with the BPU's
8 assessment of the BTC pipeline project. Turning over
9 the page, part (b) of the request is concerned with the
10 pipeline coating that was used on the oil pipeline,
11 a quite different aspect of this project, and (c) of the
12 request is concerned with a complaint made by NGOs under
13 the OECD guidelines on multinational enterprises.

14 In my submission, this structure of the request
15 makes it clear that to the extent Mr Hildyard was
16 interested in other aspects of the BTC pipeline project
17 that did not relate to the Business Principles Unit's
18 assessment of that project he asked for it in other
19 parts of the request.

20 So the very structure of the request indicates that
21 when we turn to part (a) he was concerned solely with
22 the BPU's assessment of that project.

23 Looking at part (a) itself, it is clearly focused on
24 the BPU's assessment of the project. It says so in the
25 heading. We then see reference to the BPU's assessment

1 report in each of the four subheadings of the request.
2 It is not, and I repeat not, concerned with the BTC
3 pipeline project generally in this part of the request.

4 Turning to the specific request in issue, part
5 (a)(iii) it reads:

6 "All notes and all minutes of meetings held to
7 discuss the BPU's assessment report."

8 In my submission this request is focused on the
9 discussion of the BPU's report. This is not a general
10 request for all minutes of meetings per se. The words
11 used by Mr Hildyard are words of limitation, they limit
12 the scope of the request. How do they limit it? They
13 limit it to those minutes of meetings held to discuss
14 the BPU's assessment report. There is no reference in
15 this request to minutes held to discuss any other topic,
16 and there is no reference to minutes of meetings held to
17 discuss the BTC pipeline generally.

18 Therefore it is to be inferred from the plain
19 language of this request that Mr Hildyard was seeking
20 minutes of meetings insofar as they discussed the BPU's
21 assessment report. He wasn't seeking minutes held to
22 discuss any other topic.

23 It has been said against me this morning that that
24 interpretation of the request involves a re-writing of
25 the words of the request. In response, the

1 interpretation offered by both Mr Michaels and the
2 Information Commissioner also involve precisely the same
3 thing; a re-wording of the original request.

4 How do they re-word it? They contend that these
5 words, "minutes of meetings held to discuss the BPU's
6 assessment report", are to be interpreted as meaning,
7 and I quote:

8 "Minutes of meetings at which the BPU's report was
9 discussed."

10 They say --

11 THE CHAIRMAN: You are quoting there from ...?

12 MS CALLAGHAN: From both the exact wording used this morning
13 in oral submissions but also from the way in which their
14 case has been put in the pleadings on this. If
15 necessary I can give you the bundle references, but I am
16 sure that it will be accepted that that is the way in
17 which it is put.

18 In other words, Mr Hildyard and the Commissioner
19 contend that this is to be interpreted as a request for
20 the entirety of the minutes, because they say it
21 encompasses minutes of meetings at which the BPU's
22 report happened to be discussed, together with any other
23 topics that may have been discussed at those meetings.
24 So they say that Mr Hildyard was here asking for all
25 minutes of meetings, irrespective of what matters were

1 discussed, so long as one of the matters discussed was
2 the BPU assessment report. That is the logical
3 inference of their case, and insofar as the Tribunal is
4 minded to agree with that contention, and to find that
5 Mr Hildyard was actually asking for minutes of meetings
6 at which the BPU report was discussed, together with any
7 other topics, then we make our second argument, which is
8 our legal argument, and we say this is not something he
9 was entitled to ask for as a matter of law and therefore
10 it can't be the correct interpretation of the request.

11 So we say it is not enough simply to ask the
12 question: what did Mr Hildyard ask for? One must also
13 pose the question: what is he legally entitled to ask
14 for? If the Commissioner and Mr Hildyard's
15 interpretation was the proper interpretation of the
16 request, it would in fact be a request for documents,
17 because it would be a request for documents in the form
18 of minutes that contain some specified and sought after
19 information, namely the discussion of the BPU report,
20 together with unspecified and unsought information,
21 namely any other topics discussed.

22 But regulation 5.1 of the EIRs makes clear that the
23 right of access is a right to information and not
24 documents. It reads:

25 "A public authority that holds environmental

1 information shall make it available on request."

2 I understand this to be common ground between us.
3 But I rely in support of this proposition, if I need to,
4 on Phillip Copple's textbook, "Information rights", at
5 paragraphs 9001 and 14001, which can be found in tab 32
6 of the bundle, where Mr Copple and his contributors make
7 clear that the rights of access are rights conferred in
8 relation to information rather than to documents.

9 Sir, it goes without saying that a document can
10 contain many discrete pieces of information, and if the
11 interpretation put by Mr Hildyard and the Commissioner
12 is right, then he would be able to ask for the entirety
13 of the minute, irrespective of the information contained
14 within it, and this would undermine the legislative
15 purpose of the Act by enabling him to have access to
16 information that he did not request and that was
17 unconnected with the information that he did request.

18 Can I test the absurdity of this interpretation in
19 this way: suppose there was a meeting of the
20 underwriting committee at which the BPU report was
21 discussed, but at the same meeting an entirely
22 unconnected aerospace project was also discussed, and
23 let us also suppose, as Mr Michaels suggested, that
24 staffing issues were discussed, or indeed the ECGD
25 Christmas party arrangements were discussed at the same

1 meeting. If we assume that neither the aerospace
2 project nor the staffing issues or, indeed, any
3 Christmas party arrangements involved environmental
4 information, then it is clear that Mr Hildyard didn't
5 ask for information about any of those topics, because
6 he only asked for environmental information, in the
7 express terms of his request.

8 But if the interpretation put against me was right
9 he would have to be provided with this information,
10 which is neither environmental, and which he did not
11 expressly request, unless it fell within one of the
12 exemptions and the public interest favoured withholding
13 it.

14 As to that, it may not fall within any of the
15 exemptions. An aerospace project may not involve issues
16 of national security, and it may or may not fall within
17 any of the exceptions. In addition, there may be public
18 interest arguments in favour of disclosing it.
19 Mr Michaels says, "Oh, but there would never be a public
20 interest argument in favour of disclosing staffing
21 issues", and no doubt the same point would be made about
22 any Christmas party arrangements -- although it is
23 possible I would be met with the argument that it
24 involves taxpayers' funds and therefore there is
25 a public interest in disclosing it.

1 But if Mr Michaels is right that it has to be
2 disclosed, subject to regulation 12 arguments, then in
3 my submission that would wholly undermine the
4 legislative purpose of regulation 5.1, which is to
5 require public authorities to disclose environmental
6 information that has been requested.

7 In addition, it would deprive regulation 5.1 of any
8 meaning or effect. What it would do, in effect, is to
9 shift the emphasis from regulation 5.1 to the tests that
10 have to be applied under regulation 12. It would mean
11 that it would be impossible to exclude information from
12 the scope of the request under regulation 5.1, so what
13 a public authority would have to do is simply say, "Yes,
14 it comes in under regulation 5.1, now we have to look to
15 see whether there are any applicable exemptions and we
16 have to carry out a balance of public interest here in
17 relation to this information in order to preclude
18 disclosure of obviously irrelevant information". We say
19 that that is not the structure and purpose of the
20 legislation, and nor is it the structure and purpose of
21 the directive.

22 Ms Proops took you to the preamble to the directive
23 in tab 2 of the bundle, and she pointed you to
24 paragraph 16 of that preamble, which made clear that
25 public authorities should be permitted to refuse

1 a request for environmental information only in specific
2 and clearly defined cases, and that grounds for refusal
3 should be interpreted in a restrictive way.

4 In other words, regulation 12 is to be interpreted
5 in a restrictive way against the public authority, and
6 yet the effect of the interpretation being put forward
7 today is that much more information would fall within
8 the scope of a request, and it would then be up to the
9 public authority to try to rely on these very narrow,
10 restrictive provisions of regulation 12 to exclude what
11 must obviously be irrelevant information, such as
12 staffing arrangements, and that cannot be right as
13 a matter of legislative interpretation.

14 In addition, sir, it would actually be inconsistent
15 with Mr Hildyard's own clarification, which was provided
16 in Mr Michaels's skeleton argument, where, if I can ask
17 you to turn to the skeleton arguments, and to
18 Mr Hildyard's skeleton argument prepared for him by
19 Mr Michaels, at paragraph 120. What Mr Michaels says
20 there is:

21 "So as to avoid unnecessary argument Mr Hildyard is
22 happy to clarify, as he would have been at any stage,
23 that he is content to confine his request only to those
24 elements of the 5 December minute that relate to the BTC
25 project and not to any other elements of the

1 5 December minute."

2 Sir, that paragraph highlights the inconsistency in
3 the Commissioner's position and Mr Hildyard's position,
4 because what they say to you today is the request is for
5 the entirety of the minutes, and yet they have both said
6 that that should be construed as seeking environmental
7 information relating to the BTC pipeline project.

8 THE CHAIRMAN: Wouldn't he say that there is
9 an interpretation on the one hand, which he says is the
10 wider one, which when I pointed it out to him he said he
11 did not shy away from, but what he is saying here is,
12 "But actually, not a question of interpretation, but
13 I am not troubled by the other stuff. If the Christmas
14 party is in there, I am not interested in it, actually".

15 But he is not saying he is not entitled to it as
16 a matter of interpretation.

17 MS CALLAGHAN: That may be the position Mr Michaels is
18 taking today, but certainly in terms --

19 THE CHAIRMAN: I think it is the point he is making there,
20 isn't it?

21 MS CALLAGHAN: What he is saying is, "I would be content to
22 receive less than I was legally entitled to," but he
23 says he was legally entitled to the entirety of the
24 minutes.

25 But if I can take to you the Commissioner's skeleton

1 argument, at paragraph 39.1, which is at page 17 of her
2 skeleton argument, the Commissioner --

3 THE CHAIRMAN: Bear with us.

4 MS CALLAGHAN: I apologise. It is paragraph 39 of the
5 Commissioner's skeleton argument, which is at page 17 of
6 that document.

7 THE CHAIRMAN: Yes.

8 MS CALLAGHAN: It begins:

9 "The Commissioner contends that the request was for
10 the entirety of the minutes and in support of that
11 contention he relies on the following matters ..."

12 In the very first subpoint he says:

13 "The first sentence of the request letter confirms
14 that it embraces a request for the following
15 environmental information held by ECGD in relation to
16 the BTC oil pipeline. Accordingly, the request ought
17 generally to be construed as being widely focused on
18 environmental information relating to the BTC project."

19 So it is quite clearly put there, at least in the
20 Commissioner's argument, that a request for the entirety
21 of the minutes in fact should be construed as a request
22 for information relating to the BTC pipeline project.

23 Sir, there are three problems with this: first of
24 all, if we turn back to the words of the request
25 themselves, at page 62 of the open bundle, the words of

1 the request do not in fact ask for minutes of meetings
2 held to discuss the BTC pipeline project. The language
3 is expressly focused on the BPU assessment report. That
4 is the first problem with that interpretation.

5 Second of all, it depends on a subjective
6 interpretation of the request. It involves guessing at
7 Mr Hildyard's motives and intention in seeking this
8 information and in arriving at the conclusion that what
9 he was really interested in, although he did not say so
10 expressly, was any information related to the BTC
11 pipeline generally.

12 As I have said before, to the extent that he was
13 interested in other aspects of the BTC pipeline project
14 he asked for it in other parts of the request.

15 The third problem with that argument, as we have
16 sought to demonstrate, is that a request for the
17 entirety of the minutes is not necessarily the same
18 thing as a request for information relating to the BTC
19 project. It will encompass information that goes beyond
20 a discussion of the BTC project into any other matters
21 discussed, and for those reasons, sir, the
22 interpretation of the request being put forward by the
23 Commissioner and Mr Hildyard is untenable. They are in
24 effect trying to have it both ways. Either it is
25 a request for the entirety of the minutes, in which

1 case, as Mr Michaels accepts, it logically follows that
2 it must be a request for documents that encompass
3 irrelevant information -- and I say that is not legally
4 permissible -- or it is a request for information about
5 the BTC pipeline project, in which case it contradicts
6 the actual language of the request. But it can't be
7 both.

8 Sir, this addresses my submissions on the meaning of
9 the request, but of course there are two further points
10 that I have to address you on and that, first of all, is
11 regulation 9, advice and assistance, and as to that
12 I make the following points: the regulation 9 duty only
13 arises where it would be reasonable for a public
14 authority to offer advice and assistance, and the case
15 law makes clear that that obligation does not arise
16 insofar as the request is clear.

17 I say in this case the regulation 9 duty does not
18 arise because both as a matter of express language of
19 the request and as a matter of law the interpretation
20 put forward by Mr Hildyard and the Commissioner is not
21 one that is open, and therefore there isn't any
22 ambiguity in that sense.

23 Second of all, in response to the argument put
24 forward for the very first time this morning by
25 Mr Michaels, that any ambiguity is to be resolved in

1 favour of the person requesting the information, I am
2 not aware of any authority for that proposition. The
3 directive itself does not assist Mr Michaels in that
4 proposition. It does not say anywhere that where there
5 is ambiguity or doubt the broadest possible
6 interpretation must be given to a request.

7 I also say it is your task as the Tribunal to look
8 at the request and interpret it objectively, not to seek
9 to punish a public authority for having made
10 a reasonable interpretation of the request and not
11 considering that it needed to go back and ask
12 Mr Hildyard what he meant.

13 But the third point I seek to make is that given
14 that the parties have agreed that no evidence will be
15 heard on this matter it would not be appropriate for
16 this Tribunal to make any factual finding that my client
17 breached its obligations under regulation 9, because you
18 have not heard evidence from my witness as to how this
19 request was interpreted, and why further advice and
20 assistance was not provided, and in those circumstances
21 it would be unjust to make any finding of fact in
22 relation to advice and assistance.

23 The second point that I need to address is the
24 internal review request and the complaint itself. You
25 have heard the Commissioner and Mr Hildyard argue today

1 through their representatives that the wording of
2 Mr Hildyard's request for an internal review and his
3 complaint to the Commissioner shed light on the meaning
4 of the request, and they say it is clear from those
5 documents that he was seeking the entirety of the
6 minutes. In the alternative, again an argument put
7 forward for the first time this morning, Mr Michaels
8 says the request for an internal review should be
9 treated as a fresh request for information.

10 I have the following points in response: first of
11 all, as a matter of law the wording of the internal
12 review request or a complaint cannot have the effect of
13 retrospectively altering or amending or expanding the
14 scope of an initial request for information, and I rely
15 for this proposition on the express words of
16 regulation 5.1, which makes reference only to a request
17 and not to an internal review request or to a complaint.
18 We are not obliged to disclose information in response
19 to a complaint or an internal review request.

20 Second of all, I rely on section 50 of the Freedom
21 of Information Act, which is found in tab 4(a) of the
22 authorities bundle, and section 50, which applies to
23 these proceedings, provides that the role -- well, it
24 reads:

25 "Any person in this section referred to as the

1 complainant may apply to the Commissioner for a decision
2 whether, in any specified respect, a request for
3 information made by the complainant to a public
4 authority has been dealt with in accordance with the
5 requirements of part 1."

6 In other words, the role of the Commissioner is to
7 determine whether the request for information has been
8 dealt with in accordance with the requirements of the
9 EIRs, not whether the complaint has been dealt with
10 appropriately, or whether the internal review request
11 has been dealt with appropriately.

12 My second response is this: that even if I am wrong,
13 as a matter of law, on their face these documents do not
14 in fact indicate that he was seeking the entirety of the
15 minutes, so they do not have the effect, as Mr Michaels
16 submits, of clarifying the request.

17 If I can take you, please, first of all, to ECGD's
18 response to the request at open bundle 1 page 67.

19 THE CHAIRMAN: Yes.

20 MS CALLAGHAN: The relevant paragraph is over the page at
21 page 68. Halfway down the first paragraph, close to the
22 top hole punch mark, where it reads:

23 "Additionally a minute from the underwriting
24 committee meeting of 5 December 2003 has not been
25 disclosed under section 36."

1 This is the first time that this minute is actually
2 identified by the public authority. And what they have
3 said here is that they have not disclosed it.

4 Now, as you will have seen from the evidence, that
5 was not correct, because there had, in fact, been an
6 inadvertent disclosure of part of the minutes, which
7 were redacted. But, understandably, anyone reading that
8 letter would believe that the minutes had not in fact
9 been disclosed, and anyone receiving the information
10 that was attached to this letter would not,
11 understandably, have realised that there had been
12 inadvertent disclosure, because if I take you, sir, to
13 page 135 of the bundle, this is the first page of the
14 redacted form of the minutes.

15 THE CHAIRMAN: Yes.

16 MS CALLAGHAN: If one looks at the previous pages, it is not
17 immediately obvious that this is a separate document,
18 and it is certainly not obvious that this is part of
19 that minute referred to in the covering letter.

20 So, I say that anyone receiving this would not
21 appreciate that this was that minute. If we then go to
22 the request for the internal review, which is at
23 page 190 -- I think Mr Michaels took you to page 192,
24 but it is all the same, it is the same document,
25 although at page 192 that includes my client's response.

1 But looking at page 190, what Mr Michaels says is:

2 "Without prejudice to the breadth of its request for
3 an internal review, the elements of ECGD's decision that
4 Corner House is particularly interested in having
5 reviewed are as follows ..."

6 And the second bullet point is:

7 "A minute from the underwriting committee meeting of
8 5 December 2003."

9 In my submission, what he was asking for there was
10 to have reviewed that minute; in other words, to have
11 reviewed the decision not to disclose it at all, because
12 that is what the covering letter had said in response to
13 the request.

14 He does not say there that what he wants is the
15 entirety of the minute. What he wants is a review of
16 the decision. And what was the decision? The decision
17 was not to disclose it at all. Can I then take you to
18 the complaint to the Commissioner itself --

19 THE CHAIRMAN: Let me just re-read this whole paragraph.

20 MS CALLAGHAN: Of course, yes.

21 (Pause)

22 THE CHAIRMAN: Thank you.

23 MS CALLAGHAN: So, I say this is not a request for the
24 entirety of the minutes, this is a request for a review
25 the decision not to disclose any of it.

1 Turning forward to the complaint to the
2 Commissioner -- this is at page 198 -- can I take you
3 first, please, to page 199, to the second bullet point
4 on that page. That second bullet point, on page 199,
5 points out that the ECGD refused disclosure of the
6 minutes of the underwriting committee for
7 5 December 2003 under section 36 of the Freedom of
8 Information Act.

9 So, here it is apparent that they believed there
10 had, in fact, been no disclosure of those minutes at
11 all. Lower down on the page, four bullet points later
12 it reads:

13 "This compliant to the Commissioner now relates to:

14 "(1) the redacted elements of the BPU assessment
15 report; and

16 "(2) the withheld minutes of the underwriting
17 committee."

