

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B e t w e e n:-

THE QUEEN
on the application of

(1) CORNER HOUSE RESEARCH
(2) SAMATA (a society registered under the laws of India)

Claimants

-and-

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS
Defendant

WITNESS STATEMENT OF NICHOLAS HILDYARD

I, Nicholas Hildyard, Co-Director of Corner House Research ("Corner House"), of The Corner House, Station Road, Sturminster Newton, Dorset DT10 1YJ, will say as follows:

1. I make this statement in support of the application for judicial review of the decision of the Secretary of State for Business, Innovation and Skills to abandon its policy of refusing taxpayer-backed support to projects that use forced or child labour, announced on 1st April 2010. The facts stated in this witness statement are within my knowledge

unless otherwise stated. Where the facts are not within my own knowledge, they are true to the best of my knowledge, information and belief based on the sources of information which I identify below.

Corner House

2. I am a co-director and researcher at Corner House. Corner House is a not-for-profit organisation that focuses on the environment, human rights and development issues. The aims of the organisation include research, education and campaigning. In 2008, Corner House was awarded the Liberty, Justice and Law Society Human Rights Award "for the knowledge, skill and energy shown in [its] dedicated work to help the disempowered of the world".

3. An important area of Corner House's work concerns public financing or support for projects that have adverse environmental, human rights and social effects overseas, especially in less developed countries. In that context we work particularly on issues relating to support by export credit agencies (ECAs), focusing on those from countries that are members of the Organisation for Economic Cooperation and Development ("OECD"). In the UK, our work in this area is directed at the UK's ECA, the Export Credits Guarantee Department (ECGD).

4. Over the past ten years, Corner House has closely monitored the policies and operations of the ECGD, with a view to strengthening and improving its policies on human rights, environment and sustainable development. In this regard, Corner House has submitted evidence to a number of parliamentary inquiries and UK Government consultations. It has also made oral and written submissions to international policy bodies, including the OECD's Export Credit Working Group. In addition, it has participated in nine field missions to assess the social, human rights and environmental impacts of several projects for which ECGD

support has been sought. Corner House has also undertaken in-depth research into a number of ECGD-backed projects that have been tainted by allegations of bribery.

5. In 2004-2005, Corner House also brought a successful claim for judicial review against ECGD (*R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600). That case concerned changes to ECGD's anti-bribery and corruption procedures. In that case, ECGD described Corner House as one of its "primary NGO partners".

ECGD and "harmful" child labour and forced labour

6. When Corner House first began to monitor ECGD's activities, ECGD had no environmental, social or human rights standards. Over the past few years, however, it has adopted standards, including its Business Principles, that bring its activities into line with the UK's international obligations, including those on human rights. Its absolute ban on support for projects involving "harmful" child labour and forced labour is a case in point.
7. That ban arose as a result of concerns first raised by Corner House in its evidence to a 2003 inquiry into "ECGD and Sustainable Development" held by Parliament's Environmental Audit Committee. Corner House pointed out that it was ECGD's policy at that time, as reflected in the guidance notes it provided to exporters, to permit child and forced labour "in exceptional circumstances".
8. ECGD subsequently wrote to the Committee stating: "it is the Department's policy not to provide support for any project that involves the use of bonded or forced labour. The policy statement in the

guidance notes for the impact questionnaire will be amended to provide greater clarity on this point”¹

9. For its part, the Committee’s final report was unequivocal: “There is no circumstance under which it would be acceptable for ECGD, using taxpayers money, to support projects which exploit children or employ bonded or forced labour.”²

10. Corner House shares the Committee’s view. Forced labour is rightly prohibited absolutely under international human rights agreements, including the European Convention on Human Rights. This is because forced labour – in effect, slavery – is an affront to human dignity and unacceptable in any circumstances. If some 12.3 million people today live in bonded labour (see below), it is often because those who have the power to prevent such slavery are unwilling to take action.

11. In banning support for projects involving “harmful” child labour and forced labour, the ECGD sided not only with international law but also with justice.

ECGD’s proposed changes

12. In December 2009, ECGD announced a public consultation on changes it was proposing to its Business Principles and ancillary policies. ECGD intended in future to require projects for which exporters requested its support to meet only the social and

1 Government Response to Environmental Audit Committee’s Seventh Report on ECGD and Sustainable Development, Recommendation 14, <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/1238/1238.pdf>.

