

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 1

Title: RE: US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

Date Registered: 12/06/2012

[redacted], PS/ Browne, PS/ SOSFA,

Mr Burt was also grateful for this submission.

He commented that:

- 1) Liberty deserved a longer letter dealing with the issues [redacted] set out. And given that this is likely to continue, Mr Burt thought he would need a point by point rebuttal of the issues she raised.
- 2) He agreed we should hold to our position, but that we needed to be very sure. Did Jeremy Browne and he need to meet with FCO lawyers? He commented that it would certainly continue to be an issue for both of them – Parliament and Press will be interested.
- 3) He thought the other letters could issue as they were, and is happy for them to go in his name.

[redacted]– noting Mr Browne's comment on the letters, perhaps revised drafts could come to us by COP Wednesday for signature on Thursday. Happy to discuss.

[redacted]

Acting as Assistant Private Secretary to Alistair Burt MP

[redacted]

From: [redacted] (PSBrowne) (Restricted)

Sent: 11 June 2012 11:04

To: [redacted] (Restricted); PS Minister Browne - Action (Restricted); PS Minister Burt - Action (Restricted)

Cc: SOSFA Action (Restricted); PUS Action/Info (Restricted); Vijay Rangarajan (Restricted); [redacted] * (Restricted); Edward Barker (Restricted); [redacted] (Restricted); Jonathan Farr (Restricted); PRD Action/info (Restricted); DL PO - SPADS (Restricted); Green MPST (Restricted); [redacted] (Restricted); Iain Macleod (Restricted); [redacted] (Restricted); DL Americas NAD All Staff (Restricted); Fiona Clouder (Restricted); Helen Mulvein (Restricted); [redacted] (Restricted); [redacted] (Restricted); [redacted] (Restricted); [redacted] (Restricted)

Subject: RE: [redacted] - US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

[redacted], PS/Burt, PS/SOSFA,

Mr Browne was grateful for this submission.

On the letters, Mr Browne thought that there was potential for them to be strengthened by including a more detailed explanation of why we don't think the US should try third party cases extraterritorially. He would be grateful if, subject to Mr Burt's agreement, consideration could be given to this point.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Mr Browne thought that the recommendation not to do proactive media work needed looking at again. As your submission notes, the story has already picked up media interest. It is likely to continue to be high profile. Should we not look at the timeline for the case and use that as a basis for considering the relative merits of a proactive / reactive media strategy? Your submission also references updated press lines – Mr Browne would welcome sight of these. He feels it is particularly important that our press lines address the issue of consistency with our policy on business and human rights.

With Mr Browne currently travelling, and given Mr Burt's previous interest in this case, it may make sense for these letters to issue from Mr Burt. Mr Browne would be content with such an approach, though would be equally happy to take this forward on his return to the office next week.

[redacted]

Private Secretary to Jeremy Browne MP, Minister of State

[redacted]

It is the responsibility of the lead department to register any comments made on the original correspondence. In line with FCO guidance, the Minister's office will not register this email chain or any attachments.

From: [redacted] (Restricted)

Sent: 07 June 2012 11:08

To: PS Minister Browne - Action (Restricted); PS Minister Burt - Action (Restricted)

Cc: SOSFA Action (Restricted); PUS Action/Info (Restricted); Vijay Rangarajan (Restricted);

[redacted] * (Restricted); Edward Barker (Restricted); [redacted] (Restricted); [redacted]

(Restricted); PRD Action/info (Restricted); DL PO - SPADS (Restricted); Green MPST (Restricted);

[redacted] (Restricted); Iain Macleod (Restricted); [redacted] (Restricted); DL Americas NAD All

Staff (Restricted); Fiona Clouder (Restricted); Helen Mulvein (Restricted)

Subject: [redacted] - US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

ISSUE(S) FOR MINISTERIAL ATTENTION

1. How to respond to the letter from [redacted] of Liberty to the Foreign Secretary of 15 May regarding the UK's amicus brief in the case of *Kiobel vs. Royal Dutch & Shell*; and whether to respond proactively to increasing Parliamentary and wider NGO interest in the case.

TIMING

2. Urgent. [redacted] wrote on 15 May (although the letter was not received in NAD until 23 May).

[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[redacted] Acting Head of Department and Head US Strategy, North America Department, [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 2

Title: US - UPDATE ON KIOBEL (SUPREME COURT CASE CONCERNING EXTRATERRITORIALITY)

Date Registered: 08/06/2012

[Duplicate of Document 4]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 3

All redactions in this document made under Section 40(2)

Title: US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

Date Registered: 08/06/2012

ISSUE(S) FOR MINISTERIAL ATTENTION

3. How to respond to the letter from [redacted] of Liberty to the Foreign Secretary of 15 May regarding the UK's amicus brief in the case of *Kiobel vs. Royal Dutch & Shell*; and whether to respond proactively to increasing Parliamentary and wider NGO interest in the case.

TIMING

4. Urgent. [redacted] wrote on 15 May (although the letter was not received in NAD until 23 May).

[redacted]

[redacted], Acting Head of Department and Head US Strategy, North America Department, [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[Attachment]

To: 1. PS/Mr Burt
2. PS/Mr Browne
From: [redacted]
Date: 07 June 2012
cc: see end of submission

SUBJECT: US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

ISSUE(S) FOR MINISTERIAL ATTENTION

5. How to respond to the letter from [redacted] of Liberty to the Foreign Secretary of 15 May regarding the UK's amicus brief in the case of *Kiobel vs. Royal Dutch & Shell*; and whether to respond proactively to increasing Parliamentary and wider NGO interest in the case.

TIMING

6. Urgent. [redacted] wrote on 15 May (although the letter was not received in NAD until 23 May).

BACKGROUND

7. In February we submitted an amicus brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd* which concerns the question of whether corporations are liable under the US Alien Tort Statute (ATS) for violations of international human rights law. The case has subsequently drawn attention from Parliamentarians and NGOs who appear concerned that the UK is supporting business over human rights. To date we have received four FOI requests concerning contact with Shell and the Dutch Government (with whom we filed the brief) over *Kiobel*, including one from the prominent civil liberties organisation, Liberty, and one from CORE, the Corporate Responsibility Coalition. Three requests have been turned down on grounds of cost and one is pending. [redacted] of Liberty wrote to the Foreign Secretary on *Kiobel* on 15 May (copy attached at Flag A), and Amnesty International issued a bulletin critical of the Government's position on 22 May.
8. The Ministry of Justice received three oral Parliamentary Questions on *Kiobel* at the end of April (Parliament was prorogued before the questions could be answered) and a further oral question on 9 May (which was transferred to the FCO for written reply). The questions were from Caroline Lucas MP, Virendra Sharma MP, Lisa Nandy MP and Teresa Pearce MP. All four MPs are members of the All Party Parliamentary Group on International Corporate Responsibility: Business, Human Rights and the Environment.

UNCLASSIFIED

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

9. Following my submission of 3 April we are working with like minded States to prepare a second amicus brief which addresses the issue of extraterritoriality. It is unlikely that interest in this case will go away, and when we file our second brief we can expect further scrutiny from NGOs and Parliament.

POLICY CHOICES AND ARGUMENT (INCLUDING RESOURCE IMPLICATIONS)

10. In addition to replying to [redacted] (which we must do), our choice is whether to respond reactively to questions and FOI requests or to be proactive in explaining our position to interested NGOs and Parliamentarians. We are under no obligation to reach out to interested parties, but we believe we have a positive story to tell and should not be defensive about why we have intervened in this case which has significantly broader implications. As we have had to refuse FOI requests on cost grounds, proactive letters would demonstrate a degree of openness in relation to in this case.
11. We will also consider whether to issue a Written Ministerial Statement when we file our second amicus brief, and/or whether to write again to interested parties. We will provide further advice at that time.

RECOMMENDATION

12. That Mr Browne writes to [redacted], the All Party Parliamentary Group on International Corporate Responsibility: Business, Human Rights and the Environment, CORE and Amnesty International. I attach a draft letters (at Flags B-E).

AGREED BY / DISSENTING VIEWS

13. NAD, HRDD, CEDD, Legal Advisers, Press Office, PRD and BE Washington agree.

IMPLEMENTATION

Risks & Mitigation

14. As a result of internal delays, our outreach could now be seen as defensive or an admission that we have got something wrong. It could also generate more interest in the issue than currently exists. However, interest in the case is likely to increase naturally regardless of whether we take this action, and by explaining our policy position to an interested audience we are likely to increase the chance that they and others will understand why we have taken action (if not agree with us).
15. There is a risk that this activity will have no effect on negative publicity or parliamentary and NGO interest and we may continue to receive FOIs and PQs. However, the resource costs of sending the letters are low and hence we believe it is worth engaging directly in the manner.

Parliament, Media and Public Communications

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

16. The Sunday Times ran an article on 27 May criticising UK intervention in this case (attached at Flag F). The article (which referenced Liberty's letter to the Foreign Secretary) suggested that we faced accusations from NGOs of hypocrisy "after the government intervened on the side of Shell". No other media outlet has picked up the story, however, any activity (in the form of letters from the Minister) increases the likelihood of press interest particularly given active NGO lobbying. We do not recommend proactive media work, but we will expand our existing press lines for use defensively as required and monitor media including digital channels closely.

EVALUATION / REVIEW

17. We will monitor any reaction (both directly, but also enquiries via FOI or PQs) to our letters to determine how to follow up with further action.

