

Wednesday 8th July 2009

1

2 (9.00 am)

3

(proceedings delayed)

4

(9.07 am)

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(Some discussion was heard without transcription)

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MR MICHAELS: A sensible response to that is to provide some

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context that would explain why it's misleading.

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THE CHAIRMAN: It's come up in some cases where there's been

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scribbled notes and they've said this almost, you know,

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almost illegible notes of the meeting.

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MR MICHAELS: I think that was the Rob Evans lobbying case.

12

THE CHAIRMAN: Is as likely to mislead as to inform the

13

public. There have been some comments on that sort of

14

thing.

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MR MICHAELS: I think that may have been the Evans decision

16

of the tribunal but this is slightly different. I can

17

take you to the relevant passages in submissions if need

18

be. Would it help if I gave you a paragraph reference

19

now? I appear to have made only two copies of one of

20

them.

21

THE CHAIRMAN: Sorry, Ms Chafer is saying that a similar

22

point came up on the BUAB case.

23

MR MICHAELS: That may be the reference I was looking for.

24

THE CHAIRMAN: Perhaps we were both on it, I don't remember

25

it.

1 MR MICHAELS: I believe there is a tribunal decision on this
2 but I couldn't find it.

3 MS PROOPS: We're certainly going to get copies at
4 lunchtime.

5 THE CHAIRMAN: Sorry, your paragraph numbers?

6 MR MICHAELS: In the DEFRA decision notice, paragraphs 29
7 and 30, particularly the end of paragraph 30. In the
8 FSA case -- I'm afraid I only handed up two copies of
9 one of them.

10 THE CHAIRMAN: We'll share.

11 MR MICHAELS: In the FSA case it's paragraphs 50 and 54.
12 50 really provides the context for 54 and the points
13 again simply at the end of 54. It's the same basic
14 point.

15 THE CHAIRMAN: Okay. (Pause).

16 MS CALLAGHAN: Sir, overnight we have received instructions
17 from the FCO in relation to the Turkey information. We
18 have been informed by the FCO that they consider that
19 the passage of time has reduced the sensitivity of the
20 information contained in paragraph 2.2.7 of the BPU
21 report. That, of course, has been referred to in this
22 case, for convenience, as the "Turkey information".
23 Therefore, FCO's position is that it no longer objects
24 to the release of that particular paragraph.

25 Now, that technically does not affect the argument

1 which ECGD has maintained, that it was entitled to
2 withhold that information at the time of the request.
3 That, of course, is the legal issue before the tribunal.

4 However, ECGD has only ever acted on FCO advice in
5 respect of this information, and in light of the FCO's
6 change of position, it would, of course, now be open to
7 Corner House or any other member of the public to make
8 a fresh request for that same information, and we would
9 accept that we would be obliged to release it. In those
10 circumstances, acting as a responsible Government
11 department, we are content to release that information
12 voluntarily now.

13 I have asked my solicitor to write out that
14 information for Mr Michaels' benefit, and I'm going to
15 hand it to him. I understand he may wish to make
16 submissions as to whether or not we were entitled to
17 withhold that information at the time of the request.

18 MS PROOPS: Technically speaking, the fact that the FCO has
19 said that the information is disclosable now does not
20 address the question of whether the information was
21 disclosable at the time of the request.

22 THE CHAIRMAN: Whether the decision (inaudible) was right on
23 that point, when it said it should have been -- I can't
24 remember which way it went -- but I take the point, the
25 technical issue is the time of the request, not today,

1 but if there is a way that we can effectively,
2 particularly on the timetable, resolve it, I'm sure that
3 would be helpful. Mr Michaels is taking instructions.
4 Any comments on that, Mr Michaels, in terms of whether
5 you're going to require a decision on whether it was
6 appropriate or not at the time to withhold the Turkey
7 information?

8 MR MICHAELS: Would it be all right, there will be various
9 breaks before we get to submissions, for me to address
10 you on that before I get to the start of my submissions?

11 THE CHAIRMAN: Okay.

12 MS PROOPS: Can I just raise one practical point as to
13 whether the issue is going to remain live. There is
14 the question of whether I need to question Mr Allwood in
15 close on the Turkey information. I suspect we're not
16 going to get very far anyway, because the fact is we
17 don't have anybody from the FCO to deal with issues of
18 cogency as between their position on the Turkey
19 information and their position on the flash report.
20 There is only so far I am going to be able to take it.

21 THE CHAIRMAN: I'm not sure the witness has said anything --
22 that was what the FCO said to the ECGD at the time.

23 MS PROOPS: Sorry?

24 THE CHAIRMAN: I'm not sure the witness is going to be able
25 to say that is what the FCO said to ECGD at the time.

1 MS PROOPS: So we may not be able to get any further on the
2 issue in any event.

3 MR MICHAELS: It may be that we can't go any further, and in
4 any event this is something Mr Allwood could be
5 cross-examined on in open session now, in any event,
6 this particular paragraph. I haven't taken further
7 instructions. I think we will invite the tribunal to
8 make a decision.

9 THE CHAIRMAN: You want a ruling on it?

10 MR MICHAELS: Particularly having seen this, it appears to
11 us, not least in light of the flash report, that this is
12 information in respect of which the public interest in
13 maintaining the exemption did not outweigh the public
14 interest in disclosure.

15 THE CHAIRMAN: You'll want a decision from us, even though
16 it is now largely academic?

17 MS PROOPS: As to whether Mr Allwood can assist on this
18 matter, I wonder if -- certainly, our position is that
19 he's not the authoritative witness on this question, so
20 we'll want to do what we can with him to get to the
21 bottom of the point. The fact is, we can't get to the
22 bottom of the point, so it may be just a matter we have
23 to deal with in submissions.

24 THE CHAIRMAN: All right, it's everybody thinking on their
25 feet slightly, so I think what we'll do is press on to

1 where we were with your re-examination, and see what
2 plays out during the day. Positions may change.

3 MS CALLAGHAN: Sir, I only have one question in
4 re-examination.

5 MR DAVID ALLWOOD,
6 Re-examination by MS CALLAGHAN

7 MS CALLAGHAN: Yesterday, Mr Allwood, you referred to
8 a publication which contained the BPU's e-mail address.
9 Can I ask you, please, to turn to bundle 1 to page 343.
10 What is that document, Mr Allwood?

11 A. This is a copy of the website notice that we post
12 whenever we receive an application relating to
13 high-potential impact case, so this list that the
14 high-potential impact case is currently live at the time
15 of this notice.

16 Q. Turning over to page 344, can you explain, based on the
17 text underneath that box, where you invited comments on
18 any of those projects to be sent?

19 A. We invited comments to be sent to the Business
20 Principles Unit section within ECGD either by mail -- by
21 e-mail to the BPU inbox, or by fax.

22 MS CALLAGHAN: I have no further questions.

23 THE CHAIRMAN: We're going straight into closed session.

24 [the court went into closed session]

25 (11.18 am)

1 THE CHAIRMAN: We're back in open session. I don't know
2 whether you've spoken about this during the break, but
3 there was one part of Mr Allwood's evidence in close
4 which we think we ought to quickly revisit which related
5 to the flash report. Mr Allwood was asked some
6 questions probing the relative sensitivity of the
7 criticisms in the flash report as opposed to the
8 criticisms in the BPU assessment, the Turkish material
9 which is now public information. So for that reason we
10 think we ought to revisit it, with the caveat that
11 Ms Proops challenges the witness's expertise to give --
12 to make the judgment.

13 Can I ask you, Mr Allwood, I don't know whether
14 I need to put it in formal questions, for you to run
15 through as quickly as you can your view of the relative
16 sensitivities of those two parts of the material.

17 A. In short, I believe that the information, the Turkey
18 information, contained in the BPU report is more
19 sensitive in terms of international relations between
20 the UK and Turkey because it refers to the Ceyhan
21 terminal, and the Turkish Government's intention to
22 build that into an international energy terminal, and is
23 particularly sensitive about any criticism of that.

24 The criticism is that the environmental impact
25 assessment was not done to international standards

1 because the actual location option was not left entirely
2 open as it should have been but was constrained by the
3 Turkish Government's insistence that it should be
4 located within the Bay of Iskenderun, and therefore
5 there is a criticism of the Turkish Government that it
6 is not meeting international EIA standards.

7 The criticisms within the flash report are of
8 individuals that work for, and in that respect
9 represent, BOTAS, or of the performance by BOTAS in
10 terms of reinstatement of a gas pipeline which is
11 clearly already in the public domain -- you only have to
12 fly over it to be able to see it -- whereas the
13 non-compliance with the international standards are less
14 publicly available. So bringing to it people's
15 attention by its disclosure would, I think, raise its
16 profile.

17 MS PROOPS: Can I just clarify that? I hope it won't be
18 controversial, but the witness also conceded in response
19 to cross-examination as to his competence to speak to
20 the sensitivity of this information, that his competence
21 was limited, and was particularly limited where we were
22 looking at the political sensitivity of information at
23 the time that particular requests were made. He also
24 conceded that he was not the authoritative voice on the
25 question of the political sensitivity, either of the

1 flash report or of the Turkey information.

2 A. That's correct.

3 THE CHAIRMAN: The witness is happy with that summary.

4 MR MICHAELS: Sir, on that basis I won't ask for further
5 permission to ask further questions, not that I would
6 have been given it.

7 THE CHAIRMAN: I was going to discourage you very firmly.

8 MR MICHAELS: But I will seek to put the same questions to
9 Mr Hildyard on the basis that he may have a similar
10 level of competence to provide a view on that issue.

11 THE CHAIRMAN: We'll have to see when we get to that stage.

12 We're now finished with Mr Allwood's evidence.

13 Thank you very much for your time, Mr Allwood.

14 If you need to be released, no objection, you can be
15 released.

16 (The witness withdrew)

17 THE CHAIRMAN: Mr Hildyard, then.

18 I unfairly commented that Mr Hildyard's evidence was
19 a bit like a trial brief, but that was unfair because
20 there's quite a lot of evidence, and, actually, when
21 I re-read it -- but I would encourage all of you to
22 concentrate on your evidence in the questions and not
23 get into the debate that should more properly be taking
24 part in the submissions, which -- because we're going to
25 be short enough on time in any event.

1 MR MICHAELS: I'm grateful, sir. Thank you.

2 MR NICHOLAS HILDYARD (sworn)

3 Examined-in-chief by MR MICHAELS

4 MR MICHAELS: With your permission, I have a few further
5 questions in-chief.

6 THE CHAIRMAN: Yes. Can we just skip very quickly through
7 the formality?

8 MR MICHAELS: Can I ask you to turn to page 432 of the open
9 bundle number 1. The same problem, sir, appears in
10 relation to this statement. It appears we have an
11 unsigned version.

12 THE CHAIRMAN: I just want to make sure the witness
13 identifies it and confirms that it's true.

14 A. I identify this and confirm that that's my witness
15 statement.

16 Q. Can I ask you to turn now to open bundle 3, and to
17 page 1041, where you should find the flash report.

18 Could you inform the tribunal what use, what public
19 use, has been made by you of the flash report?

20 A. I've referenced it in three places. One is in a letter
21 to the ECGD that was sent on 26th August last year.
22 Also, in a submission to the Environmental Audit
23 Commission which was sent on 26th August last year too,
24 and I referenced it in correspondence with BP as part of
25 a complaint under the OECD guidelines on multi-national

1 companies.

2 THE CHAIRMAN: Is everybody happy for the witness to have a
3 notebook?

4 MS CALLAGHAN: I was just going to comment that the witness
5 does appear to have a notebook and I am not happy for
6 him to have it there with him.

7 THE CHAIRMAN: I suspect he's just checking dates, but ...

8 THE WITNESS: That's what I was doing.

9 MR MICHAELS: I put to Mr Allwood yesterday in
10 cross-examination that the flash report had been sent by
11 you to BP. Was that correct?

12 A. That was actually incorrect. I referenced it in
13 a letter, and I sincerely apologise if that misled
14 anyone. I thought it was part of the bundle.

15 Q. I want to ask you briefly about two questions relating
16 to the new documents or new information that has come
17 out in the course of this hearing. We have received
18 this morning a handwritten extract. I don't know if the
19 tribunal has been given a copy of this. This is the
20 Turkey information, so you will have it in your bundle.

21 THE CHAIRMAN: Is this what you were saying the solicitors
22 were going to --

23 MS PROOPS: Page 17.

24 MR MICHAELS: You have it in the unredacted version of the
25 report. We simply have the handwritten copy. It's

1 paragraph 2.2.7. Do you have a copy of it on your
2 table?

3 A. No, it's in my notebook.

4 MR MICHAELS: Can he have his notebook for the purposes of
5 looking at this?

6 THE CHAIRMAN: By all means check the notebook to see if
7 it's on that page.

8 A. It's the spiral bound one. It's copied out -- if you
9 look through -- you'll see it's the page after that.
10 Oh, actually, sorry, it's the very top of the open
11 bundle.

12 MR MICHAELS: You have just heard a summary of Mr Allwood's
13 evidence in relation to this document, this information.
14 Could you comment on whether you believe there is any
15 public interest in disclosure of this information and
16 what that public interest might be, if so?

17 A. I can make an immediate comment. I think that perhaps
18 the most significant thing that I would pick up on is
19 the last sentence, that it goes some way to correct
20 this. The BPU's report identifies issues that it
21 considers to be material. This paragraph relates to two
22 issues that are material, the assessment of
23 alternatives, and I believe I'd look at the document,
24 inland waterways, or waterways.