2 Environmental Audit Committee, ECGD and Sustainable Development, para 49, <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/689/68902.htm>

environmental standards laid down in the OECD's Recommendation on Common Approaches. Importantly, ECGD would no longer screen any projects with a repayment term of less than two years. It would also no longer screen any project of which the UK exporter's share was worth less than SDR 10 million (equivalent to £10 million) unless the project was in a "sensitive" environmental site.

13. Detailed analysis of the texts of the OECD's Recommendation on Common Approaches revealed that ECGD's proposed changes amounted in effect to ECGD abandoning its absolute ban on "harmful" child labour and forced labour. At no stage during the public consultation that ECGD held on its proposed changes to its Business Principles and ancillary policies did ECGD spell out that it would abandon this ban.

Implications of proposed changes

14. Corner House is concerned that the ECGD's 1st April decision to rescind its ban will have potentially severe consequences for thousands of the estimated 12.3 million people across the world who are trapped in situations of forced labour and the estimated 218 million child labourers around the world.³

15. That view is based on the following facts:

16. Child labour has been found in projects very similar to those that have historically been financed by ECGD. Corner House understands, for example, that the Italian export credit agency, SACE, recently suspended a loan to Techint, part of the Tennova steel group, for

³ <http://www.stopchildlabour.eu/stopchildlabour/English/About-Child-Labour/Facts-Figures>.

supplying rollers to Bushan Steel Ltd's Bhushan-Meramandali steel mill project in Orissa, India, after a consultant raised concerns about child labour. The loan was reinstated only after conditions were imposed. ECGD has recently supported a number of exports for steel projects in India⁴ and, as of the time of writing, is considering another.⁵ Whilst there is no evidence that the projects supported by ECGD use child labour, the fact that others in the sector have done so underscores the need to assess such projects for the potential use of child labour. In the Indian context, such use may also involve bonded labour.

17. A number of countries where the use of forced labour is prevalent are on cover for ECGD support. They include the so-called BRIC economies (Brazil, Russia, India and China) – four of the markets that UK Trade and Investment (UKTI), the government body set up to promote UK exports by assisting exporters in finding markets, has designated as “high growth markets”⁶ with major opportunities for UK exporters. India, for example, is described by UKTI as “one of the fastest expanding [economies] in the world, with a rapidly expanding consumer class” and a country where “UK companies are well

4 In 2007-08, ECGD supported exports of steel making equipment by SMS Mevac UK Ltd to JSW Steel Ltd in India (see: http://www.ecgd.gov.uk/2007-08_list_of_guarantees_issued.pdf). The credit was less than 10 million SDR.

In 2005-06, ECGD supported two export credits for steel projects; one for exports of slab casters from VAI Industries (UK) Ltd and another for steel making equipment from SMS Mevac UK Ltd. In both cases the buyer was Jindal Vijayanagar Steel Ltd. The credits were for less than 10 million SDR. See: http://www.ecgd.gov.uk/list_of_guarantees_issued.pdf.

5 As of 28th April 2010, ECGD was still considering an application for export support for a Jindal Steel and Power steel mill at Angul, Orissa. See: <http://www.ecgd.gov.uk/high-potential-impact-cases-2009-12-21.pdf>.

6 UK Trade and Investment, “High Growth Markets”, https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/home?portlet_1_actionOverride=/pub/portlets/genericViewer/showContentItem&portlet_1_navigationContentPath=/BEA+Repository/328/425207&_pageLabel=welcome.

positioned to take advantage of this growing export and investment market”.⁷ China,⁸ Russia⁹ and Brazil¹⁰ are described in similar terms.

18. UK Trade and Investment singles out construction, agriculture and mining as three of the sectors that present major export opportunities in the BRIC countries. These are also the sectors where the International Labour Organisation reports bonded labour to be most prevalent, significantly increasing the risk that unscreened ECGD support for exporters in these sectors might facilitate child or forced labour.

19. A joint 2009 report by the International Labour Organisation (ILO) and the European Bank for Reconstruction and Development (EBRD) recently highlighted the extent of forced labour in the Russian construction industry: “The Russian construction industry has seen a significant growth after the financial crisis in 1998. Most of the construction companies are now private, employing around 5 million workers. A significant number are migrant workers, among them many without a legal residence or a work permit. They are particularly vulnerable to labour exploitation and coercive labour practices.”¹¹

7 UK Trade and Investment, “India”, https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPageId=/india.

8 UK Trade and Investment, “Opportunities for UK Businesses in China’s Regional Cities”, https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?genericSummary_23navigationContentPath=/BEA+Repository/328/423372&_pageLabel=CountryType1&_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPageId=/china. “The development of regional cities in China offers huge opportunities to UK business”.

