

## Redactions Key

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[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**

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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

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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

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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

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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.