[redacted]
Americas Directorate
[redacted]

Number of attachments: 6

cc: Special Advisers
PS/Lord Green
[redacted], HRDD
Edward Barker, CEDD
[redacted], Legal Advisers
[redacted], BE Washington
PRD
Press Office

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

FLAG B - Liberty

[redacted]

Liberty

Liberty House

26-30 Strutton Ground

London

SW1P 2HR

Thank you for your letter of 15 May to the Foreign Secretary about HMG's decision earlier this year to file an amicus brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd.* I am replying as Minister responsible for human rights policy.

We have long had an interest in the application of the Alien Tort Statute in the US and, along with like-minded States, have intervened in other ATS cases in the past. It is important to note that the Supreme Court will not examine the substance of the allegations against Shell, and, in any case, we take no position on these allegations. The Supreme Court will only concern itself with specific questions of law. Nor is the case about whether companies may have human rights responsibilities in general: as you know we all agree they do (and indeed we are working now, as you know, on implementation of the UN Guiding Principles on business and human rights, for UK firms). As far as we are concerned, the main question before the Court is whether the Alien Tort Statute may apply to cases with little, or no, connection with the USA (i.e. whether, and in what circumstances, the ATS may apply "extraterritorially"). Another question the Court will have to consider is whether international law itself imposes such human rights related obligations; in addition to those that may exist under domestic law.

The UK submitted an amicus brief to set out to the US Supreme Court our position on these two questions of international law. They are important in much broader circumstances than

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

this case and matter to UK interests. A US Supreme Court ruling on the issue of extraterritorial jurisdiction, in particular, would have a significant effect on potential future cases concerning UK national interests.

Our position on extraterritoriality is long held and cross cutting: it is one we have expressed in a number of different contexts including in relation to the assertion of US antitrust law and securities regulation (and, as here, we have often submitted briefs in conjunction with other like-minded States). In order to prevent conflicts between jurisdictions, international law has developed limits on the appropriate extent of national jurisdiction i.e. the principle that jurisdiction is primarily territorial. While in some cases we accept that States have the right to hold individuals to account for actions committed overseas, we believe that US courts should not assert jurisdiction on claims brought by a *foreign* plaintiff against a *foreign* company which concern events in a *third* country, where the case has little, or no, connection to the US.

On corporate liability under international law, our brief set out the position that international law does not directly impose human right obligations on companies. International law imposes such obligations on States. We took no position on whether US domestic law could impose such liabilities on corporations. Indeed, the Government considers that States should hold corporations within their own jurisdiction to account for their activities within their territory (and sometimes, outside that territory) under domestic criminal and civil law where that accords with the relevant international law principles on jurisdiction.

JEREMY BROWNE

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

FLAG C - APPG

[redacted]

All Party Parliamentary Group on

International Corporate Responsibility: Business, Human Rights and the Environment

House of Commons

London

SW1A 0AA

Shortly before the Easter recess I became aware that members of the Committee tabled three oral Parliamentary Questions to the Ministry of Justice concerning the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd*. Parliament was prorogued before the questions could be answered, and, although the questions were to colleagues at the MoJ, I thought Committee members might welcome some information on the Foreign and Commonwealth Office's approach to this issue (the FCO is responsible for international legal matters). I am writing as Minister responsible for human rights.

We have long had an interest in the application of the Alien Tort Statute in the US and, along with like-minded States, have intervened in other ATS cases in the past. It is important to note that the Supreme Court will not examine the substance of the allegations against Shell, and, in any case, we take no position on these allegations. The Supreme Court will only concern itself with specific questions of law. Nor is the case about whether companies may have human rights responsibilities in general: as you know we all agree they do (and indeed we are working now, as you know, on implementation of the UN Guiding Principles on business and human rights, for UK firms). As far as we are concerned, the main question before the Court is whether the Alien Tort Statute may apply to cases with little, or no, connection with the USA (i.e. whether, and in what circumstances, the ATS may apply "extraterritorially"). Another question the Court will have to consider is whether international law itself imposes such human rights related obligations; in addition to those that may exist under domestic law.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

The UK submitted an amicus brief to set out to the US Supreme Court our position on these two questions of international law. They are important in much broader circumstances than this case and matter to UK interests. A US Supreme Court ruling on the issue of extraterritorial jurisdiction, in particular, would have a significant effect on potential future cases concerning UK national interests.

Our position on extraterritoriality is long held and cross cutting: it is one we have expressed in a number of different contexts including in relation to the assertion of US antitrust law and securities regulation (and, as here, we have often submitted briefs in conjunction with other like-minded States). In order to prevent conflicts between jurisdictions, international law has developed limits on the appropriate extent of national jurisdiction i.e. the principle that jurisdiction is primarily territorial. While in some cases we accept that States have the right to hold individuals to account for actions committed overseas, we believe that US courts should not assert jurisdiction on claims brought by a *foreign* plaintiff against a *foreign* company which concern events in a *third* country, where the case has little, or no, connection to the US.

On corporate liability under international law, our brief set out the position that international law does not directly impose human right obligations on companies. International law imposes such obligations on States. We took no position on whether US domestic law could impose such liabilities on corporations. Indeed, the Government considers that States should hold corporations within their own jurisdiction to account for their activities within their territory (and sometimes, outside that territory) under domestic criminal and civil law where that accords with the relevant international law principles on jurisdiction.

JEREMY BROWNE

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

FLAG D - CORE

Marilyn Croser

Co-ordinator

The Corporate Responsibility (CORE) Coalition

Unit 306

16 Baldwins Gardens

London

EC1N 7RJ

I understand that CORE is interested in HMG's decision earlier this year to file an amicus brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd.* As such I thought it might help if I, as Minister responsible for human rights policy, set out some of the background to the Foreign and Commonwealth Office's approach to this issue (the FCO is responsible for international legal matters).

We have long had an interest in the application of the Alien Tort Statute in the US and, along with like-minded States, have intervened in other ATS cases in the past. It is important to note that the Supreme Court will not examine the substance of the allegations against Shell, and, in any case, we take no position on these allegations. The Supreme Court will only concern itself with specific questions of law. Nor is the case about whether companies may have human rights responsibilities in general: as you know we all agree they do (and indeed we are working now, as you know, on implementation of the UN Guiding Principles on business and human rights, for UK firms). As far as we are concerned, the main question before the Court is whether the Alien Tort Statute may apply to cases with little, or no, connection with the USA (i.e. whether, and in what circumstances, the ATS may apply "extraterritorially"). Another question the Court will have to consider is whether international law itself imposes such human rights related obligations; in addition to those that may exist under domestic law.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

The UK submitted an amicus brief to set out to the US Supreme Court our position on these two questions of international law. They are important in much broader circumstances than this case and matter to UK interests. A US Supreme Court ruling on the issue of extraterritorial jurisdiction, in particular, would have a significant effect on potential future cases concerning UK national interests.

Our position on extraterritoriality is long held and cross cutting: it is one we have expressed in a number of different contexts including in relation to the assertion of US antitrust law and securities regulation (and, as here, we have often submitted briefs in conjunction with other like-minded States). In order to prevent conflicts between jurisdictions, international law has developed limits on the appropriate extent of national jurisdiction i.e. the principle that jurisdiction is primarily territorial. While in some cases we accept that States have the right to hold individuals to account for actions committed overseas, we believe that US courts should not assert jurisdiction on claims brought by a *foreign* plaintiff against a *foreign* company which concern events in a *third* country, where the case has little, or no, connection to the US.

On corporate liability under international law, our brief set out the position that international law does not directly impose human right obligations on companies. International law imposes such obligations on States. We took no position on whether US domestic law could impose such liabilities on corporations. Indeed, the Government considers that States should hold corporations within their own jurisdiction to account for their activities within their territory (and sometimes, outside that territory) under domestic criminal and civil law where that accords with the relevant international law principles on jurisdiction.

JEREMY BROWNE

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

FLAG E - Amnesty International

[redacted]

Amnesty International UK

The Human Rights Action Centre

17-25 New Inn Yard

London EC2A 3EA

I understand that Amnesty International UK is interested in HMG's decision earlier this year to file an amicus brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd*. As such I thought it might help if I, as Minister responsible for human rights policy, set out some of the background to the Foreign and Commonwealth Office's approach to this issue (the FCO is responsible for international legal matters).

We have long had an interest in the application of the Alien Tort Statute in the US and, along with like-minded States, have intervened in other ATS cases in the past. It is important to note that the Supreme Court will not examine the substance of the allegations against Shell, and, in any case, we take no position on these allegations. The Supreme Court will only concern itself with specific questions of law. Nor is the case about whether companies may have human rights responsibilities in general: as you know we all agree they do (and indeed we are working now, as you know, on implementation of the UN Guiding Principles on business and human rights, for UK firms). As far as we are concerned, the main question before the Court is whether the Alien Tort Statute may apply to cases with little, or no, connection with the USA (i.e. whether, and in what circumstances, the ATS may apply "extraterritorially"). Another question the Court will have to consider is whether international law itself imposes such human rights related obligations; in addition to those that may exist under domestic law.

The UK submitted an amicus brief to set out to the US Supreme Court our position on these two questions of international law. They are important in much broader circumstances than this case and matter to UK interests. A US Supreme Court ruling on the issue of

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

extraterritorial jurisdiction, in particular, would have a significant effect on potential future cases concerning UK national interests.