18 Again, here they believe that the entirety of the
19 minutes have been withheld. Then, at the bottom of the
20 page, paragraph 7, the summary of the complaint, they
21 say:

22 "We wish to complain about ECGD's continuing refusal
23 to release the following information."

24 The first bullet point is all items redacted from
25 that BPU report, and over the page they say a minute

1 from the underwriting committee meeting of
2 5 December 2003. In other words, they were not asking
3 for the entirety of the minute, they were complaining
4 about ECGD's apparent refusal to disclose any part of
5 it; and that is quite a different thing.

6 If any further point needs to be made on that, can
7 I take you, please, to page 209 of the same document --
8 the same complaint, page 209, paragraph 53, the same
9 point is made:

10 "The minutes have been withheld in their
11 entirety ..."

12 And then paragraph 56:

13 "Whilst there may be elements of the document that
14 it would be appropriate to redact, we do not accept it
15 is legitimate to withhold the entirety of the document."

16 That is what they are complaining about. They are
17 not asking to see all of it. They are complaining about
18 the decision to withhold all of it. So, it may be
19 inferred that if they had realised they had actually
20 been provided with a redacted copy of it, they would be
21 complaining about, similarly, as with the BPU assessment
22 report, they would be complaining about the items
23 redacted from it.

24 The third point that we make in response to this
25 argument is in response to the suggestion made this

1 morning, that this internal review request should be
2 interpreted as a fresh request for information. We do
3 not accept, as a matter of law, that an internal review
4 request can or should be interpreted as a fresh request
5 for information, but, in any event, ECGD would say that
6 it is clear from the wording of the internal review
7 request that it wasn't a fresh request for information.
8 To go back to it again, he was wanting to have reviewed
9 elements of ECGD's decision to withhold that minute.
10 That is not the same as saying, "I would like to make
11 a request to have the information contained in that
12 minute". That is not a fresh request for information,
13 we would submit.

14 So, for all of those reasons, we contend that the
15 later document, the internal review request and
16 complaint, don't actually shed any light or clarify that
17 initial request. They are premised on a mistaken but
18 reasonable assumption that ECGD had withheld the
19 entirety of the minutes, but they are not actually
20 a request for all of that document.

21 Insofar as it is necessary to make the point, that
22 is how ECGD interpreted it at the time.

23 So, for all of those reasons, sir, we contend that
24 ECGD's interpretation of the request is the only
25 interpretation that is available to you as a matter both

1 of objective interpretation of the language of the
2 request, and also as a matter of law. In other words,
3 this was a request which was confined to information
4 about the BPU assessment report.

5 Unless there are any further questions that you may
6 have, those are my submissions, subject to anything ...

7 THE CHAIRMAN: I think we are going to have a short break
8 now. I imagine we could do with one. You are
9 envisaging that we would have a closed session on this
10 issue?

11 MS CALLAGHAN: Only insofar as the Tribunal considers it
12 would be assisted by hearing from Mr Roberts-Mee about
13 the actual content of the minutes, but if the Tribunal
14 doesn't consider it is necessary in order to answer this
15 particular issue, then we don't seek to take your time
16 up with it.

17 THE CHAIRMAN: Right, okay.

18 MS CALLAGHAN: It was more a case of --

19 THE CHAIRMAN: We will take the break, have a quick talk
20 among ourselves and feed the view out to the clerk as to
21 whether we are going to need that or whether we just go
22 straight to ...

23 We will take 10 minutes now, so we will come back at
24 12 o'clock.

25 (11.50 am)

1 (A short break)

2 (12.10 pm)

3 THE CHAIRMAN: Mr Michaels.

4 Further submissions by MR MICHAELS

5 MR MICHAELS: Thank you, sir.

6 I don't propose to take very long about this. We
7 see the issue as a relatively simple and narrow issue of
8 construction of the original request, and that is where
9 the focus needs to be. I do wish to raise a few points
10 in response to my friend's submissions.

11 The first point I would raise is quite a lot was
12 made about the correspondence between the ECGD and
13 Corner House in relation to the apparent accidental
14 disclosure of part of the underwriting committee
15 minutes, and it seemed to be suggested that, as a result
16 of that, it was quite clear what it was we were not
17 seeking.

18 I have an issue --

19 THE CHAIRMAN: Well, I think it is saying that you have to
20 interpret the language elsewhere that you were relying
21 on in the context of that circumstance.

22 MR MICHAELS: We have a concern about that as a matter of
23 principle, first of all, which is that in this appeal
24 there was before the Tribunal previously witness
25 evidence, including a detailed statement from

1 Mr Hildyard, about precisely those issues.

2 The parties then agreed not to have that evidence
3 before the Tribunal on the basis that it was not needed
4 to be considered. Therefore, I am slightly concerned my
5 friend is inviting the Tribunal to make inferences about
6 what Mr Hildyard did know or understand when it is quite
7 clear from a statement that had been prepared, and in
8 the bundle, what his intentions were there.

9 But there is a more specific point here --

10 THE CHAIRMAN: As I understood Ms Callaghan's point, it
11 stood on the document, that read the document and you
12 can see that the correspondence is addressing a slightly
13 different issue, she would say, than the more broad one
14 that you are inviting us to conclude it was.

15 MR MICHAELS: That, as I understand it, goes to the second
16 issue, which is whether it is permissible to interpret
17 a request for an internal review as a fresh request, and
18 whether that request was for an internal review was
19 seeking the full minute.

20 It doesn't go at all to the original interpretation
21 of the first request as drafted. That is my
22 understanding there.

23 But there is a wider issue that arises from that
24 correspondence between the ECGD and Mr Hildyard, which
25 that at no point did the ECGD seek to explain to

1 Mr Hildyard, in light of that further correspondence,
2 what the minute consisted of, that it consisted of more
3 information than merely the BPU report; and therefore to
4 seek any clarification from Mr Hildyard of what it was
5 he wanted in that respect.

6 They simply proceeded, notwithstanding the terms --
7 and I will put it neutrally, the terms of his request
8 for an internal review, without providing any further
9 assistance whatsoever to Mr Hildyard. That cannot be
10 the right approach, we say, in the context of the
11 directive of access to environmental information that
12 requires disclosure to the widest possible extent, and
13 specifically requires member states to ensure that
14 public authorities provide advice and assistance.

15 I was accused, I think, of advancing an entirely
16 novel argument this morning. It was said against me
17 that we had never suggested previously that where
18 a request is ambiguous and advice and assistance is not
19 given then the Tribunal must adopt a broader
20 interpretation. In fact, that is set out clearly at
21 paragraphs 128 to 130 of our skeleton argument in
22 precisely those terms.

23 THE CHAIRMAN: Do you want to take us to it?

24 MR MICHAELS: I don't think there are page references for
25 our skeleton. Unfortunately mine is not paginated.

1 Paragraph 128, which is two pages from the end. It
2 starts off with a heading in italics halfway up the
3 page.

4 THE CHAIRMAN: Paragraph 128?

5 MR MICHAELS: Yes, there is a heading immediately above it
6 which sets out the point in, I believe, the same terms
7 I have advanced it this morning.

8 THE CHAIRMAN: Yes.

9 MR MICHAELS: And then at paragraph 130 particularly. So
10 this is not a new argument advanced for the first time
11 this morning.

12 We were also accused of falling into the same trap
13 as we accused the ECGD of falling into, of seeking to
14 interpret the request by rewording it. And specifically
15 it was said against us that we needed to, and had,
16 specifically inserted the words "at which", as in "as
17 which the BPU report was discussed", into our request.
18 But if you look further up the same page in that
19 skeleton argument, where we set out the plain language
20 meaning that we seek to attribute to the request for
21 information, we don't do any such thing. And we have
22 never sought to vary the terms of request. We rely on
23 its plain terms; we do not need to add in additional
24 words in order to make our case. And that is, we say,
25 clearly contrary to the approach that needs to be taken

1 by the ECGD to interpreting the request the way they say
2 it should be interpreted.

3 I refer there specifically to paragraph 125 of our
4 skeleton argument.

5 Whilst we are on that same point, the logic,
6 I think, of the ECGD's position in respect of that issue
7 would be that the request for information at
8 paragraph (a)(iii), all notes and/or minutes of meetings
9 held to discuss the BPU assessment report, would in fact
10 only consist of meetings held exclusively to discuss the
11 BPU's assessment report. That would be the logic of
12 where they are going with that argument. And yet that
13 has never been suggested, even by the ECGD, in relation
14 to this case.

15 Their position has been that they accept it relates
16 to the minutes of meetings held to discuss the BPU's
17 assessment report, even if it is meetings held to
18 discuss a variety of other issues. They simply say: the
19 only part of the minutes that you are asking for is
20 those bits concerned with the BPU assessment report.
21 And that requires, as set out in my opening, a clear
22 insertion of additional words.

23 A further brief point: concern was expressed in
24 a number of different ways about the effect that it
25 would have on, I believe, freedom of information

1 requests generally, public authorities' handling of
2 requests specifically, of giving a request the broader
3 interpretation for which we contend.

4 I don't need to respond to all of those points as
5 they were put, but I would say that regulation 9 and the
6 duty to provide advice and assistance --

7 THE CHAIRMAN: Hold on a second.

8 (Pause)

9 Yes.

10 MR MICHAELS: We would say that the regulations provide
11 a complete answer to that problem insofar as it is
12 a problem. The main concern appeared to be that
13 requesters could put unfeasibly broad requests, or
14 unrealistically broad requests. The regulations in the
15 directive deal with that in a number of ways. The most
16 significant of them has already been drawn to your
17 attention, which is the duty to provide advice and
18 assistance in the directive, the regulations and then
19 amplified in the code of practice. And that, we would
20 suggest, is a complete answer to the point.

21 But, to the extent it is necessary to go beyond
22 that, it is also notable that the regulations do provide
23 exemptions for requests that are manifestly unreasonable
24 or formulated in too general a manner.

25 Now, if the ECGD had concluded that either of those

1 applied to this request, then they would have been
2 entitled, subject to providing advice and assistance, to
3 come back to Mr Hildyard and seek clarification, or, in
4 the context of a manifestly unreasonable request, to
5 refuse disclosure.

6 It was also put to you, and I don't need to labour
7 this point, because the deputy chair identified the
8 issue correctly, this there was an inconsistency between
9 our concession in the skeleton argument and our legal
10 submission, that the request needs to be broadly
11 interpreted. There is no inconsistency there at all,
12 for precisely the reason the deputy chair identified.

13 I wish to make two additional small points here
14 before concluding.

15 The first is that it seemed to be suggested, and
16 I had some difficulty with this, that as the regulations
17 and the Freedom of Information Act are concerned with
18 information there was a fundamental problem with an
19 approach that relied, as we do here, on a request for
20 documents.

21 Now, the first point to note is a practical point
22 which is that, if there were a fundamental difficulty
23 with requesting documents, then many of the appeals
24 before this tribunal would have been decided on an
25 entirely different basis. The reality is that members

1 of the public seeking information, they ask for
2 documents as a shorthand for the information contained
3 within those documents.

4 And one only needs to open the bundle of authorities
5 at the first two tribunal decision notices. If one
6 looks at the case of Archer, for instance, and I am sure
7 the position would be repeated throughout these
8 authority bundles, but the first case of Archer, at
9 tab 5, page 3, and in that case the appellant,
10 paragraph 2, requested the council to provide him with
11 the minutes of the council's southern area committee
12 meeting. There is no dispute -- and this is an EIR
13 decision -- no dispute whatsoever that it is
14 impermissible to seek disclosure of the minutes; it is
15 plainly shorthand for the information contained within
16 the minutes.

17 Exactly the same point, and I don't wish to labour
18 it too much, but on a wider scale, and not in the EIR
19 context, is the next case, at tab 6, which is a DFES and
20 school funding. Page 3, at the very foot:

21 "Please send copies of all minutes senior management
22 meetings of DFES ..."

23 Again, there is no question that it is impermissible
24 somehow to request documents from public authorities.
25 And, with the greatest respect, Phillip Copple neither

1 says that, neither says it is impermissible to request
2 documents, nor could he do so.

3 The final specific point I wish to make, and it is
4 somewhat shooting in the dark as a third party in this
5 context has to do to an extent, having not seen all the
6 information, but if I ask the Tribunal to turn to
7 page 283 of the open bundle, which is again the
8 18 January letter from ECGD to the Information
9 Commissioner, paragraph 68, which is responding again to
10 this point about precisely this issue about scope. The
11 second sentence:

12 "The additional information in the minutes does not
13 relate to the BPU report, it relates to separate issues
14 in relation to the BTC project."

15 We can't comment in detail, having not seen the
16 document, but one wonders only if many of these issues
17 in relation to, say, staffing, and so on, and the
18 Christmas party, are in fact hypothetical.

19 What one appears to be looking at is a set of
20 minutes that deal with the BTC report, partly in
21 relation to BPU and partly in relation to other aspects
22 of the BTC report. So, many of the hypothetical
23 arguments that have been put against me this morning,
24 with respect to this particular factual context, fall
25 away.

1 In conclusion, it is our position that the
2 appropriate approach for the Tribunal to take in this
3 sort of context is to look at the request, interpret it
4 objectively, but, having regard to the duties on public
5 authorities in the context of the wider directive, to
6 make sure that the requester is not being prejudiced by
7 any failure to give advice and assistance, particularly
8 where a request may have more than one meaning, such
9 that giving a narrower interpretation to the request
10 would result in the requester not getting all of the
11 information it may be seeking.

12 Sir, that is my reply.

13 THE CHAIRMAN: I think what we should do is to go away and
14 see if we can reach a conclusion on these points so we
15 can press on with the hearing and know the basis on
16 which the next part of the hearing is going to take
17 place. I am just wondering whether the sensible thing
18 to do is to take one hour and seven minutes' break now,
19 pick up 1.30, and hopefully we can give you an
20 indication on where we are going on this particular
21 part, and we know what the basis of the next stages are
22 and the witness -- you are looking doubtful.

23 MS CALLAGHAN: Sir, while I wouldn't want to prevent the
24 Tribunal reaching a decision if it considers it is ready
25 to reach a decision on this issue, nothing that you are

1 going to hear in terms of the issues on the appeal will
2 have any bearing on the issues raised in the cross
3 appeal. So, in a sense, we don't need to have
4 a decision from you on the cross appeal in order to deal
5 with the evidence and submissions on the appeal itself.
6 And, of course, depending on the decision that the
7 Tribunal might reach, ECGD may need to consider its
8 position.

9 But certainly from our perspective there is no need
10 for you to reach a decision at this stage. We are
11 content for a joint decision on both the appeal and the
12 cross appeal to be reached at the same time.

13 THE CHAIRMAN: Other thoughts on that?

14 MS PROOPS: I think technically speaking we can proceed to
15 deal with the substantive appeal --

16 THE CHAIRMAN: We are not going to find ourselves addressing
17 issues that if you go one way on this point -- even if
18 we go another way on the -- we are not going to hear --

19 MS PROOPS: I can't anticipate why that would happen, and
20 bearing in mind we are going to have, if the cross
21 appeal is successful, a further substantive hearing on
22 those parts of the minutes that are not concerned with
23 the BPU report. Having said that, I am always in favour
24 with an early lunch personally.

25 THE CHAIRMAN: Then I think we will press on.

1 Let's press on, then, if you are content to, which
2 I think is straight into the evidence.

3 MS CALLAGHAN: But on that point, sir, I have not yet had
4 the opportunity to take full instructions from
5 Mr Dodgson on the new material that was raised over the
6 weekend in relation to these international institutions.
7 And, indeed, Mr Dodgson --

8 THE CHAIRMAN: The material we got this morning?

9 MS CALLAGHAN: Yes, and in addition to that, there were some
10 points raised in the skeleton arguments which I have not
11 yet had the chance to take full instructions on from
12 Mr Dodgson because he has been in Canada, and then
13 flying back from Canada on Friday.

14 I wondered if I had take a short period --

15 THE CHAIRMAN: No, I think, if that is the case, we are much
16 better to start Mr Dodgson in a straight run after
17 a lunch, rather than going 15 minutes and off again. So
18 I think it would be much better if we go back to the
19 early lunch idea and pick it up at 1.30. Then you will
20 have had a chance to speak to Mr Dodgson.

21 MR MICHAELS: Sir, I didn't have a chance to comment on your
22 suggestion that you reach a decision --

23 THE CHAIRMAN: Sorry, I thought I put it --

24 MR MICHAELS: No, I didn't raise my hand sufficiently fast.
25 We agree that, in principle, there is nothing in the

1 remainder of the appeal that will require a decision to
2 be reached at this stage because there will need to be
3 second hearing in any event.

4 However, we would certainly welcome a decision on
5 this issue, on the basis that, even if it is not
6 a reasoned decision at this stage, a decision would
7 allow the Tribunal at the conclusion of this hearing, or
8 very soon thereafter, to give directions for the next
9 stages, and to allow us to move towards the second
10 hearing.

11 Mr Hildyard requested this information some
12 three years ago, and is keen, so far as possible, to get
13 directions in place, if his cross appeal is upheld, to
14 allow us to move towards a second hearing. And so, for
15 that reason, we would approve of a decision, sir.

16 THE CHAIRMAN: We will take that into consideration over the
17 break. So, 1.30 pm.

18 (12.25 pm)

19 (The short adjournment)

20 (1.30 pm)

21 THE CHAIRMAN: Despite the invitation not to reach
22 a decision, we found we could. For the sake of
23 efficiency and tidiness, we think it would be good if we
24 give you a broad indication of where we have got to on
25 this point.

1 This is not our reasoned decision, we will
2 incorporate that in our final decision, but what it
3 comes down to is that we do not intend to apply the
4 wider interpretation to the request. We don't find it
5 particularly difficult to interpret the request in a way
6 that doesn't narrow it to the minutes so far as they
7 apply -- cover the report. It is just a correct
8 interpretation of them, we feel, that that is what is
9 covered and nothing else.

10 We come to that by way, really, of looking at the
11 document as a whole, the way the information request is
12 refined down in stages, as we see it, from the breadth
13 of the second sentence to the letter through the
14 narrowing effect of the subheading (a) and then the
15 further narrowing effect of (i) to (iii). We don't find
16 that to be ambiguous. We find that to be clear, that it
17 only covers that part of the minutes that address the
18 BPU assessment report.