25 What this suggests is that there is some doubt as to

1 whether or not the materiality of those concerns was
2 addressed in full. It only goes some way to correct
3 this, and previously there has been insufficient
4 information to justify the location of the terminal.

5 This is a major terminal. It's on a very sensitive
6 site. There are turtles there and also it's a fishing
7 ground. If that was not -- if the alternatives were not
8 properly assessed, then I think it brings into question
9 the statement that was made to Parliament by the ECGD,
10 or potentially brings it into question, that the project
11 complied in all material respects with international
12 standards, and that would be of concern to us. It would
13 also be of concern that perhaps the OECD, which oversees
14 the common approaches recommendation, had not been
15 potentially informed that a derogation from
16 international standards had in fact occurred, or
17 a decision to derogate from international standards had
18 occurred, and there is a requirement on the ECGD to
19 report any derogations.

20 So I would be -- so there is a significant public
21 interest. I would stress that that's on an immediate
22 view of what's here.

23 Q. Mr Allwood explained that this passage contains at least
24 an implicit criticism of the Turkish State. That's my
25 understanding of his evidence. Had that criticism been

1 made by other people in the context of the BCT process?

2 A. Well, can I just respond by saying I don't think that
3 actually the criticism, it would be of the Turkish
4 State. The criticism would be of the project developer,
5 sponsor, the ECC, for not complying with international
6 standards, and of the lender group for allowing
7 a derogation that wasn't declared. It is perfectly up
8 to the Turkish State to say where it wants to put its
9 terminals. It isn't the project developer. It's up to
10 the ECGD to potentially refuse the credit on the basis
11 that it didn't apply to its standards. Does that answer
12 your question?

13 Q. That answers a separate question, but that is helpful.
14 The question that I was asking is to the extent that
15 there is a criticism in here about the location of the
16 report and its non-assessment. Had that criticism been
17 made publicly elsewhere?

18 A. That criticism or questions and concerns had been raised
19 about the location and about the non-assessment of
20 alternatives, yes.

21 Q. By whom?

22 A. NGOs, including, from memory, the Corner House.
23 Certainly WWF, World Wildlife Fund.

24 Q. Could I ask you briefly to comment on the other document
25 that was disclosed yesterday, which was the Freshfields

1 legal memorandum. I don't know whether you'd find that
2 on the witness desk, if there is a copy on the witness
3 desk. We disclosed yesterday a Freshfields legal
4 memorandum. I don't know if there is a copy. (Handed).

5 THE CHAIRMAN: Is that something that was put to the witness
6 yet or handed up to us?

7 MS CALLAGHAN: No, it was not. It is privileged.

8 MS PROOPS: I'll share with Mr Michaels.

9 MS CALLAGHAN: The tribunal has not received it because my
10 understanding was that Mr Michaels conceded that he
11 accepted our point, our point being that in respect of
12 the paragraphs he had previously said appeared to be
13 legally privileged, the extent there was any legal
14 privilege, it had been waived.

15 MR MICHAELS: Yes, we do accept that.

16 MS CALLAGHAN: As a result I did not put that document to
17 any witness and I did not give it to the tribunal.

18 MR MICHAELS: If the tribunal doesn't have it, I'm content
19 not to ask the witness questions about it.

20 MS CALLAGHAN: We'd be grateful.

21 MR MICHAELS: Can I ask you to turn to page 528, which is
22 bundle 2, the second large bundle. Do you recognise
23 this document?

24 A. I do. It is business principles -- sorry, yes, it is
25 business principles of the ECGD.

1 Q. This page is headed "Transparency"?

2 A. That's right.

3 Q. Could I ask you to look at the first bullet point under
4 the heading "Objectives"?

5 A. Yes.

6 Q. Tell me your understanding of that bullet point.

7 A. My understanding, and certainly it was my understanding
8 at the time -- I'll give my understanding at the time
9 that we put in the submissions on this particular
10 project. My understanding of this was that ECGD would
11 do what it says there, that it would consult, listen and
12 respond to people like myself and groups like Corner
13 House on major issues.

14 Q. Can you say any more about what you would consider major
15 issues to encompass?

16 A. Well, I would say that it certainly encompasses
17 policies. It certainly encompasses products, and where
18 ECGD says it encompasses practice, I would say that that
19 includes the practice of how it implements the business
20 principles, and the practice of reviewing projects, and
21 the practice of deciding on conditions for projects, and
22 the practice of deciding whether or not to support
23 a project. Those are all practices, as far as I'm
24 concerned.

25 Q. When these business principles were first published,

1 what was your reaction to their publication? How did
2 you perceive them?

3 A. We had some concerns that they didn't go quite far
4 enough. But we welcomed them, and I still think that
5 they represent perhaps ECGD going beyond what some other
6 ECAs internationally go beyond. I'd particularly
7 welcome the commitment to looking at wider government
8 policy on human rights, on sustainable development,
9 which does go beyond the common approaches.

10 Q. Can you explain how it goes beyond the common
11 approaches?

12 A. The common approaches does not require, for example, any
13 scrutiny of a project against human rights standards,
14 international human rights obligations. I mean, that's
15 just one example.

16 Q. What would have been your reaction, so far as you recall
17 it, to this chapter, the "Transparency" chapter?

18 A. I would have expected ECGD to do what it says, to listen
19 to us and to respond to us.

20 Q. How did you, if at all, test that?

21 A. I'm not -- I don't quite understand that.

22 Q. When did you first make use of these principles to
23 engage with the ECGD?

24 A. Oh, I think we tried from the very start. They were
25 introduced in 2000, I think, certainly in

1 representations on a dam in Turkey, the Ilisu Feili(?)
2 dam, we sent in submissions, and certainly on corruption
3 issues, we've attempted to engage with ECGD.

4 Q. In relation also to this subject?

5 A. And in relation to this subject.

6 Q. Has the ECGD's implementation of these business
7 principles -- or how has the ECGD's implementation of
8 these business principles accorded with your
9 expectations?

10 A. I think there's been a large gap, one of which was
11 highlighted, actually, and only has come into the public
12 domain, as far as I'm aware, during this particular
13 tribunal hearing.

14 We'd always assumed, and had never been corrected in
15 that assumption, that the BPU assessed conflict risk,
16 for example. We raised it specifically, some of these
17 conflict risks, at meetings at which a member of the
18 Business Principles Unit was present. I think that they
19 are, the document, the minute of those meetings are in
20 the bundle, but we were never told that it wasn't an
21 issue that the Business Principles Unit dealt with. We
22 know that one of the government's major foreign policy
23 priorities is to prevent conflict. We know that the
24 Business Principles require ECGD to take account of
25 wider government policy and that the Business Principles

1 Unit is responsible for implementing the business
2 principles. We therefore would have expected ECGD to
3 look at conflict risks -- the Business Principles Unit
4 to look at conflict risks. We now find that they're
5 not. So I think there is a gap between what they say on
6 the one hand and what they do on another, and on
7 consultation, there is very definitely a large gap.

8 Q. Can you say a little bit more about how there is a large
9 gap on consultations?

10 MS CALLAGHAN: That's a leading question.

11 MR MICHAELS: I don't think it is leading question.

12 MS PROOPS: It is a leading question. It's a 'how'
13 question.

14 MR MICHAELS: It is an open question.

15 Could you say a little bit more about what you
16 describe as the large gap on consultation?

17 A. Yes. We put in detailed submissions, probably a rather
18 New York lawyer's brief, but on this pipeline. We spent
19 an incredible amount of time on it, a lot of time in the
20 field on it, and we have never had a response to our
21 specific questions and concerns that were raised.

22 Q. Could I ask how that compares with your engagement with
23 other members of the lender group, to the extent that
24 there was any engagement?

25 A. Well, we engaged with the IFC, which is part of the

1 lenders group, and the IFC and we also engaged with the
2 EBRD, and both of them published at least the response
3 to the concerns raised, and it's a detailed response,
4 actually.

5 Q. Were there any other differences in the way that those
6 lender groups engaged with you as against the way the
7 ECGD engaged?

8 A. We met with them, we met with ECGD. No, I think the
9 main difference is in the response to the specific
10 concerns and detailed concerns that we raised.

11 Q. Does that difference have any impact on the way in which
12 you might engage in future with those different
13 institutions?

14 A. Well, there are no absolutes here in terms of the
15 choices we would make. But where the conversation with
16 an institution is entirely one way, there is less
17 likelihood that we would continue to engage. Certainly,
18 a recent example is discussions that the OECD, over the
19 common approaches, which has held consultations on the
20 common approaches, but where NGOs have gone along and
21 given detailed evidence and submissions and had very
22 little back, little, if nothing, back, and the NGOs have
23 decided to withdraw from that consultation.

24 So it's always a decision of where one puts one's
25 times and energies. There are many routes to try to

1 achieve one's objectives of getting one's concerns
2 across and acted on, and if this isn't a route that's
3 fruitful, then we wouldn't engage with it.

4 Q. Could I ask you to turn back to the flash report.

5 A. Can you remind me where it was?

6 Q. Your slimmer bundle, bundle 3, towards the back of
7 page 1046. Two-thirds of the way down the page, there's
8 a passage in bold italics. If I could just ask you to
9 read the lines above that in that passage.

10 A. Yes. From the wrap(?) annex, yes?

11 Q. Yes, I think that's sufficient, unless anybody wishes
12 you to read further up.

13 When you first read that flash report, how did you
14 perceive the statement in the final sentence?

15 A. I was very disturbed by it. I did not perceive that it
16 just -- well, I read it in a context, a wider context,
17 in which there'd been criticism of BOTAS's operations of
18 the pipeline, its implementation of the pipeline, that
19 had covered a wide range of issues, from engineering to
20 its handling of social issues. So I read this very much
21 in this context, and I read it, and still continue to
22 read it, as a criticism of BOTAS's approach to
23 implementing this particular project. And it raised
24 major concerns with me that if the company that's
25 actually responsible, not just for building, but

1 operating the pipeline in the Turkey section, is not
2 transparent, is dishonest, and shows a lack of
3 consistency in how it applies policies, that is of
4 considerable concern to me.

5 Q. Thank you. You can close that bundle.

6 One final question. Evidence has been given, which
7 you will have heard, as to the extent to which
8 consideration of environmental and social impacts can
9 have a bearing on financial risk. Can you comment on
10 how you see that issue?

11 A. I think there's plenty of evidence that shows that
12 environmental and social risks are more than just
13 marginal in terms of financial risks. If I can give
14 just two brief examples. In the cases of Sakhalin oil
15 pipeline, non-compliance by Shell, the company building
16 it, with local environmental legislation led to
17 a complete renegotiation of the contracts by the Russian
18 State. That is clearly with major financial
19 implications.

20 If I could also give one other example. Where
21 conditions, environmental and social conditions, are put
22 in the contracts that the ECAs and lender groups sign on
23 to, and where subsequently they're not enforced, the
24 export credit agency may have to withdraw from the
25 project because the contract has gone into default.

1 This has happened yesterday, with three export credit
2 agencies withdrawing from a major project in Turkey, the
3 Ilisu Dam project, because of conditions that they put
4 into the contract, the environmental and social
5 conditions had not been met by Turkey.

6 That clearly has financial implications, not least
7 in the amount of time that the ECA spent on assessing
8 the project, getting the contracts in place, and so on
9 and so forth.

10 MR MICHAELS: No further questions.

11 Cross-examination by MS CALLAGHAN

12 MS CALLAGHAN: Can I just pick up on some of the evidence
13 you've given this morning. Your position is that,
14 reading the business principles, you expect ECGD to
15 listen and to respond to you; is that correct?

16 A. To members of the public, to NGOs, yes, and to
17 stakeholders. I think the wording is stakeholders.

18 Q. Yes. Let's assume you represent Corner House, our
19 stakeholders for these purposes.

20 A. Okay.

21 Q. Did you expect a response to your submissions on the BCT
22 project?

23 A. Yes.

24 Q. Do you consider that the obligation set out there, to
25 the extent that it is an obligation, is one to consult

1 in accordance with Cabinet Office guidelines?

2 A. The distinction, and that was only very recently made
3 open to the Corner House, in fact earlier this year by
4 ECGD, up to then, I'd assumed that "consult" meant what
5 the government means by consult, ie, according to
6 government office guidelines. So it had never occurred
7 to me that when they talked about "consult", they meant
8 something other than consult in the Cabinet Office
9 guidelines sense of the word.

10 Q. Just to clarify, when you saw this document for the
11 first time, published in December 2000, you considered
12 that the phrase "ECGD will consult" meant that they
13 would consult in accordance with Cabinet Office
14 guidelines?

15 A. Absolutely, yes, or whatever the established guidelines
16 were at the time.

17 Q. So that would mean, wouldn't it, that they should not
18 have reached a decision on whether or not to support the
19 BTC project without having responded to your
20 submissions?

21 A. I think that's absolutely right.

22 Q. Presumably you saw the decision notice that ECGD issued
23 in December of 2003 when it decided to grant support for
24 the project. If I can take you to it, page 345 of the
25 first bundle.

1 A. Yes.

2 Q. If you look at page 349, you see the date that it was
3 issued on, 17 December 2003.

4 A. Yes.

5 Q. You and your organisation, Corner House, would have been
6 aware of this decision almost as soon as it came out,
7 wouldn't you?