Our position on extraterritoriality is long held and cross cutting: it is one we have expressed in a number of different contexts including in relation to the assertion of US antitrust law and securities regulation (and, as here, we have often submitted briefs in conjunction with other like-minded States). In order to prevent conflicts between jurisdictions, international law has developed limits on the appropriate extent of national jurisdiction i.e. the principle that jurisdiction is primarily territorial. While in some cases we accept that States have the right to hold individuals to account for actions committed overseas, we believe that US courts should not assert jurisdiction on claims brought by a *foreign* plaintiff against a *foreign* company which concern events in a *third* country, where the case has little, or no, connection to the US.

On corporate liability under international law, our brief set out the position that international law does not directly impose human right obligations on companies. International law imposes such obligations on States. We took no position on whether US domestic law could impose such liabilities on corporations. Indeed, the Government considers that States should hold corporations within their own jurisdiction to account for their activities within their territory (and sometimes, outside that territory) under domestic criminal and civil law where that accords with the relevant international law principles on jurisdiction.

JEREMY BROWNE

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 4

Redactions marked in red made under Section 42. Redactions marked in dark green made under Section 27(1)(a). Redactions marked in light green made under Section 27(2). All other redactions made under Section 40(2)

Title: US - UPDATE ON KIOBEL (SUPREME COURT CASE CONCERNING EXTRATERRITORIALITY)

Date Registered: 25/05/2012

PS/Mr Burt, PS/Mr Browne,

Please see attached minute on our interventions in the US Supreme Court case considering issues of extraterritoriality and corporate liability under international law (Kiobel vs Royal Dutch & Shell). This minute is also a response to the commission from Private Office for a note explaining our shift in stance on this issue ([redacted]'s email below – apologies for missing your deadline).

Summary

HMG submitted an amicus brief (which covered well-established HMG positions on extraterritoriality and corporate liability under international law) following consideration of the points of law at issue. It was not at the behest of Shell. The brief was in support of the Respondents and we were not aware, at that time, that a neutral brief was a possibility. Subsequently, Mr Burt recommended submitting a further, but neutral, brief [redacted] Shell are concerned that a neutral brief will damage their case and have lobbied the FCO, BIS and No10. In contrast, Amnesty International has issued a notice which recommends that the Government withdraw its intervention in Kiobel, and has urged the Foreign Affairs Select Committee to ask the FCO for the reasons behind our intervention.

[redacted], Acting Head of Department and Head US Strategy, North America Department, [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

From: [redacted] (Restricted)

Sent: 23 May 2012 12:59

To: Helen Teasdale (Restricted)

Cc: Lindsay Appleby (Restricted)

Subject: COMMISSION FOR NO 10 ON AMICUS CURIAE BRIEF

[redacted],

We spoke about this earlier today; we received a call from [redacted] (No.10 PS/PM) about the Shell Amicus Curiae brief and submission on Nigeria/Shell. I asked you for a note (2 pages) for 12.00 on 24 May to give the outline and reasoning for why we appear to have shifted to a more neutral stance rather than an Amicus Curiae stance (friend of the Court) that was in favour of Shell's position. Andy Browne (Executive Vice President Shell) had been lobbying No10 to find out why the Government had moved to a more neutral stance.

You were already in the process of writing a note for Mr Burt and Mr Browne on this and would be able to offer us background brief for No.10 by tomorrow.

Many thanks,

[redacted]

[redacted] | Private Secretary to the Foreign Secretary | Foreign and Commonwealth Office | London

[redacted]

Follow the Foreign Secretary on [twitter](#) and [facebook](#)

Private Office does not register documents. Please remember to register this e-mail.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[Attachment] Memorandum

To PS/Mr Burt
From [redacted]
Date 21 May 2012
Pages 3

SUBJECT: US – UPDATE ON KIOBEL (SUPREME COURT CASE CONCERNING EXTRATERRITORIALITY)

Summary

1. HMG submitted an amicus brief (which covered well-established HMG positions on extraterritoriality and corporate liability under international law) following consideration of the points of law at issue. It was not at the behest of Shell. The brief was in support of the Respondents and we were not aware, at that time, that a neutral brief was a possibility. Subsequently, Mr Burt recommended submitting a further, but neutral [redacted]. Shell are concerned that a neutral brief will damage their case and have lobbied the FCO, BIS and No10. In contrast, Amnesty International has issued a notice which recommends that the Government withdraw its intervention in Kiobel, and has urged the Foreign Affairs Select Committee to ask the FCO for the reasons behind our intervention.

Detail

2. On 3 February we filed an amicus brief in support of the Respondents in the case of Kiobel vs. Royal Dutch & Shell. Our decision to submit a brief followed my submission of 10 January 2012 to Mr Browne, Mr Bellingham and Mr Burt. [redacted] We did not intervene at the request of Shell: the case was brought to our attention by US Counsel [redacted] who was aware of our interest in the use of the Alien Tort Statute and issue of extraterritoriality. We filed a brief in support of the Respondents as we had not been made aware that it was possible to file a neutral brief. (In addition, but not considered at the time, a neutral brief may not have been feasible as the deadline for a neutral brief is generally considerably earlier than a brief in support of the Respondents. [redacted])
3. [redacted].
4. On 16 April Mr Burt agreed with the recommendation in my submission that the UK should submit a second amicus brief (which would expand upon the issue of extraterritoriality which was touched upon in our earlier brief). Mr Burt also said that he was keen that the UK submit a neutral brief. There were two central arguments for a neutral brief:

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

- that the content would be the same as one in support of the Respondents as it would focus on the point of law at issue and not comment on the allegations levelled at the Respondents;
 - that it was becoming clear that we would be able to secure the support of more countries if we submitted a neutral brief [redacted].
5. Against those arguments we recognised that switching from a brief in support of the Respondents to a neutral one might be judged as HMG taking a view on the allegations against Shell (essentially that we do not support Shell and/or that we believe they may be culpable for the alleged human rights abuses). In addition we recognised that it may be viewed negatively by British business and as a sign that HMG does not have the interests of business at heart.
6. [redacted]
7. [redacted]
8. CEDD have contacted Shell to inform them that we are minded to submit a neutral brief. Shell have since lobbied the FCO, BIS, and No10 in an attempt to persuade us to retain a supportive brief. Shell have argued that a move from a brief in support of the Respondents to a neutral one will be perceived negatively by the Court. [redacted] Shell's lobbying, however, [redacted].
9. Separately we are coming under pressure from NGOs. We have received three FOI requests concerning Kiobel and we and MoJ have received a number of Parliamentary Questions. We intend to attempt to address some of their concerns by writing directly to the organisations in question (AI, Liberty, the All Party Parliamentary Group on International Corporate Responsibility and the FAC). A draft letter is being submitted separately to Ministers.

[redacted]

North America Department

Cc:

PS

PS/PUS

PS/Mr Browne

PS/Mr Bellingham

PS/Lord Green

CEDD

HRDD

Legal Advisers

BE Washington

Press Office

Special Advisers

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 5

Title: [redacted] - US - Supreme Court - Kiobel – Extraterritoriality

Date Registered: 17/05/2012

ISSUE FOR MINISTERIAL ATTENTION

1. Whether to submit a second *amicus curiae* brief (in tandem with other countries) in the case of *Kiobel* (currently before the US Supreme Court) detailing HMG's concerns over extraterritoriality; and whether to do so in support of the Respondents or neutrally.
2. Our strategy for responding to the Alien Tort Statute (ATS) cases as requested by Mr Burt in response to my earlier submission – see separate note (annex A).

TIMING

3. Priority. The earliest we would have to submit a brief is 13 June (although the date varies depending upon whether we submit a neutral brief or a brief in support of the Respondents – see para 6). [redacted] Accordingly, considerable coordination between States and US Counsel will be required to draft the brief. This will take a number of weeks and hence we would need to begin this process as soon as possible.

[redacted], Head US Strategy, North America Department, [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Attachment]

To: 1. [redacted], Head NAD

“The Supreme Court’s interest in our earlier brief must be viewed as a success. The argument for submitting a new brief to achieve a common understanding of this important aspect of international law is compelling. Whether to do so in support of the Respondents, or neutrally, would be best determined by the approach supported by our international partners.”

2. PS/Mr Burt

From: [redacted]

Date: 03 April 2012

cc: see end of submission

SUBJECT: US – KIOBEL – EXTRATERRITORIALITY

ISSUE FOR MINISTERIAL ATTENTION

1. Whether to submit a second *amicus curiae* brief (in tandem with other countries) in the case of *Kiobel* (currently before the US Supreme Court) detailing HMG’s concerns over extraterritoriality; and whether to do so in support of the Respondents or neutrally.
2. Our strategy for responding to the Alien Tort Statute (ATS) cases as requested by Mr Burt in response to my earlier submission – see separate note (annex A).

TIMING

3. Priority. The earliest we would have to submit a brief is 13 June (although the date varies depending upon whether we submit a neutral brief or a brief in support of the Respondents – see para 6). [redacted]. Accordingly, considerable coordination between States and US Counsel will be required to draft the brief. This will take a number of weeks and hence we would need to begin this process as soon as possible.