19 And so, our decision, we are not going to require to
20 go into the other arguments which proceed from the basis
21 that it may be ambiguous. We don't find it ambiguous,
22 so that the things like whether ECGD complied with its
23 obligations to advise and assist, it seems to us,
24 doesn't arise, and the issue of whether, if it had
25 failed in that respect, its failure should affect our

1 interpretation, because we have already reached our
2 decision on a clear understanding and
3 clear interpretation of the language, and we don't think
4 we need to go into those sorts of issues. And
5 similarly, the impact or any impact that subsequent
6 communication between the parties may have, similarly,
7 it seems to us, do not arise. It is simply
8 a straightforward interpretation point.

9 So, we will reflect that, or expand on that, in our
10 decision, but that means that for the rest of this
11 hearing we are proceeding on the basis that the original
12 request was limited in that way.

13 MS PROOPS: Can I just raise two matters. Firstly, I am not
14 sure why, but we are getting a little feedback, which we
15 weren't getting this morning, and it is a little
16 distracting.

17 The other point is that I have put before you
18 a judgment of the High Court that is hot off the press
19 this morning, which has some relevance to a number of
20 the grounds that are being advanced by ECGD. It is
21 a case that I was involved with, involving a request for
22 disclosure about information as to how the Home Office
23 had been applying its Freedom of Information Act
24 procedures to a number of requests for information under
25 FOIA, so it is what is called a meta request case; and

1 we will obviously make submissions on the judgment in
2 due course.

3 THE CHAIRMAN: So we will just park that in the back of our
4 authorities bundle.

5 MS PROOPS: Thank you.

6 MS CALLAGHAN: Sir, if I can open ECGD's case by calling
7 Mr Steven Dodgson.

8 MR STEVEN DODGSON (sworn)

9 Examination-in-chief by Ms Callaghan

10 MS CALLAGHAN: Mr Dodgson, I hope that you will have
11 a complete set of the open bundles before you; can I ask
12 you, please, to open bundle 1, and turn, please, to
13 tab 5, page 387 of the bundle. Is that your witness
14 statement which you prepared for these proceedings?

15 A. It is.

16 Q. And can I take you, please, to page 412 -- oh dear --
17 I have noticed there is no signature on this statement.
18 Sir, how would you like us to deal with this?
19 Mr Dodgson will obviously be willing to provide you with
20 a signed copy -- I am told the signature is in the
21 closed bundle. If it is permissible, can I take --

22 THE CHAIRMAN: I think we just want the witness to confirm
23 that it is -- he doesn't have to identify his signature,
24 but if he confirms that the evidence is his evidence and
25 it is true.

1 MS CALLAGHAN: Thank you.

2 Can I ask you to confirm whether the contents of
3 your statement are true?

4 A. Yes.

5 THE CHAIRMAN: Actually, my closed version isn't signed --
6 or maybe ... Anyway, I think that is good enough for
7 us, isn't it?

8 MS CALLAGHAN: Sir, with your permission, may I ask a number
9 of supplemental questions arising out of matters in the
10 skeleton arguments, and matters that have come up after
11 the last week or so?

12 THE CHAIRMAN: Yes.

13 MS CALLAGHAN: Thank you. Mr Dodgson, can I start by asking
14 you what kind of cases or projects does the Business
15 Principles Unit, or BPU, deal with?

16 A. Normally, civil projects.

17 Q. If you can make sure your answers are directed towards
18 the Tribunal and that your voice is kept up so we could
19 all hear you.

20 Does that include defence projects?

21 A. No.

22 Q. Does it include aerospace projects?

23 A. No.

24 Q. We have seen in the evidence of both yourself and
25 Mr Allwood that the role of BPU is to assist the

1 environmental, social and human rights impacts of
2 a project; does that include assessment of political or
3 security or conflict related risk?

4 A. No.

5 Q. Does the BPU assist the financial aspects of a project?

6 A. No.

7 Q. Does it have a role in calculating financial risk?

8 A. No.

9 Q. Does it have a role in underwriting projects?

10 A. No.

11 Q. Focusing on environmental impacts, what is the BPU's
12 role in assessing the environmental impacts of
13 a project?

14 A. To ensure compliance with our policy that a project
15 should normally meet international standards in all
16 material respects.

17 Q. Taking a concrete example, is it the role of BPU to
18 assess the risk or likelihood that a particular
19 environmental event, let's say an oil spill, might
20 occur?

21 A. In that example, their role would be to ensure there
22 would be an oil spillage response plan in conformance
23 with the international standards.

24 Q. So, what is meant by "environmental risk" in the context
25 of the BPU's assessment?

1 A. I think it would be more helpful to talk about
2 environmental, social compliance, compliance with
3 international standards, rather than risk.

4 Q. Can I take you to your witness statement. You will have
5 it in front of you, no doubt. Paragraph 21 of your
6 witness statement, which is at page 393 of the bundle.
7 You say at the end of that paragraph, you are discussing
8 the Case Impact Analysis Process, CIAP, and you say at
9 the end:

10 "Under the terms of the CIAP, projects that do not
11 meet the relevant standards will normally be considered
12 unacceptable."

13 What are the relevant standards you are referring to
14 there?

15 A. Those will be the World Bank Group standards or any
16 other applicable standards in the absence of World Bank
17 Group standards.

18 Q. If the BP advises that a project does not comply with
19 the relevant standards, would ECGD generally support
20 that project, or not?

21 A. It is unlikely to support a project that does not meet,
22 in all material respects, the standards.

23 Q. Can I take the converse situation. If the BPU advises
24 that a project does comply with relevant standards,
25 would that be determinative of whether ECGD would decide

1 to offer support for that project?

2 A. The financial risks associated with that project would
3 also have to be acceptable.

4 Q. Just to check that I heard, the financial risks of that
5 project would also have to be acceptable?

6 A. Yes.

7 Q. So, coming back to my question, if the BPU advises that
8 a project does comply with the relevant standards, would
9 that determine, by itself, whether the ECGD would offer
10 support for a project?

11 A. Not on its own.

12 Q. In your view, to what extent would disclosure of the BPU
13 report provide an insight into the reasons why ECGD had
14 positively decided to support a project?

15 A. Could you repeat the question, please?

16 Q. Of course. In your view, to what extent would
17 disclosure of the BPU report provide an insight into the
18 reasons why ECGD had positively decided to support
19 a project?

20 A. It would to the extent that contained within the BPU
21 report is an assessment by our analysts of all the
22 relevant environmental and social factors.

23 Q. And to what extent do relevant social and environmental
24 factors determine whether or not you, as a body, will
25 decide to support a project?

1 A. The assessment would have to show that, in all material
2 respects, they met the international standards.

3 Q. Yes. And the next question would be, to what extent do
4 those social and environmental factors determine why or
5 whether ECGD will decide to support a particular
6 project?

7 A. In order to support a project, first of all those
8 environmental and social standards would have to be met,
9 and, in addition, the financial risks would have to be
10 acceptable.

11 Q. Can I take you to paragraph 13 of your witness statement
12 at page 390 of the bundle. In paragraph 13 you state on
13 the fourth line:

14 "ECGD charges the exporter or the bank (in the
15 latter case the costs would normally be recovered from
16 the borrower) a risk-related premium on business it
17 supports."

18 Can you clarify, what is meant by a "risk-related
19 premium"?

20 A. ECGD's policy is that it prices to risks. Therefore, on
21 assessment of all the financial risks, a premium is then
22 calculated and then is charged for the project or piece
23 of business in question.

24 Q. What type or types of risk are assessed in order to
25 calculate the premium?

1 A. Economic and political risks and, in the case of
2 a project financing, the project's viability, because
3 the cashflows from the project would have to meet the
4 debt servicing requirements.

5 Q. What are the key factors that impact on the calculation
6 of the premium?

7 A. Firstly, the country risk; that is the ability of
8 particular country in question to service its foreign
9 exchange debts.

10 It would also take into account any political risks.
11 That might be, potentially, war risks, for example. And
12 then, as I said earlier, in the case of project
13 financing, the viability of the project, the ability of
14 the project to generate the cash revenues to service the
15 debt.

16 Q. To what extent do environmental issues impact on the
17 calculation of the premium?

18 A. If at all, I think at the edges. As I said earlier, the
19 concern with the environment is compliance with
20 international standards.

21 Q. Can you conceive of any circumstances in which
22 environmental factors might affect the calculation of
23 financial risk or the calculation of the premium?

24 A. In the example that you gave, where, for example, there
25 could be an oil spillage, the project company might have

1 to pay damages which would take cash out of the project,
2 so to that extent it could have a financial impact. The
3 underwriting would seek to mitigate that particular risk
4 by whatever means.

5 Q. Would that have an impact on the calculation of the
6 premium at the beginning of the project or is that
7 something you are talking about that might cause
8 financial loss if it happened after the project had
9 begun?

10 A. It is rather that it -- if it caused financial loss, we
11 would seek to take protections against that financial
12 loss.

13 Q. Can I take you, please, in the same bundle, to page 470
14 of the bundle. This is annex 2 to the witness statement
15 of Mr Nicholas Hildyard, who is giving evidence on
16 behalf of Corner House. Can I ask you, please, to look
17 at paragraph 4 of that page, and in particular the last
18 sentence, which says:

19 "Assessing the conflict risks of the project was
20 thus clearly of importance to any realistic pricing of
21 premium risks."

22 On its face, would you agree with that sentence?

23 A. Yes.

24 Q. And just to clarify, is assessment of conflict risks
25 carried out by the BPU?

1 A. No.

2 Q. Turn over the page, please, to page 471. In particular,
3 can I ask you to look at the bottom of paragraph 9.

4 Mr Hildyard says:

5 "This issue is particularly serious in light of
6 ECGD's recent statement in a letter to me [which I will
7 come to next] that the assessment of such risks was
8 carried out by BPU and recorded in the BPU report, and
9 moreover that the risk assessment by the underwriting
10 committee of those issues was based on the BPU report."

11 Now, I am going to take to you the letter
12 Mr Hildyard is referring to there, so can I ask you to
13 put that bundle to one side for the moment and open up
14 bundle 2.

15 Can I ask you, please, to turn to page 962 within
16 that bundle. This appears to be a letter from ECGD, in
17 particular Steve Head, the information officer, to
18 Mr Nick Hildyard of Corner House, dated, I believe,
19 30 January, although it is slightly obscured in my copy.
20 It is clearly answering a request for information under
21 the Freedom of Information Act. Can I ask you to look
22 at (d) on this page. The question that is clearly being
23 posed by Mr Hildyard:

24 "Did the ECGD undertake an assessment of the
25 conflict related risks raised by NGOs prior to the

1 decision to support the BTC project. If so, please
2 supply the title and date of the assessment, and the
3 identity of the department or institution that undertook
4 it.

5 "Points (a) and (b) above, that is a reference to
6 conflict related risk, were included in a paper
7 submitted to ECGD's underwriting committee entitled
8 Baku-Tbilisi-Ceyhan pipeline project and
9 dated December 2003."

10 That is a long way of asking you this question,
11 Mr Dodgson: is this reference in this letter to a paper
12 submitted to ECGD's underwriting committee a reference
13 to the BPU report written by Mr Allwood?

14 A. No, no.

15 Q. Can you close that bundle, please. Open up bundle 1
16 again. If we go back to the page that we were on
17 before, which was 471, can I ask you to turn over to --
18 no, stay on that page for the moment. Mr Hildyard, on
19 this page, appears to be questioning the assertion of
20 Baroness Symons, replying on behalf of ECGD
21 in December 2002 -- this is a reference to
22 paragraph 8 -- that the pipeline route was chosen
23 specifically to avoid areas of conflict.

24 Can you comment on the degree to which the pipeline
25 route goes through areas of conflict?

1 A. It does not go through areas of conflict.

2 Q. Can I ask you to turn over the page, please, to
3 page 472. At the top of that page, the assertion is
4 made that the recent resurgent conflict in Georgia
5 resulted in Russian air strikes along the pipeline route
6 with some missiles landing within 100 yards of the
7 pipeline itself; as far as you are aware, is that
8 statement correct, namely that Russian air strikes were
9 made along the pipeline route with some missiles landing
10 within 100 yards of the pipeline itself?

11 A. As I recall it, the project company informed us that
12 that was not true.

13 Q. Again, just a reminder, if you could keep your voice up,
14 Mr Dodgson.

15 Can I ask you to look on the same page at
16 paragraph 11. A statement is made by Mr Hildyard as
17 follows:

18 "The risk that the pipeline might be subject to
19 systemic engineering failures would also affect the
20 project's ability to repay its debts and thus the
21 premium that ECGD might charge to cover its commercial
22 risks."

23 On its face, would you agree with that statement?

24 A. Yes.

25 Q. Mr Hildyard then refers to risks relating to the

1 pipeline coating; do you agree that any risks related to
2 the pipeline coating could have an impact on financial
3 risk or the pricing of the premium?

4 A. To the extent that it might impact on the integrity of
5 the pipeline, which would prevent oil flowing through
6 the pipeline, yes.

7 Q. Do you regard that issue, pipeline coating, as an
8 environmental issue?

9 A. That is really an engineering issue.

10 Q. In any event, whatever label one gives it, was that
11 a matter that was assessed by the BPU or is part of the
12 role of the BPU to assess?

13 A. No, that was not assessed.

14 Q. Going back to your witness statement at paragraph 12,
15 which is at page 390 of that same bundle, you have said,
16 about two thirds of the way through that paragraph:

17 "It is only in the event that ECGD has to pay claims
18 following a payment default that expenditure is actually
19 incurred."

20 What factors typically cause a borrower to default
21 on payment?

22 A. Insolvency would be an obvious example, but if, for
23 example, there was a war that impacted on the ability of
24 the project to make payment, that could be another
25 reason.

1 Q. As far as you are aware, on how many occasions have
2 environmental or social factors caused an ECGD supported
3 borrower to default on payment?

4 A. I have no personal recollection of any project.

5 Q. In your view, how likely is that to occur?

6 A. As I say, I have never known it to occur and therefore
7 I would imagine it would be very rare. But that clearly
8 is a matter of speculation.

9 Q. In your view, would disclosure of the BPU report assist
10 in safeguarding public funds or taxpayer funds?

11 A. Yes.

12 Q. How?

13 A. Well, the report itself will demonstrate there is
14 compliance with international environmental standards.
15 As I said earlier, it is also the case that the project
16 would have to meet our financial risk standards. If
17 both of those are met, then the project is acceptable,
18 and to the extent that the BPU report demonstrates that
19 compliance, that must be a good thing.

20 Q. Right. Just focusing on taxpayer funds, as opposed from
21 demonstrating compliance with international standards,
22 how would disclosure of the BPU report assist in
23 safeguarding taxpayer funds?

24 A. I don't think the disclosure of the BPU report of itself
25 would make a difference in that respect.

1 Q. Turning now to the topic of international relations,
2 I am going to ask you some questions about a couple of
3 organisations. The first one is Coface. Can you just
4 explain to the Tribunal, first of all, do you know what
5 Coface stands for?

6 A. It is the French Export Credit Agency. I don't know the
7 French title.

8 Q. The French Export Credit Agency. Mr Allwood has
9 explained in his witness statement that it is a private
10 insurance company; is that right?

11 A. Yes.

12 Q. Where does it operate?

13 A. It operates out of France, but it also operates within
14 the United Kingdom and in other jurisdictions.

15 Q. Mr Allwood has explained that this company, Coface,
16 manages the provision of export credit insurance on
17 behalf of the French state; would you agree with that
18 statement?

19 A. Yes.

20 Q. Do you know where its power to manage the provision of
21 export credit insurance on behalf of the French state
22 comes from?

23 A. I think there is particular French legislation which
24 governs the provision of export credits and through
25 Coface.

1 Q. Are you saying, then, that the legislation makes
2 specific provision for Coface as an organisation?
3 A. I don't know particularly whether it is Coface, but it
4 makes provision for the delivery of export credits
5 underwritten by the state through that third party.
6 Q. Does Coface itself determine the amount of risk
7 capacity?
8 A. For its own commercial business, yes, but for business
9 which is done on behalf of the French state, and
10 underwritten by the French state, it would be the French
11 Government that determines credit risk policies.
12 Q. So, just to clarify, which entity is it that performs
13 the underwriting function? Is it Coface that
14 underwrites the risk?
15 A. For business that --
16 Q. I am only talking about managing the provision of export
17 credit insurance on behalf of the French state?
18 A. Then the French Government will decide.
19 Q. Do you know whether Coface is subject to any form of
20 ministerial or governmental oversight by the French
21 state?
22 A. There will be an interdepartmental committee.
23 Q. Are you aware of such an interdepartmental committee?
24 A. Yes.
25 Q. Who sits on that committee?

1 A. I believe it will be the Ministry of Trade, the Ministry
2 of Foreign Affairs or External Affairs, the French
3 Treasury, or Finance Ministry, and probably will, and
4 I am sure does, include a Coface official.

5 Q. And what is this interdepartmental committee tasked with
6 doing in respect of Coface?

7 A. I think it has two broad roles. One is to establish
8 policy, and then, secondly, to consider individual
9 cases.

10 Q. You mentioned that Coface has its own business and that
11 it is also responsible for managing the provision of
12 export credit insurance on behalf of the French state;
13 in the context of the BTC pipeline project, which
14 element of Coface was involved?

15 A. The French state.

16 Q. The French state.

17 I am now going to hand up a document which my
18 learned friend Ms Proops for the Information
19 Commissioner put before the Tribunal this morning.

20 This consists of printouts from the websites of
21 a number of organisations, including IFC, the
22 International Finance Corporation, and EBRD, the
23 European Bank for Reconstruction and Development.
24 I take it to be common ground, or at least not in
25 dispute, that both the IFC and the EBRD are

1 international financial institutions. I am sure I will
2 be told if I am wrong -- I'm correct.

3 So, I am not going to pose any questions about
4 IFC governance, but can I ask you to turn forward a few
5 pages in that clip of documents to a document headed
6 "IFC's policy on disclosure of information,
7 September 1998".

8 I understand that this is, indeed, as the title
9 indicates, was its policy on disclosure of information
10 at that time, and would have been in force at the time
11 that the BTC project was active.

12 Can I ask you, please, to go to page 6 of that
13 document, actually it may be best to start at the bottom
14 of page 5, which is headed "Constraints". It says:

15 "While every effort is made to keep constraints to
16 a minimum, the effective functioning of the corporation
17 necessarily requires some derogation from complete
18 openness. Annex 1 to the policy sets forth a detailed
19 discussion of the grounds for non-disclosure of certain
20 documents or information."

21 There then follows annex 1. So, turning over the
22 page to page 6, clarifying the constraints on
23 disclosure, can I ask you, please, to look at the fourth
24 paragraph on that page, that begins:

25 "Documents and information ..."