8 A. Yes.

9 Q. Did you write, or Corner House write, to ECGD or contact
10 ECGD at the time and complain that they had reached
11 a decision on support without having responded to your
12 submissions?

13 A. No, we didn't, and there's a reason for that. We're
14 a small organisation. We hadn't had access to, and
15 didn't have access to, lawyers. We were unaware of the
16 process of judicial review in any substantive terms at
17 that point, and we thought the decision had been made.
18 We thought the decision had been made, and that was it.

19 Q. Were you in contact with Phil Michaels of Friends of the
20 Earth at the time this decision was made?

21 A. I was in contact with Phil Michaels, sure. I mean,
22 I worked with Phil Michaels on number of issues;
23 I didn't work with him on the BCT pipeline.

24 Q. You would have been aware that Phil Michaels is an
25 experienced litigator in the field of judicial review,

1 wouldn't you?

2 A. Why?

3 Q. Were you aware of that?

4 THE CHAIRMAN: Don't ask questions back. If you don't know,
5 you don't know.

6 A. I don't know if I was aware that he is an experienced
7 litigator. I knew of his work on access to information,
8 but I didn't know of his work on judicial review at the
9 time. I can't remember knowing of it specifically.

10 Q. Mr Hildyard, in fact, Corner House are experienced
11 litigators in the field of judicial review, aren't they?

12 A. Subsequent to this decision, yes.

13 Q. When do you say you acquired knowledge of judicial
14 review process?

15 A. In 2004. We took the ECGD to court.

16 Q. In 2004?

17 A. Yeah.

18 Q. When in 2004?

19 A. I think it was December.

20 Q. So you're saying that by December 2004 you had the
21 requisite knowledge of judicial review process to take
22 ECGD to court, but you didn't have it in December 2003?

23 A. I am saying that in that intervening period, one of the
24 things we began to -- I mean, I began to ask -- asking
25 questions about, well, how do you challenge these sorts

1 of decisions?

2 Q. That is simply not realistic, is it?

3 A. Why?

4 Q. You were the head of an organisation that was an NGO
5 that had advanced a major media campaign against the BCT
6 project, hadn't you, prior to December 2003?

7 A. Actually, let me -- I'm sorry. You're right. Because
8 if I think back to the Ilisu case, actually Friends of
9 the Earth did potentially look at the possibility of
10 a judicial review.

11 Q. When was that?

12 A. My apologies.

13 THE CHAIRMAN: That's okay.

14 A. That was in 2000.

15 MS CALLAGHAN: So you had already experienced judicial
16 review process, or the possibility of launching judicial
17 review proceedings, three years before ECGD made its
18 decision on the BCT project?

19 A. No, Friends of the Earth had considered that
20 possibility.

21 Q. Which is an organisation with which your organisation,
22 Corner House, works closely?

23 A. It works closely. It's a different organisation.

24 Q. Mr Hildyard, you didn't launch any judicial review
25 against ECGD for its failure to consult with you or

1 respond to you in relation to the BCT project, did you?

2 A. No.

3 Q. Yet your position is that they absolutely should have
4 responded to your submissions before they reached
5 a decision on support.

6 A. That is right. That's absolutely right.

7 Q. Mr Hildyard -- can I just wait for people to sit down?
8 It's rather distracting.

9 Do you believe that credit export agencies such as
10 ECGD should exist?

11 A. I think that export credit agencies such as ECGD can
12 play a useful role. I think that they are in need of
13 reform. I think that they need mandatory environmental
14 and social standards, that they need to be more
15 transparent, and some of those objectives are set out in
16 the so-called Jakarta Declaration that's in the bundle.

17 Q. What is the useful role that they can play?

18 A. They can assist exporters.

19 Q. You accept, do you, that that is a valid function?

20 A. I do.

21 Q. Is it not your position, and the position of Corner
22 House, that export credit agencies such as ECGD fuel
23 a race to the bottom where no environmental or social
24 standards will get in the way of business as usual?

25 A. Sorry, can you put that one again?

1 Q. Certainly. Is it the view of you and Corner House, your
2 organisation, that credit export agencies such as ECGD
3 fuel a race to the bottom where no environmental or
4 social standards will get in the way of business as
5 usual.

6 A. It is certainly the view of Corner House and other
7 groups within the ECA Watch Alliance that where ECAs
8 have lower standards or no standards, that that does
9 fuel a race to the bottom and that if one is looking to
10 transform or bring about a change within industry, such
11 that it is more sustainable environmentally and more
12 responsible socially, standards are very, very
13 necessary.

14 Q. Do you say that the ECGD is one of those ECAs that has
15 lower or no standards?

16 A. I say that the ECGD has improved since, I think,
17 possibly those words were written, but I'm still
18 concerned about (a) its application of its stated
19 standards, and I'm also concerned about the wide scope
20 for discretion in the application of those standards.

21 Q. Just to be clear, those words were written on the
22 ECA Watch website, weren't they?

23 A. Quite possibly. I mean, I'm not overly familiar
24 with it.

25 Q. You clearly recognised them when I read them out to you.

1 Do you accept that they can be found on the ECA Watch
2 website --

3 A. I --

4 MS PROOPS: Can I just pause there? I think it's
5 unacceptable to quote from a document that has not been
6 provided to the parties, and it is unacceptable to seek
7 to introduce, when a witness is already giving evidence,
8 the document that should have been produced if reliance
9 was going to be placed on it.

10 A. I'm happy to --

11 MS CALLAGHAN: I don't need to, if the witness accepts the
12 proposition that --

13 MS PROOPS: No, I'm absolutely -- that's absolutely
14 incorrect ... if an excerpt from a document that neither
15 I nor Mr Michaels has seen is to be put to a witness,
16 that is completely unacceptable.

17 THE CHAIRMAN: I hadn't realised it was a document.
18 I thought it was just a memorable phrase coming out of
19 a question. I didn't realise even it was a quote.

20 MS CALLAGHAN: I'm very happy to --

21 THE CHAIRMAN: All this about "race to the bottom" and all
22 the rest of it is a quote, is it?

23 MS CALLAGHAN: It's a quote from a website.

24 MS PROOPS: Why has the document not been produced until the
25 witness has already started giving evidence? I mean,

1 one is being ambushed by documents. There have been
2 documents that have been coming out throughout this
3 hearing. To have a document come out in the midst of
4 a witness giving evidence is completely unacceptable.

5 THE CHAIRMAN: In this particular circumstance, it sounds as
6 if the witness is not too troubled to comment on that
7 statement as a statement, and he has done so in terms of
8 where he sees, in his view, where ECGD stands in
9 relation to the relative standards of ECAs. But I'm not
10 sure where the question is that he's going to go next.

11 Are you seeking to attribute this to the witness?

12 MS CALLAGHAN: Yes, I am, sir, and I'm trying to elicit
13 whether or not --

14 THE CHAIRMAN: Do we have any evidence of what ECA Watch is
15 even?

16 MS CALLAGHAN: Yes, it's in Mr Hildyard's witness statement.
17 ECA Watch is a group of NGOs that concern themselves
18 with the activities of ECAs, isn't it?

19 A. Yes.

20 Q. It has a website, doesn't it?

21 A. It does.

22 Q. Corner House is one of the members of ECA Watch?

23 A. It doesn't have members as such, but it is part of
24 that --

25 MS PROOPS: Can I just ask where this whole line of

1 questioning is going? What is the point at which this
2 is driving, bearing in mind the issues the tribunal has
3 to decide?

4 MS CALLAGHAN: It is not for Ms Proops to question where my
5 cross-examination is going, but, sir, if you want to
6 have an answer to that, it's obviously to establish the
7 pre-disposition of this particular witness.

8 THE CHAIRMAN: Right. So have you any material you want to
9 put? I mean, if there's stuff --

10 MS CALLAGHAN: It has not been disputed by the witness, but
11 I'm very happy to provide my learned friends --

12 THE CHAIRMAN: No, not this particular one, but you've
13 obviously got a clip of papers there. So if there's new
14 material coming in, I think we need to at least know
15 what it is you're proposing to put in --

16 MS CALLAGHAN: I'm sorry, sir, but --

17 THE CHAIRMAN: -- and we can then decide. I mean, at the
18 moment it seems to be said that this witness is
19 associated with a public statement which indicates his
20 pre-disposition. I'm not sure where that takes us in
21 terms of public interest generally, because we're not
22 talking about the disclosure, or possible disclosure, of
23 any material to this witness.

24 MS PROOPS: Or indeed the applicant's motive in requesting
25 the information.

1 THE CHAIRMAN: But the public -- I'm not sure where it's
2 going in any event, and I'm troubled by the suggestion
3 that the witness is being ambushed. So the first
4 document has been commented on. Are there any other
5 documents you're putting to the witness?

6 MS CALLAGHAN: Sir, I don't need to put any other further
7 documents, but these are documents that come from the
8 ECA Watch website, and I'm happy to provide copies of
9 them.

10 THE CHAIRMAN: Can't you simply ask the witness -- I mean,
11 if you're looking at the witness's views, he's giving
12 you answers on what his overall attitude to what --

13 MS CALLAGHAN: Indeed, and that's precisely what I've been
14 asking him.

15 THE CHAIRMAN: -- ECAs are. But if you're then going to
16 produce information which you say is contrary to what he
17 is saying in evidence, then I think we need to be very
18 careful.

19 MS PROOPS: I'm still struggling to see where this line is
20 going, because the motive of the applicant is not
21 relevant.

22 THE CHAIRMAN: You made your point ... let's try and keep
23 going.

24 MS CALLAGHAN: Can I move on? What is your position, and
25 the position of Corner House, on whether ECGD should

1 have provided financial support for the BCT pipeline?

2 A. Our position was that the project did not meet
3 international standards and that therefore ECGD and IFC
4 and EBRD and the other ECAs should not have provided
5 support.

6 Q. Do you believe the BCT project met international
7 standards at the time that ECGD offered support for the
8 project?

9 A. No.

10 Q. Do you believe that the BCT project currently meets
11 international standards or not?

12 A. I have some concerns over some aspects of it. I think
13 there are some outstanding compensation claims, for
14 example, and certainly, if there was no proper
15 assessment of the siting of the terminal, I'd still have
16 concerns over that. Those are examples, not at all an
17 exhaustive list.

18 Q. So you have other concerns as well?

19 A. I would have to give thought to what they were, but
20 I can supply the tribunal with something on that.
21 That's quite a technical question.

22 Q. Going back to the note of the decision that we looked at
23 at page 345, if we go back to 349, the last page of that
24 document, you would have seen at the time ECGD's
25 conclusion that the project complies in all material

1 respects with relevant guidelines and standards.

2 A. Yes.

3 Q. Were you concerned about the conclusion that ECGD had
4 reached in that regard?

5 A. I didn't accept it. I felt that it was they had
6 misdirected themselves, if you like, on the materiality
7 of the issues.

8 Q. So is it fair to say that you disagreed with the
9 conclusion that the project complied in all material
10 respects with the relevant guidelines and standards?

11 A. Yes, I still do.

12 Q. Do you say it is difficult for you to assess the
13 soundness of that conclusion without knowing the basis
14 on which it was arrived at?

15 A. Absolutely. All I have at the moment in the public
16 domain is our evidence, submissions, what IFC said, but
17 I have no sense of how ECGD came to its conclusions, and
18 I should mention EBRD also.

19 Q. And if it's difficult to assess the soundness of the
20 conclusions, presumably it would also be difficult to
21 attack the soundness of ECGD's conclusions without
22 knowing the basis on which they reached those
23 conclusions?

24 A. I wouldn't use the word "attack".

25 Q. Can I rephrase it as "criticise"?

1 A. To assess them, weigh them up, respond to them, it would
2 certainly be very difficult.

3 Q. You have had disclosure of the redacted version of the
4 BPU report, haven't you?

5 A. Yes.

6 Q. Is your complaint that it doesn't indicate the basis for
7 the conclusions reached in relation to each issue?

8 A. That is exactly the complaint.

9 Q. You've also said in your witness statement it doesn't
10 indicate the rationale behind the decision; is that
11 correct?

12 A. That's exactly right.

13 Q. If you did have access to the BPU's reasoning behind
14 each issue considered in the BPU report, is it likely
15 that you would wish to consider that reasoning?

16 A. I would like to have considered that reasoning. That's
17 why we've asked for the information.

18 Q. So in fact, you would consider the reasoning, wouldn't
19 you?

20 A. Yes.

21 Q. And you would have views about the soundness of that
22 during, wouldn't you?

23 A. I would have views about the soundness of the reasoning,
24 yes.

25 Q. Is it likely that you would disagree with the soundness

1 of some or all of the reasoning --

2 MS PROOPS: How can the witness answer that question?

3 A. How can I possibly say that?

4 THE CHAIRMAN: He doesn't need you keep jumping in.

5 A. I am sorry, I haven't seen the material ...

6 MS CALLAGHAN: Let's take the example of the information you
7 were shown this morning, paragraph 2.2.7 of the BPU
8 report. That's the information that has been
9 colloquially described as the Turkey information. Now,
10 you, as you've fairly pointed out, have only had a
11 fairly short time to consider that material but you've
12 already reached, as you say, an immediate view, haven't
13 you?

14 A. An initial view.

15 Q. An initial view?

16 A. I mean just -- yeah.

17 Q. And your initial view, as you expressed it, was that you
18 had some doubt that the materiality of the concerns had
19 been addressed about the routing of the pipeline?

