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Our Ref: JB/RS/CH(5)
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Dear Madam,

R (oao Corner House & Samata)-v-Secretary of State for Business, Innovation and Skills – CO/5231/10

We refer to the Defendant's Acknowledgement of Service and Summary Grounds filed on the 1 June. We would be grateful if the following brief Reply could be brought to the attention of the Judge considering the application for permission on the papers.

1. It is notable that the Defendant claims that the ECGD retains its original policy not to utilise forced labour or child labour. However, exporters will not be asked whether they use forced labour or child labour, and will not be informed of the policy. The policy might exist in theory, but a 'don't ask, don't tell' procedure has been put in place. In reality, the practical effect is that the policy has been abandoned - ECGD will cover projects that use forced labour or child labour because it will not ask, and the exporter need not disclose this, even if it well knows that child labour will be used.
2. The Defendant suggests that the case is of little interest or importance because only a small number of contracts previously written by ECGD have had a repayment term of less than 2 years or a value of less than SDR 10 million. However, ECGD has itself stated that past levels of demand for a product are no guide to possible future demand. In its response to the Claimant's complaint that the ECGD had failed to carry out an impact assessment for its Consultation on the proposed changes to its Business Principles, ECGD wrote:

"No Impact Assessment was appended because it was felt that no such Impact Assessment could be drawn up. The reasons for this were outlined in a Written Parliamentary Answer on 25th January 2010 to a

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Parliamentary Question asked of Lord Davies of Abersoch, the Minister for Trade, Investment and Small Business, by Lord Lester of Herne Hill. In part, that response stated:

"No assessment has been made of the potential impact of such a proposal on the protection of social and human rights, including protection against the exploitative use of child workers and the use of forced labour overseas, because ECGD does not know, and cannot estimate, the level of future demands for support for exports falling into the above category. Without such prior knowledge, ECGD cannot estimate the proportion of those within that category that might have possible environmental and social impacts, including on human rights, or determine the classification between A, B or C impacts and whether such impacts would satisfy international standards as specified in the OECD recommendation on common approaches and, therefore, be eligible in principle for ECGD support."

ECGD stands by the answer that Lord Davies gave and does not, contrary to what has been submitted to us, consider that the level or size of past applications provides a basis for extrapolating the future level and size of applications, either in the round or of those which have previously been subject to ESHR impact assessment, but which in future are proposed not to be so subject".

One reason why the past is not a good guide to ECGD's future business is that ECGD's business is demand driven: it responds to applications rather than actively seeking business. ECGD itself has recently highlighted the likely increase in demand for short-term cover:

"Need for Intervention in Short Term Export Finance During recessions, it is normal for international trade activity to decline. In this downturn, however, world trade has fallen much more quickly than can be justified by the decline in demand alone. Empirical evidence indicates that the decrease in the availability of export finance has made the situation worse . . . The current severe problems in the global financial system have caused previously unseen financial market failures that have reduced export financing capacity. UK exporters, who would have obtained export finance in a well functioning market, are now unable to obtain this due to the limited risk appetite of banks. The contraction in the availability of short-term export finance is likely to become more severe once world trade begins to recover."

Past demand is no guide to future demand. It is likely that the change challenged in these proceedings will have a significant effect.

3. The Defendant also suggests that other OECD countries tend to adopt the Common Approaches. In fact, this is not the case. The OECD's own assessment of how the Common Approaches is being implemented, show that the majority of the UK's main competitors "impose" procedures that are higher than those required under the Common Approaches. Paragraph 21 of the OECD Report shows that 15 Export Credit Agencies (out of 31 from 30 countries) classify all projects regardless of value, 15 impose a SDR 10 million limit and one sets a SDR 20 million limit.
4. ECGD has previously adopted standards in excess of Common Approaches, and continues to maintain those policies. For example, in the area of bribery and corruption.

Yours faithfully,



Leigh Day & Co

Cc: Andrew Jack, Treasury Solicitor