1 Can I ask you to read that to yourself. Is it then
2 apparent from this policy that negotiations between the
3 IFC and its client would generally not be disclosed?

4 A. That's correct.

5 Q. On the same page, looking another further two paragraphs
6 down, beginning:

7 "Proceedings of the board of directors and its
8 committees ..."

9 Can I ask you to read that to yourself. Do I take
10 it from this paragraph that, unless there is explicit
11 board approval, documents prepared for the consideration
12 or review or approval of the board will not be publicly
13 available?

14 A. Correct.

15 Q. So, that would include, for example, minutes of any
16 committees of the IFC?

17 A. I assume that to be the case, yes.

18 Q. And presumably also any reports that are provided for
19 the consideration of that board?

20 A. Yes.

21 Q. Likewise, looking at the next two paragraphs on that
22 page, if I ask you to read them to yourself?

23 (Pause)

24 So, looking at that penultimate paragraph beginning
25 "likewise", is it clear from that paragraph that the IFC

1 considers that its communications with other governments
2 and their agencies, presumably to include export credit
3 agencies, would be confidential and not disclosed to the
4 public?

5 A. Correct.

6 Q. Finally, that the IFC would consider that it is
7 necessary to safeguard the free and candid exchange of
8 ideas between IFC staff. So internal documents, for
9 example minutes of investment committee meetings, would
10 not be made available?

11 A. Yes.

12 Q. Turning forward, there is a further updated policy of
13 the IFC on disclosure of information dated
14 30 April 2006, it is a few pages on. Can I ask you,
15 please, to go into that document and look at section 3,
16 headed "Information made available by IFC". That is on
17 internal page 2. Under that section is the heading
18 "General Principles". Then, looking at paragraph 9, it
19 says:

20 "There is a presumption in favour of disclosure,
21 absent a compelling reason not to disclose ..."

22 And then:

23 "... in making its determination, IFC takes into
24 account the general considerations described below."

25 Looking at subparagraph (a) below, could I ask you

1 to read that to yourself, please.

2 (Pause)

3 Do I take it from that paragraph that IFC, as
4 a matter of policy, does not disclose information
5 provided to it by its clients or third parties?

6 A. Yes.

7 Q. Turning over the page, can I ask you, please, to read to
8 yourself (b) and (c). Looking at paragraph (b), do
9 I take it from that paragraph that IFC, as a matter of
10 policy, does not disclose documents or communications it
11 has had with other states or organisations or agencies,
12 such as other ECAs?

13 A. Yes.

14 Q. Further, it doesn't disclose any internal documents or
15 memoranda or other communications issued by or between
16 members of IFC's board of directors or, indeed, its
17 advisers and staff of board of directors, et cetera?

18 A. Yes.

19 Q. Thank you. Can I ask you, please, to look at
20 paragraph 13 of the same document, on page 4. We can
21 see there that IFC makes publicly available certain
22 social and environmental information. I don't have any
23 particular question to put to you on that, but no doubt
24 if others do, they will ask it, but I simply draw your
25 attention to that; would you accept that, at least on

1 its face, IFC makes available certain social and
2 environmental information?

3 A. Yes.

4 Q. Thank you. Turning forward in the same clip of
5 documents, we see a public information policy issued by
6 EBRD. It looks like this. And can I ask you, please,
7 to go into heading (e), which is on page 9 of the
8 internal document. It is headed, "Information
9 considered confidential", and it reads:

10 "Notwithstanding any other issue in the policy, the
11 bank will not disclose:

12 "1.1. Documents intended for internal purposes only
13 or classified under the Bank's internal classification
14 regime; or

15 "1.2. Board documents unless board approval for
16 release is given."

17 So, on that basis, if it had an equivalent of
18 underwriting committee minutes, or a report provided to
19 the committee for its consideration, these would not be
20 disclosed, under this policy?

21 A. That would be my understanding, yes.

22 Q. Looking on the same page at 1.4, we see that:

23 "Information which if disclosed in the Bank's view
24 would seriously undermine the policy dialogue with
25 a member country would also be excluded from disclosure,

1 and that would include any documents, memos or other
2 communications which are exchanged with member countries
3 or other organisations and agencies, et cetera."

4 A. Yes.

5 Q. Thank you. I have no further questions on that clip of
6 documents.

7 Can I ask you just two questions about the select
8 committee report into the BTC pipeline which you
9 commented on in your witness statement. Can I clarify,
10 did the ECGD provide the select committee with an
11 unredacted copy of the BPU report?

12 A. Yes.

13 Q. We have seen in the evidence what the select committee
14 recommendations were; what was the Government's response
15 to those recommendations, in relation to ECGD?

16 A. That the select committee talked about greater
17 transparency and the Government committed to issue notes
18 of decisions on cases after they had been underwritten
19 where interested parties had made comments to us about
20 the project or the piece of business under
21 consideration.

22 Q. Since that commitment given by the Government, are you
23 aware of any notes of decisions on cases that have been
24 published?

25 A. No.

1 Q. Are you aware of any reason why no notes of decisions
2 have been published?

3 A. Well, it would be because we haven't received from
4 interested parties comments on relevant cases where we
5 have given such a commitment.

6 Q. In relation to the select committee's recommendation
7 that ECGD should have released or disclosed the BPU
8 report itself, what was the Government's response on
9 that?

10 A. The Government did not accept that.

11 Q. One final topic, and that is legal privilege. Can I ask
12 you, please, to turn to open bundle 1, and turn to
13 page 81. Under the words "Restricted", there is a final
14 paragraph that sits above the heading "BPU Assessment".
15 It makes reference to:

16 "The lenders group's Turkish counsel has confirmed
17 there is no statement of law in the sponsor's response
18 that is incorrect or misleading."

19 To the extent that that statement is legally
20 privileged, which you obviously can't comment on, do you
21 know whether or not ECGD intended to disclose that
22 paragraph?

23 A. It looks to me like an inadvertent disclosure.

24 MS CALLAGHAN: Likewise, turning forward to page 105 of the
25 bundle --

1 MR TAYLOR: Sorry, which page was that?

2 MS CALLAGHAN: Page 105 of the open bundle. Page 34 of the
3 internal report. Under the heading "NGO Comments", in
4 that large paragraph, you see the sentence beginning:
5 "However, the lender group's Turkish counsel has
6 stated ..."

7 And there is then a sentence that follows. As far
8 as you are aware, did ECGD intend to disclose that
9 sentence?

10 A. Again, it looks inadvertent.

11 Q. Finally, page 116. Above the heading "NGO Comments", in
12 that paragraph in the final sentence we see a sentence
13 beginning:

14 "The legal counsel in the three host countries ..."

15 A. It looks inadvertent again.

16 MS CALLAGHAN: Thank you.

17 I think to the extent that any other point needs to
18 be made, it will arise in submissions.

19 Thank you, Mr Dodgson. I had no further
20 supplemental questions for you. If you could stay there
21 for any questions from Mr Michaels or Ms Proops.

22 Cross-examination by MS PROOPS

23 MS PROOPS: I think I am going first, actually, if that is
24 all right.

25 I am going to ask you a series of questions,

1 Mr Dodgson. I tried, in crafting my questions, to
2 ensure that I am not asking you questions which would
3 elicit closed evidence, but if you feel that in your
4 answer -- or my question effectively invites to you
5 trespass on that evidence, please let everybody know and
6 don't feel compelled to give that evidence in open
7 session.

8 I want to start by asking you some questions about
9 the backdrop against which civil servants were operating
10 int he period leading up to the preparation of the
11 BPU report, and also the meeting, on 5 December, of the
12 underwriting committee.

13 At the time that the BPU was conducting its
14 assessment, over the course of 2003, ECGD had in place
15 the business principles which we find in the open
16 bundle, bundle 2, at page 833. So, we see from
17 page 834, bottom of the page, dated December 2000 -- so,
18 by the time of the BPU assessment, these business
19 principles had already been in place for a number of
20 years.

21 It is right to say, isn't it, that throughout the
22 business principles there is a strong emphasis on
23 transparency, isn't there?

24 A. Yes.

25 Q. If we look at page 835 and we look at the penultimate

1 bullet point on that page we see reference to:

2 "We will be open and honest in all our dealings and
3 will expect the same from others."

4 We see at 836, top of the page:

5 "We will apply these business principles through
6 policies which have been grouped under the following
7 headings: transparency."

8 If we turn to 841, the transparency section, the
9 first bullet point identifies one of the objectives in
10 terms of transparency, and it confirms that:

11 "ECGD will consult to, listen to and respond to
12 relevant stakeholders on major issues."

13 Now, the implication of that objective is that
14 consultation with ECGD will be a two-way street; in
15 other words, it is not simply stakeholders setting out
16 their concerns about a particular project, it is also
17 ECGD responding to concerns that had been expressed?

18 A. That is what I take "respond" to mean.

19 Q. So, the objectives suggest that the approach should be
20 that it is not simply stakeholders dropping their
21 arguments, their evidence, into some sort of silent
22 void, there has to be a degree of responsiveness on the
23 part of ECGD to that evidence, to those arguments?

24 A. On the major issue, correct.

25 Q. And that is the important element of the transparency

1 function under the business principles.

2 A. It is under transparency.

3 Q. It also says in the second bullet:

4 "ECGD will be as open as possible whilst respecting
5 legitimate commercial and personal confidentiality."

6 Now, there is no suggestion anywhere in this
7 document, and in particular in these objectives that we
8 are looking at now, that ECGD will be as open as
9 possible but that in practice it may need to protect
10 civil servants against particular disclosures that may
11 invite public criticism?

12 A. No.

13 Q. The only limits we see in the objectives in this second
14 bullet on being as open as possible is respecting
15 legitimate commercial and personal confidentiality. We
16 also see, if we look on in the policy section, we see
17 again reference to engagement with stakeholders to
18 discuss ECGD's policies, products and practice. And in
19 the final bullet:

20 "Expand the information it publishes regarding its
21 financial performance, business activities and the
22 application of the business principles."

23 Now, as you have highlighted in your evidence, it is
24 the role of the BPU, in effect, to ensure that ECGD is
25 complying with its business principles with respect to

1 particular projects?

2 A. Yes, I said in my earlier evidence that its role is to
3 ensure that the environmental impacts of the projects we
4 support meet international standards.

5 Q. So, it is reasonable to infer, is it not, from this
6 policy objective that we see outlined here that, in
7 terms of achieving transparency, ECGD will look to
8 expand the information it publishes about the
9 application of its business principles by the BPU; would
10 you accept that is effectively implicit?

11 A. Yes.

12 Q. It is right to say, is it not, that what ECGD is doing
13 via these business principles is representing both to
14 the public and to civil servants that it is embracing
15 a culture of openness with respect to its activities;
16 would you accept that?

17 A. A degree of openness, that is true.

18 Q. A fairly strong degree of openness, would you accept?

19 A. A greater degree of openness.

20 Q. Would you accept that what the business principles
21 suggest is that there is, in fact, a strong imperative
22 to disclose information about its activities, including
23 the application of the business principles to particular
24 projects?

25 A. And we have done that.

1 Q. Yes. It is right to say, isn't it, that any civil
2 servant reading this document would be aware that,
3 insofar as they are engaged in the process of applying
4 the business principles to particular projects, there is
5 no guarantee that their activities will remain veiled in
6 secrecy?

7 A. No, to the extent, however, that any other applicable
8 law might apply, and the Freedom of Information Act
9 would be an obvious example.

10 Q. And, in fact, if -- any civil servant reading this
11 document would be particularly conscious of the fact
12 that ECGD has committed itself to culture of openness,
13 vis a vis the application of the business principles?

14 A. Yes.

15 Q. You accept in your evidence that ECGD's activities
16 entailed contingently committing substantial amounts of
17 taxpayers' money to projects there are inherently risky.
18 That is, in broad terms, what I understand the thrust of
19 your evidence to be here?

20 A. Well, ECGD is in the risk business; we underwrite risks
21 on all the projects and all the business we support.
22 And to that extent, in extremis, at least, there is
23 potential risk to the taxpayer.

24 Q. And is entirely natural, isn't it, in those
25 circumstances, given the core function of ECGD, that

1 ECGD should embrace a culture of openness with respect
2 to its activities?

3 A. To the extent that we contingently underwrite public
4 funds, we should, and indeed we do.

5 Q. So, it is entirely to be expected, isn't it, that ECGD
6 would seek to expose its activities to public scrutiny?

7 A. And we do.

8 Q. You are, of course, aware of the EU directive on public
9 access to environmental information. That directive, as
10 you probably know, was adopted in January 2000. Now,
11 that is obviously a number of years before the BPU
12 itself commenced an assessment of the BTC project, and
13 obviously it is a key implication of the directive that
14 it will fundamentally change the landscape in terms of
15 permitting public access to environmental information
16 held by public authorities?

17 A. That's right, subject, obviously, to the exemptions.

18 Q. In effect, under the directive, access to environmental
19 information becomes the rule rather than the exception?

20 A. Yes.

21 Q. Civil servants operating within ECGD at the time that
22 the BTC project was being assessed would presumably have
23 been aware of the directive?

24 A. Probably in general terms rather than specifics.

25 Q. So, they would have been aware not only of the culture

1 of openness that is embraced via the business
2 principles, but also the more particular emphasis on
3 disclosure of information, when that information is
4 environmental information, under the directive?

5 A. Yes.

6 Q. And that, in a sense, reinforces -- that directive
7 reinforces the imperative in favour of openness where
8 environmental information is concerned?

9 A. There is a presumption of openness.

10 Q. So, is it safe to say, in summary, the dominant culture
11 within ECGD at the time the report was generated was
12 a culture of openness rather than, let's say, a culture
13 of secret squirreling, as you might find, for example,
14 in the security services?

15 A. I don't think we are into secret squirreling. I think
16 there was an incremental change in ECGD as a result of
17 the adoption of the business principles to greater
18 openness over time.

19 Q. There is no correspondence or other documents before
20 this tribunal to suggest that civil servants who were
21 participating in BPU activities -- no correspondence to
22 suggest they were being given an assurance that
23 information generated in respect of their activity would
24 not be disclosed?

25 A. I would doubt that. I can't vouch for it, but I would

1 very much doubt that.

2 Q. So, what those civil servants are, in fact, going to be
3 conscious of is the transparency obligations created by
4 the business principles and the obligations in terms of
5 disclosure under directive.

6 I want to on to another subject, which is EGDC's
7 relationship with the taxpayer. Actually, I take the
8 view that we are really not going to be in dispute,
9 hopefully, on this issue.

10 We note from ECGD's skeleton and its grounds of
11 appeal that ECGD has taken issue with the Commissioner
12 he is finding that ECGD is involved, if you like, with
13 the commitment of large sums of public money. And, in
14 particular, the Commissioner commented in paragraph 41
15 about the commitment of large sums of public money being
16 an issue in respect of ECGD's involvement under the BTC
17 project.

18 In this case, it is not in dispute that ECGD issued
19 guarantees worth a total, including interest, of around
20 \$150 million.

21 In paragraph 53 of your witness statement, you refer
22 to decision makers conditionally committing taxpayers'
23 money to projects. So, you yourself don't seem to have
24 any difficulty using the word "commit" in this context.

25 If we look at bundle 1, page 67, and you look --

1 this is ECGD's response to Corner House, its refusal of
2 his request. If you look on page 68, under the heading
3 "Public Interest", it is stated:

4 "Turning to the public interest, it is recognised
5 there is a public interest in transparency of decision
6 making and accountability in the deployment of public
7 funds."

8 That is, in effect, a reference to the fact that
9 ECGD, by its decisions, commits taxpayers' money, albeit
10 on a contingent basis; yes?

11 A. (Witness nodded)

12 Q. Now, you refer in your evidence to a number of
13 contingencies in connection with the guarantees issued
14 by ECGD. You refer, for example, to requiring the
15 borrower to commit to repayment of the loan, to charging
16 a premium to banks and exporters and so on. And it is
17 right to say, isn't it, that these are essentially
18 safeguards to reduce the risk that the taxpayer will be
19 exposed to paying out on the guarantee, that there will
20 be, if you like, a cash consequence for the taxpayer.

21 In paragraph 12 of your evidence, however, you
22 confirm that the contingent liabilities do reflect the
23 risk that ECGD may be required to pay claims in the
24 event of a payment default. So, these guarantees have
25 financial value, don't they, and they do, therefore,

1 expose taxpayers to some risk, albeit that you would say
2 that, because of the contingencies, it is not
3 a substantial risk.

4 THE CHAIRMAN: It will help the transcript writer if you
5 actually say "yes".

6 A. Yes.

7 MS PROOPS: Thank you.

8 If we think for a moment about public perceptions of
9 ECGD's activities, because we are trying to draw the
10 distinction between commitment and the contingent
11 commitment of public funds, it is right to say, isn't
12 it, that the public is likely to perceive ECGD's
13 activities as, in substance, committing the taxpayer to
14 substantial liabilities in respect of substantial and
15 inherently risky projects?

16 A. Potential liabilities.

17 Q. That is going to be the public perception of what ECGD
18 is doing?

19 A. That is one part of their perception.

20 Q. Yes. Would you accept that any risks to which the
21 taxpayer may be exposed, in respect of these guarantees,
22 is likely to increase in the event that ECGD's
23 assessment of the project in question is not as careful
24 or as thorough or as rigorous as it should have been?

25 A. Yes.

1 Q. So, the extent of the risk to which taxpayers are
2 exposed correlates directly to the quality of the
3 assessment conducted by ECGD?

4 A. That is a factor.

5 Q. And again, I don't think this is in dispute, but in
6 bundle 1, page 235, paragraph 16.1, the second sentence
7 of that paragraph says:

8 "ECGD operates at the more risky end of the risk
9 spectrum by definition."

10 So, financially speaking, these are not, if you
11 like, gilt edged projects, they are inherently risky
12 projects that ECGD is involved with?

13 A. Well, ECGD operates broadly as an insurer of last
14 resort, so, by definition, it underwrites projects, as
15 it says here, at the risky spectrum. But we would still
16 have to satisfy ourselves, under our credit risk
17 policies, that the individual risks are acceptable
18 according to those policies.

19 Q. But the fact that you are operating at the risky end of
20 the spectrum means that it is even more important, isn't
21 it, that there is rigour and thoroughness in the
22 assessment process adopted by ECGD?

23 A. There should also be thoroughness and rigour in
24 assessing risk.

25 Q. Now, the effect of agreeing to grant \$106 million

1 guarantee in respect of the BTC project was that the
2 UK Government, in the name of the taxpayer, was helping
3 to contribute to the fundamental viability of the
4 BTC project?

5 A. No, the project would have had to have been viable
6 anyway.

7 Q. But, presumably, the fact there is a need for Government
8 guarantees that that is an important element of making
9 this project viable, looked at in the round?