BACKGROUND

4. My submission of 11 January (annex B) set out our argument for submitting an *amicus* brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd* which concerns the question of whether corporations are liable under the US Alien Tort Statute (ATS) for violations of international human rights law. Ministers supported the decision to file a brief and the hearing took place on 28 February. Subsequently the Supreme Court ordered further argument on the following question:

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

"Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

5. As framed, this question is clearly directed at establishing whether the ATS should apply to events that might amount to violations of international law that occur outside US territory: in other words, whether - and in what circumstances - the US courts may exercise extraterritorial jurisdiction in ATS claims. It has been our longstanding position that the US courts should not exercise extraterritorial jurisdiction under the ATS in respect of the acts of foreign corporations committed entirely outside the territory of the United States where there is no significant nexus to the US. Accordingly, submitting a brief on this question will enable the UK to express its consistent position objecting to the overly broad assertion of extraterritorial jurisdiction before the courts. A good result from the Court on this question could also assist British corporations, even if the original question before the Court (i.e. whether or not corporations may be liable to pay damages for violations of international law under the ATS) is answered in the affirmative.
6. This question was not previously before the Court, [redacted]. The deadline for the Petitioners is 6 June, for a neutral brief is 13 June and for the Respondents is 8 August. We expect the oral hearing in October or November.

US Government position

7. The US government also filed a brief in *Kiobel* (in support of the Petitioners) [redacted]. However, the US brief did not address the question of whether international law provides that corporations are liable for breaches of human rights, arguing instead that holding corporations accountable is a matter for domestic law (the "remedies approach"). [redacted]
8. [redacted]

POLICY CHOICES AND ARGUMENT (INCLUDING RESOURCE IMPLICATIONS)

9. The choices are as follows:
 - to submit a brief in support of the Respondents [redacted]
 - submit a neutral brief [redacted]
 - to take no action.

Argument in support of a HMG *amicus* brief

10. This is a rare opportunity to influence the Supreme Court on the application of the ATS to foreign corporations - a chance to submit a brief on the precise question that has concerned the UK throughout, and in facts that amount to the paradigm case that has concerned us the most: an ATS claim against a non-US company in relation to its activities outside the US where there is no significant link to the US. This is the first time this question will be examined by the Supreme Court in an ATS claim against a foreign company. [redacted]
11. The argument for filing a brief on the question of extraterritoriality is essentially the same as set out in my previous submissions. [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

12. [redacted]

13. We would restrict our argument in a brief to the limits on extraterritorial jurisdiction under international law, without expressing a view on how the ATS as a domestic US statute should be interpreted.

Whether to submit a neutral brief or one in support of the Respondents

14. [redacted]

15. [redacted]

16. Against that is the potential to secure the support of other countries for our brief. A number of European States have indicated a willingness to join a neutral brief [redacted]. The brief would undoubtedly have greater impact with the Supreme Court if more countries are signed up to it. Hence on balance a neutral brief with more supporters could be of greater benefit to business than a brief in support of the Respondents backed only by the UK [redacted]. A neutral brief might also prevent accusations that we are on the side of human rights abusers.

17. On a practical note, a neutral brief would have to be submitted considerably earlier than a brief in support of the Respondents, and ahead of the brief submitted by Shell itself.

[redacted]

European Commission position

18. [redacted] The Commission filed a brief in 2004 in Sosa and has proposed that any new brief restate the previous position. [redacted] We are considering how to reply, but are likely to flag that the UK has already submitted a brief in this case and intends to do so again.

Whether to submit a joint brief

19. A joint brief with third countries would have a greater impact. [redacted]

Argument against

20. Success at the Supreme Court would remove one of the few remedies for individuals seeking redress against foreign companies for their actions in foreign states. NGOs and civil society are aware of our previous brief and have reacted badly to the move. At a meeting hosted by Amnesty International with about 35 other NGOs present HRDD colleagues faced questions about the brief and HMG's business and human rights work. We were accused of standing up for business (Shell) and against the victims of appalling human rights abuse. Although colleagues were able to set out the position clearly, the strength of feeling was evident from the questions the NGOs posed. We can expect a similar reaction to any further brief.

Resource implications

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

21. Counsel (Baker and Miller) have quoted \$30,000 plus printing costs for a joint brief with the Netherlands. We would split this evenly and hence be expected to pay around £9,300. The fee will increase by \$3,000 for each additional government that the UK persuades to join the brief, but we would aim to secure that the overall bill was split evenly between the governments (thus reducing the cost to HMG even further). So early in the financial year NAD should be able to manage the costs from within existing resources (although NAD does not have a standing budget line for legal fees such as this as they are difficult to predict).
22. We are not contractually bound to use the same law firm and could seek quotes from other firms for this business, but we do not recommend this. We do not normally change counsel during a court case unless there are concerns with their performance (which do not apply here). Approaching other suppliers would delay the start of the drafting process (which is not desirable). Finally, Baker and Miller are currently our attorneys of record in the Kiobel case, and have the experience of preparing our two most recent briefs (and others in the past), and the Dutch are comfortable with using them. Hence, it makes sense to continue with Baker and Miller, but we will, of course, seek value for money in doing so.

RECOMMENDATION

23. To engage Counsel to submit a brief; and to seek support from like-minded third countries for a joint brief. On whether to submit a neutral brief or one in support of the Respondents, we recommend that we seek support from partners for a brief in support of the Respondents, but if other countries are set on filing a neutral brief that we agree to do so in order to increase the likely impact of our collective views with the Court.

AGREED BY / DISSENTING VIEWS

24. Legal Advisers, CEDD, BE Washington, HRDD, Press and Digital Department, and PRD.

IMPLEMENTATION

Next steps

25. [redacted]

Risks & Mitigation

26. The risks are largely set out in the argument. There remains the risk that we will be accused of being on the side of business in relation to human rights abuses, particularly if we submit a brief in support of the Respondents. We will maintain our public line that human rights is at the core of all our foreign policy, that the brief is solely concerned with the issue of extraterritoriality, and that it is not an expression of view on the allegations made against the defendants.
27. Although outside FCO responsibility, there is the risk that existing calls for the introduction of domestic legislation to hold British companies to account for activities

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

overseas would grow stronger if the ATS route were removed. This would be a matter for Ministers and Parliamentarians.

US Government position – risk to bilateral relationship

28. [redacted] UK's views on this issue should be well known to the US government given the number of briefs we have submitted on this point in the past (including the brief we submitted in *Rio Tinto* in December last year). [redacted]

Parliament, Media and Public Communications

29. We had one media enquiry from the civil liberties organisation, Liberty, which is running a campaign on transparency within the justice system. They presented our position as being in support of business and "seeking to cover up torture in US courts". There has been no follow up to that enquiry. There has been significant interest in the case on the legal network and within the US, but not regarding the UK's brief. Previous press lines are attached (annex D) and will be updated should ministers recommend filing a brief.

30. There has been no parliamentary interest in this or the *Rio Tinto* case. We will be prepared to answer parliamentary questions should they arise, but do not believe that this issue warrants proactive work with Parliament such as a Written Ministerial Statement.

EVALUATION / REVIEW

31. BE Washington and Legal Advisers will continue to follow developments in the case. We do not anticipate any further questions from the Supreme Court which would warrant an intervention by the UK. However, we would consult ministers again should the need arise.

[redacted]

Americas Directorate

[redacted]

Number of attachments:

cc:

PS

PS/Mr Browne

PS Mr Bellingham

PS Lord Green

PS/PUS

Special Advisers

[redacted]

[redacted], BE Washington

[redacted], HRDD

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Edward Barker, CEDD
[redacted], Africa Directorate
Press Office
PRD

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[Attachment]

Memorandum – Annex A

SUBJECT: US – ALIEN TORT STATUTE

[redacted]

Annex B

Duplicate of 1st Attachment to Document 17

Annex C

Duplicate of 2nd Attachment to Document 17

Annex D

Previous Press Lines

The Foreign Secretary has made clear on many occasions that Human Rights is at the core of all of our foreign policy. It is not in our character as a nation to have a foreign policy without a conscience or to ignore our obligation to help those less fortunate.

The UK has a strong reputation as a defender of human rights, including through our support for the UN Guiding Principles on business and human rights - also known as the “Ruggie Principles” - which were endorsed by the Human Rights Council in June 2011. The UK is working to fold these into a Government strategy on business and human rights by mid-2012. Among other things this will make clear the Government’s expectation that British companies will build respect for human rights into all aspects of their operations and will act accordingly.

The UK *amicus brief* submitted to the US Supreme Court in January was in partnership with the Dutch government. The UK/Dutch brief is concerned solely with the position under international law of the following issues: liability of corporations for human rights violations, extraterritoriality and the exhaustion of local remedies.

We believe that human rights obligations rest with States– and not with non-state actors such as corporations. It is the UK’s well-established position that corporations can and should be held to account for their activities before a court which can exercise jurisdiction over those activities in accordance with established rules of international law.

If needed:

The decision to submit an *amicus* brief does not mean that the UK has taken a position on the allegations made against the defendants (Royal Dutch/Shell).

UNCLASSIFIED

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

The Supreme Court's function at this stage is to address the pure points of law at issue. The UK brief was similarly confined to points of law, not how they might apply in future.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 6

Title: [redacted]: US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

Date Registered: 11/05/2012

ISSUE(S) FOR MINISTERIAL ATTENTION

1. How to respond to increasing Parliamentary and NGO interest in the UK's amicus brief in the case of Kiobel vs. Royal Dutch & Shell.

TIMING

2. Priority. We are receiving increased Parliamentary attention on the case and believe it is in our interests to be proactive.

[redacted]

[redacted], Acting Head of Department and Head US Strategy, North America Department, [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[Attachment]

To: PS/Mr Burt
From: [redacted]
Date: 10 May 2012
cc: see end of submission

SUBJECT: US - KIOBEL - PARLIAMENTARY AND NGO ENGAGEMENT

ISSUE(S) FOR MINISTERIAL ATTENTION

1. How to respond to increasing Parliamentary and NGO interest in the UK's amicus brief in the case of Kiobel vs. Royal Dutch & Shell.