20 A. That it suggested that was the case.

21 Q. Yes, and you also stated that if the alternatives had
22 not been properly assessed, which appeared to you may
23 have been the case from reading this passage, that
24 brought into question a statement made to Parliament by
25 ECGD that the project complies with all material

1 standards?

2 A. That's right.

3 Q. And having seen this piece of information and already
4 reached the view that potentially ECGD has made
5 a questionable statement to Parliament about whether or
6 not the project complied with all material standards, is
7 it likely that you would wish to make those views known
8 to the wider public?

9 A. I would certainly want to make those views known to the
10 wider public.

11 Q. Would you accept that Corner House, your organisation,
12 and you personally are perfectly capable of making your
13 views known to the wider public, and indeed you're very
14 competent at doing so?

15 A. That's very kind of you. I accept that.

16 Q. Would you accept that you're very media savvy?

17 A. Some would say that. We get quite a lot of media
18 coverage.

19 Q. I take it, from Mr Michaels' cross-examination, that
20 it's your position that if the full BPU report were to
21 be made public, you would not single out any particular
22 civil servant for criticism. Is that your position?

23 A. That is absolutely our position. I would like to say
24 that in our -- I think it was the first letter that we
25 wrote, or Mr Michaels wrote, asking for the

1 Information Commission to review the case, we were at
2 pains to point out that any criticisms we made did not
3 reflect on the professional integrity of the civil
4 servants. I don't have that letter in front of me.
5 I think it's in the bundle. We do not make ad hominem
6 attacks; we're concerned with ECGD and improving its
7 practices.

8 Q. I'm grateful.

9 Do you accept that any criticism you are likely to
10 make would relate to the soundness of the reasoning
11 underpinning the BPU report?

12 A. It would certainly bear on the soundness of the
13 reasoning, yes, but more on the conclusion.

14 Q. But earlier you accepted that by simply having the
15 conclusions, it was difficult for you to assess the
16 soundness of the conclusions without having access to
17 the basis for the reasoning.

18 A. Well, you need the two, don't you?

19 Q. Well, that was the -- [overspeaking].

20 A. Sorry, I would say you need the two, yes. You need to
21 look at the two in the round.

22 Q. So simply having the conclusions by themselves won't
23 enable you to assess the soundness of the reasoning
24 underpinning that conclusion?

25 A. Put like that, that's absolutely right.

1 Q. So once you have received the full BPU report, any
2 criticism that you are likely to make would relate to
3 the soundness of the reasoning underpinning that report
4 rather than the conclusions themselves?

5 A. Of ECGD's reasoning, yes.

6 Q. Well, it wouldn't just be ECGD's reasoning, would it,
7 because the only thing that is left in the BPU report is
8 the BPU's assessment sections, which you say provide the
9 reasoning for the conclusions.

10 A. BPU is a unit within the ECGD. It is operating as part
11 of the ECGD. That's what we're interested in. We are
12 interested in ECGD's reasoning.

13 Q. Yes, but although BPU is a unit within ECGD, what you
14 would be criticising would relate to the soundness of
15 the reasoning in a particular unit's report, wouldn't
16 it?

17 A. The soundness of the reasoning in a particular unit's
18 report, yes, but we've also asked for the underwriting
19 committee minutes of the meeting that was held to
20 discuss the report, and so we'd also want to look at how
21 they dealt with the issues that were raised in the
22 report. The two go together.

23 Q. Yes. Do you accept --

24 A. In order -- and the whole time they are units of the
25 ECGD. I don't make a distinction.

1 Q. Do you accept that it's inevitable that if you're
2 criticising the reasoning underlying the BPU report, you
3 would in effect be criticising the person or persons
4 responsible for that report whether or not you would
5 identify them by name?

6 A. This has -- you know, this has to do with institutional
7 personalities. I mean, I accept that possibly
8 Mr Allwood wrote most of the report, but he was writing
9 as a civil servant working for ECGD, and it's as a civil
10 servant working for ECGD that the reasoning is
11 important.

12 Q. Let me rephrase the question in a slightly different
13 way. If you are criticising the reasoning underlying
14 the BPU report, you are in effect criticising the civil
15 servant responsible for writing that report, whether or
16 not you identify him or her by name.

17 A. Well, strictly speaking, I suppose that is a view. It's
18 not my view.

19 Q. It's not your view?

20 A. No, it's not my view.

21 Q. But you accept that that's how it would be perceived?

22 A. By those who would personalise things, yes, but I don't
23 like personalising things. I'm interested in ECGD as an
24 institution.

25 Q. Do you accept that those civil servants who are

1 responsible for that report would have no opportunity to
2 defend their work to the public if you were to make
3 criticisms through the media about the soundness of the
4 conclusions that they have reached?

5 A. The ECGD would have an opportunity to respond.

6 Q. ECGD would?

7 A. Yes.

8 Q. Do you mean the minister would?

9 A. The minister would, yes, and so would ECGD's press
10 office.

11 Q. But do you accept that the particular civil servant
12 whose reasoning you are criticising would not be
13 expected, or indeed have an opportunity, to go in front
14 of the media and defend their position?

15 A. I wouldn't expect them to, because they are not being
16 personally criticised. I mean --

17 Q. Their work is being criticised though, isn't it, though,
18 Mr Hildyard?

19 A. May just say this: I mean, the logic of this is that
20 any -- if I was to critique a published report by ECGD,
21 for example, their annual report, which was written by
22 someone, I was therefore criticising the accountant for
23 ECGD. That doesn't stack up. It's not how I think
24 members of public view documents that are put together
25 by units of departments. They're viewed

1 institutionally.

2 I think the public is au fait enough with the
3 workings of companies, bureaucracies, government
4 institutions, to be able to make that distinction.

5 Q. Can I move to a different topic?

6 THE CHAIRMAN: If you are, we just need -- the stenographers
7 are struggling ... they've just asked for a short break.
8 Can we just do a five minute break? Is that enough for
9 you? I think we'll just stay here.

10 (12.22 pm)

11 (A short break)

12 (12.28 pm)

13 A. Before we start --

14 THE CHAIRMAN: You can ask the question, but I'm not sure if
15 I'm going to be able to answer it.

16 A. I think I may have got the dates slightly wrong when
17 Ms Callaghan was asking me about my knowledge of
18 judicial review. I may have been aware of judicial
19 review at that time, but I'm trying to remember the
20 date.

21 THE CHAIRMAN: The second time the evidence is -- or the
22 refinement of the evidence is 2000. That's what I have
23 in the evidence.

24 A. I can't remember -- I cannot recall asking for -- or
25 getting legal advice on a judicial review of an ECC

1 case. But I can clarify that. I'd have to go back to
2 my diary ... I'm giving my apologies ...

3 MS CALLAGHAN: Mr Hildyard, is it your position that members
4 of the public such as yourself are entitled to
5 participate in the decision-making processes that affect
6 them?

7 A. Yes.

8 Q. Is it your position that members of the public should be
9 able to judge for themselves whether public authorities
10 reach good decisions and do so in a manner which is
11 consistent with their policies and procedures?

12 A. Absolutely.

13 Q. Do you accept that in order for anyone to participate in
14 the decision-making process in a meaningful way, they
15 would need access to all relevant information relating
16 to that decision?

17 A. The more information that's available, the better.

18 Q. But if it is to be participation in the decision-making
19 process that's meaningful, you would have to have all
20 relevant information before you in order to participate,
21 wouldn't you?

22 A. I accept that there may be cases where some information,
23 national security, should not be in the public domain.
24 I give that --

25 Q. That wasn't the answer to my question, but I note it

1 anyway. So do I take it from your last answer that you
2 accept there can be a difference between the totality of
3 relevant information that relates to a decision and
4 information that's properly disclosable under either the
5 Freedom of Information Act or the regulations?

6 A. I accept that difference.

7 Q. Do you accept that as a government department, ECGD is
8 accountable to Parliament?

9 A. I accept that.

10 Q. And Select Committees can and do enquire into its
11 conduct, don't they?

12 A. They do.

13 Q. Corner House can make submissions at Select Committee
14 hearings into ECGD, can't it?

15 A. It can.

16 Q. In fact it does?

17 A. It does.

18 Q. Can I turn to open bundle 1, page 354.

19 A. Yes.

20 Q. This is the summary section of the Select Committee
21 report into implementation of ECGD's business
22 principles. Now, I put the question carefully, but can
23 I ask you to look at that first paragraph, and in
24 particular, the first sentence, which states:

25 "In our view, ECGD's decision-making procedures and

1 its consideration of the application from BP for
2 underwriting support for the BCT pipeline construction
3 project were consistent with its business principles."

4 Did you personally derive some reassurance from that
5 finding?

6 A. I don't actually agree with it.

7 Q. I'll move on. Can I ask you, please, to go to
8 paragraph 55 of your witness statement, which is
9 at page 447. You're referring here to both the decision
10 note of ECGD and to one of the comments made by the
11 Select Committee in relation to that decision note.

12 A. Yes.

13 Q. What you've said there is that:

14 "The note does set out the process by which the
15 project was assessed, and the standards against which it
16 was bench marked. However, since the procedures and
17 standards which the ECGD employed were already in the
18 public domain, the decision note therefore adds little
19 to the public record in that regard."

20 A. Yes.

21 Q. Can I ask you to go to the document at page 323 of that
22 bundle. It is the CIAP document, the case impact
23 analysis process published by ECGD.

24 A. Yes.

25 Q. You are presumably familiar with this document?

1 A. Yes.

2 Q. Is that right?

3 A. Yes.

4 Q. Looking at paragraph 2.1 under the heading

5 "Methodology", it says:

6 "The methodology described in this paper is intended
7 to give an outline of the case impact analysis process
8 that's usually followed by BPU. It is not a statement
9 of what will be done in every case as the BPU will
10 exercise its professional judgment on the basis of the
11 actual circumstances of each individual case."

12 I'm terribly sorry, I'm finding the noise of paper
13 turning slightly distracting.

14 MS PROOPS: I apologise.

15 MS CALLAGHAN: If you turn over the page to paragraph 2.5,
16 you see a paragraph that reads at the beginning:

17 "The method used by ECGD is to determine the
18 acceptability of the impacts of the case because to
19 compare them with international standards ..."

20 It says:

21 "These international standards are usually those
22 contained in the directives, policies and guidelines of
23 the World Bank Group."

24 It goes on to list some of those policies and
25 guidelines. Do you see that?

1 A. I do see that.

2 Q. These are very broad statements of generally the
3 methodology that the ECGD proposes to adopt in
4 respect of different cases, isn't it?

5 A. Yes.

6 Q. Can I ask you now to look at the disclosed parts of the
7 BPU report. In particular, can we start with page 72?

8 A. Where is it?

9 Q. The same bundle. Page 72 is the beginning of that
10 document. Just to clarify, it follows the covering
11 letter of 13th December 2005 at page 67 of the bundle.

12 A. Sorry, which page are you on?

13 Q. This is the document that was provided in response to
14 your request for information. It's the BPU report. The
15 letter that covered that is at page 67, for your own
16 reference, and the BPU report itself starts at page 72.

17 A. Yes.

18 Q. Do you accept that this is the document that you were
19 provided with in December 2005?

20 A. Yes.

21 THE CHAIRMAN: You're on a different page.

22 MS CALLAGHAN: Page 72. Do you accept that's the first page
23 of the disclosed parts of the BPU report you were
24 provided with in response to your information request?

25 A. I do.

1 Q. At page 73, if you can turn over, we see a heading
2 "Methodology". I'm sure you're familiar with the
3 contents of this report. Turning forward to page 74, we
4 see the heading "Named Criteria for Acceptability".

5 These two pages, and I can take it in detail if
6 you'd like me to, set out the methodology that ECGD
7 actually apply to this particular project?

8 A. Yes.

9 Q. Doesn't it?

10 A. Yes.

11 Q. At page 74, when we look at that page, in the main
12 paragraph there on that page it says:

13 "As stated in the BPU case impact analysis process,
14 it's ECGD's policy that projects should comply in all
15 material respects with the relevant safeguards, policies
16 directives and environmental guidelines of the World
17 Bank Group. Thus, for ECGD, the applicable
18 environmental and social policies and guidelines against
19 which the project, ie the BCT project has been assessed
20 are ..."

21 Then we see a long list of them.

22 A. Yes.

23 Q. Indeed, the most relevant guidelines and policies and
24 safeguard policies have then been listed in bullet point
25 form on that page?

1 A. That's right.

2 Q. So the information on this page of the document enables
3 the reader to determine whether or not ECGD has in fact
4 considered and applied the policies and guidelines that
5 it said it would apply in the CIAP document, doesn't it?

6 A. That's right.

7 Q. Turn forward to page 75. It might help you to have the
8 table of contents handy -- they're at page 72 -- so you
9 can see this in context. But we can see here that the
10 report then embarks on an examination of a number of
11 different topics, doesn't it?

12 A. Yes.

13 Q. The first topic it discusses is route selection on
14 a macro scale.

15 A. Yes.

16 Q. This page, at the very least, tells you that the BPU did
17 consider group selection at a macro scale, doesn't it?

18 A. Yes.

19 Q. Likewise, turning forward at page 76, we then see that
20 it goes on to discuss route selection on a micro scale,
21 looking first at Azerbaijan and then moving forward
22 through the different Member States, Georgia and Turkey.