10 A. The purpose of the guarantees was to enable the project
11 to finance the purchase of UK goods and services. That
12 is why we exist.

13 Q. Exactly. So, it is to facilitate, if you like, the
14 project -- certain aspects of the project, not the
15 project in its entirety?

16 A. Well, it is to contribute to the financing of the
17 project.

18 Q. And that helps makes the project viable?

19 A. No, the project would have to be viable because unless
20 the project was viable we wouldn't supply the financing.

21 Q. Okay. But, in any event, the effect of granting the
22 guarantee, the taxpayer is, through the Government,
23 financing this particular project?

24 A. Yes, it is part of the debt financing.

25 Q. And it is not in dispute that this project, the BTC

1 project, was a particularly controversial project?

2 A. There was controversy about the project.

3 Q. I used the word "particularly controversial" because
4 that is the language used in one of ECGD's letters;
5 would you accept that?

6 A. Yes.

7 Q. We know it is not in dispute that a number of NGOs were
8 strongly opposed to the project?

9 A. That's correct.

10 Q. It was also a project with very substantial
11 environmental, social and human rights implications;
12 would you accept that?

13 A. Well, there were environmental and social issues that
14 had to be considered.

15 Q. The question I put to you is that there were very
16 substantial environmental, social and human rights
17 implications. We are, after all, talking about
18 a 1700 kilometre pipeline transversing three countries,
19 rather than building a septic tank outside a hotel, for
20 example?

21 A. In that comparison, you are correct.

22 Q. And the fact there are such substantial environmental,
23 social and human rights implications again emphasised
24 how critically important it is that ECGD gets its
25 assessment of those implications right?

1 A. Correct.

2 Q. And the reason it is so critically important is because,
3 if ECGD gets it wrong, it doesn't properly assess the
4 environmental risks, for example, whether environmental
5 standards have been met, the effect is that the
6 Government, in the name of the taxpayer, is providing
7 financial backing for a project which may have all sorts
8 of devastating effects?

9 A. That's correct.

10 Q. So, if ECGD gets the assessment wrong, the net effect is
11 that, as a nation, we would be using our assets to
12 support an inherently damaging project?

13 A. Well, I think in this particular example, of course, it
14 would have to be other lenders to the project, of which
15 there were many, that would also --

16 Q. Yes, it is not on our own, but we are contributing to
17 that problem.

18 Now, against that background, would you accept that
19 the public would have a strong interest in accessing
20 information which reveals precisely how ECGD has
21 assessed the financial, the environmental, social and
22 human rights implications of the BTC project?

23 A. Well, it would be in the interests of the public that we
24 had properly assessed the financial risks and the
25 environmental and social impacts.

1 Q. The way in which the public can reassure itself, that is
2 in fact what you have done, is most obviously through
3 accessing information which reveals how you have
4 assessed the particular project?

5 A. Well, they could equally do it through Parliamentary
6 accountability.

7 Q. You understand that the point of the access regimes
8 afforded under both the Freedom of Information Act and
9 EIR is to afford members of the public direct access to
10 information held by public authorities.

11 A. That's correct.

12 Q. And you understand, and I hope this is not in dispute,
13 and I appreciate this is, in a sense, a legal question,
14 but it does set the context for how we deal with the
15 information we are concerned with, underpinning FOIA and
16 the EIR is a recognition that members of the public are
17 entitled to participate in decision making processes
18 that affect them, including, not least, decision making
19 processes relating to the environment; would you accept
20 that?

21 A. That turns on what you mean by "participation in the
22 decision making process". We publish how we take
23 decisions in regards to compliance with international,
24 environmental and social standards. What we don't do is
25 throw open our doors to the public to participate in the

1 decision taking on the cases.

2 Q. So, the point is, I was going to move on to later, that
3 members of the public have to, effectively, take your
4 word for it that you are applying the policies and
5 procedures that you have adopted in a rigorous and
6 consistent manner?

7 A. I wouldn't have put it in those terms. I mean, we are
8 accountable to ministers, and ministers are accountable
9 to Parliament. As it happens, in this particular case
10 Parliament looked at what we did and made a judgment;
11 and that is where the accountability is.

12 Q. But there has always been accountability to Parliament
13 in respect of our public organisations?

14 A. That's correct.

15 Q. The point of FOIA and the EIR was to open up public
16 access to information held by public authorities so the
17 public could be the judge of decisions taken by public
18 authorities, as we saw, not least, in the MPs' expenses
19 cases most recently?

20 A. Well, it is not my place to comment on that. There
21 would be a practical difficulty if, and I am sure this
22 would never happen, let's hope not, every member of the
23 public were to seek information, it would be impossible
24 to supply it. That is precisely why Parliament, as
25 representatives of the people, are to whom we account.

1 Q. I apologise, but it just seems that you are not, in your
2 evidence, allowing -- and maybe I am trespassing into
3 matters that ought to be dealt with in legal
4 submissions -- but you are not allowing for the culture
5 change that was initiated by the enactment of FOIA and
6 EIR, which are both specifically designed to allow
7 members of the public to access information held by
8 public authorities?

9 A. I would disagree with that, to the extent that,
10 certainly since the adoption of our business principles,
11 incrementally there has been a substantial increase in
12 openness in the disclosure of information and, indeed,
13 in this particular case. So, I think it has been
14 entirely consistent with the greater openness espoused
15 in our business principles.

16 Q. I am going to look at the extent to which you have,
17 in fact, disclosed information relating to this process
18 in a moment, but just before I leave the issue of the
19 interests, the public interests that are served by
20 disclosure of information relating to your assessments,
21 if you think about the issue of achieving transparency
22 in respect of the operations of ECGD, do you accept that
23 disclosing information which reveals how we see ECGD has
24 assessed a particular project would help members of the
25 public to understand precisely how ECGD is working in

1 practice, in the context of real projects with which it
2 is engaged?

3 A. And that is why the Government, in its response to the
4 recent environmental audit committee report, has given
5 further commitments to publish more information on the
6 standards applicable to projects we support, and how
7 they will assist.

8 Q. I understand that you are accepting there is that public
9 interest in transparency in that respect?

10 A. Yes.

11 Q. What achieving greater transparency does is it enhances
12 the ability of members of the public to participate in
13 debates about whether ECGD should be engaging in certain
14 financing activities in a much more informed and
15 educated manner?

16 A. Well, I think the difficulty I have is, again, what
17 might be meant by participating in debates about whether
18 we should support a particular project. I mean, our act
19 of Parliament, the ECGD Act, gives that power to ECGD on
20 behalf the Secretary of State, and internally we have
21 a risk committee or, as it was then known, an
22 underwriting committee, that does that.

23 Q. Yes, but are you not ignoring the public's role in that
24 process?

25 A. Well, the public role is for them to understand the

1 projects that we are considering, and we do publish
2 information, particularly behind projects that we are
3 considering, and they are given an opportunity to make
4 comments. And there are requirements, particularly
5 under international agreements, to disclose to the
6 public environmental information related to those
7 projects against which we will be taking decisions.

8 Q. And the simple point is that if you disclose information
9 about how you have assessed, for example, in this case,
10 the BTC project, that is likely to inform the public and
11 ensure that when the public is engaging with ECGD in the
12 future they are doing so in a more enlightened, educated
13 manner?

14 A. Well, they may do.

15 Q. Let's think about the public interest and
16 accountability. Would you accept that it is in the
17 public interest that members of the public are able to
18 access for themselves information which reveals whether
19 and to what extent ECGD is getting it right in practice,
20 in terms of providing financing to individual projects?

21 A. Well, I think our annual report and accounts can tell
22 them that.

23 Q. So, your position is that, quite apart from your
24 obligations under the EIR and FOIA, it is sufficient
25 that, in effect, matters can be dealt with in

1 Parliament, and you publish certain information in your
2 annual report; that should satisfy the public, in your
3 view?

4 A. Well, as I have said, over the years there has been an
5 incremental increase in information. We have also, as
6 you said, been accountable to Parliament. There will
7 always be certain circumstances where information cannot
8 be disclosed, and that is precisely why Parliament
9 included exemptions in the various regulations and acts.

10 Q. I want to put to you two scenarios, to see if we can
11 bottom out this public interest issue a little further.

12 If a request is made for disclosure about how, let's
13 say, the BPU has assessed the environmental, social and
14 human rights implications of a particular project, and
15 what that information reveals is that, in fact, the BPU
16 did a fantastic job, it consistently and rigorously
17 applied its principles, it is right to say that
18 disclosure of that information is going to serve an
19 important public interest in terms of building public
20 confidence in ECGD, that it is doing its job properly;
21 would you accept that?

22 A. That was precisely the point made by the trade and
23 industry committee.

24 Q. Similarly, the other side of the coin, if the
25 information reveals that ECGD is not robustly and

1 consistently applying its policies and procedures,
2 disclosure will enhance the ability of the public to
3 hold ECGD accountable for those failures?

4 A. Well, I would hope that ECGD didn't always -- always was
5 rigorous in its assessment of projects, and in the
6 compliance to international standards.

7 Q. You would hope, naturally, I am sure we all would, but
8 the point is that, if things go wrong, disclosure of
9 information about how things have gone wrong helps to
10 ensure that ECGD is properly held accountable?

11 A. Maybe that is appropriate at the time, if and when they
12 go wrong.

13 Q. We understand, not least from the annual report we have
14 in bundle 2 at page 916, if we look at the right-hand
15 column on 916 it says:

16 "ECGD's contribution to the total financing was
17 relatively small. This was an important project in
18 a number of ways. It was the most complex environmental
19 and social assessment the department has carried out to
20 date."

21 Now, as a matter of logic, is it right to suppose
22 that the very complexity of the project increased the
23 risk that something might go wrong with the assessment,
24 as compared with a much more straightforward project?

25 A. Not necessarily.

1 Q. If we look on in page 917, the second paragraph:

2 "The project is partially complete and now subject
3 to regular independent monitoring. The lessons learnt
4 from BTC are already being applied to other projects."

5 Is it right to say, therefore, that the way the ECGD
6 approached the BTC project has gone on to inform how
7 ECGD has approached other projects?

8 A. That is what that paragraph says.

9 Q. Would you accept, therefore, that there is an even
10 stronger public interest in accessing information about
11 how ECGD approached the BTC project, because, in effect,
12 that approach has been filtered into other assessment
13 processes?

14 A. I think the public would be interested to know how,
15 generally, ECGD approaches its environmental impact
16 assessment compliance, and, as I have said previously,
17 over time we have incrementally increased that
18 information.

19 Q. Can you just assist on this. You say you think the
20 public is interested generally, in generally how ECGD is
21 operating, and you have published your procedures to
22 assist with that.

23 A. Mmm hmm.

24 Q. It is right to say, isn't it, that members of the public
25 may be much more specifically interested in how you have

1 assessed particular projects, particularly informed
2 members of the public, like Corner House, Friends of the
3 Earth and so on?

4 A. That's correct.

5 Q. They may not be satisfied with just general information
6 about your procedures?

7 A. I don't think they are.

8 Q. Let's move on to look at information in the public
9 domain. Now, we know, from the review letter we have in
10 bundle 1, which you will find at page 194, we know from
11 paragraph 7 of that letter that ECGD decided to disclose
12 to the public, or in this case the applicant, the
13 conclusions that were reached by the BPU in respect of
14 this assessment process; yes?

15 Now, apart from the disclosure of that concluding
16 paragraph, ECGD has never published any information as
17 to how, for example, the BPU assessed the various
18 aspects of the BTC project, has it?

19 A. That's correct.

20 Q. So, the public has no way of knowing how the BPU
21 assessed the various arguments, counter arguments and
22 the evidence that was put before it?

23 A. Well, in this particular case, they do, since their
24 representatives from Parliament have looked at it.

25 Q. No, members of the public themselves don't know how the

1 arguments, counter arguments and evidence were assessed?

2 A. Individually, they would not, no.

3 Q. ECGD has also never published information about how the
4 underwriting committee itself assessed -- whether to
5 recommend granting financial support in connection with
6 this project?

7 A. That's correct.

8 Q. As a matter of historical fact, ECGD's lack of openness
9 on these matters was expressly lamented by the select
10 committee in its report?

11 A. That's correct.

12 Q. If we look at page 359 of the bundle, and I obviously
13 want to tread very carefully with respect to this
14 report, but if we look at page 359, and we look at the
15 bottom of that page, the last sentence on page 359:

16 "We were more disturbed at the department's
17 reluctance to put its own BPU report into the public
18 domain, particularly as this would have provided an
19 essential insight into ECGD's decision making process,
20 and enhanced our ability to explain our scrutiny of its
21 actions."

22 So, it is clear from the committee's report that it
23 considers that the information which has been withheld
24 in this case would have provided the public with an
25 essential insight into ECGD's decision making process?

1 A. That's correct, yes.

2 Q. And, as a matter of fact, ECGD's refusal to disclose
3 that information has meant the public has no essential
4 insight into our ECGD assess the project?

5 MS CALLAGHAN: Well, insofar as that question is based on
6 the presumption that Parliament got it right in its
7 report, that is not a question that can be put
8 appropriately.

9 MS PROOPS: Well, I'm not actually resting it on the report,
10 I'm asking a factual question as to whether this witness
11 accepts that, as a result of ECGD's refusal to disclose
12 information about the assessment process, the result has
13 been that the public has had no essential insight into
14 how ECGD assessed the projects. I am not inviting you
15 to comment on the report.

16 A. Thank you for that clarification. No, I mean,
17 individual members of the public have not seen the
18 assessment and, therefore, in that sense, they would not
19 know.

20 Q. And they have had, therefore, no opportunity to
21 scrutinise the quality or adequacy of the assessment
22 undertaken by ECGD, the public?

23 A. The assessment. They have obviously seen or could see
24 all the other unredacted parts of the BP --

25 Q. We are not concerned with the unredacted parts, we are

1 concerned with the assessment.

2 A. I understand that.

3 Q. It is accepted that ECGD publishes information about the
4 mechanic counsel process it follows when reaching
5 a decision on a particular project. That is not in
6 dispute. But that information tells the public nothing
7 about the substance of public decision making processes
8 relating to particular projects such as the BTC project.
9 It doesn't tell you why ECGD liked some arguments,
10 disliked others, accepted some evidence, rejected other?

11 A. No, that is in the assessment sections.

12 Q. The decision note, which we have at bundle 1 at
13 page 345, is a short document. Once again, it is
14 a document that gives no real insight as to how the BPU
15 was assessing the materials and arguments that had been
16 put before it?

17 A. Correct.

18 Q. So, where we end up, is that, as at the date of the
19 request, which is August 2005, highly informed educated
20 organisations like Corner House were completely in the
21 dark as to how, in substance, ECGD had assessed this
22 particular project?

23 A. Yes, they would have had no knowledge of the assessment.

24 Q. And they continue to be in the dark today because we
25 have still had no access to that information?

1 A. Exactly.

2 Q. Would you accept the proposition that failure to publish
3 information about how you have assessed consultation
4 responses, for example to the BTC project, is likely to
5 alienate those organisations who have worked hard to put
6 detailed consultation responses before you?

7 A. Well, can I just clarify, you use the word
8 "consultation", and in case there is any
9 misunderstanding --

10 Q. I may not be using it correctly in this context?

11 A. It is not public consultation in the sense of public
12 guidelines. But, you will recall that in our case
13 impact assessment process, we invite comments and we
14 take account of those comments.

15 Q. But the difficulty for people who work very hard to put
16 their comments together to give you an overview of,
17 what, let's say, Corner House's concerns about
18 a particular project are, the difficulty for those
19 organisations is that they put their comments before
20 you, you go off behind closed doors and assess those
21 comments, and at no point does Corner House have any
22 idea of what you made of those comment?

23 A. No well, no, they haven't seen the assessment, correct.

24 Q. Can you see how that one way street approach to
25 discussions, if you like, could be alienating of major

1 stakeholders like Friends of the Earth and so on?

2 A. I understand that is their position, yes.

3 Q. Do you accept that, putting to one side particular
4 examples, that that that is a real risk of not providing
5 a response?

6 A. The response is whether or not the project met
7 international standards. I think what you are getting
8 at is the individual component of the standards and what
9 our assessment was, taking account of all of the
10 arguments one way or the other.

11 Q. You accept that it could be alienating of organisations
12 that are --

13 A. They may feel deprived, yes.

14 Q. Do you accept that you are likely to have a more
15 constructive dialogue with stakeholders if there is,
16 in fact, a dialogue, rather than a monologue that is
17 coming from one direction.

18 A. I don't think it is a monologue, to the extent that,
19 from time to time, we will meet with those
20 organisations. I would accept that we are in listening
21 mode rather than debating mode, because that is not the
22 purpose of those meetings, so it is not entirely
23 monologue.

24 Q. Help me with this: when the business principles talk
25 about responding, in the context of consultations, in

1 what sense is ECGD responding to the comments that it
2 receive, if we are thinking about transparency issues?

3 A. I think this will turn on what is meant by, in that
4 particular quote, "major issues". We have taken that to
5 mean as is set out in the policy objectives, around
6 products, policies and practices. And, indeed, over the
7 years since the publication of the business principles,
8 the Government have undertaken a number of public
9 consultations, and the Government has responded to
10 comments made to it by interested parties.

11 But there was no commitment to respond in the sense
12 of cases that CIAP talks about receiving comments and
13 them being taken into account.

14 Q. Would you accept it is likely to build confidence
15 amongst major stakeholders, for example Friends of the
16 Earth, Corner House and others, if you publicly
17 demonstrate, through disclosure of your assessment, that
18 you have carefully and rigorously engaged with the
19 evidence and arguments that have been put before you?

20 A. Well, it would certainly satisfy those organisations
21 that have made submissions to us to have received the
22 assessment.

23 Q. And in that sense, it would build confidence in ECGD?

24 A. It may do.

25 Q. You answered some questions in response to questions in

1 chief from your counsel about changes in the way in
2 which ECGD operated following select committee comments
3 about a lack of openness and transparency. You
4 confirmed that there haven't been any decision notes
5 that have been issued, but this is because there hasn't
6 been a project that has attracted the need to issue
7 a decision. That is what I understood the thrust of
8 your evidence to be.

9 I don't want to get into the select committee report
10 but am I right to understand that, as a matter of
11 policy, you now recognise that you need to go beyond
12 merely publishing information about your procedures,
13 that you actually need to give the public some substance
14 and meat on the bones in terms of how you are assessing
15 the projects?

16 A. Yes, the Government responded to the trade and industry
17 select committee, but looked at the BTC in particular,
18 and gave a commitment to publish more information and,
19 more recently, has done so in the context of the
20 environmental audit committee report on ECGD and
21 sustainable development.