TIMING

2. Priority. We are receiving increased Parliamentary attention on the case and believe it is in our interests to be proactive.

BACKGROUND

3. In February we submitted an amicus brief in the case of Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd which concerns the question of whether corporations are liable under the US Alien Tort Statute (ATS) for violations of international human rights law. The case has subsequently drawn attention from Parliamentarians and NGOs who appear concerned that the UK is supporting business over human rights. We have received two FOI requests concerning contact with Shell and the Dutch Government (with whom we filed the brief) over Kiobel, including one from the prominent civil liberties organisation, Liberty. The Ministry of Justice received three oral Parliamentary Questions on Kiobel at the end of April (Parliament was prorogued before the questions could be answered) and a further oral question on 9 May (which will be transferred to the FCO for written reply). The questions were from Caroline Lucas MP, Virendra Sharma MP, Lisa Nandy MP and Teresa Pearce MP. All four MPs are members of the All Party Parliamentary Group on International Corporate Responsibility: Business, Human Rights and the Environment.
4. Following my submission of 3 April we are working with like minded States to prepare a second amicus brief which addresses the issue of extraterritoriality. It is unlikely that interest in this case will go away, and when we file our second brief we can expect further scrutiny from NGOs and Parliament.

POLICY CHOICES AND ARGUMENT (INCLUDING RESOURCE IMPLICATIONS)

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

5. Our choice is whether to respond reactively to questions and FOI requests or to be proactive in explaining our position to interested NGOs and Parliamentarians. We are under no obligation to reach out to interested parties, but we believe we have a positive story to tell and should not be defensive about why we have intervened in this case. In addition, this is a technical legal issue which is not particularly easy to follow as a lay person. Setting out our stance in a letter to interested parties would be a means to get across the whole picture (rather than through piecemeal replies via FOI or individual PQs). The letter will include a reference to the work currently underway to draft a second amicus brief, but will not go into any detail (we would not wish to disclose our position publicly before we file the brief).
6. We will also consider whether to issue a Written Ministerial Statement when we file our second amicus brief and will provide further advice at that time (we do not recommend a WMS in advance of filing our second brief).
7. IMG support proactive engagement on this issue and do not believe that writing to Liberty undermines the FOI Act request that we have received from them.

RECOMMENDATION

8. That Mr Burt writes to the All Party Parliamentary Group on International Corporate Responsibility: Business, Human Rights and the Environment, to Liberty and to Amnesty International (who have also raised concerns over our intervention in this case) setting out why we intervened in *Kiobel*, and offers to each a contact point in the FCO for further follow up questions. I attach a draft letter.
9. Departments will reply in due course, and in line with the legislation, to the FOI requests.

AGREED BY / DISSENTING VIEWS

10. NAD, HRDD, CEDD, Legal Advisers, Press Office, PRD and BE Washington agree.

IMPLEMENTATION

Risks & Mitigation

11. There is a risk that our outreach could be seen as being defensive or an admission that we have got something wrong. Or that it could generate more interest in the issue than currently exists. However, we assess these risks to be minimal. Interest in the case is likely to increase naturally regardless of whether we take this action, and by carefully explaining our position to an interested audience we are likely to increase the chance that they and others will understand why we have taken action (if not agree with us).
12. There is a risk that this activity will have no effect on negative publicity or parliamentary and NGO interest and we may continue to receive FOIs and PQs. However, the resource costs of sending the letters are low and hence we believe it is worth engaging directly in the manner.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Parliament, Media and Public Communications

13. There has been no significant press interest in this issue so far. However, any activity (in the form of letters from the Minister) increases the likelihood of press interest particularly given active NGO lobbying. We do not recommend proactive media work, but we will expand our existing press lines for use defensively as required and monitor media including digital channels closely.

EVALUATION / REVIEW

14. We will monitor any reaction (both directly, but also enquiries via FOI or PQs) to our letters to determine how to follow up with further action.

[redacted]
Americas Directorate
[redacted]

Number of attachments: 1

cc: Special Advisers
PS/Mr Browne
PS/Lord Green
[redacted], HRDD
Edward Barker, CEDD
[redacted], Legal Advisers
[redacted], BE Washington
PRD
Press Office

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

DRAFT LETTER TO PARLIAMENTARIANS/LIBERTY

INTRODUCTIONS:

[MPs:

[redacted]

All Party Parliamentary Group on

International Corporate Responsibility: Business, Human Rights and the Environment

House of Commons

London

SW1A 1AA

Shortly before the Easter recess I became aware that members of the Committee tabled three oral Parliamentary Questions to the Ministry of Justice concerning the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd.* Parliament was prorogued before the questions could be answered, and, although the question was to colleagues at the MoJ, I thought Committee members might welcome some information on the Foreign and Commonwealth Office's approach to this issue (the FCO is responsible for international legal matters).

[Liberty:

[redacted]

Liberty

Liberty House

26-30 Strutton Ground

London

SW1P 2HR

I have become aware of *Liberty's* interest in HMG's decision earlier this year to file an amicus brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd.* As such I thought it might help if I set out some of the background to our decision to intervene.

UNCLASSIFIED

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Please note that I understand that your organisation has submitted a Freedom of Information Act request to this department. This letter is not an attempt to undermine that request (which will be answered in due course by officials in line with the legislation), but a desire on our part to be open with the NGO community as to why we have filed an amicus brief in this case.]

[Amnesty International]

[redacted]

Amnesty International UK

The Human Rights Action Centre

17-25 New Inn Yard

London EC2A 3EA

I have become aware through my officials of Amnesty International UK's interest in HMG's decision earlier this year to file an amicus brief in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd.* As such I thought it might help if I set out some of the background to our decision to intervene.]

TEXT OF LETTER:

As you will be aware, on 17 October 2011, the US Supreme Court granted the Plaintiffs' petition for *certiorari* (review) of the Second Circuit (Court of Appeal) decision of 2010 in this case. The Supreme Court is considering the following questions:

(1) *Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. para. 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.*

(2) *Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.*

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

It is important to note that the Supreme Court is not considering the substance of the allegations put forward by the Plaintiffs against Royal Dutch Petroleum and Shell, but will concern itself solely with the questions above.

We have long considered that corporations cannot be liable for alleged human rights violations under customary international law, as there is no such established rule of international law. We are also clearly of the view that human rights obligations under international law are owed solely by States or in exceptional circumstances supra-national bodies like the EU. This is not just a legal technicality. We are concerned that by recognising the direct liability of non-State actors for violations of international human rights law, as well as by undermining the principle of national sovereignty in prevention, and punishment of, and redress for abuses, States might be given reason to downplay or even ignore their own international human rights law obligations. They may also not come under pressure to provide a remedy, and indeed prevent abuses, if plaintiffs have recourse to redress elsewhere.

Given the international standing of the US Supreme Court and the significance of any ruling by it, we believed strongly that it was in the UK's national interest to file an amicus brief setting out our position and understanding of these points. This is not the first time that the UK has filed an amicus brief in cases under consideration in the US, although it is the first time that this particular issue (corporate liability under customary international law) has been considered by the Supreme Court.

It is also important to note that our brief was concerned the position of corporate liability under international law. It took no position on whether the Supreme Court should interpret the Alien Tort Statute as imposing liability on corporations as a matter of US domestic law. The brief left it open for the Supreme Court to do so, and indeed, HMG considers it entirely proper that States should be able to hold corporations within their own jurisdiction to account for their activities within their territory (and sometimes, outside that territory) under domestic criminal and civil law. Nevertheless, such laws must be consistent with principles of jurisdiction under international law, and not affect another State's ability to regulate companies within its territory.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Accordingly this case was also an opportunity to restate HMG's position on extraterritorial jurisdiction. In order to prevent conflicts between jurisdictions, international law has developed limits on the appropriate extent of national jurisdiction, in particular that jurisdiction is primarily territorial i.e. a State has the right to exercise jurisdiction over all persons and actions taking place within its territory. While in some cases we do accept that States have the right to hold individuals to account for actions committed overseas, we believe that the US courts should not assert jurisdiction in respect of claims brought by foreign plaintiffs against a foreign defendant in respect of actions wholly committed on foreign territory with little nexus with the United States.

Our position on extraterritoriality is long-held and cross-cutting. It is one we have expressed in a number of different contexts including in relation to the assertion of US antitrust law and securities regulation in previously submitted amicus briefs (we have often submitted briefs in conjunction with other like minded states).

Taking all of the above into consideration and after consultation with the Ministry of Justice and Department for Business, Innovation and Skills, we decided to file an amicus brief in this case. Given our shared interest in the issues under consideration, on this occasion we filed jointly with the Government of the Netherlands. As the Supreme Court will consider the specific issue of extraterritoriality (in relation to *Kiobel*) later this year, we are also currently considering how we can best present our views on this important legal issue.

I am aware that our decision to file a brief in this case is being seen by some as support for business and disregard for human rights concerns. Please let me assure you that this is not the case. The Foreign Secretary has made clear on many occasions that Human Rights are central to the core values of our foreign policy. It is not in our character as a nation to have a foreign policy without a conscience or to ignore our obligation to help those less fortunate. In filing an amicus amicus in this case we are not taking a position on the human rights issues at the heart of the allegations; we are simply making a technical statement of the Government's legal positions.

The UK has a strong reputation as a defender of human rights, including through our support for the UN Guiding Principles on business and human rights - also known as the "Ruggie Principles" - which were endorsed by the Human Rights Council in June 2011. The UK is

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

working to fold these into a Government strategy on business and human rights by mid-2012. Among other things this will make clear the Government's expectation that British companies will build respect for human rights into all aspects of their operations and will act accordingly.