23 A. That's right.

24 Q. So again at the very least the document tells you what
25 topics the BPU considered?

1 A. Yes.

2 Q. Then moving forward to page 82, we see the beginning of
3 the report assessing individual environmental impacts,
4 and that includes atmosphere and water bodies and
5 habitats and so on, doesn't it?

6 A. That's right, yes.

7 Q. You'll also be familiar that it then goes on to discuss
8 a number of potential social impacts?

9 A. Yes.

10 Q. You've stated in your witness statement -- and I'm happy
11 to take you back to it at paragraph 51 -- that it's
12 evident from this report that one of its principal
13 purposes was to address the concerns of NGOs.

14 A. Yes.

15 Q. Can I turn you back to page 76 of the report, and
16 bearing in mind that this relates to the topic of route
17 selection on a macro scale, looking at the top of the
18 page under the heading "NGO Comments", that section, or
19 those two paragraphs, gives you information about how
20 the BPU dealt with NGO comments, doesn't it?

21 A. No, it summarises the NGO comment.

22 Q. Okay. It summarises NGO comments.

23 A. And I'm not certain that I -- I'd need to look back, but
24 I think some other issues were raised too.

25 Q. Just looking at footnote four, which accompanies that

1 heading "NGO Comments", when we look at the footnote, it
2 says:

3 "The NGO comments reported in this report are those
4 that the BPU considers the most pertinent to the issue
5 being reported. This report does not attempt to list
6 every comment received from NGOs."

7 So, at the very least, the information on this page
8 tells you the NGO comments that the BPU considered to be
9 the most pertinent?

10 A. That's right.

11 Q. It also tells you, as you pointed out, how the BPU
12 summarised those NGO comments?

13 A. Yes.

14 Q. And by a process of omission, it would tell you what NGO
15 comments were not considered pertinent by the BPU?

16 A. That's right.

17 Q. So you will be able to judge, from looking at those NGO
18 comments sections, whether or not BPU accurately and
19 fairly summarised NGO concerns?

20 A. Yes, although I would add that some of the comments on
21 alternatives, for example, and the route, may have been
22 in -- I mean, in other sections in that the sections
23 chosen in the BPU report aren't necessarily the section
24 headings used by the NGOs. So concerns over the
25 terminal and assessment of the terminal may well have

1 come in the issues of the macro route, but they may have
2 also come into issues around water polluting and so on.

3 Q. Certainly, and it would be possible to navigate this
4 report and to look at those different subject headings
5 to see what, if any, NGO comments were recorded in
6 relation to each of those different topics?

7 A. Agreed.

8 Q. Yes. Would you accept, then, that the disclosure of
9 these parts of the report that you were given in 2005
10 mean that you now have, or have had since 2005, far more
11 information about BPU's assessment of environmental and
12 social impacts and NGO comments than you had before you
13 made the request?

14 A. No, I don't accept that, in that -- well, what we do not
15 have is the assessment. I have, you know -- it tells us
16 that they summarised 99 per cent of the time accurately,
17 but sometimes inaccurately, our views, but they don't
18 tell us what their assessment of those views are, except
19 where there are one or two places where they've not --
20 they've failed to redact it when they meant to do.

21 Q. So can I ask you to turn toward page 135 of the bundle.
22 These are the redacted minutes you were provided with in
23 response to your request for information. Do you accept
24 that disclosure of these redacted minutes gives you at
25 least some information about the underwriting

1 committee's decision-making process?

2 A. The process or its assessment?

3 Q. Either its assessment or its process. This document
4 gives you some information about that, doesn't it?

5 A. It gives some information about the issues that they
6 considered, but not the assessment.

7 Q. Looking at page 135, at paragraph 3.1, which reads:

8 "In presenting their review, BPU referred to the
9 paper before the committee and outlined ..."

10 Then there's a series of bullet points.

11 That information tells you first of all that BPU
12 attended this meeting, doesn't it?

13 A. It does.

14 Q. And that also they'd presented their review or their
15 report?

16 A. That's true.

17 Q. Presumably in relation to the BCT project because that's
18 what your information request related to?

19 A. That's right.

20 Q. It also tells you, doesn't it, what they considered
21 important enough to underline to the underwriting
22 committee?

23 A. Yes.

24 Q. Turning over the page, paragraph 3.2 begins:

25 "In general discussion, BPU stated that outstanding

1 issues included ..."

2 Then there's a bullet point list there.

3 So it tells you what issues the BPU considered to be
4 outstanding at this stage?

5 A. That's right.

6 Q. It's then apparent from 3.3 that a number of issues were
7 addressed in general discussion of the BPU review, and
8 at least in its redacted form it tells you some of the
9 issues that were discussed in general discussion.

10 A. Yes.

11 Q. Turning over the page to --

12 MR MICHAELS: Sir, I'd just question -- I'm not in the habit
13 of jumping in, but might I question where this is going
14 on the basis that ECGD's case is that this ought never
15 to have been disclosed and that ECGD's position is that
16 this was a mistaken disclosure, and therefore our
17 understanding is that had ECGD done what it set out to
18 do, its intention, then Mr Hildyard would not have had
19 any of this information about which Ms Callaghan is now
20 questioning. It's not clear --

21 THE CHAIRMAN: Except the reality is that it did go out, and
22 I think the question is pointing to, given what you've
23 got, let's have a look at what you didn't get, to try to
24 put it as neutrally as possible. So it's the fact that
25 Mr Hildyard got it, not the fact that they got it

1 inadvertently.

2 MR MICHAELS: If that's where it's going, then it's not in
3 dispute, but if where it's going is that the ECGD
4 discharged their responsibilities so as to provide
5 sufficient information to meet the public interest, then
6 that couldn't be accepted and that would appear to be
7 contrary to ECGD's own case. But that may be a matter
8 for Ms Callaghan to deal with in submissions.

9 MS CALLAGHAN: As a matter of fact, ECGD inadvertently
10 disclosed this redacted form of the minutes, but we have
11 never objected to that disclosure and we've never sought
12 to argue in our grounds of appeal anything to do with
13 the open version of these minutes.

14 THE CHAIRMAN: I think we're looking at the public interest
15 in disclosure, given what is already in the public
16 domain.

17 MR MICHAELS: Precisely, sir, and to that extent --

18 THE CHAIRMAN: It's actually in the public domain.

19 MR MICHAELS: But, sir, it wasn't at the relevant time,
20 that's precisely the point. At the relevant time, it
21 cannot be said that this was in the public domain.

22 MS PROOPS: Can I just intervene very briefly?

23 THE CHAIRMAN: No, you're all just firing at me ... let me
24 just think that through. (Pause). At the time of the
25 rejection of the request -- they happen at the same

1 time. They have this and the rest is rejected.

2 MR MICHAELS: But they --

3 THE CHAIRMAN: So that's the moment in time we have to
4 assess the public interest. You now have this body of
5 information. What is the public interest in having
6 more?

7 MS PROOPS: Can I just intervene very briefly? What
8 I understand Ms Callaghan to be driving at --

9 THE CHAIRMAN: Part of the trouble of jumping in is that we
10 don't know where the question is going, so we're
11 beginning to guess, and actually I'm inclined to let the
12 questioning go on and get on with it, frankly.

13 MS PROOPS: We'll come back to it if we need to.

14 MS CALLAGHAN: At page 137 under paragraph 4, we see
15 a description of next steps, don't we?

16 A. Yes.

17 Q. So this would tell the reader what happened or was
18 proposing to happen after this meeting took place?

19 A. Yes.

20 Q. Finally, looking at page 138, although the individual
21 names have been redacted, this list informs the reader
22 of the people that attended that very important meeting?

23 A. Yes.

24 Q. Again, I'm going to put the question: as a result of
25 this disclosure of this particular document, members of

1 the public such as yourself have far more information
2 about the decision-making process of the underwriting
3 committee than you did have at the date of the decision?

4 A. That's quite correct.

5 Q. And that information enables you to reach certain
6 judgments about the matters taken into account by both
7 the BPU and the underwriting committee?

8 A. It allows us to reach limited judgments or limited views
9 on what was taken into account. We had no idea, for
10 example, from what's been released what the BPU
11 recommended, nor do we know what the underwriting
12 committee made of those recommendations; we know that
13 they said that they accepted them, but did they accept
14 them in full? Did they accept that monitoring of
15 a particular issue should be every month, every week, as
16 recommended, perhaps, by the BPU? Or did they say no,
17 it should be over six months?

18 MS CALLAGHAN: I have no further questions.

19 THE CHAIRMAN: Who's next? Where do we go next? We've got
20 you down as a possibility of cross-examining.

21 MS PROOPS: I don't have any questions at all.

22 THE CHAIRMAN: I think you said that earlier. Do we have
23 any questions up here?

24 Questioned by the panel

25 MR TAYLOR: Can I ask you to turn to page 468 in the first

1 bundle, please, and in particular paragraph 2. At that
2 point you describe how -- you set out that you have
3 findings in depth of an on the ground fact-finding
4 mission to Turkey. I am just interested to know whether
5 that's done independently or whether that's done with
6 the cooperation of BCT or other partners involved in the
7 project.

8 A. It was a fact-finding mission by the principal NGOs
9 involved in working on this. From memory, it included
10 (inaudible) project, Corner House, Friends of the Earth
11 and an American group. So it was NGO, non-governmental
12 organisations. It was not done with the collaboration
13 of either ECGD or the Turkish Government or DTC. In
14 fact, on number of those occasions, we were considerably
15 harassed by the local police.

16 MR TAYLOR: Thank you.

17 THE CHAIRMAN: We've no more questions from here.

18 Any re-examination?

19 MR MICHAELS: Yes, I think I can do it in five minutes.

20 THE CHAIRMAN: This is a witness who we are going to dispose
21 of -- sorry, "dispose of" is the wrong language, but
22 finish the process, dispose of the process in 45, so
23 we're running short again. So press on.

24 Re-examined by MR MICHAELS

25 MR MICHAELS: Can I ask you to turn to page 206. Do you

1 recognise this document? The first page is page 198.

2 A. Yes, I do. It's the first letter that we've sent to
3 the -- I think it's the first letter we sent to the
4 Information Tribunal -- Commission.

5 Q. On page 206 on paragraph 44, could you read the first
6 sentence?

7 A. "Furthermore, and without questioning the
8 professionalism or integrity of BPU staff, Corner House
9 is concerned that the BPU's assessment of the subject
10 failed to include material facts, which, if included,
11 could have affected the assessments of the project's
12 compliance with the ECGD's policy".

13 Q. Is that the quote you were seeking to refer Ms Callaghan
14 to?

15 A. It was, actually, yeah.

16 Q. Is it your position that you do not wish to question the
17 professionalism or integrity of the BPU staff?

18 A. I have enormous respect for the BPU staff.

19 Q. Could I ask you to turn to page 256. Do you recognise
20 this e-mail?

21 A. Yes.

22 Q. Could I ask you to read the first sentence of the main
23 paragraph?

24 A. "In this particular case we do not require the
25 individual names to be released."

1 Q. Could you explain why you did not require the individual
2 names to be released?

3 A. Because we're not interested in the individual names.

4 Q. Why is that?

5 A. We're only interested in how the ECGD as an institution
6 implements its business principles and its mission
7 statement.

8 Q. From your wider knowledge of the NGO field, would you
9 say your view is consistent with or inconsistent with
10 other NGOs operating in this area?

11 A. I can't speak for other NGOs, but my experience has been
12 that that view would be broadly shared.

13 Q. Could I ask you to turn separately to page 354. You
14 were taken to this report. This the Trade and Industry
15 Select Committee report. You were taken to it earlier
16 by Ms Callaghan.

17 A. Yes.

18 Q. Can I ask you to go further forward to page 362 within
19 that report.

20 A. Yes.

21 Q. If you look at the first sentence, or perhaps read the
22 first sentence of paragraph 27.

23 A. "In its response to the allegations made against it,
24 ECGD chose not to address each of the claims made by the
25 other witnesses."

1 Q. What is your understanding of the scope of the Trade and
2 Industry Select Committee's conclusions on the ECGD's
3 approach to BCT?

4 A. That they concluded that the CIAP process was
5 implemented, and that questions raised, or concerns
6 raised, by NGOs had been taken into account, and that
7 the project complied with the procedures principally.

8 Q. Did the Select Committee consider the adequacy of the
9 BPU's assessment of each of those issues?

10 A. Not as far as I recall, and I have to say that I don't
11 think it would have been in a position to have done so
12 given the evidence that it had.

13 MR MICHAELS: Sir, I have no further questions.

14 THE CHAIRMAN: Thank you very much. Thank you very much for
15 your time.

16 (The witness withdrew).

17 THE CHAIRMAN: You can stop on the transcript now.

18 (1.01 pm)

19 (Discussion re timetables)

20 (The Short Adjournment)

21 (2.00 pm)

22 (Proceedings delayed)

23 (2.05 pm)

24 Submissions by MS CALLAGHAN

25 MS CALLAGHAN: Sorry, sir. I am struggling to find my

1 notes.

2 I have taken instructions over the luncheon
3 adjournment. As a responsible government department, we
4 have obviously carefully considered the evidence that
5 has been given at this hearing, and in light of the
6 evidence that has been given by the witnesses in their
7 totality, and in the particular circumstances of this
8 case, ECGD no longer seeks to make the submission that
9 the public interest in maintaining the internal
10 communications exception in regulation 12(4)(e)
11 outweighs the public interest in disclosing that
12 information.