22 Q. Despite that policy shift, there still has been no
23 disclosure of the information that reveals how ECGD
24 assessed this particular project in terms of the
25 substance of the assessment?

1 A. That's correct.

2 Q. I want to move on to a different topic now, which is the
3 public interests that you claim that favour maintaining
4 the various exemptions. I want to begin by looking at
5 arguments relating to what information lawyers tend to
6 call "the safe space arguments", and, you will
7 understand, by that I am including, for example,
8 concerns that civil servants may have that, if their
9 advice is disclosed, they may be subject to unjust
10 public criticism.

11 At the time of the request that we are concerned
12 with in this case, the decision to grant the guarantee
13 was getting on for two years old, was about 18,
14 19 months, I think, after the decision had been taken?

15 A. That's correct.

16 Q. The pipeline at that stage was well on its way to
17 completion, and, in that sense, the decision to grant
18 support was, in effect, water under the bridge?

19 A. Yes.

20 Q. Would you accept that, at the time of the request, any
21 criticism resulting from disclosure of information about
22 ECGD's involvement in the project would be likely to
23 focus on the minister responsible for the decision,
24 rather than on civil servants per se?

25 A. Well, I can't say for certain, because -- well, it may

1 have done.

2 Q. We know from the review document that we have looked at
3 that ECGD had no concerns about publishing the
4 conclusions of the BPU team in respect of the
5 BTC project. We have seen that at page 195. So, what
6 we infer, presumably, is that ECGD had no concerns about
7 making the public aware that the BPU had found that the
8 project complied in all material respects with relevant
9 guidelines and standards?

10 A. Well, it would have to logically follow since that is
11 our stated policy.

12 Q. So, the implications of having released this information
13 is that it is no longer a secret that the BPU itself
14 rejected arguments put forward by various entities that
15 the project was in breach of relevant guidelines and
16 standards; that is now in the public domain.

17 Now, there is no suggestion in your evidence that,
18 notwithstanding that the conclusions of the BPU have
19 been released to the public, there has been any fall out
20 for members of the BPU resulting from that disclosure?

21 A. Well, I am not aware of any.

22 Q. Isn't it right to say that, if there is a risk that
23 members of the BPU are going to be criticised because of
24 conclusions that they have reached on this particular
25 project, that risk is already live, because of the

1 disclosure of your conclusions?

2 A. I am not quite sure I understand what you are saying
3 there.

4 Q. The thrust, as we understand it, of ECGD's case is that
5 it needs to protect civil servants within the BPU from
6 unjust criticism, by avoiding disclosure of information
7 which shows how they assessed the project, and yet we
8 know that ECGD has agreed to disclosure of information
9 about how the BPU assessed the project, because there
10 has been disclosure of the conclusions of the report?

11 A. That's right.

12 Q. So, if there are risks that member of the BPU are going
13 to be exposed to criticism for the conclusions that they
14 have reached, those risks are already live as a result
15 of information that ECGD has been content to put into
16 the public domain?

17 A. No, I think the risk would be around the detail of the
18 assessments against each of the aspects of the project.

19 Q. Can we just explore that a little further. What we have
20 currently is a situation where the BPU's conclusions
21 have been published but not its reasoning. Would you
22 accept that the disclosure of the conclusions without
23 the reasoning mean that civil servants working within
24 BPU cannot demonstrate to the public why the assessment
25 process they conducted justified the conclusions that

1 they reached?

2 A. Well, that almost presupposes their role is to
3 demonstrate to the public. Their role is to ensure
4 compliance with, but I take your point that, in the
5 absence of that, the public would not be able to see
6 what they had done to satisfy themselves on the
7 individual aspects.

8 Q. What I am trying to grapple with at this point in my
9 questions is why ECGD was content to disclose your
10 conclusions but not the reasoning, and the implications
11 of that for individual civil servants working within the
12 BPU?

13 A. By definition, the project could not have done ahead
14 unless it had met, in all material respects,
15 international standards, because that is our publicly
16 stated policy.

17 Q. You say in paragraph 52 that if civil servants' advice
18 was published this would erode ministerial
19 responsibility?

20 A. Yes, can you --

21 Q. Paragraph 52?

22 A. The page number, please.

23 Q. I am so sorry. It is page 403.

24 A. Sorry, 403?

25 Q. 403.

1 A. Thank you.

2 Q. You refer here to if civil servants' advice is published
3 this can erode ministerial responsibility, but, of
4 course, ECGD has opted to disclose BPU's advice, in
5 terms of the conclusions, which is that it met all the
6 relevant standards. So, in that sense, if there is
7 going to be an erosion of ministerial responsibility, it
8 has already happened as a result of the disclosure of
9 the conclusions.

10 A. Well, as I said, the project could not have gone ahead
11 unless it had met international standards, so, in one
12 sense, it didn't need to be stated.

13 Q. Paragraph 55 of your evidence you say that it is
14 important that officials in the BPU are shielded from
15 the pressure from interested parties.

16 Now, I understand you in this paragraph of your
17 evidence to be talking about the time leading up to the
18 completion of the relevant report; is that correct?

19 A. Yes.

20 Q. Mr Allwood's evidence is that third parties, including
21 NGOs, already knew who was working on which part of the
22 assessment process; you are nodding?

23 A. Yes.

24 Q. You confirm that, yes. And he has given evidence that
25 civil servants from been the BPU in fact engaged

1 directly with third parties, including NGOs?

2 A. Yes.

3 Q. It follows, to the extent that civil servants within the
4 BPU -- there is a risk that they will be exposed to
5 pressure, well, they are exposed to that pressure
6 anyway, because the individual NGOs know who is
7 responsible for which part of the assessment; do you
8 accept that?

9 A. Yes.

10 Q. In addition, you are talking about pressure being
11 exerted in the period prior to the completion of the
12 report; we are talking in this case about a request for
13 disclosure of a report after the report has been
14 concluded and, indeed, after the administrative decision
15 in question has been taken, so, there is no real risk of
16 the sort of undesirable pressure being brought to bear
17 in this case, is there?

18 A. Well, except there could be pressure to the extent that
19 there would be a criticism afterwards of those -- and
20 those individuals may well be known.

21 Q. I think that is a different consideration, isn't it,
22 than the one you are identifying?

23 A. Here I am talking about as they assess.

24 Q. So, that is not strictly relevant to this case, is it?

25 A. Well, that is my paragraph 55 wording.

1 Q. But it is not relevant to this case because this is
2 a case that concerns a request for disclosure of
3 information after the report is completed?

4 A. Yes.

5 Q. You also say in paragraph 55 that disclosure will impact
6 on relations between BPU members and members of third
7 parties. Can you just explore that. If the assessment
8 that has been conducted by the BPU is sound and well
9 reasoned, there is no reason why disclosure of that
10 information should compromise the BPU's relationship
11 with third parties, is there?

12 A. That depends who those third parties are.

13 Q. Well, can you elaborate?

14 A. Well, we have third party relationships with other
15 potential lenders or export credit agencies in that
16 project with whom we exchanged information and views and
17 had discussion and debate.

18 Q. I am sorry, I am not talking specifically about the
19 partners' information here, I am talking about arguments
20 as to preserving a safe space. And putting to one side
21 the issue of the partners' information, the point that
22 I put to you is: if the assessment carried out by the
23 BPU is sound and well reasoned, there is no reason why
24 disclosure of that information would jeopardise your
25 relationship with third parties, for example NGOs, or

1 compromise it?

2 A. No.

3 Q. In fact, disclosure of the information is likely to
4 enhance the relationship, because those NGOs would have
5 a clearer insight into what you were actually doing?

6 A. It might do.

7 Q. And if your assessment is sound and well reasoned, it is
8 unlikely that it is an assessment which is going to
9 invite unjust criticism?

10 A. That is a matter of speculation.

11 Q. This particular assessment was effectively being
12 conducted in the public eye, wasn't it, in the sense
13 that members of the BPU were engaging with NGOs and so
14 on?

15 A. Yes.

16 Q. So, in that sense, civil servants within the BPU were
17 already operating within the public domain?

18 A. Well, they had, consistent with the CIAP, invited
19 comments from NGOs, if that is who you are talking about
20 in particular.

21 Q. So, these are not junior civil servants who are
22 operating under the radar behind closed doors
23 effectively?

24 A. It depends what you mean by "junior", effectively, but
25 there are junior members of the BPU and there is

1 a senior officer.

2 Q. But if we look at the point about operating under the
3 radar, they are not, because they are operating,
4 effectively, engaging with the public openly?

5 A. They would have been known by name.

6 Q. I am not going to deal with your evidence where you
7 allude to concerns about advice being less clear and
8 candid if the report is disclosed, because I understand
9 that is not an issue that is before the Tribunal.

10 Can I just ask you about the BPU itself. This is an
11 important unit within ECGD, isn't it?

12 A. That's correct.

13 Q. And it is carrying out high profile important work;
14 would you accept that?

15 A. Correct.

16 Q. It is conducting, in effect, important and, in civil
17 service terms, fairly prestigious work; would you accept
18 that?

19 A. Yes, I suppose so.

20 Q. Would you accept that, in the circumstances, it is
21 likely to be a unit which will tend to attract career
22 civil servants?

23 A. We have employed career civil servants, although we have
24 also employed specialists, particularly with
25 environmental qualifications directly.

1 Q. And the individuals who may be attracted to working for
2 this high profile, prestigious unit will always be aware
3 that there is no guarantee that the information they
4 generate, for example in the context of particular
5 reports, will be immune from disclosure to the public?

6 A. That applies to all civil servants.

7 MS PROOPS: I think it is safer for me ask the remainder of
8 my questions in closed session. Arguably they could
9 straddle open and closed, so I think it is probably
10 safer to put them in closed.

11 That is all we have.

12 THE CHAIRMAN: How long are you going to be?

13 MR MICHAELS: Sir, I was going to ask, we are due to have
14 a comfort break.

15 THE CHAIRMAN: Yes. That is why I was asking the question.
16 If you were going to be 12 minutes, we'll push on; if
17 you are going to be 35 minutes, then we will take the
18 break now.

19 MR MICHAELS: Sir, a lot of the areas that I was going to
20 cover have already been covered by Ms Proops, so what
21 I would appreciate is the comfort break now, which would
22 allow me to go through and refine my questions, and,
23 I think, save the Tribunal some time.

24 THE CHAIRMAN: Okay, let's say back at 3.35.

25 MS CALLAGHAN: Sir, if the usual statement could be made to

1 the witness.

2 THE CHAIRMAN: You remain under oath. You can move around,
3 but you can't discuss the case with any members of your
4 legal team. You are in purdah for the course of your
5 evidence.

6 (3.25 pm)

7 (A short break)

8 (3.40 pm)

9 Further examination-in-chief by MS CALLAGHAN

10 MS CALLAGHAN: Sir, over the break I realised that some
11 instructions that were handed to me in writing I didn't
12 deal with when I was asking supplemental questions of
13 Mr Dodgson, and I may have left a mistaken impression on
14 the question of local privilege as a result of not
15 putting a particular question to Mr Dodgson. I have
16 spoken to Ms Proops and Mr Michaels, and they have
17 kindly given me permission to put that point now.

18 THE CHAIRMAN: Okay, let's get it done now.

19 MS CALLAGHAN: Thank you.

20 Can I ask you to open bundle 1 at page 273. This is
21 the letter from ECGD to the Information Commissioner in
22 relation to this complaint by Mr Hildyard. If I can ask
23 you to turn forward, please, to page 284. It is the
24 last page of that letter, and in paragraph 74 they turn
25 to deal with certain paragraphs in the BPU report, and

1 what is stated there on the fourth line is that the
2 information in the fourth paragraph of section 4 of the
3 BPU report -- and I will bring to you that -- relates to
4 a list of environmental legislation which was produced
5 by legal counsel of the three host countries. And if
6 I can ask you to keep your finger or a hand or a pen on
7 that page and go back, please, to page 116 in the
8 bundle, this is section 4 that is referred to, and in
9 the fourth paragraph we see that list of environmental
10 legislation referred to.

11 It says:

12 "The lender group environmental specialists have
13 asked legal counsel in each of the three host countries
14 to produce a list of the environmental legislation in
15 place prior to the advent of the IGA and HGAs that could
16 potentially be breached by the BTC project."

17 It then goes on to state:

18 "This list has then been forwarded to BTC Co for
19 comment."

20 Do you see that?

21 A. Yes.

22 Q. To the extent that that advice and list was disclosed to
23 BTC Co it would therefore be in the public domain?

24 A. Yes.

25 Q. Because BTC Co would not be one of the clients for the

1 purposes of legal advice given by the lender group,
2 would it?

3 A. No.

4 Q. And so, on that basis, the letter from ECGD at page 284
5 explains that that advice is no longer privileged, and
6 it goes on to say:

7 "This differs from the legal advice referred in
8 section 3.72. of the BPU report which, as far as I am
9 aware, has not been disclosed and still retains its
10 privileged status."

11 Do you see that?

12 A. Yes.

13 Q. So, to the extent that I asked you whether or not that
14 paragraph was disclosed to Mr Hildyard inadvertently,
15 are you able to comment on whether it was, in fact,
16 inadvertent disclosure?

17 A. Not in it has already been disclosed to BTC.

18 MS CALLAGHAN: Thank you.

19 Thank you, sir.

20 MR MICHAELS: Sir, if I might make a preliminary
21 observation, in terms of process.

22 If I can ask you, sir, briefly, before
23 I cross-examine, may I make a brief submission in
24 relation to process, because it will explain why --

25 THE CHAIRMAN: Well, start it, and I will stop you if

1 I don't think it appropriate. I can't really comment
2 until you make it, so you will make it, and then you
3 will get your comment then.

4 MR MICHAELS: In the ECGD's grounds of appeal, they did
5 raise the point at paragraph 34 on page 16, bundle 1,
6 this is the final sentence:

7 "Financial losses to ECGD are much less likely to be
8 caused by environmental or social factors than by other
9 factors relating to the creditworthiness of borrowers or
10 purchasers."

11 That was in ECGD's grounds of appeal. However, no
12 evidence in support of that, to the best of my
13 recollection, was adduced in the written witness
14 statements provided pursuant to the Tribunal's
15 directions.

16 However, we have heard only this morning, in further
17 questioning, examination-in-chief, a considerable amount
18 of evidence that goes towards this point. We don't
19 object to that evidence being adduced, but we do say it
20 puts us at a disadvantage now, in terms of
21 cross-examining Mr Dodgson, on some of the evidence that
22 he gave them, because we do not have with us documents
23 that we would have liked to adduce in order to put them
24 before Mr Dodgson and ask him questions about them.

25 Now, it seems to me --

1 THE CHAIRMAN: I am in the right place? Grounds of appeal?

2 MR MICHAELS: Grounds of appeal, page 16.

3 THE CHAIRMAN: In the internal ...

4 MR MICHAELS: No, page 16 of the bundle pagination.

5 THE CHAIRMAN: Right, sorry.

6 MR MICHAELS: I apologise. Page 11 internal.

7 THE CHAIRMAN: Right, start again.

8 MR MICHAELS: Paragraph 34, the final sentence.

9 THE CHAIRMAN: Yes.

10 MR MICHAELS: We do not object, as I say, to that evidence

11 being given, but, although the legal submission is not

12 new, the evidence given in that respect is entirely new.

13 And it is not -- it is not --

14 THE CHAIRMAN: Is the evidence significantly different from

15 that, that it was a factor?

16 MR MICHAELS: Financial losses to ECGD --

17 THE CHAIRMAN: There is a linkage between the environmental

18 and social factors and the financial risk.

19 MR MICHAELS: Yes.

20 THE CHAIRMAN: Is the point.

21 MR MICHAELS: The point there is that, in effect,

22 environmental issues are not relevant to assessment of

23 financial risk.

24 THE CHAIRMAN: Are much less likely to be caused by

25 environmental or social factors.

1 MR MICHAELS: Yes.

2 THE CHAIRMAN: I am not sure that I heard anything
3 remarkably different from that coming from the witness
4 today, which was that it was a factor, but not
5 a determinative one, wasn't it?

6 MR MICHAELS: That was part of the evidence. I will need to
7 consult the transcript to go through the full details of
8 what was said --

9 THE CHAIRMAN: Can I suggest that you do that. This witness
10 is coming back later, is he not, to give evidence in
11 closed?

12 MR MICHAELS: Yes, all I was going to say --

13 THE CHAIRMAN: Can we cut through this. If you have
14 a problem, we may have another short opening session
15 with this witness.

16 MR MICHAELS: Sir, that is all I wanted to --

17 THE CHAIRMAN: Have a look at the transcript, tell us before
18 Wednesday morning whether you want a short opening
19 session with this witness on Wednesday.

20 MR MICHAELS: It may mean one or two further couple of
21 documents, I hope not --

22 THE CHAIRMAN: I am not saying you can or you cannot, but
23 let's just park it until then and press on with this
24 afternoon.

25 Cross-examination by MR MICHAELS

1 MR MICHAELS: Thank you. I don't expect to be long in my
2 cross-examination. The vast majority of questions were
3 put by Ms Proops, so, with apologies to the witness and
4 the Tribunal, there may be some jumping around, this is
5 a little bit of a rag bag of additional points that
6 I wish to put.

7 If I ask you, first of all, to turn to the
8 underwriting committee report in its redacted form,
9 which is at page 135 of open bundle 1 -- I have been
10 asked to clarify, I'm not talking about a report, I am
11 talking about the minutes, the underwriting committee
12 minutes, open bundle 1.

13 THE CHAIRMAN: Yes.

14 MR MICHAELS: Now, these minutes have been disclosed -- the
15 bits that are in here have been disclosed accidentally;
16 correct?

17 A. That's correct.

18 Q. And it is the ECGD's position that these minutes ought
19 to have been withheld in their entirety?

20 A. Yes.

21 Q. On the basis that their disclosure would have the
22 harmful effects set out in your witness statement?

23 A. That's correct.

24 THE CHAIRMAN: Voice up, please.

25 A. Correct.

1 MR MICHAELS: We would like to take the opportunity briefly
2 to have a look at why it is, or what particular harms it
3 is you suggest arise from disclosure of these particular
4 elements here.

5 If I could ask you to look, first of all, at
6 paragraph 3 and 3.1. This explains that, in the
7 underwriting committee meeting, the BPU referred to the
8 paper before the committee. And I understand that to be
9 the BPU report; is that correct?

10 A. Yes.

11 Q. And they outlined the key dates and activities occurring
12 pre- and post- financial close; the wide range of
13 documents they had reviewed; the leak prevention
14 minimisation systems; and the key contents of the ESAP,
15 which I understand to stand for Environmental and Social
16 Action Plan, and the improvements achieved by export
17 credit agencies.