However ultimately we believe that human rights obligations rest with States – and not with non-state actors such as corporations. It is the UK's well-established position that corporations can and should be held to account for their activities before a court which can exercise jurisdiction over those activities in accordance with established rules of international law.

I hope that you have found this explanation helpful. Should you have any questions please feel free to contact [redacted] of our North America Department [redacted].

ALISTAIR BURT

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 7

Title: RE: [redacted] - US - Supreme Court - Kiobel - Extraterritoriality

Date Registered: 03/05/2012

[redacted],

Mr Burt was grateful for this submission. He is keen to submit a neutral brief.

Best regards

[redacted] Assistant Private Secretary to Alistair Burt MP |
[redacted]

From: PS Minister Burt - Action (Restricted)

Sent: 03 April 2012 14:54

To: [redacted] (Restricted); [redacted]* (Restricted); [redacted] (Restricted); [redacted] (Restricted); [redacted]* (Restricted)

Subject: FW: [redacted] - US - Supreme Court - Kiobel - Extraterritoriality

From: [redacted] (Restricted)

Sent: Tuesday, April 03, 2012 2:54:15 PM

To: PS Minister Burt - Action (Restricted)

Cc: SOSFA Action (Restricted); PS Minister Browne - Info (Restricted);

PS Minister Bellingham - Info (Restricted); PUS Action/Info (Restricted);

DL PO - SPADS (Restricted); [redacted] (Restricted);

[redacted] (Restricted); Helen Mulvein (Restricted);

[redacted] (Restricted); [redacted]* (Restricted);

Edward Barker (Restricted); [redacted] (Restricted);

[redacted] (Restricted); PRD Action/info (Restricted);

DL Americas NAD All Staff (Restricted); Fiona Clouder (Restricted);

Green MPST (Restricted)

Subject: [redacted] - US - Supreme Court - Kiobel - Extraterritoriality

Auto forwarded by a Rule

ISSUE FOR MINISTERIAL ATTENTION

1. Whether to submit a second *amicus curiae* brief (in tandem with other countries) in the case of *Kiobel* (currently before the US Supreme Court) detailing HMG's concerns over extraterritoriality; and whether to do so in support of the Respondents or neutrally.
2. Our strategy for responding to the Alien Tort Statute (ATS) cases as requested by Mr Burt in response to my earlier submission – see separate note (annex A).

TIMING

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

3. Priority. The earliest we would have to submit a brief is 13 June (although the date varies depending upon whether we submit a neutral brief or a brief in support of the Respondents – see para 6). [redacted]. Accordingly, considerable coordination between States and US Counsel will be required to draft the brief. This will take a number of weeks and hence we would need to begin this process as soon as possible.

[redacted], Head US Strategy, North America Department, [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 8

Title: RE: SUBJECT: US - AMICUS CURIAE BRIEF – KIOBEL

Date: (Registered) 26/03/2012

[redacted],

Mr Browne is supportive of submitting an amicus curiae to the Supreme Court. Mr Browne is reassured by the position set out in para 15 of the submission – that submission of an amicus brief does not mean that UK companies should not be held to account for their actions. This mitigates the risk that the UK is seen as being inconsistent in its approach to human rights.

[redacted] Private Secretary to Jeremy Browne MP, Minister of State

[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 9

Title: 20120313 US ATS Follow up Submission

Date Registered: 14/03/2012

[Duplicate of Attachment to Document 5]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 10

Title: COJUR COACD - COJUR* COACD - Report - Meeting of the Public;

eGram CFSP/SEC/0195/12

Date Registered: 13/03/2012

[redacted]

NL and UK indicated that they had filed a joint brief as amici curiae in support of the defendants in the Kiobel case. The UK and Australia have also filed a joint brief in support of the petitioners in the Sarei case. [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 11

**Title: COJUR COACD - Report - Meeting of the Public International; eGram
CFSP/SEC/0129/12**

Date Registered: 17/02/2012

[redacted]

NL and UK indicated that they had filed a joint brief as amici curiae
in support of the defendants in the Kiobel case. The UK and Australia
have also filed a joint brief in support of the petitioners in the
Sarei case. [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 12

Title: RE: US - AMICUS CURIAE BRIEF - KIOBEL

Date Registered: 07/02/2012

[redacted]

Parts also redacted under Exemption 40(2)

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 13

**Title: COJUR COACD - COJUR COACD - Meeting of the Public International
Law Working; eGram CFSP/SEC/0074/12**

Date Registered: 01/02/2012

[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 14

Title: RE: US - AMICUS CURIAE BRIEF – KIOBEL

Date Registered: 31/01/2012

[redacted]

Parts also redacted under Exemption 40(2) and 27(1)(a)

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 15

**Title: COJUR COACD - Draft Agenda - Meeting of the Public; eGram
CFSP/SEC/0054/12**

Date Registered: 25/01/2012

[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 16

Title: RE: SUBJECT: US - AMICUS CURIAE BRIEF – KIOBEL

Date Registered: 16/01/2012

[redacted]

Mr Burt was grateful for sight of this submission. He commented:

“The lawyer in me finds this fascinating.

In the short term our approach is right, and we should submit a brief.

But it might help defending this position – it’s perfectly respectfully defended as per the arguments set out in the submission - by noting a developing argument in law and that we are prepared to make a contribution to it.

We should join others in some form of legal forum to consider whether the law is strong enough to prevent unacceptable behaviour by corporations; if so, how it may be enforced, if not, how it might be changed.

If we are to receive more of these requests, this might to be a useful way forward”

Best regards

[redacted] Assistant Private Secretary to Alistair Burt MP |
[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 17

Title: SUBJECT: US - AMICUS CURIAE BRIEF – KIOBEL

Date: 10/01/2012

1. Whether to submit an *amicus curiae* brief to the US Supreme Court in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd* which concerns the question of whether corporations are liable under the US Alien Tort Statute (ATS) for violations of international human rights law.
2. The key issues that Ministers will wish to consider are:
 - [redacted]
 - The potential damage to British business of a Supreme Court finding that corporations can be held liable for such violations (paras 20-21);
 - The risk that intervening may be perceived as the UK placing business interests above human rights (paras 23-25);
 - [redacted]
 - [redacted]

TIMING

3. Urgent. The deadline for submitting an *amicus curiae* brief is 3 February, but a decision needs to be made urgently to allow sufficient time for Counsel to prepare and clear a brief.
4. Given the complexity of the issue and short timeframe, officials would be available to brief Ministers via an office meeting if that was preferable.

Apologies for the delay.

[redacted]

[redacted], Head US Strategy, North America Department, FCO Tel: [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[Attachment]

To: 1. [redacted]

“It is clear that there is an important legal principle at stake, with potentially far-reaching consequences for British businesses. We are right to consider our human rights equities, but the balance of our interest favours submitting a brief.”

2. Iain Macleod

[redacted]

3. PS Mr Bellingham, & PS Mr Browne - in parallel

From: [redacted]

Date: 11 January 2012

cc: see end of submission

SUBJECT: US - AMICUS CURIAE BRIEF - KIOBEL

ISSUE(S) FOR MINISTERIAL ATTENTION

5. Whether to submit an *amicus curiae* brief to the US Supreme Court in the case of *Kiobel et al v. Royal Dutch Petroleum Company, Shell Transport & Trading Company Plc AND Shell Petroleum Development Company of Nigeria Ltd* which concerns the question of whether corporations are liable under the US Alien Tort Statute (ATS) for violations of international human rights law.
6. The key issues that Ministers will wish to consider are:
 - [redacted]
 - The potential damage to British business of a Supreme Court finding that corporations can be held liable for such violations (paras 20-21);
 - The risk that intervening may be perceived as the UK placing business interests above human rights (paras 23-25);
 - [redacted]
 - [redacted]

TIMING

7. Urgent. The deadline for submitting an *amicus curiae* brief is 3 February, but a decision needs to be made urgently to allow sufficient time for Counsel to prepare and clear a brief.
8. Given the complexity of the issue and short timeframe, officials would be available to brief Ministers via an office meeting if that was preferable.

BACKGROUND

[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

9. [redacted]

Prosperity and support to British business

24. The risk of the US Supreme Court ruling [redacted] carries potentially significant negative implications for UK business. Quantifying these implications is extremely difficult. [redacted] The prosperity arguments would therefore lean strongly towards defending HMG's established principle (rejecting the notion of corporate liability for violations of CIL) by taking an *amicus* brief in this case that re-states this position before the US Supreme Court so that if the Court is minded to address the point they will have the benefit of the views of HMG. [redacted]

25. While the extra-territorial application of the ATS/failure to require exhaustion of local remedies are not included in the questions for the US Supreme Court hearing, the fact remains this is a real problem for business generally. The argument for inclusion of HMG's position on extraterritoriality/exhaustion of local remedies in an *amicus* brief is set out in para14 (and was covered by my earlier submission on *Rio Tinto*). CEDD would therefore support inclusion of HMG's position on this issue in a brief.

26. In conclusion, both BIS and CEDD believe that that the prosperity and potentially significant commercial considerations in this case weigh in favour of the UK submitting an *amicus* brief. They fully recognise the presentational and reputational arguments for human rights policy that weigh against, but believe that the risks of damage to UK business both financially and for the UK's wider economic and commercial reputation are at least of matching weight.