13 It follows from that that ECGD is withdrawing its
14 first four grounds of appeal against the decision
15 notice, and we would invite the tribunal to uphold the
16 decision notice in respect of those parts of the BPU
17 report and minutes which were sought to be withheld by
18 ECGD solely in reliance on the internal communications
19 exception.

20 For clarification, ECGD does continue to rely on the
21 international relations exception, and it does continue
22 to seek to withhold the legally privileged information
23 which I think is agreed can appropriately be withheld
24 under regulation 12(5)(b), although you will appreciate
25 that previously ECGD had relied on 12(4)(e) in relation

1 to legally privileged information.

2 THE CHAIRMAN: Right.

3 MS CALLAGHAN: But, to be clear, we seek to rely on the
4 exception in relation to legally privileged information.

5 THE CHAIRMAN: Yes.

6 MS CALLAGHAN: In light of that, we would simply invite the
7 tribunal to uphold the decision notice in relation to
8 internal communications, and it will no longer be the
9 case for the tribunal to reach a decision in respect of
10 the first four grounds of appeal.

11 THE CHAIRMAN: Thank you very much for that. So, subject to
12 anything else you may need to say, we may need a final
13 short closed session to just go through and make sure
14 we're all agreed exactly what is continued to be
15 withheld. I don't know, how much debate is there still
16 on those remaining points?

17 MS CALLAGHAN: We would need to go into closed session to
18 deal with whether or not the information is legally
19 privileged, unless any concession is to be made in that
20 respect.

21 MR MICHAELS: On the legally privileged information, we are
22 not going to oppose the appeal, on the basis of the
23 evidence that's come forward since this started, that
24 the legally privileged information that has been
25 disclosed was not inadvertently disclosed.

1 MS PROOPS: Was inadvertently?

2 MR MICHAELS: No, was not inadvertently disclosed but had
3 been disclosed because it was no longer privileged. Our
4 opposition to that ground falls away, in effect. We
5 understand that relates to only two small passages in
6 two of the paragraphs in any event.

7 The issue of the partner information, which
8 I understand is passages in about six or so paragraphs
9 within the report, and limited passages within about
10 half a dozen paragraphs in the report, does remain live.

11 THE CHAIRMAN: Yes. Is that all that's --

12 MR MICHAELS: That's all that remains live.

13 THE CHAIRMAN: The Turkey information --

14 MR MICHAELS: The Turkey information --

15 THE CHAIRMAN: -- has now gone?

16 MR MICHAELS: It has now gone. It has been disclosed to us.

17 There remains a question --

18 MS CALLAGHAN: Can I explain ECGD's position? It's
19 obviously its ground of appeal. ECGD's position on the
20 Turkey information was that we were right to withhold
21 that information at the time we took the decision
22 because, of course, we did so on FCO advice.

23 THE CHAIRMAN: Let's just deal with partner information and
24 make sure we -- I want to make sure I don't trip over in
25 the last bit of it. So we have the partner information.

1 We're going to have to go into close to complete the
2 debate on that.

3 You may have some submissions on that, I guess,
4 but --

5 MR MICHAELS: They are likely to be very limited indeed.

6 THE CHAIRMAN: Yes, and some general points.

7 MR MICHAELS: I don't propose to take the tribunal through
8 all of the wider issues; the majority have now been
9 conceded.

10 THE CHAIRMAN: So it makes sense if we did as your timetable
11 said, closed on that and then open?

12 MR MICHAELS: Indeed.

13 THE CHAIRMAN: Yes? Or does it make sense to do it the
14 other way round?

15 MR MICHAELS: No, we think it makes sense to do closed
16 first, not least on the basis that our understanding is
17 that principal information in relation to the partner
18 information is likely to be whether or not redaction is
19 capable of achieving -- is capable of resulting in some
20 further of the information disclosed to Corner House,
21 and it's likely the tribunal is going to get much more
22 benefit from that in closed session.

23 THE CHAIRMAN: We need a closed session. It's just whether
24 you wanted to give us the general points first.

25 MR MICHAELS: It may be that you end up getting considerably

1 further through that closed session and then just hear
2 some further short submissions, if any.

3 THE CHAIRMAN: So we do the closed session on that and then
4 as long as you want on your open submission. The only
5 other issue then is the Turkey information, which, go
6 back to restate, I think is what you said this morning,
7 just restate that the --

8 MS CALLAGHAN: Certainly. ECGD's position is that at the
9 time of dealing with the request for information, it was
10 right to withhold that Turkey information, which is
11 paragraph 2.2.7 of the BPU report. That's internal
12 page 17.

13 THE CHAIRMAN: We don't need to go through it now. We know
14 what we're talking about at this stage.

15 MS CALLAGHAN: Because, of course, it was acting on FCO
16 advice, and we are not instructed by FCO that that
17 advice was wrong at the time. We are simply instructed
18 that, with the passage of time, the sensitivity of that
19 information has reduced to the point where it can now be
20 disclosed, and has in fact been disclosed.

21 THE CHAIRMAN: So as to that, Mr Michaels certainly
22 continues to assert, and you continue to deny, that
23 it should have been disclosed at the time?

24 MS CALLAGHAN: Yes.

25 THE CHAIRMAN: So we have that to dispose of --

1 MS CALLAGHAN: Yes.

2 THE CHAIRMAN: -- similarly, largely in closed session?

3 MS CALLAGHAN: Yes.

4 MR MICHAELS: I will only have very brief submissions to
5 make.

6 THE CHAIRMAN: Is there any other business that we have to
7 deal with?

8 MS PROOPS: The Commissioner wants to make some general
9 points about the concession that's been made and the
10 timing of it, but that's something we can do in open
11 session, perhaps, once we've dealt with --

12 THE CHAIRMAN: So the answer is: we go into closed session
13 now and then we have an open session for your
14 submissions and then any other wrap-ups; yes? All
15 right, if you can leave us, and anybody else who is not
16 connected with the parties.

17 [The hearing went into closed session]

18 (3.40 pm)

19 THE CHAIRMAN: Mr Michaels, you wanted to make some opening
20 submissions on what we've just been discussing?

21 Submissions by MR MICHAELS

22 MR MICHAELS: I'm going to make some brief opening
23 submissions in relation to both the Turkey issue, which
24 is, as I understand, still, as it were, in dispute, the
25 appeal not having been withdrawn on that point, and some

1 equally brief submissions on the partners' information.
2 Then I wish to raise some issues of general concern
3 about the way the appeal has been dealt with and I'll do
4 that at the end.

5 Starting with the Turkey information, we now have
6 the advantage that we've seen it in the paragraph that
7 was handed up this morning.

8 The legal position is that the exception only
9 applies if and to the extent that the information
10 disclosed would adversely affect international
11 relations. In that case the ECGD would need to
12 demonstrate that there actually would be prejudice, ie,
13 it is more likely than not that there would be an
14 adverse effect on the UK's relations with Turkey, and to
15 the extent we need any authority for that, it's Hogan.
16 I don't propose to take the tribunal to any authorities
17 for this.

18 It's notable in this case that the decision notice,
19 the Information Commissioner's decision notice, found
20 only that the information was capable of having some
21 effect on international relations, and that it concerned
22 international relations. Now, of course it's open to
23 the tribunal to reach a different finding on that basis,
24 but whilst we would accept the Commissioner's view that
25 it was capable of having some impact and that it

1 concerned international relations, we do not believe
2 that the passage disclosed -- and I'll come to why --
3 would adversely effect international relations.

4 We heard evidence from Mr Hildyard this morning that
5 it was his view -- and this would be our submission --
6 that the passage in question was not in the slightest
7 a criticism of Turkey itself, the State, but rather was
8 a criticism of the sponsor, and to a greater extent the
9 criticism of the lender group who approved the project,
10 notwithstanding that it was not in compliance with the
11 international standards to which they intend to be held
12 in their sponsorship, in their financial support role.
13 There was no criticism whatsoever in this paragraph that
14 we have seen of Turkey itself.

15 When I returned to open session this morning and
16 I was given a summary of the evidence that had been
17 given in close and which we were entitled to be told
18 about, it was said that Mr Allwood's evidence was that
19 the passage refers to Turkey's intention to build a new
20 international terminal, and deals with that government's
21 insistence that the terminal be located at one
22 particular place, Ceyhan.

23 Whether or not those facts are correct -- and they
24 may well be -- the passage that has actually been
25 disclosed says none of those things, either explicitly

1 or implicitly. The passage simply says:

2 "The Business Principles Unit concurs with
3 Mott Macdonald's view that, based on a review of the EIA
4 report, insufficient information had been provided, and
5 that is information by the sponsor, BCT Co, to justify
6 the location of the terminal. However, the information
7 provided in a SLIP [I think Supplementary Lender's
8 Information Protocol] goes some way to correct this."

9 There is nothing in the words themselves, the
10 passage disclosed, that would in any way adversely
11 affect international relations or would suggest the
12 meaning that we are told Mr Allwood sought to attribute
13 to it.

14 We would suggest that that interpretation goes not
15 merely very considerably beyond the words that we have
16 seen, but is also an example of something that we
17 suggest we have seen throughout this case, of undue
18 alarm about how words, passages, may be interpreted in
19 some quarters, rather than an interpretation of the
20 withheld information itself.

21 We have also seen evidence in respect of the flash
22 report. I don't propose to trouble you by taking you to
23 that report again, but in respect of the flash report,
24 we were told by Mr Dodgson that his reading of that
25 report was that it represented trenchant criticism of

1 Turkey. We would respectfully agree with that
2 interpretation and we would invite the tribunal to place
3 more weight on that interpretation of the flash report
4 than on Mr Allwood's. That is no criticism of
5 Mr Allwood; it is merely that Mr Allwood is reading that
6 passage with the eyes of somebody who drafted it, and
7 therefore the interpretation he is giving is perhaps the
8 interpretation that he may have intended to communicate.
9 But what the flash report actually says is, we say,
10 quite clearly trenchant criticism of Turkey.

11 The reason that's relevant is because it is
12 certainly -- and we would say far and away stronger in
13 terms of the criticism of Turkey than any criticism that
14 could conceivably be found in the passage disclosed this
15 morning.

16 We are, of course, operating on the basis, having no
17 direct evidence to the contrary, that the FCO decided
18 that the flash report could be released, albeit at a
19 later date.

20 The final point I'd make in relation to the Turkey
21 information is that notwithstanding any public interest
22 favouring maintenance of the exception in this case,
23 which we have said is very low, there is an extremely
24 strong public interest in disclosure of that
25 information.

1 Now, what I'm not going to do, because of the stage
2 we have reached in these proceedings, is go through the
3 wider public interest in relation to the information in
4 the report as a whole. You have Mr Hildyard's evidence
5 and you have our skeleton argument or written
6 submissions.

7 But I will simply raise the additional layer of
8 public interest favouring disclosure that came out of
9 Mr Hildyard's evidence this morning in respect of this
10 passage.

11 He explained that this passage raised a real concern
12 about compliance by the lenders' group, with its own
13 policies and procedures in respect of meeting
14 international standards, specifically compliance with
15 World Bank standards. We'd say in this case that is
16 a strong heightened public interest in addition to all
17 the other public interest favouring disclosure of this
18 report that relates to this particular paragraph.

19 So those are my submissions on the Turkey issue.

20 In relation to the partners' information, if I can
21 make a couple of brief points. Our understanding is
22 that much of what is being discussed at this stage
23 between the parties in closed session -- and I think
24 I've been informed of this openly -- is as to the scale
25 of the extent to which the information can be released,

1 subject to redactions.

2 Now, we think that is important because what we are
3 concerned with here is the question of disclosure of
4 information concerning communications between the ECGD,
5 on the one hand, and other members of the lender group
6 on the other hand: IFC, EBRD, COFACE, SACE, et cetera.

7 We put it to Mr Dodgson yesterday that it would be
8 possible to redact the identities of those partner
9 groups such that there would no longer be any real harm
10 in disclosure of that information, ie the passages could
11 be legitimately disclosed as long as the names were
12 redacted.

13 Mr Dodgson did not object, is my understanding of
14 his evidence, to that in principle, but raised a concern
15 merely about whether or not the identities of those
16 partners could nonetheless be discovered through some
17 sort of secondary route. I won't speculate about what
18 those secondary routes would be.

19 We would say that that must be the right overall
20 approach, that -- well, the starting point must be
21 correct that so long as the identities of those partners
22 can be disguised, there can be no harm falling within
23 this particular exception that would justify maintaining
24 the exception.

25 But we would urge the tribunal particularly to be

1 very cautious with an approach that allows it to -- that
2 involves speculation on possible ways on which an NGO or
3 a member of the public might conceivably be able to make
4 a link between a statement of view by an overseas public
5 authority, and the identity of that authority. It may
6 be that some connections can be made in some
7 circumstances, I don't know, but we think the trying
8 should be very cautious with about withholding
9 information on that basis, and particularly so when the
10 overall thrust of the ECGD's case in this regard is that
11 disclosure of this information would adversely affect
12 international relations, because in the future those
13 authorities would be reluctant to engage with ECGD on
14 similar types of issues.

15 Now, we do not accept as a matter of fact that that
16 is the case, and some questions were put in evidence
17 yesterday which I won't go over, but even accepting that
18 that were the case, we would suggest that such public
19 authorities -- it would be extremely unrealistic to
20 think that such public authorities would take such an
21 approach, ie refuse to work with ECGD in the future,
22 when they were shown that the ECGD had in fact redacted
23 their identities and had taken reasonable precautions to
24 avoid disclosure of their identities when releasing the
25 information.