18 Can you explain what particular harm to the public
19 interest arises from disclosure of those paragraphs?

20 MS CALLAGHAN: Sir, with all due respect I don't understand
21 the relevance of this question, given that it has been
22 disclosed and you are not asked to determine whether it
23 ought to be disclosed again. That is not your role in
24 these proceedings, you are --

25 THE CHAIRMAN: We may have some similar questions to put

1 when we come to the closed session, and -- so I think
2 Mr Michaels -- this is about all he has seen, so I think
3 he probably ought to be able to put the question.

4 MR MICHAELS: In addition, sir, the point we would also be
5 making is that the minister issued a notice deciding, in
6 his reasoned opinion, that all of this document ought to
7 be withheld.

8 THE CHAIRMAN: I am not sure we are going to go there,
9 Mr Michaels. Let's stick with the question you have for
10 the witness now.

11 MR MICHAELS: If you can explain the public interest for
12 withholding that paragraph there.

13 A. I am slightly confused, because I understand 3.1 is in
14 the public domain.

15 Q. But it is the ECGD's position is that it was disclosed
16 accidentally. And, actually, it is the ECGD's position
17 is that it ought, in law, to have been withheld; is that
18 your position?

19 A. Well, looking at this now I see nothing -- I mean some
20 of the information clearly goes to some of the detail of
21 what was reviewed. That has since been published in the
22 unredacted version of the Business Principles Unit
23 report.

24 Q. So, it is not your position that there is a public
25 interest in maintaining any exceptions here?

1 A. I can't see any here in either of the four bullet
2 points.

3 Q. At paragraph 3.2 it is then explained that, in general
4 discussion, BPU stated that outstanding issues included,
5 and they then list eight bullet points setting out the
6 outstanding issues as at that date?

7 A. Mm-hm.

8 Q. Now, at the time that the request was made in 2005, is
9 it your view that there was a public interest in
10 withholding this information here, and if so, could you
11 explain to the Tribunal what that public interest was?

12 A. (Pause)

13 Again, I can't see anything in particular. The
14 second bullet point I would want to think about, because
15 it touches on stuff in the closed information.

16 Q. But leaving aside what it touches on, just looking
17 purely at the terms for that second bullet point, then,
18 that you have highlighted, is there anything in that --

19 A. No, I have said that other than that I don't think there
20 is anything there that would be particularly ...

21 Q. Can I ask you to look further down the page at
22 paragraph 3.3?

23 A. Yes.

24 Q. I am happy to take the whole of 3.3 as a piece, if you
25 would like, and I will give you a moment to read that.

1 I put the same question.

2 A. (Pause)

3 Yes, I have read them.

4 Q. I would put the same question to you: are there any
5 particular issues there that lead you to believe that
6 that information ought not to be disclosed to the
7 public, or ought not to have been at the time of the
8 request?

9 A. There may be with 3.3(b), in the sense that that was
10 ongoing in terms of securing the pipeline.

11 Q. Securing the pipeline? By which you mean there may have
12 been a security risk from disclosure of this
13 information, or ...

14 A. The point was that the pipeline was going to be guarded,
15 and that would continue to be, and may have been,
16 through 2005 onwards, whereas, on 3(a), once the
17 decision had been taken to support the project, then oil
18 would have been extracted, and flowed, and there would
19 have been impacts.

20 Q. So, you seem to be drawing a distinction there in terms
21 of the time by which the public interest -- or the
22 public interest changing over time, having regard to the
23 changing factors on the ground?

24 A. There may have been issues on (b) because there would be
25 a continuing need to secure that pipeline. And, on the

1 words in front of me, I would want to consider very
2 carefully whether there would still be a public interest
3 in withholding that information.

4 Q. But I understand from your request that, in relation to
5 the other aspects --

6 A. On (a).

7 Q. Sorry, I asked you to look at (a), (b), (c) and (d).

8 A. Sorry, I didn't look at (c) and (d). I apologise.

9 I see nothing in particular on (c).

10 MR MICHAELS: Could I ask you, finally, to look at
11 paragraph 4 --

12 THE CHAIRMAN: I am not sure he had got to (d).

13 MR MICHAELS: I am sorry.

14 A. I hadn't got to (d).

15 Q. I am sorry, I misheard.

16 A. (Pause)

17 (d) is fine.

18 MR MICHAELS: (d) is fine?

19 A. Yes.

20 Q. Finally, in relation to paragraph 4?

21 A. Well, that is history.

22 Q. And at the time that the request was made in 2005?

23 A. Well, all the outstanding issues will have been settled.

24 MR MICHAELS: You will appreciate that it causes

25 Corner House some concern that all of this information

1 is information which the ECGD considered ought to have
2 been withheld, and in respect of which there was
3 a ministerial certificate to withhold all of this
4 information, and yet it is now being said that, at the
5 time of the request, in fact, you don't believe there
6 would have been any harm caused by disclosure of this
7 information.

8 THE CHAIRMAN: Where is the question there?

9 MR MICHAELS: Our concern -- it appears to us that ECGD --

10 THE CHAIRMAN: Okay, it may appear to you, and that may be
11 a part of your submissions, but --

12 MR MICHAELS: The question is: it appears us that ECGD takes
13 a rather blanket approach to refusal to release certain
14 documents, of which this is one; would you accept that
15 is the case?

16 A. No, I mean, when we receive information requests, we
17 examine the documents, we look to see what may be
18 released, and whether any particular exemptions should
19 apply, and that, I'm sure, will have been done in this
20 case.

21 Q. If I could turn back to your witness statement, moving
22 on to a new topic.

23 A. Could you give me a page reference, please?

24 MR MICHAELS: Yes, if I could ask you to turn to
25 paragraphs 50 and following.

1 THE CHAIRMAN: Mr Dodgson's witness statement?

2 MR MICHAELS: Which is at page 402 and following of the
3 bundle.

4 A. Thank you.

5 MR MICHAELS: You start off by saying that:

6 "Ministers are responsible for decisions taken by
7 their departments. They are accountable to Parliament
8 and to the public for the workings and decisions of
9 their departments. Their decisions can be judicially
10 reviewed. They can respond to criticism from the
11 public."

12 Is it not the case also that senior civil servants,
13 particularly in the ECGD, are also accountable for the
14 decisions and can also respond, particularly to
15 Parliament?

16 A. Formally, civil servants are accountable to their
17 ministers, and ministers to Parliament. But it is the
18 case that civil servants -- senior civil servants in the
19 main -- can be called to witness on behalf of their
20 ministers to Parliament.

21 Q. That is the case, is it not, particularly in the case of
22 ECGD, where it is the accounting officer that takes the
23 decisions on whether to grant support?

24 A. He takes those decisions on behalf of the secretary of
25 state.

1 Q. Is it not the case that you and your colleagues are
2 called before Parliamentary committees?

3 A. That's correct.

4 Q. To give account for your actions in relation to conduct
5 of the ECGD?

6 A. That's correct.

7 Q. This is the following paragraph, paragraph 51. The code
8 of practice provides, and you set out a quote there:

9 "Civil servants are not allowed to take part in any
10 public activity which compromises their impartial
11 service to the Government of the day or any future
12 Government."

13 Your comment on that, the following sentence:

14 "Civil servants do not have the opportunity to
15 respond directly to external criticism, even if it is
16 aimed at them personally."

17 You say that:

18 "Civil servants are particularly vulnerable where
19 the advice they give forms the basis on which
20 a controversial decision is made."

21 I wish to ask three separate questions about that.
22 The first is whether you are aware of personal criticism
23 being levelled at any of the relevant civil servants in
24 respect of the BTC pipeline?

25 A. I think, but I would need to check, that there may have

1 been named those officers in the BPU that were
2 responsible for its compilation in the public domain.
3 But I would need to check the source for that. But
4 otherwise I cannot say that I was, although I was not
5 personally involved in the project. But I have given
6 evidence to Parliament and I have not been criticised.

7 Q. No. Would you accept that it is the case that in
8 a campaign such as the Baku campaign and others similar
9 that criticism is almost invariably directed at the
10 institution, rather than any particular individuals?

11 A. By that, you mean the BTC project?

12 Q. No, I mean the export credit agencies department?

13 A. You talked about the Baku campaign.

14 Q. I apologise. I am using a shorthand for a coalition of
15 interested stakeholders such as Corner House and Friends
16 of the Earth. There was a campaign called the Baku
17 campaign. They made significant criticisms of a range
18 of financial institutions, yes?

19 A. Yes.

20 Q. In relation to the funding of the BTC project. Those
21 criticisms, would you accept, were invariably, or almost
22 invariably, directed at these financial institutions
23 rather than any individuals within those institutions?

24 A. Correct. So far as I am aware, that is the case.

25 Q. You also say, and this was the bit I read, that civil

1 servants do not have the opportunity to respond directly
2 to criticism because of that aspect of the code that you
3 have quoted. However, you have indicated that civil
4 servants, particularly civil servants of a certain
5 seniority, are called before Parliament to give account
6 for their actions and in that context they certainly are
7 able to respond to criticisms about the institutional
8 conduct or even their conduct of the application; is
9 that not correct?

10 A. I think we can comment on the institution conduct when
11 we speak at select committee. We are effectively
12 representing the minister.

13 Q. In the following paragraph, paragraph 52, you say that:

14 "If officials' anonymity is removed and their advice
15 is publicly disclosed before or after the decision is
16 made the principle of ministerial responsibility for
17 decisions taken in the name of a minister is eroded."

18 I would like to suggest to you that that assumes
19 that the public is unable to distinguish between advice
20 and decision-making; does it not?

21 A. Yes.

22 Q. And that if the public are able to distinguish between
23 advice being given and decision-making, then that
24 principle will not be eroded?

25 A. Possibly.

1 Q. Could you expand on that?

2 A. No, I can't say for certain, because in some issues some
3 people -- well, even if people are able to make
4 a distinction between a decision and advice for that
5 decision, it is possible that the public in their minds
6 may still see -- see them as one and the same.

7 Q. Precisely. But if the public are able to distinguish
8 between the adviser, i.e. the civil servant giving
9 advice and the minister making the decision, then that
10 confusion ought not to happen?

11 A. Well, I can imagine certain situations -- I can't say it
12 has happened at ECGD -- where some of the issues of the
13 day that are being discussed and the advice that civil
14 servants give on highly political, complex,
15 controversial issues, separating that out may be
16 difficult in the public's mind.

17 Q. You then draw, and this is paragraphs 54 to 55 -- this
18 is slightly going over some ground that has already been
19 covered by the Commissioner.

20 A. Sure.

21 Q. You then particularly highlight the vulnerability of the
22 Business Principles Unit, on the basis in part that they
23 are a small, specialised unit, readily identifiable?

24 A. (Witness nodded).

25 Q. I do wish to take you over some ground that was covered

1 previously. The point here is that the overall
2 conclusion of the Business Principles Unit has been
3 published by the ECGD; that's correct?

4 A. Correct.

5 Q. It is also correct that the ECGD is prepared to identify
6 who reached that conclusion, i.e. both that it was the
7 Business Principles Unit and that the report was signed
8 off by the head of that unit?

9 A. Formally the decision is made by the underwriting --

10 Q. I apologise, not the decision, I mean the conclusion of
11 the Business Principles Unit --

12 A. Well, the recommendation --

13 Q. -- as to conformity with the international standards?

14 A. That's correct.

15 Q. That would seem us to expose Mr Allwood or members of
16 the Business Principles Unit to precisely the sorts of
17 vulnerability that you are concerned about?

18 A. Correct.

19 Q. Can you explain why that is not the case, if it is your
20 position that it is not the case?

21 A. Sorry, could you ...

22 Q. The disclosure of Mr Allwood's conclusion?

23 A. That's right.

24 Q. That the project complies in all material respects with
25 relevant international guidelines would appear to expose

1 Mr Allwood to the sort of vulnerability about which you
2 express concern; is that correct?

3 A. Yes.

4 Q. On what basis, then, or what further risk of
5 vulnerability would there be from disclosing his precise
6 conclusions on, say, the applicability of any one
7 World Bank guideline?

8 A. Well, because on -- I think you are talking about on the
9 individual aspects that have not been disclosed he could
10 be criticised, is what I am saying.

11 Q. But surely the concern of most of those involved in
12 campaigning against ECGD support for this pipeline is as
13 to whether or not ultimately ECGD supports it?

14 A. Well, they would have known we supported it, but it
15 complied in all material respects to international
16 standards, and that will have included, obviously, the
17 individual aspects.

18 Q. If I could ask you on that point briefly -- we may need
19 to come back to this -- to turn to the Case Impact
20 Analysis Process, and specifically make 324 of your
21 bundle. Paragraph 2.8 reads:

22 "Projects that do not meet the relevant
23 international standards will normally be considered
24 unacceptable. ECGD's approach in these circumstances is
25 to engage the export and project developer in

1 discussions, with the objective of raising the project
2 standard to an acceptable level."

3 Would you accept that on those words it is not the
4 case that non-compliance with an aspect of international
5 guidelines will automatically rule out ECGD support?

6 A. That's correct. That is the word "normally".

7 Q. It is the word "normally". So there may be cases in
8 which ECGD would in fact support a case, notwithstanding
9 that it doesn't comply with every single aspect of
10 World Bank guidelines?

11 A. Yes, exceptionally that could be the case.

12 Q. So it is not automatically the case, then, is it, that
13 the mere fact that ECGD has supported this project means
14 this it is known that Mr Allwood or the BPU concluded
15 that the project complied in all material respects?

16 A. Well, I think our public statement was that it met
17 international standards.

18 Q. You also say that it is important that officials in the
19 BPU are shielded -- this is paragraph 55 of your
20 statement, I'm sorry, page 403 of the open bundle.

21 A. Thank you. Could you draw my attention to the paragraph
22 again, please?

23 Q. Paragraph 55, page 403:

24 "It is important that officials in the BPU are
25 shielded from pressure from interested external parties

1 as they assess whether projects meet the standards set
2 out in the CIAP."

3 We would certainly accept that it is part of the
4 ECGD's role that their staff are protected from
5 harassment, but is it not the case that members of the
6 BPU, particularly the head of the BPU -- that that role
7 involves being under significant pressure from a range
8 of stakeholders?

9 A. Well, stakeholders send comments. Some of those
10 comments might object to an aspect of the project or
11 indeed the whole project, that is true.

12 Q. But the head of the BPU will in this sort of project,
13 a highly controversial project, will attend meetings
14 with stakeholders at which they are trying, as
15 campaigning organisations, as pressure groups, to
16 persuade him strongly to report, to recommend, that the
17 ECGD does not support the project?

18 A. Well, they may well do. It was clear from the terms of
19 engagement of those meetings that the BPU was in
20 listening mode. It was an opportunity for those
21 campaign groups to pass their views.

22 Q. But the point is, we suggest, that his role is precisely
23 there to face the pressure that comes from dealing with
24 highly controversial projects, the pressure from the
25 campaigners on the one hand and on the other hand the

1 exporters and the project sponsors to move ahead
2 quickly?

3 A. No, his role is to ensure that the project complies in
4 all material respects with international standards. He
5 gathers information to help him form that view, and we
6 have, as it were, invited comment from interested
7 parties and we set out to take those into account in our
8 deliberations. That is his role.

9 Q. Turning to the next section of your statement, which is
10 headed, starting at paragraph 58, "The need to protect
11 confidentiality communications between ECGD and project
12 participants", you say at the foot of the page that:

13 "ECGD qualifies its confidentiality undertakings to
14 reflect its obligations under FOIA and the environmental
15 information regulations."

16 Since you started doing that, has that altered the
17 basis on which any of the partner lenders engage with
18 the ECGD?

19 A. On this particular project, we set out the terms on
20 which we --

21 Q. I apologise, just to clarify, I meant generally. Since
22 you started informing -- is that a no?

23 A. No.

24 Q. And it hasn't caused any of those groups to stop working
25 with you?

1 A. No, I have no example where they have.

2 Q. Presumably the corollary also applies, that you are
3 aware that other ECAs in their respective jurisdictions
4 have their own obligations to disclose information to
5 their citizens?

6 A. They may well have, yes.

7 Q. Presumably they inform you, do they not, in their
8 confidentiality letters, that they may have also to
9 disclose information?

10 A. I haven't personally seen their confidentiality letters.

11 Q. I would like to put a hypothetical to you, if I might.
12 If, for instance, a court in the US ordered disclosure
13 of a report equivalent to the BPU report -- the EXIM
14 report, say, in the US -- would that cause you to stop
15 working in the future with EXIM?

16 A. We would have to take a view on what information was
17 disclosed that may be material to us and our
18 interests --

19 Q. Sorry, had you finished?

20 A. I was merely going to add "and then take a view on what
21 our relationship might be with them in the future".

22 Q. Would it alter that view if the identity of the ECGD
23 were not specifically included in that report?

24 A. Possibly.

25 Q. The reason I ask that question -- I will take you

1 straight to it -- is that we would suggest that many of
2 the concerns that you raise about partner groups and
3 communications with partner groups would cease to
4 operate if the specific identities of those partner
5 groups were not identified, i.e. were redacted, when
6 their views were disclosed?

7 A. Well, it may be that even if the names are redacted it
8 is possible from other language or content to identify
9 the supplier of the information. We would have to look
10 at the information as a whole and take a view.

11 Q. But if it were not possible to identify the maker of
12 that information from any particular language, and
13 I can't comment, of course, because I haven't seen the
14 particular language, but if it were not possible to say
15 that this particular view came from Coface or SACE or
16 Hermes, then presumably disclosure of a view of another
17 participant would not cause the damage that you suggest?

18 A. Possibly. I mean, it depends. As you say, we are
19 talking hypothetically here so it is very difficult. So
20 if it was expressed in terms of "a participant said" and
21 the participant wasn't identified, it could nonetheless
22 to guesswork being taken and possibly someone striking
23 who it was. I would want to consider very carefully in
24 those circumstances, taking consideration of the whole
25 document, whether that has prejudiced ECGD's position

1 and what that might mean for our future relationship
2 with that party.

3 Q. I apologise, I may have confused you. I pulled back
4 from the hypothetical about EXIM at that stage and I was
5 talking about specifically now in this context about the
6 BPU report, whether disclosure of the partner
7 information, communications by partner groups, whether
8 it would cause the same harm if the identities of those
9 partner organisations were redacted?

10 MS CALLAGHAN: I am not sure that the answer to this
11 question can be answered without getting into closed
12 material.