9 UK Trade and Investment, “Russia”, https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPageId=/russia. “Russia is designated one of UKTI’s High Growth Markets”.

10 UK Trade and Investment, “Brazil”. https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPageId=/brazil.

11 ILO and EBRD, “Preventing Forced Labour Exploitation and Promoting Good Labour Practices in the Russian Construction Industry”,

20. A 2005 report by the ILO¹² documented cases of forced labour in the construction sector, including the following:

“We saw cases while visiting construction sites where people were kept in basements, in locked premises, spending the night in unsuitable conditions. When we arrived, the migrants hid themselves in empty barrels. We had to pull one person out, as he could not get out of it himself – the lid had been closed or he had closed it himself in such a way that it effectively could not be opened. We had to pull the lid off to let him out. In construction – as a rule – workers are guarded, kept away from outside visitors. As they don’t have documents they rarely leave the site. That is why they are exploited more brutally.

Generally, workers are taken to a building site, kept in vans, and work from dawn till dark, hoping that they will receive remuneration when the job is finished. There is no direct coercion. But there are many cases where, upon completion of a building, a bus arrives and takes all the workers away to be deported. These violations occur more often in private, out of town industry. In large-scale city construction, the Moscow government has much more control and there are fewer violations.”

21. Such forced labour, according to the report, is not restricted to the construction industry in Russia but is common in other sectors too.

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcm_041904.pdf.

12 Elena Tyuryukanova, “Forced labour in the Russian Federation today: irregular migration and trafficking in human beings”, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081997.pdf.

22. In 2009, the ILO also documented forced labour in a number of former Soviet states, all on ECGD cover: “In Kyrgyzstan, the State Committee on Migration and Employment has reported that the most widespread forms of forced labour are related to debt bondage and retention of wages of Kyrgyz citizens working in agriculture and construction abroad, mainly in the Russian Federation and Kazakhstan. In Uzbekistan, following media reports of the use of forced child labour in the cotton industry, several major retailers and buyers stated that they would no longer purchase cotton from that country”.¹³

23. The problem of child and bonded labour in India has been described by Samata in its witness statement, which I have read and with which I agree. I would add only that:

- mining in India is a sector that UK Trade and Investment regards as an export opportunity for UK exporters;¹⁴
- Corner House has anecdotal photographic evidence (provided by Mines and Communities, a UK network working with communities all over the world affected by mining) of digging machinery of a type manufactured by UK companies being used in a mine in India where child labour is clearly being used (attached as Exhibit NH1);
- The International Labour Office (a department of the International Labour Organisation) has warned that public sector infrastructure projects (an area that UK Trade and Investment also cites as a growth area for exports) are prone to the use of bonded labour (“Labour in large public works and construction sites is often

13 ILO, “Cost of Coercion”, para 96, http://www.ungift.org/docs/ungift/Steering-committee/ILO_Report_2009.pdf

14 See, for example: UK Trade and Investment, Sector Report – Metals and Minerals Sector in India, 2 November 2009, <https://www.uktradeinvest.gov.uk/ukti/ShowDoc/BEA+Repository/345/438148>. The report states: “on the raw material side, there is a growing demand for low ash metallurgical coal and various grades of steel scrap.”

organized through middlemen and contractors, leading to well-entrenched systems of advances and resulting in bondage”).¹⁵

- Agriculture, a sector also cited by UK Trade and Investment as a business opportunity for UK exporters,¹⁶ is also a sector with a high prevalence of bonded labour.¹⁷

24. Corner House rejects the view that assessing applications to ECGD for child and bonded labour would place UK exporters at a competitive disadvantage. Analysis of the responses given by OECD member states to the OECD Export Credit Working Group’s 2009 survey on implementation of the Common Approaches¹⁸ reveals:

- 17 of the OECD member ECAs have a formal policy of assessing (not merely screening) projects with a repayment period of under two years (which in future ECGD will exclude from assessment) where they are revealed to have impacts that are deemed of concern and/or where they involve specific sectors that are known to have impacts. Although the extent of assessment varies and the triggers for assessment, the responses clearly state that some form of assessment takes place.
- 4 of the ECAs have an informal policy of making such assessments.

15 Srivastava, R., “Bonded Labour in India: its Incidence and Pattern”, International Labour Office, 2005, p.26,
<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1017&context=forcedlabour>.