1 We think it extremely unrealistic that such
2 authorities would, in those circumstances, cease to
3 engage with or cooperate with the ECGD.

4 There are two further points we wish to make
5 separately on this. The first is that, if I can ask you
6 to turn up page -- the very end of the third bundle,
7 1096. This is a letter from the European Commission to
8 an NGO, a forestry NGO. It also works on export credit
9 issues. In the letter to the European Commission, it's
10 clear from the second paragraph that Miss Naya(?) asked
11 whether credit export agencies are covered by directive
12 2003/4 on public access to environmental information, ie
13 the Environmental Information Directive.

14 The Commissioner's response to that question is then
15 set out in this letter. The tribunal may wish to read
16 the entirety of the letter afterwards, but I'll take you
17 in particular to the final paragraph on the following
18 page, in which the Commission expresses the view that:

19 "Export credit agencies, whether or not belonging to
20 the public administration, qualify as public authorities
21 within the meaning of Directive 2003/4 and are obliged
22 to observe the rules laid down in that Directive."

23 Now the relevant of that, we suggest, is clear. To
24 the extent that the ECGD has obligations to disclose
25 this information, or this type of information, bodies

1 such as Hermes and COFACE and SACE all have identical --
2 at least insofar as the regulations do not go further
3 than the Directive -- have identical obligations under
4 Europe, and therefore domestic, law.

5 There would certainly be an understanding by those
6 authorities that there are obligations on each of them
7 to provide members of the public with this sort of
8 information -- subject, of course, to any applicable
9 exceptions.

10 We say therefore this goes a long way to answering
11 the concerns expressed by ECGD about the effect this
12 sort of disclosure would have on relationships with
13 those particular partner groups.

14 In relation to other partner groups, the IFC and the
15 EBRD, they of course are not -- well, the IFC certainly
16 is not covered by the Environmental Information
17 Directive. The position there in respect of IFC and
18 EBRD is that both of those bodies have published very
19 detailed responses to the concerns expressed by
20 stakeholders in their parallel prior disclosure or
21 consultation exercise. You have had handed up to you
22 yesterday the IFC's response to that public consultation
23 process.

24 To the extent that any of the partner views include
25 the views of the IFC or the EBRD, then we would suggest

1 it would not be legitimate to withhold any of those
2 views in any event to the extent that they are the same
3 as, or reflect, the responses already set out in the
4 IFC's and the EBRD's own public responses.

5 Now, we cannot comment, of course, on the details of
6 any of those, but it's certainly an exercise that the
7 tribunal, the Commissioner or the ECGD can carry out.

8 Sir, those are the only submissions -- suitably
9 brief, I hope -- in relation to Turkey and partners.
10 I do have general comments to make, but it may be
11 appropriate to hold them.

12 THE CHAIRMAN: Let's let Ms Callaghan make any response she
13 wants to those submissions.

14 Submissions in reply by MS CALLAGHAN

15 MS CALLAGHAN: In relation to the Turkey information,
16 obviously this tribunal has heard evidence in closed
17 session about how this passage has been interpreted, and
18 I say that the tribunal should accept the evidence that
19 it has heard during closed session on how it should be
20 interpreted.

21 In relation to the flash report, I'm happy to repeat
22 to Mr Michaels the point that I made in closed session:
23 that the flash report and its disclosure by FCO are not
24 capable of undermining the reasoning for withholding the
25 information in relation to Turkey contained in the BPU

1 report, insofar as the decision to disclose the flash
2 report was made by the FCO in October of 2008, whereas
3 the position adopted by the FCO in relation to the
4 Turkey information in the BPU has consistently been the
5 same since the date that they were first consulted by
6 ECGD around the time the explained was made to the
7 Commissioner.

8 So a consistent line has been taken by the FCO in
9 that regard, and I say that to the extent that the flash
10 report can possibly undermine the cogency of the FCO's
11 reasoning on the Turkey information, that could only
12 apply, if at all, after October 2008.

13 In relation to the partners' information, ECGD does
14 not accept that there can be no harm so long as the
15 identities of the partners cannot be determined
16 themselves. It's difficult for me to take that any
17 further without reference to the material in the closed
18 session. But I'm sure the tribunal has the point.

19 Of course I accept that the European ECAs are
20 subject to the Directive as it's been implemented in
21 each of those Member States.

22 I'd agree that the IFC itself and the EBRD are not
23 covered by the Directive, but nevertheless we've seen
24 their policies on disclosure of information in open
25 session, and we've seen that although they chose

1 voluntarily to publish detailed summaries of NGO
2 concerns and their own responses, both of those
3 organisations named by Mr Michaels have taken the view
4 in their own public information policies that the
5 equivalent document of the BPU report and the
6 underwriting committee meeting minutes would themselves
7 be confidential and would not be disclosed by those
8 particular organisations. We say, therefore, it is not
9 inconsistent with the ECGD also to maintain that
10 position, particularly in light of the express
11 exemptions provided for in regulation 12(4)(e) and
12 12(5)(a).

13 I don't think I can take those points any further in
14 open session.

15 Further submissions by MR MICHAELS

16 MR MICHAELS: I don't wish to reply, only to clarify
17 something because I don't wish it to be misunderstood on
18 the transcript. I didn't concede that the EBRD is not
19 covered by the directive; the IFC certainly isn't.

20 I have no position on whether the EBRD is or isn't.

21 MS CALLAGHAN: I'm grateful for that clarification.

22 THE CHAIRMAN: Right. So we have to go away and make
23 a decision on those final points. What's going to
24 happen in the meantime? Is the reporter minutes going
25 to be disclosed with redactions? What I'm thinking is

1 that now, having reached this position, there really
2 should be some way whereby the reporter minutes can be
3 disclosed while we're finalising our decision on some
4 very small points in it.

5 So there's no reason, is there, for it to be
6 disclosed, subject to the redactions at the widest form
7 they have been put in argument, if I can put it that
8 way. I don't want to go back to them and identify
9 exactly what, but so then if we order further
10 information, just that little piece of information goes
11 cross. Do you see the point I'm making?

12 MS CALLAGHAN: Yes, I do, sir. I don't see that should be
13 difficult. We can do that.

14 Can we be given a short period of time in which to
15 prepare that document?

16 THE CHAIRMAN: Like what?

17 MS CALLAGHAN: Well, we've seen the problems with
18 inadvertent disclosure in this case.

19 MS PROOPS: But this is different. You know exactly what
20 information is in issue.

21 THE CHAIRMAN: Just maintain the --

22 MS CALLAGHAN: But there is a mechanical exercise involved
23 here that does need to be checked carefully.

24 THE CHAIRMAN: What are you asking for? We can't have an
25 argument unless we know what you're asking for.

1 MS CALLAGHAN: Can I ask for seven days, sir?

2 MR MICHAELS: I will be making some general comments, but
3 after four years we're not going to quibble about six or
4 seven days.

5 THE CHAIRMAN: Okay.

6 MS PROOPS: Can I just ask if the disclosure should also be
7 provided to the Commissioner?

8 MS CALLAGHAN: Of course.

9 MS PROOPS: Thank you.

10 THE CHAIRMAN: You want to make some --

11 Further submissions by MS PROOPS

12 MS PROOPS: I just want to make some general comments to
13 reflect the Commissioner's concern as to the timings of
14 the concession on regulation 12(4)(e).

15 I wish to make clear that I am not positively
16 inviting the tribunal at this stage to make any findings
17 in respect of my comments, but I do wish them to be
18 noted for the record and also to make the tribunal aware
19 that we are currently reserving our position on costs
20 because I have been unable to take instructions from the
21 relevant individual within the ICO as to whether we wish
22 to apply for our costs.

23 My learned friend Ms Callaghan has said that as
24 a responsible government department, they were
25 effectively now conceding that they could maintain their

1 case on regulation 12(5)(e). It is of course
2 responsible for a public authority to concede, where it
3 has recognised that it has a hopeless case. However,
4 what is not responsible is to put two other parties to
5 the cost and trouble of attending a three-day hearing
6 when plainly the only scope for argument related to a
7 handful of clauses, and those arguments could readily
8 have been dealt with through short written submissions,
9 and therefore we could have obviated the need for a
10 hearing at all. And that is to say nothing, of course,
11 of the inconvenience to the tribunal. We say the
12 reality of this case is that the ECGD should have
13 recognised at the outset, indeed when it received the
14 request, that it had no maintainable case under
15 regulation 12(4)(e).

16 Now I'm sure Ms Callaghan will say well, ECGD is
17 being responsible because it thought it had a good case,
18 but it's only when it got to the hearing and it heard
19 evidence, and that evidence was tested, that it realised
20 that actually the position was more complicated.

21 I would say that that argument is unsustainable. The
22 fact is that what has happened at this hearing is ECGD
23 has been forced to accept obvious matters relating to
24 12(4)(e), that any reasonable and responsible public
25 authority would and should have recognised at the time

1 it received the request.

2 The reality as to why this case has come before the
3 tribunal is because ECGD has persistently and
4 unreasonably failed to recognise the role played both by
5 the Directive and by the regulations in this context,
6 and the strong imperatives in favour of disclosure which
7 underpin those enactments. They have persistently and
8 unreasonably failed to recognise the manifest and
9 obviously strong public interest in disclosure. They
10 have persistently and unreasonably failed to recognise
11 the weakness of any public interest in favour of
12 maintaining the exception.

13 I also wish to state openly, and for the record, on
14 behalf of the Commissioner, that the Commissioner is
15 very troubled in particular by the evidence that has
16 been given by Mr Dodgson. Mr Dodgson is a senior civil
17 servant. He is one of the directors of ECGD. We are
18 troubled by his evidence because we say that it reveals
19 that Mr Dodgson is himself, even at his late stage,
20 three and a half years after the EIR has come into force
21 and six years after the Directive has been adopted,
22 Mr Dodgson, even at this stage, seems to be unable to
23 understand the effects and public policy imperatives
24 underpinning the Directive and the EIR. I would suggest
25 that the position that has emerged from his evidence is

1 that, in effect, the ECGD does not need to disclose
2 important information relating to environmental matters
3 because ECGD is itself accountable to Parliament and may
4 be subject to scrutiny by a select committee, because
5 that was his answer, in effect, to my question, putting
6 points to him that there was strong public interest in
7 disclosure.

8 THE CHAIRMAN: But he also said that, going forward, the
9 ECGD will be complying with the undertaking it gave to
10 publish detailed decisions.

11 MS PROOPS: I would accept that, but the point is --

12 THE CHAIRMAN: You're making a point about what you see as
13 his state of mind today and, by inference, the state of
14 mind of ECGD today. And I think you've only given one
15 half of the picture.

16 MS PROOPS: If I could just respond to that. We fully
17 accept that ECGD's stated policy position now is that it
18 will in future disclose summaries of its assessment in
19 respect of particular projects. The concern that we had
20 about Mr Dodgson's evidence was that when I was asking
21 him questions in cross-examination as to why there would
22 have been strong public interest in favour of disclosure
23 of this information, his response, in effect, was not to
24 accept that proposition on the basis that there was no
25 strong public interest in disclosure because ECGD was

1 accountable to Parliament, and its actions are subject
2 to scrutiny by them.

3 THE CHAIRMAN: Even then, I think you've got to be careful
4 if you're making a costs application, and I'm concerned
5 that some comments may be appropriate, but we really
6 need to be quite careful with them. And what was the
7 point you were just making when I interrupted you?

8 MS PROOPS: I was just seeking to make the point -- let me
9 just explain --

10 THE CHAIRMAN: Just pick up the point, just to get me back
11 on my train of thought, because there's another side
12 of it which I wanted to bring out.

13 MS PROOPS: Sorry. The point I was making, I think, when
14 you came in, was that that Mr Dodgson was answering
15 questions that I put to him as to why they were --
16 [overspeaking].

17 THE CHAIRMAN: I think it's a fairer way to put it, or it is
18 right, that part of the ECGD accountability is through
19 Parliament. I think he's entitled to say that you take
20 that into account when you are considering the public
21 interest in further disclosure. Now, you often get the
22 sort of argument put before the tribunal that may sound
23 as if it's saying that's enough, and the answer is well,
24 the answer, put the other side, is, well that was in
25 place before the FI came in, so the FI must have

1 intended to add something to it. That's the argument.
2 But again, I think your characterisation was unbalanced
3 on that point.

4 MS PROOPS: Sir, we obviously have our impression of the
5 evidence that has been given, and our impression of that
6 evidence is not simply -- I recognise that there is
7 strong public interest and disclosure of this
8 information, but you also have to throw into the mix
9 that we are accountable to Parliament and we are subject
10 to Parliamentary scrutiny, as we read his evidence, that
11 evidence --

12 THE CHAIRMAN: You must be careful. That's your reading of
13 the evidence. We were going to consider the evidence
14 and come to conclusions. You're now using this tribunal
15 as a soapbox to put your side of the picture when
16 there's very little scope for the other side to be put.
17 So I think you can express your concerns, but at a very
18 late stage your opponent in litigation gave up an
19 argument which you felt all along was untenable. We
20 hear you on that, but leads, if anywhere, to a costs
21 publication, not a soapbox.