13 THE CHAIRMAN: It can on the hypothesis. If the
14 contribution to the debate by the partner, such as the
15 contribution to the debate of the partner, can be
16 disclosed without directly or indirectly disclosing the
17 identity of the partner, would the witness think that
18 that would undermine the relationship between the ECGD
19 and that partner. I don't see why that question
20 shouldn't be put.

21 A. I think in that hypothetical situation that I would
22 agree that it wouldn't necessarily impair the
23 relationship between that particular -- but I would want
24 to look at the whole --

25 THE CHAIRMAN: You would take it in context.

1 A. Yes, absolutely.

2 MR MICHAELS: Can I ask, has that exercise been carried out
3 by you, or by the ECGD? Have you looked specifically at
4 the question of disclosing those views with the precise
5 identities of the partners being redacted?

6 MS CALLAGHAN: I don't think this is a matter that
7 Mr Dodgson can necessarily deal with. This is something
8 that has been dealt with on this side of the room by my
9 instructing solicitors and by my client. I can assure
10 Mr Michaels, if he needs the reassurance, that we have
11 undertaken the exercise he has requested.

12 MS PROOPS: Perhaps the best way to deal with it, is that --
13 it is an issue that has been raised -- it can be
14 addressed in closed session with witnesses, as to
15 whether it would be viable to redact the names and
16 whether that would leave any meaningful information as
17 a result.

18 MR MICHAELS: If I could take you to one non-hypothetical
19 example of that situation, which is within the BPU
20 report at page 104 of the open bundle. The second
21 paragraph from the bottom, the third sentence, halfway
22 down, starts:

23 "IFC's social issues specialist, who had observed
24 several land acquisition meetings, has commented that
25 RUDF [which is a Turkish NGO representing citizens who

1 have been displaced] did in fact provide advice directly
2 to landowners."

3 That seems to me to be an expression of one of the
4 views of the partner organisations; is that correct?

5 A. Is it a statement of fact or is it an opinion here?

6 Q. Well, it appears to us to be clearly an opinion,
7 "a social issues specialist has commented", i.e. using
8 his expertise. Now, on what basis did the ECGD decide
9 to release that particular comment?

10 A. I can't comment specifically. I would have to --
11 I would have to take advice.

12 Q. Perhaps it is a question I can put to Mr Allwood again
13 tomorrow.

14 It raises a concern, from my client, and I will put
15 this to you as a question, that ECGD may be
16 cherry-picking when it decides which elements of partner
17 groups' views to disclose to the public; is that the
18 case?

19 A. When you say "cherry-picking", what do you mean?

20 Q. I mean by that picking particular quotes that are
21 favourable to the ECGD's overall position?

22 A. Well, as I said in an earlier response, when we receive
23 information requests we will go through the documents
24 and we have to take a view as to whether information
25 should be withheld and if so, on what grounds.

1 Q. May I have one moment.

2 (Pause). I may have to come back to that document
3 in a moment, if that is all right.

4 I wish to ask you separately a question in relation
5 to evidence you gave this morning for the first time in
6 your oral evidence-in-chief. My understanding is that
7 it was your evidence that the BPU is not responsible for
8 giving any advice on conflict risks; is that correct?

9 A. Yes. Separately assessed.

10 Q. Sorry?

11 A. That was separately assessed.

12 Q. Separately assessed. By?

13 A. We have a country-risk analysis division.

14 Q. If I can ask you to turn to page 127 of the bundle.

15 That page is concerned with projects in disputed areas,
16 which is precisely, as we understand it -- and with
17 World Bank guidance operating principle 7.60 -- that is,
18 as we understand it, precisely the same issue: it is the
19 issue of conflict risk, is it not?

20 A. I think as we read the words here, it was known there
21 were areas of dispute within the countries within which
22 the pipelines were going. This is a statement that the
23 pipeline would not be routed through any of them. It is
24 not an assessment, it is a statement that it would not
25 be.

1 Q. Perhaps I need to leave it to the Tribunal to probe this
2 in closed session, in terms of the redacted element, but
3 I will certainly put it to you in open that it appears
4 that this involves the BPU carrying out some form of
5 assessment as to whether or not the concerns of NGOs
6 about conflict risk in the pipeline area were correct or
7 not --

8 A. Well --

9 Q. -- and the BPU here sets out two competing positions,
10 and then an assessment, which we have not seen; is that
11 correct?

12 A. Again, I don't want to stray into what might be closed
13 session on the BPU assessment and the redacted section
14 of this report.

15 MR MICHAELS: If I could ask you to turn back to the page
16 that I was on a moment ago, 104, the point that --
17 I took you halfway through and, I apologise, I broke you
18 off -- was the views of the IFC's social issue
19 specialists, if I could ask you at the same time to open
20 up a different bundle, which I think will be open
21 bundle 3. I don't know how that is labelled on your
22 desk. It is supplemental bundle, cross appeal bundle --

23 THE CHAIRMAN: We have both, so we have a cross appeal
24 bundle and we have a supplementary open bundle.

25 MR MICHAELS: It will be the cross appeal open bundle.

1 Should be.

2 If I ask you to turn to page 1045.

3 THE CHAIRMAN: You have to give me the page number again.

4 MR MICHAELS: Page 1045.

5 This comes from the document called the Flash
6 report, which is the report of Mr Allwood on his field
7 visit to the region. It starts at page 1041. It says:

8 "This report documents the initial observations
9 regarding key issues on the pipeline project."

10 The passage I just wanted to refer to here is the
11 third paragraph up from the bottom of 1045.

12 THE CHAIRMAN: Is this a document you are familiar with?

13 A. Yes, I am just not sure what is the third paragraph --

14 MR MICHAELS: It starts "Compulsory Land Acquisition".

15 A. Thank you.

16 MR MICHAELS: If I ask you to read that paragraph and, in
17 particular, the italicised bold paragraph from
18 Mr Allwood at the foot of that paragraph.

19 MS CALLAGHAN: Sir, I do not know what the question is going
20 to be, but I do wonder whether the appropriate question
21 might be directed to Mr Allwood.

22 MR MICHAELS: It may well be something I put to Mr Allwood.

23 THE CHAIRMAN: If it is the wrong witness, it will not carry
24 much weight, so just let the question go.

25 Let me just read it myself.

1 MR MICHAELS: Now, in that paragraph, Mr Allwood identifies
2 what he describes as a major flaw in the process, and
3 requests BTC to take immediate action to address this.
4 And the major flaw is that RUDF only attends a sample of
5 all the negotiation meetings and does not provide any
6 whatsoever assistance to the people whose land is being
7 acquired.

8 That seems to conflict with the passage in the BPU
9 report, which says that RUDF in fact provides advice
10 directly to landowners. That is the view of
11 the IFC social issues specialist -- I was back in the
12 same paragraph.

13 I hope you have two pages open in front of you,
14 page 104, which is the BPU report, and page 1045, which
15 is the Flash report?

16 A. Yes.

17 Q. Now, there may be a range of explanations for that
18 discrepancy, but I simply would like to put to you that
19 this is an example of there being a very strong public
20 interest in disclosure of this sort of view here?

21 A. Well, the visit report was done during consideration of
22 the project, and this report that you are referring me
23 to with IFC is towards the end, when we were into the
24 decision phase. I would have to take advice, but there
25 may be, because of a timing issue, something that has

1 changed. But I would need to take advice on that.

2 Q. Indeed, there may well be. There is a six months gap
3 between the two reports.

4 A. Yes.

5 Q. The point I am putting to you simply is that this does
6 raise an issue of significant public interest for those
7 who have raised concerns about the adequacy, say, of the
8 land acquisition process; that there is, on its face at
9 least, an apparent conflict between the contemporaneous
10 record of Mr Allwood and the final report of the BPU?

11 A. But that may well always be the case in projects as they
12 are being developed, and as we engage in constructive
13 engagement, so that projects are brought up to standard.
14 That comes back to the timing issue that I have raised,
15 but I don't think that, of itself, necessarily raises
16 public interest because, as we have explained in our
17 CIAP, we have a policy of constructive engagement, so
18 that projects can be brought to standard.

19 Q. Can you say what you mean by "the timing issue"?

20 A. Well, all I am saying is that, on the face of it, this
21 is a visit report undertaken or written at the time of
22 a visit by the BPU, Mr Allwood, to the market.

23 The report you are drawing my attention to with the
24 IFC was written at the end of that process, by which
25 time it is perfectly possible that issues were

1 clarified, facts obtained, to get to the right -- to be
2 able to make the statement that was in the report.

3 Q. It may that be it is more fruitful for me to take this
4 up with Mr Allwood tomorrow.

5 I only have two more brief points to deal with. The
6 first is, if I could take you to -- I don't know where
7 you have this in your papers, there is a document handed
8 up this morning, a clip of IFC documents.

9 You were asked a question, a series of questions, in
10 relation to the IFC's policy on disclosure of
11 information document.

12 Page 4 of that document, about a third of the way
13 through the clip, it has --

14 A. I may have a different page 4.

15 Q. It is page 4 of the policy on disclosure of information.

16 A. Yes, with section C --

17 Q. That's right.

18 A. Thank you.

19 Q. Then you were asked questions about paragraph 13(a)?

20 A. Yes.

21 Q. Paragraph 13(a) explains that:

22 "The IFC makes publicly available the following
23 social and environmental information. For each proposed
24 investment ..."

25 And then it carves out some:

1 "... IFC issues a brief summary of its review
2 findings and recommendations, the environmental and
3 social review summary. The ESRS includes the rationale
4 for IFC's categorisation of the project, a description
5 of the main social and environmental risks and impacts,
6 and the key measures identified to mitigate those risks
7 and impacts specifying any actions that will need to be
8 implemented to undertake the project in a manner
9 consistent with the performance standards."

10 Now, would you accept that the information that the
11 IFC say they make public goes considerably further,
12 therefore, than the terms of the BPU report? And
13 perhaps if I can clarify what I am asking you, I'm
14 specifically referring there to the key measures
15 identified to mitigate and the specification of actions
16 that need to be implemented?

17 A. Well, the -- that particular information has not been
18 made available publicly here.

19 Q. No. And yet the IFC feel that it is perfectly
20 appropriate and reasonable to disclose that sort of
21 information to stakeholders and to the public more
22 generally?

23 A. Well, that is a matter you would have to address to the
24 IFC.

25 Q. What do you think might be the reason why ECGD is

1 unwilling to disclose the sort of information that other
2 members of the lender group are apparently willing to
3 disclose?

4 A. Well, as I have said in earlier evidence, there has been
5 an incremental change to transparency and, in the most
6 recent inquiry by the environmental audit committee, it
7 has -- the Government gave a commitment that in future
8 it would give information on high impact projects and
9 the standards that have applied to that project and
10 information on ECGD's assessment against those
11 standards.

12 So, we may be moving towards something that the IFC
13 does. I can't comment in detail, because I have never
14 seen an IFC report on a particular project to see
15 whether those words there match what they publish at
16 a project level.

17 Q. It may be appropriate for us to provide a copy of that
18 report, assuming it is still in the public domain, to
19 the Tribunal tomorrow, or Mr Allwood.

20 If I can take you to one final and relatively brief
21 issue, it is -- questions were put to you on behalf of
22 the Information Commissioner about ECGD's handling of
23 the consultation around this project, and you gave clear
24 evidence that, in your view, this was not
25 a consultation.

1 I just wish to put to you -- give you the
2 opportunity to revise your view on that, if you wished.
3 I take you to page 362 of the open bundle. If you look
4 at paragraph 27 on that page, which sets out ECGD's
5 response, and it quotes -- sorry, this is the trade and
6 industry select committee report that your client relies
7 on.

8 Page 362, it sets out the ECGD's response, in
9 summary, and then has a quote from John Weiss.

10 I believe he was deputy chief executive at the time?

11 A. That's right, yes.

12 Q. And he said:

13 "We have been transparent about our consideration of
14 the application throughout [and that is the
15 BTC application] and our final decision took into
16 account the information that was presented to us during
17 the consultation."

18 Now, is it your view that that was incorrect, that
19 there was, in fact, no consultation?

20 A. The evidence I gave previously was that, in the case
21 impact assessment process, we invite comment and we give
22 a commitment to take account of those comments. The
23 point I was trying to make previously, in trying to
24 distinguish that and public consultations, because the
25 issue is around response to interested parties, the

1 public consultations, the Government will seek
2 a representation and submissions and formally respond to
3 those submissions. We do not make the same commitment
4 in terms of cases.

5 The evidence you have drawn my attention to was
6 based on oral evidence -- I assume it is based on oral
7 evidence that John Weiss gave in hearings to the
8 committee, and I suspect he used "consultation" rather
9 loosely in that context. I don't think he meant it in
10 term of public consultation.

11 Q. In your witness statement, you refer to the committee's
12 overall conclusion in respect of that report, which you
13 refer to as a matter of historical fact.

14 A. Yes.

15 Q. And you refer, and quote, I believe, the paragraph on
16 page 354?

17 A. Of the report?

18 Q. Yes. Under the heading, "ECGD support for the
19 BTC pipeline."

20 And, in that part, the committee set out their
21 conclusion, on which you rely, explicitly by reference
22 to the fact that the ECGD claims to have undertaken
23 a lengthy consultation procedure. That is the fourth
24 line down. Do you accept that?

25 A. Well, they are the words written, yes, and I imagine

1 that they have drawn that from John Weiss's evidence.

2 Q. In your business principles, your statement of business
3 principles, and you were taken to this previously by the
4 Commissioner -- so if I take you there one more time,
5 page 854, open bundle 2.

6 A. Sorry?

7 Q. 841.

8 A. Thank you.

9 Q. It says there -- I will wait for the Tribunal to find
10 it, under "Transparency", the first objective:
11 "ECGD will consult, listen to and respond to
12 relevant stakeholders on major issues."

13 Now, I understood you to be saying that
14 consideration of whether to grant support for the
15 BPU project is not such a major issue; is that correct?

16 A. Yes, I took it -- if you look under "Policies", we
17 consult -- I -- formally consult on policies, products
18 and practice, and have done so.

19 Q. I don't see where you say the words "formally consult
20 with"?

21 A. Sorry, those were my words, not the words written here.
22 We undertake public consultations on policy, products
23 and practice. So, in objectives, ECGD will consult
24 major issues we take to be policies, products and
25 practices.

1 Q. With respect, Mr Dodgson, it appears that the objectives
2 set out at the top go considerably more widely than the
3 particular commitments in terms of ECGD's policies?

4 A. And the point I made was that, in our CIAP, our
5 published case impact assessment process, which was
6 published after these business principles were
7 published, we make it clear that we invite comment and
8 take account of those comments. We do not undertake
9 consultation in the sense of public consultation --

10 Q. But in your -- I apologise.

11 A. Sorry?

12 Q. In your CIAP, it is not said, is it, that you would
13 publish any sort of BPU report?

14 A. No, and as a result of FOIA and EIRs, parts of that
15 reports have now been published.

16 Q. But it is certainly not said either that you would not
17 publish the conclusions of BP Unit, the Business
18 Principles Unit?

19 A. No, I don't think it does say that.

20 Q. So, it is not understood, and perhaps you could clarify,
21 the basis on which you said say that CIAP narrows down
22 the commitments given by ECGD to transparency as set out
23 in its overarching business principle?

24 A. I am telling you the point that our practice has been
25 that we invite comment and take account of comments. We

1 have given no commitment in that document to undertake
2 a consultation on the terms of Cabinet office --
3 I believe they are now the Department of Business
4 Innovation and Skills Guidelines, but for these purposes
5 they are Government guidelines on public consultations.

6 Q. But this is a situation in which you have accepted that
7 the consideration of BTC was one of the most
8 controversial decisions that ECGD had had to make, at
9 least in that year and possibly over several years?

10 A. It was a major case, and it was a difficult, complex and
11 indeed, as you say, controversial case. But that
12 doesn't mean that we have therefore somehow committed to
13 undertake a public consultation on that case --

14 Q. But the business -- I apologise --

15 A. We haven't.

16 Q. But the business principles are aimed at being
17 understood by members of the public and stakeholders,
18 are they not?

19 A. Exactly. They are published for the public to see.

20 Q. Would you not accept that stakeholders, members of the
21 public, would not draw that narrow distinction that you
22 are seeking to draw and would assume that that
23 commitment to consult on such major issues would include
24 major issues such as consideration of a highly
25 controversial pipeline project?

1 A. Well, as I say, the policy -- the business principles
2 were issued in 2000. The CIAP was published a few years
3 later. It had the statement in there of what we do and
4 that is what we do. We have a record of undertaking
5 public consultations on major issues which are around
6 policies, products and practices.

7 MR MICHAELS: Sir, I have no further questions.

8 THE CHAIRMAN: What are we going to do about our timetable
9 now? Is Mr Dodgson not available tomorrow, is that why
10 the timetable has been done the way it has, or is it
11 just that you wanted to clear all the open evidence
12 before you came to closed evidence? The procedure now,
13 according to our timetable, is that tomorrow we start
14 with Mr Allwood. I wondered if that is because
15 Mr Dodgson is not available tomorrow or whether we are
16 free to start at 10 o'clock tomorrow in order to finish
17 Mr Dodgson, which is just any questions from here and
18 your re-examination?

19 A. I am available.

20 MS CALLAGHAN: I believe Mr Dodgson is available tomorrow.
21 It was considered convenient to try to finish one
22 witness this afternoon and start a new one tomorrow
23 morning.

24 THE CHAIRMAN: You presumably have a bit of re-examination,
25 we may have a question or two, and so we need another

1 half an hour, I suspect. Do we do it tomorrow morning
2 at 10 o'clock and bring Mr Dodgson back again on
3 Wednesday for closed session?

4 MS CALLAGHAN: We have no objection to Mr Dodgson giving
5 evidence tomorrow morning.

6 THE CHAIRMAN: I think we will start at 10 o'clock tomorrow
7 morning in order to finish your evidence. That means
8 you remain under oath overnight.

9 Any other bits and pieces before we ...

10 MS PROOPS: I was just speculating as to whether the parties
11 need as much time with Mr Hildyard as we have outlined
12 in the timetable, because I expect the Tribunal is more
13 interested in hearing evidence from the public
14 authorities' witnesses.

15 THE CHAIRMAN: I have to say Mr Hildyard's struck me as
16 looking like a New York trial brief rather than looking
17 like evidence. I am not sure how much cross-examination
18 you can do on it without it just being arguing issues.

19 MS PROOPS: I don't have any cross-examination for
20 Mr Hildyard.

21 THE CHAIRMAN: That is helpful, it may mean we speed up
22 later. Let's look for opportunities to speed up later
23 if we can.

24 Thank you very much. 10 o'clock tomorrow morning.
25 (4.50 pm)

1 (The hearing adjourned until 10 o'clock the following day)

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