Human Rights and International Justice Considerations

27. HRDD is concerned that actively intervening would damage everything the Government is doing to show that good business achievement and good corporate human rights behaviour are compatible with each other. Submission of a UK brief effectively defending the corporate position in this case will be perceived as inconsistent with our position on the UN Guiding Principles – the so-called “Ruggie Principles” or “Protect, Respect and Remedy Framework” - on Business and Human Rights, which were endorsed by the Human Rights Council in June and of which the UK was a key supporter during their five year gestation. These non-binding Principles call on states to set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations (note: they do not call for extraterritorial jurisdiction as exercised under the ATS). They also call on businesses to respect human rights, avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved. Finally they call for access to remedy for victims when human rights have been abused. The government has announced that it is preparing a cross-government strategy on business and human rights, catalysed by and incorporating guidance on, the Guiding Principles. However, there are currently no plans to adopt legislation in the UK to hold companies to account under UK law for human rights abuses overseas. If the US Supreme Court finds that companies are liable under US law for human rights abuses, that may lead to pressure from NGOs to introduce similar legislation in the UK.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

28. HMG's legal position is that human rights obligations rest with states and not non-state actors such as corporations. There are good policy reasons behind this: holding non-State actors liable for violations of international law carries the risk that States' responsibility for ensuring respect for human rights, and our ability to hold them to account for human rights violations, would be diluted/diminished. Separately, having the US (or other States) exercise extraterritorial jurisdiction allows developing countries to avoid themselves developing and implementing good human rights law, because victims can find redress elsewhere. While there are currently no plans to adopt legislation in the UK to hold companies to account under English law for human rights abuses overseas, civil society groups maintain that systems of voluntary guidelines on corporate behaviour are not effective and they continue to press for legislation. If the US Supreme Court finds that companies are liable under US law for human rights abuses, that will highlight the fact that a similar possibility does not pertain in the UK and will certainly fuel pressure from NGOs for similar legislation in the UK. That would be the case whether or not the UK filed an *amicus* brief, but our doing so would highlight the issue.
29. Supporters of the action against Shell (including NGOs and the media, as well as the plaintiffs) will likely argue that the courts and human rights legislation of Nigeria are inadequate to deal with a case of this nature, and that the US ATS is the only practical form of redress for the victims. By submitting an *amicus curiae* brief HMG would be acting to seek a result that will close a possible remedy for victims of alleged human rights abuse (albeit one we consider to be contrary to principles of international law). HMG has already been criticised over proposed changes to the UK Legal Aid Bill by John Ruggie, creator of the UN Guiding Principles on business and human rights, who claims that the reduced access for overseas plaintiffs to UK judicial remedies that critics allege will result from those changes goes directly against the Principles' call for States to reduce legal barriers that lead to a denial of access to remedy. On that Bill we have followed the Ministry of Justice line that, after our reforms are implemented, it will still be possible to bring claims against UK multinational companies, but we believe that the costs involved will be more proportionate to the sums in issue. However, the same criticism may be levelled at the UK for submission of an *amicus* brief in *Kiobel*. It could also be interpreted as cutting across our stated ambition to challenge impunity and to help deliver justice to victims of the most serious of international crimes. However, an *amicus* brief would not take any position on whether or not the alleged human rights violations had been committed, rather focussing on the broad legal principles at stake. The brief could also include a positive statement making clear that HMG's clear position is that companies should respect human rights.

[redacted]

30. [redacted]

31. [redacted]

Relations with the Nigerian Government

32. Africa Directorate and BHC Abuja do not believe that submitting an *amicus* brief dealing with the human rights complaints against business (and extra-territoriality/exhaustion of local remedies) would cause serious problems for UK/Nigeria relations. However, we will need to be ready to respond to any questions put to us – whether by the plaintiffs, politicians or NGOs from the area or the media. If so, we can state clearly that we are not seeking to defend or protect Shell against the allegations – just trying to ensure that

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

international law is consistently applied on these two points. In addition, we feel that any fall out could be easily managed locally. We have sufficient examples of HMG's work on human rights to quash any suggestion of double standards. In addition, BHC Abuja commented that not objecting to the extension of international human rights law to corporations could cause difficulties. For example groups could continually cite international human rights against British companies operating in Nigeria.

[redacted]

33. [redacted]

34. [redacted]

35. [redacted]

Shell's Position

36. Although Shell have not formally requested intervention by HMG, their Counsel in the US has approached the Counsel who drafted our *Rio Tinto amicus* brief asking for UK support. CEDD have also discussed the case with Shell in London and were asked if HMG would submit an *amicus* brief.

Resource Implications

37. Baker and Miller, a US law firm specialising in ATS, have quoted a fixed fee of \$22,500 (£14,500) plus printing costs. This is a reduction on their previously quoted price of \$30,000, hence we are unlikely to achieve any further reductions even with our long-standing relationship with the firm (Baker and Miller most recently drafted the brief for the *Rio Tinto* case). DGD&I may have the resources to meet around half this cost: CEDD have indicated that they would provide the shortfall.

RECOMMENDATION

38. That Legal Advisers approach Baker & Miller and engage them to file an *amicus* brief on behalf of HMG making the following arguments:

[redacted]

AGREED BY / DISSENTING VIEWS

39. North America Department, HRDD, IOD, CEDD, Legal Advisers, Africa Directorate, BE Washington, BHC Abuja.

IMPLEMENTATION

Next steps

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

40. If agreed, Legal Advisers will engage Counsel on the terms of a draft brief and follow up with the [redacted] on the possibility of submitting this jointly. CEDD will inform Shell of our decision.

Risks & Mitigation

41. [redacted]

42. [redacted]

43. [redacted]

Human rights – risk of accusation of hypocrisy

44. A central plank of government policy on business and human rights is that our pursuit of greater prosperity through trade and investment by British companies overseas is compatible with our expressed expectation that those companies will reflect core British values in doing their business by respecting human rights in the countries where they operate. There is cynicism in civil society and among parliamentarians about whether this is achievable. While our argument in this case is a matter of sound legal principle, the perception of critics of HMG's position on business and human rights will be that we are standing up for big business and against the human rights cause of ordinary people. They are also likely to draw a link to proposals in the Legal Aid Bill that they argue will virtually wipe out any chance of judicial redress by foreign victims of human rights abuses involving UK actors overseas, against which NGOs are lobbying HMG hard. And if it is indeed the case that the UK stands alone in submitting a brief in support of the Shell position, that will only serve to highlight our isolation as the only government prepared to protect the inviolability of the corporate position which - although coherent legally with HMG positions - presentationally will be damaging. This may undermine the government's efforts to demonstrate that it is in the vanguard of countries pursuing better human rights respect from business and erode some of the goodwill we have created in this area.

45. To mitigate this risk we would propose that any *amicus* brief should include points on the UK's belief that corporations are liable under the law for the consequences of their actions, including human rights concerns; that human rights abuses should be addressed in the State in which they occur; and that the UK is in the process of implementing the UN Guiding Principles on business and human rights. For use with critics this would give a strong political and presentational message about the Government's priorities on business and human rights. We will consult with US counsel on how best to present these with the other points we need to get across. We would also establish clear lines to be used in correspondence with the media and NGOs that point to HMG's established position on corporate liability in CIL, the principle of issues of extraterritoriality and exhaustion of local remedies, and our position that human rights obligations rest with states and not non-state actors.

[redacted]

46. [redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Parliament, Media and Public Communications

47. Human rights NGOs will take a significant interest in this case and it may generate considerable parliamentary and media interest, particularly in light of HMG's Business and Human Rights agenda. There was considerable interest in a UK *amicus* brief submitted in an ATS case in defence of UK companies that traded in South Africa during the apartheid era. A Ministerial Statement was made in response, squaring HMG's stance on human rights abuses overseas and its position in ATS cases. We will consider whether a Ministerial Statement will be necessary in response to Parliamentary and NGO interest.

48. We will not publicise HMG action, but any brief filed by HMG will be accessible to any interested parties. We can therefore expect media and parliamentary interest (although we have had no questions or correspondence on the *amicus* brief submitted in the *Rio Tinto* case). NAD, Legal Advisers, CEDD and HRDD would work with Press Office to prepare press lines which make clear that this is about the legal issues of the scope of international law, extraterritoriality and the exhaustion of local remedies, and which stress that this is not a judgement on the human rights issues at stake, which we take very seriously.

EVALUATION / REVIEW

49. Legal Advisers will monitor developments on the case and, as necessary, provide advice on the implications of the outcome of this case on future interventions under the ATS.

[redacted]
Head US Strategy
North America Department
[redacted]

Number of attachments: 1

cc:

PS
PS Mr Burt
PS Lord Green
PS/PUS
Helen Mulvein
[redacted], BE Washington
[redacted], IOD
[redacted], HRDD
[redacted], CEDD
[redacted], Africa Directorate
Press Office
PRD

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[Attachment]

To: 1. Angus Lapsley - *My reading is that the key issue is not commercial interests vs human rights, but whether this case would set a precedent for the extension of US extraterritoriality which we consider to be inconsistent with international law - ie para 10.*

2. [redacted]

3. PS/Mr Burt and PS/Mr Browne

4. PS

From: [redacted]

Date: 5 December 2011

cc: see end of submission

SUBJECT: US - RIO TINTO - AMICUS BRIEF

ISSUE FOR MINISTERIAL ATTENTION

1. How to respond to a request by the Rio Tinto group that HMG submit an amicus curiae brief: (i) supporting the petition by Rio Tinto Plc and Rio Tinto Ltd for an appeal to the US Supreme Court; and (ii) reaffirming HMG's previously stated position that extraterritorial application of the US Alien Torts Statute (ATS) as well as a lack of an exhaustion of domestic remedies requirement are contrary to international law.
2. The key issues that Ministers will wish to consider are:
 - HMG's previously established position on extraterritoriality and the exhaustion of domestic remedies in relation to ATS cases such as this;
 - Previous HMG interventions in support of Rio Tinto at earlier stages of this case (pre-May 2010);
 - The potential damage to British business of extraterritorial jurisdiction, particularly in the US;
 - The risk that intervening may, however, be perceived to be inconsistent with our position on the UN Guiding Principles – the so-called "Ruggie Principles".