22 MS PROOPS: Sir, I've heard what you said and I don't
23 propose to say any more about it. If I could just
24 explain the reasons why I was making the point. It's
25 because we have had experience of other cases where we

1 obviously take a different view of the evidence, but
2 setting down markers in that way has led to a more
3 positive engagement from the relevant public authority,
4 and it may be, sir, that you've heard the evidence --

5 THE CHAIRMAN: I'm not convinced that this is the right
6 forum for that sort of public debate.

7 MS PROOPS: I accept your point on that.

8 THE CHAIRMAN: So can you bear that in mind when you say
9 what you want to say.

10 Further submissions by MR MICHAELS

11 MR MICHAELS: I'll try not to stand on my soapbox, but I do
12 wish to make points which I think are important. I do
13 generally endorse, I must say, most of what Ms Proops
14 has just said.

15 I think those the context I'd put it in is slightly
16 different. I'd put it very specifically in the context
17 of the requirements of the Argos Convention and the
18 Directive on Access to Environmental Information.

19 I don't need to take you to them, I'm going to read
20 from the authorities rather than open them up for you.
21 Just as a reminder, the opening recital to the Directive
22 is that:

23 "Increased public access to environmental
24 information and the dissemination of such information
25 contribute to a greater awareness of environmental

1 matters, a free exchange of views, more effective
2 participation by the public in environmental decision
3 making, and eventually to a better environment."

4 THE CHAIRMAN: Which I think you put to Mr Dodgson and he
5 accepted.

6 MR MICHAELS: Precisely, sir. He did accept that.

7 Moreover, Mr Allwood accepted that the general
8 principles set out in the Argos Convention that were
9 read by Ms Proops -- and I'll just refer to two of them
10 -- were also applicable in this case:

11 "In the field of the environment, improved access to
12 information and public participation in decision making,
13 enhance the quality of the implementation decisions,
14 contribute to public awareness of environmental issues
15 and give the public the opportunity to express its
16 concerns and enable public authorities to take due
17 account of such concerns, recognising the desirability
18 of transparency in all branches of government and
19 inviting the legislative bodies to implement the
20 principles of this convention, and recognising the
21 importance of the respective roles that individual
22 citizens, NGOs and the private sector play in
23 environmental protection."

24 Then the objective.

25 Both the Convention and the Directive require that:

1 "Where a request for information is made, then,
2 subject to the exceptions, that information is disclosed
3 as soon as possible."

4 The reason for that is obvious. It's that
5 information is requested so as to enable an NGO or
6 a member of the public to participate in relevant
7 environmental debates and influence their outcome, et
8 cetera.

9 That is important because this is a case where the
10 request for information was made some four years ago.
11 The concession on the vast bulk of the information was
12 made this morning. There is not a case where it's open
13 to the ECGD simply to say, "We have been on a learning
14 curve. Yes, we made a mistake four years ago and we
15 ought to have disclosed this information, but now we're
16 in a much better position, we've learned more, we've
17 heard more evidence, and we 'fess up, we've it wrong."

18 So the appropriate way to look at it is to stop the
19 clock at various points throughout this process, at
20 which the ECGD could have, indeed was explicitly invited
21 to, reconsider its position.

22 The first of those was the request for the internal
23 review, and at that stage we say that the ECGD should
24 have been probing its civil servants and asking the same
25 types of questions -- maybe not in the same detail, but

1 the same types of questions that have been put to their
2 witnesses in the last two days, in effect: would this
3 really have the effect that you are contending on your
4 ability to do your job to recruit staff, et cetera?"

5 Had those questions been put rigorously by the
6 public authority at the relevant time, the time of the
7 internal review, then at the time of the Information
8 Commissioner's complaint, and then at the time when,
9 following a determination in our favour, the ECGD
10 decided to lodge an appeal to this tribunal, at each one
11 of those stages they ought to have reached the same
12 conclusion because the evidence in those regards has not
13 shifted.

14 So when considering this issue, we'd invite the
15 tribunal to stop the clock at those stages.

16 THE CHAIRMAN: We're not considering it. You're making
17 a costs application, as I understand it.

18 MR MICHAELS: I'm not making a costs application,
19 I cannot --

20 THE CHAIRMAN: I'm allowing you to use the facilities of the
21 tribunal at the moment to sound off.

22 MR MICHAELS: Sir, I'm very grateful, but, unlike Ms Proops,
23 I am not saying that I'm not inviting you to make any
24 comment on whatever decision you make. I hope I'm not
25 merely sounding off because this is a matter of real

1 concern. The reason I'm not making a costs application
2 is purely because I'm instructed pro bono and therefore
3 there are no relevant costs in this case in respect of
4 which I could make an application.

5 However, were there, I would certainly be saying
6 that under the relevant rule, the ECGD's conduct of this
7 appeal has been manifestly unreasonable for all those
8 reasons.

9 In the Commissioner's decision notice, the
10 Commissioner found -- and I'll give you a reference
11 without inviting you necessarily to turn it up, page 49,
12 paragraph 31 -- a complaint was made about the ECGD's
13 delay in dealing with the case. The quote is:

14 "The Commissioner has found complaint four to have
15 been amply justified and criticises ECGD accordingly for
16 its extremely poor performance and cavalier disregard
17 for the procedures set out in the legislation."

18 Those are strong words, but those strong words were
19 amply justified at the time and we say are amply
20 justified --

21 THE CHAIRMAN: Were they going to the reasons or the delay
22 at that time?

23 MR MICHAELS: They were going to the delay, they were going
24 precisely to the delay. But, sir, what we say here --

25 MS CALLAGHAN: It has never been a ground of appeal.

1 MR MICHAELS: It has not been a ground of appeal, but, sir,
2 what we say here, quite clearly, is that what happened,
3 there has been no new evidence, as it were, that was not
4 been available from interrogating their own civil
5 servants. What has happened here is, there has been
6 a continuing process of delay from the day the request
7 was made up until this morning, and that stringing out,
8 delay, procrastination, is, we say, a cause for
9 significant criticism for the way in which the public
10 authority has conducted this appeal and the way in which
11 it has had regard of the rights of Mr Hildyard to this
12 environmental information.

13 THE CHAIRMAN: I think delay was mentioned in the decision
14 notice, wasn't it?

15 MR MICHAELS: It was mentioned in the decision notice
16 specifically because that was a ground at that time.
17 Now, a finding was made --

18 THE CHAIRMAN: The marker was put down then?

19 MR MICHAELS: Indeed, sir, but since --

20 THE CHAIRMAN: And I haven't gone back to it, but I suspect
21 that some of the delay came from the Information
22 Commissioner's office.

23 MR MICHAELS: Not the delay that was being criticised, sir.

24 THE CHAIRMAN: Not the delay that had been criticised, but
25 some of the passage of time.

1 MR MICHAELS: Undoubtedly, and on another day I may well
2 criticise the Information Commissioner for the delays in
3 processing these complaints, and that is certainly --

4 THE CHAIRMAN: What I'm saying is, delay was dealt with in
5 the decision notice.

6 MR MICHAELS: Yes.

7 THE CHAIRMAN: I'm not aware of any culpable delay in the
8 process of this appeal. It's gone a bit slower than
9 some of the others, but there have been reasons for
10 that. In fact, at one stage certainly all of you agreed
11 a delay when I was urging you to speed up a bit, you may
12 remember, at the pre-hearing review. But delay up to
13 that stage has been dealt with at the decision notice.
14 I don't think that delay can -- in the way that this
15 appeal has been handled; you're simply saying that the
16 result of the -- you're saying the result of the delays
17 up to the decision notice and the inevitable passage of
18 time since, it's been a very long time before they
19 conceded the point.

20 MR MICHAELS: Well, with respect, I would put it slightly
21 differently. I don't wish to labour this point, but
22 after the decision notice was issued, the ECGD ought to
23 have, at that stage at least -- this is the third point
24 at which I'd stop the clock -- taken a very long and
25 hard look at its evidence and on whether it seriously

1 had grounds for alleging that the Commissioner had this
2 wrong and that really the internal communications
3 exception applied on the basis on which they said. It
4 ought to have been quite clear to them at that stage
5 that there was no such basis.

6 The fact that they appealed at that stage and
7 throughout have maintained their appeal, notwithstanding
8 the various stages of this appeal, we say is, in the
9 context of the Argos Convention(?) and the Environmental
10 Information Directive, further culpable delay and seeks
11 to deprive members of the public of the rights to which
12 not only they are entitled, but which are sought to be
13 protected by the overarching concerns of that directive.

14 I don't ask for my costs because we have none, but
15 certainly if the Commissioner invites you at any point
16 to order costs in his favour, then we'd ask that you'd
17 take into account those concerns, and we would ask so
18 far as possible that those concerns are at least
19 reflected as ours in your decision.

20 THE CHAIRMAN: Do you need to take instructions on any of
21 that before you reply?

22 MS CALLAGHAN: No, I don't think so, sir.

23 THE CHAIRMAN: Let me just mention one of my own, having
24 fought your corner. I was, I have to say, disappointed
25 that about 45 minutes before the point was conceded,

1 there was an ongoing attack on the pre-disposition of
2 Mr Hildyard. I found that a strange juxtaposition of
3 events, that we should be having that at the beginning
4 of his evidence, and about 45 minutes later, less lunch,
5 we were having the point conceded. That's my comment.
6 You say what you want to say.

7 Further submissions by MS CALLAGHAN

8 MS CALLAGHAN: Your point is noted, sir.

9 Ms Proops has said that she's not inviting you to
10 make any finding of fact. Mr Michaels is not saying
11 that; in fact, I understand from what he's saying that
12 he isn't actually inviting this tribunal to comment.

13 So the position is this: there is no longer any live
14 grounds of appeal in relation to internal
15 communications. There is, therefore, no dispute between
16 the parties, and in those circumstances, it's not
17 necessary, or indeed, in my submission, appropriate, for
18 the tribunal to make findings of fact in relation to
19 those grounds which would include findings of fact in
20 relation to the evidence given.

21 But in relation to Ms Proops's remarks about
22 Mr Dodgson's's evidence, I make two points: I don't
23 accept Ms Proops's summary of the evidence given is
24 either accurate or fair. In the first place, Mr Dodgson
25 made appropriate concessions in response to questions

1 put to him. He did accept a public interest in
2 transparency and he did accept a public interest in
3 disclosure of the information.

4 The evidence that was given by Mr Dodgson was
5 evidence that, as a responsible senior civil servant, he
6 was perfectly entitled properly to give. He was
7 entitled to take the position that ECGD is accountable
8 to Parliament, to the public through Parliament, and
9 through Parliamentary processes, and he was also
10 entitled to take the position that the exemptions in the
11 legislation entitled ECGD, having done the public
12 interest balancing exercise, to come to the conclusion
13 that those exemptions applied, and in my submission it
14 is wholly unfair to attack a civil servant for
15 reasonably believing at the time that those exceptions
16 applied to this information.

17 It's not appropriate, in my submission, for the
18 Commissioner to suggest that unless a public authority
19 takes the view that in all situations the public is
20 entitled to participate in the decision-making process,
21 and that it logically follows from that that they must
22 be given access to all information that a public
23 authority holds, but that is the logical implication of
24 the position that was being put to my witness, that if
25 the public has a right to participate in the

1 decision-making process, the logical implication of
2 that, it appeared to us, was that they would have to be
3 given all relevant information, including internal
4 documents.

5 Now, that is not correct as a matter of law. If it
6 were correct, the exemptions wouldn't exist in the Act.
7 Even Mr Hildyard reasonably accepted that there is
8 a difference between being entitled to all relevant
9 information and being entitled to information under the
10 disclosure legislation. I myself am troubled by the
11 accusations made today by the Commissioner that a civil
12 servant is not entitled to rely on exemptions
13 specifically provided for in legislation and regulations
14 without being accused of somehow behaving
15 inappropriately or not accepting or being convinced by
16 the underlying imperatives of that legislation.

17 So I don't accept the criticisms that have been made
18 of Mr Dodgson today. But, sir, you have the point. We
19 consider that we have tried to act as a responsible
20 public authority in weighing up the evidence, at the end
21 of that evidence, to consider whether or not we can
22 maintain a particular argument. We took the view that
23 we couldn't maintain a particular argument in light of
24 that evidence and we behaved responsibly by letting the
25 tribunal know that position as soon as we'd had an

1 opportunity to consider the evidence in its totality.

2 THE CHAIRMAN: Thank you.

3 I think that's the end of it, isn't it? Any other
4 issues we need to address? We'll let you have
5 a decision on what we're left to make a decision on as
6 soon as possible. I haven't checked with my colleagues
7 what their availability is over the next few working
8 days, but we'll do it as soon as we reasonably can.

9 Thank you very much for your assistance.

10 Don't wait for us to leave.

11 (4.30 pm)

12 (The hearing adjourned)

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25

1	INDEX	
2		PAGE
3	MR DAVID ALLWOOD,	6
4		
5	Re-examination by MS CALLAGHAN	6
6		
7	MR NICHOLAS HILDYARD (sworn)	10
8		
9	Examined-in-chief by MR MICHAELS	10
10		
11	Cross-examination by MS CALLAGHAN	23
12		
13	Questioned by the panel	58
14		
15	Re-examined by MR MICHAELS	59
16		
17	Submissions by MS CALLAGHAN	62
18		
19	Submissions by MR MICHAELS	68
20		
21	Submissions in reply by MS CALLAGHAN	78
22		
23	Further submissions by MR MICHAELS	80
24		
25	Further submissions by MS PROOPS	82

1		
2	Further submissions by MR MICHAELS	88
3		
4	Further submissions by MS CALLAGHAN	96
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