TIMING

3. **Urgent.** If Ministers decide that HMG should file a brief with the US Supreme Court this will need to be agreed with the Australian Government and submitted by 28 December. Given the intervening Christmas holidays, **we need to instruct US lawyers as soon as possible and in any event this week.**

BACKGROUND

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Rio Tinto and PNG

[redacted]

4. [redacted]

5. [redacted]

[redacted]

6. [redacted]

7. [redacted]

8. [redacted]

POLICY CHOICES AND ARGUMENT (INCLUDING RESOURCE IMPLICATIONS)

9. There are two options: to file an amicus curiae brief repeating points made in previous briefs on this case; or to take no action (and reply accordingly to Rio Tinto).

The UK's position on the legal issues on Extraterritorial Application/Exhaustion of Domestic Remedies under the ATS

10. [redacted]

Previous action in support of Rio Tinto

11. We have filed two amicus briefs previously in the Rio Tinto proceedings (in 2007 and 2009 on the extraterritoriality and exhaustion of local remedies points). HMG has also filed briefs in other ATS cases, opposing the US courts' overly broad assertion of extraterritorial jurisdiction. We have also used other forms of influence such as demarches. We have often been in good company, submitting joint amicus briefs along with Australia, Ireland, Switzerland, and the Netherlands, and alongside the European Commission. The table at **Annex 2** outlines UK and foreign government action in previous ATS cases and other cases involving extraterritorial application of US regulatory law against foreign companies. The previous US administration also submitted briefs in ATS cases, making clear the clear foreign relations risks posed by the US courts (effectively) ruling on the conduct of foreign states.
12. [redacted] Given that we have already intervened in this case and that our interventions have been aimed at limiting the extraterritorial application of this law (rather than excusing the conduct of the company), this is an important opportunity to set a useful precedent for British businesses.

Prosperity and support to British business

13. Extraterritorial jurisdiction is a problem for business, particularly in the US courts which have power to make very high damages awards. [redacted] Supporting Rio Tinto in this

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

case (and more generally the interests of UK business as a whole) is consistent with the FCO's commitments under our Charter for Business.

14. The commercial considerations in this case weigh in favour of the UK taking an amicus curiae brief, but we are clearly not committed to blind support for business. The human rights allegations (see below and Risks) are clearly of great concern in this case. However, we would not be taking a position on whether or not the allegations are correct. Whatever decision is taken on the issue of whether we file an amicus brief, it is however important that we remain closely engaged with Rio Tinto on this case as it develops.

Human Rights Considerations

15. HMG's clear position is that human rights obligations rest with states and not non-state actors such as business, and that to encourage the pursuit of extraterritorial judicial redress will over the long term undermine the development of good human rights law and implementation of that law in developing countries. However, HRDD is concerned that actively intervening in support of Rio Tinto will be perceived as being inconsistent with our position on the UN Guiding Principles – the so-called "Ruggie Principles" or "Protect, Respect and Remedy Framework" - on Business and Human Rights, which were endorsed by the Human Rights Council in June and of which the UK was a key supporter during their five year gestation. These Principles call on states to set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. They also call on businesses to respect human rights, avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved. Finally they call for access to remedy for victims when human rights have been abused. The government has announced that it is preparing a cross-government strategy on business and human rights, catalysed by and incorporating guidance on, the Ruggie Principles.
16. Supporters of the action against Rio Tinto (including NGOs and the media, as well as the plaintiffs) will likely argue that the courts and human rights legislation of PNG are inadequate to deal with a case of this nature, and that the US ATS is the only practical form of redress for the victims. By submitting an amicus curiae brief HMG would be acting to seek a result that will undeniably remove a possible remedy for victims of alleged human rights abuse (albeit one we consider to be contrary to principles of international law). It could also be interpreted as cutting across our stated ambition to challenge impunity and to help deliver justice to victims of the most serious of international crimes.

[redacted]

17. [redacted]

US Government position

18. The US Government have not made clear their position on this case, but did not file an amicus brief during earlier stages of this litigation. It is unclear at this juncture whether the State Department will advise submitting a brief; however the current Legal Adviser at State Department (Harold Koh) has a strong background promoting corporate liability for

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

human rights under international law. [redacted] We do not expect any serious adverse reaction to the UK position given the precedent of previously filing amicus briefs.

Relations with Papua New Guinea

19. Port Moresby advise that supporting the brief should not adversely affect PNG-UK relations as a court ruling against Rio Tinto could hinder the National Government and the Autonomous Bougainville Government plans to reopen the Panguna copper mine.

Interplay with other ATS litigation

20. [redacted]

21. [redacted]

Resource Implications

22. Counsel (instructed on previous briefs) has advised that the full cost of a submission at this stage will be US\$12,500 (plus printing costs). [redacted] If so, the total UK commitment will be US\$6,250 plus half the printing costs. North America Department can meet the costs of the brief on this occasion. However, NAD will not necessarily have funds available for a further amicus curiae brief, should *Rio Tinto* have the opportunity to take their case to the Supreme Court (which would fall within next financial year). NAD would discuss with other departments a split of funding in that instance.

RECOMMENDATION

23. That we file a brief supporting the petition for certiorari [redacted]

AGREED BY / DISSENTING VIEWS

24. Agreed by North America Department, Legal Advisers, HRDD, Asia Pacific Directorate, BE Washington, Port Moresby, CEDD, IOD, Press Office.

IMPLEMENTATION

Next steps

25. If Ministers agree the recommended option, Legal Advisers will [redacted] file an amicus brief and (with the Australian authorities) instruct counsel to draft and file a brief by the Court's deadline.

Risks & Mitigation

26. [redacted]

Human rights – risk of accusation of hypocrisy

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

27. A central plank of government policy on business and human rights is that our pursuit of greater prosperity through trade and investment by British companies overseas is compatible with our expressed expectation that those companies will reflect core British values in doing their business by respecting human rights in the countries where they operate. There is cynicism in civil society and among parliamentarians about whether this is achievable. While our argument in this case is a matter of sound legal principle, the perception of critics of HMG's position on business and human rights will be that we are standing up for big business and against the human rights cause of ordinary people. They are also likely to draw a link to proposals in the Legal Aid Bill that they argue will virtually wipe out any chance of judicial redress by foreign victims of human rights abuses involving UK actors overseas, against which NGOs are lobbying HMG hard. This may undermine the government's efforts to demonstrate that it is in the vanguard of countries pursuing better human rights respect from business and erode some of the goodwill we have created in this area. As well as being raised publicly, there is a chance it may be raised at the Foreign Secretary's Human Rights Advisory group on 19 December. To mitigate this risk we would establish clear lines to be used in correspondence with the media and NGOs that point to the issues of extraterritoriality and exhaustion of local remedies, and will ensure the Foreign Secretary is thoroughly briefed for the Advisory Group meeting.

Parliament, Media and Public Communications

28. Human rights NGOs will take a significant interest in this case and it is likely to generate considerable parliamentary and media interest, particularly in light of HMG's Business and Human Rights agenda. There was considerable interest in a UK amicus brief submitted in an ATS case in defence of UK companies that traded in South Africa during the apartheid era. A Ministerial Statement was made in response, squaring HMG's stance on human rights abuses overseas and its position in ATS cases. We will consider whether a Ministerial Statement will be necessary in response to Parliamentary and NGO interest. The Foreign Affairs Committee has also shown continued interest in the FCO's approach to human rights and has secured a Westminster Hall debate on human rights. With HRDD we will ensure the Minister handling the debate is fully briefed on this issue.

29. We will not publicise HMG action, but any brief filed by HMG will be accessible to any interested parties. We can therefore expect media and parliamentary interest. NAD, Legal Advisers and HRDD would work with Press Office to prepare press lines which make clear that this is about the legal issues of extraterritoriality and the exhaustion of local remedies, and which stress that this is not a judgement on the human rights issues at stake, which we take very seriously.

EVALUATION / REVIEW

30. Legal Advisers will liaise with Rio Tinto's counsel on the progress on the case. Legal Advisers will also provide advice on the implications of the outcome of the Rio Tinto decision for future ATS cases.

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

[redacted]

Head US Strategy

North America Department

[redacted]

Number of attachments:

cc:

PS/PUS

PS/Lord Green

Helen Mulvein, Legal Advisers

[redacted], HRDD

Peter Wilson, Asia Pacific Directorate

Edward Barker, CEDD

[redacted], Press Office

PRD

BE Washington

Port Moresby

Canberra

Annex 2

[redacted]

Redactions Key

[No colour] – Exemption 40(2)

[Dark Green] – Exemption 27 (1)(a)

[Red] – Exemption 42(1)

[Light Green] – Exemption 27(2)

Document 18

Title: RE: State responsibility for human rights [redacted]

Date Registered: 12/12/2011

[redacted]

Parts also redacted under Sections 35(1)(a) and 40(2)