16 UK Trade and Investment, “India”,
https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/countries?_nfls=false&_nfpb=true&_pageLabel=CountryType1&navigationPagelD=/india.

17 International Dalit Solidarity Network, *Dalits and Bonded labour in India*,
<http://idsn.org/caste-discrimination/key-issues/bonded-labour/india/>. Agriculture accounts for approximately 64 percent of the entire population’s workforce and employs far more bonded labourers than all other industries and services in India put together.

18 OECD Export Credit Working Group, “Survey on the Environment and Officially Supported Export Credits Projects”, 2009,
http://www.oecd.org/department/0,3355,en_2649_34169_1_1_1_1_1.00.html

- 8 specifically exclude short-term credits from any form of evaluation.
- 1 did not reply to the question.

Significantly, such assessments are undertaken by the majority of the UK's competitors: Germany, France, Japan (for JBIC-supported loans), Canada, Austria, Australia, Sweden, Switzerland, The Netherlands and Norway. The only competitors who have the blanket exclusion from assessment now adopted by ECGD are: USA, Japan (for Nexi-supported loans), Finland, Spain and Korea.

25. Similarly for applications where the share of the project is less than SDR 10 million – and thus below the ECGD's new screening threshold – the majority (18) of OECD ECAs again go beyond the OECD's Common Approaches, categorising such projects not only where their location is sensitive (a requirement of the Common Approaches) but also if there is a more general risk of impacts. Those with a risk category above "low" would be assessed.

26. Annex 1 summarises the responses of the OECD ECAs.

27. Corner House also notes that the administrative enquiries until now employed by ECGD to ensure that a project does not use forced or child labour are straightforward, involving no more than exporters declaring if the goods or project for which they are seeking support will "cause, require, bring about or stimulate" child labour or bonded or forced labour.¹⁹ Moreover evidence presented to ECGD by exporter groups on the issue of child and forced labour stated that the majority of exporters already take steps to ensure that they are not involved in

¹⁹ ECGD, Impact Questionnaire [FormIQ3], April 2007, question 8, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc.

exploitative labour practices.²⁰ It would therefore surely not be burdensome for them to provide the same reassurances to the ECGD.

28. Indeed, Corner House finds the arguments put forward by ECGD about the burdens that screening and assessment would impose on business disturbingly reminiscent – and as irrational – as arguments made by slavers in the nineteenth century against regulations on their activities:

"I should think myself guilty of a rash and impolitic measure in voting for the abolition, if I only took a cursory glance at the present state of the finances of England, and her relative situation with Europe. I cannot bring myself to think this a convenient time, the country in an eligible situation, or the Minister serious in his inclination to make an experiment which presents a certain prospect of loss, and no possibility of advantage. An abolition would instantly annihilate a Trade that annually employs upward of 5,500 sailors, upwards of 160 ships and exports which amount to 7,000,000 l sterling"

Heads of the Speech Delivered by Colonel Tarleton to the House of Commons on 18 of April, 1791, on a Motion made by Mr. Wilberforce, for the Abolition of the Slave Trade²¹

29. In sum, Corner House believes that the decision to scrap ECGD's absolute ban on "harmful" child and forced labour *will* result in ECGD

20 Sovereign Star Trade Finance, "Submission to Public Consultation on proposed changes to ECGD's Business Principles", available at: http://www.ecgd.gov.uk/responses_received_to_ecgd_s_business_principles_consultation.pdf.

Sovereign Star Trade Finance was formed in 2004 with Treasury approval to support UK small and medium sized enterprises by offering ECGD insured medium term loans. In its submission, Sovereign Star states:

"From our experience, we have not found that British companies knowingly exploit children in a harmful way in the export of their goods and services; they seek to avoid selling to companies that engage forced and bonded labour. Exporters that are found to be involved in such activity can be reported and investigated. The reputational and legal risk of being associated with harmful child labour practices are a major deterrent, more so than any screening undertaken by ECGD."

21 <http://www.recoveredhistories.org/pamphlet1.php?catid=27>

supporting such practices, in contravention of the UK's international human rights commitments and an affront to civilized standards of conduct.

Protective Costs Order

30. Corner House has very limited financial resources. Without the benefit of a protective costs order ("PCO") set at a level that Corner House and its Co-Claimant can afford to meet between them, Corner House will be unable to contemplate bringing these proceedings.

31. I attach as Exhibit NH2 Corner House's 2008 approved accounts together with its cash books for 2009 and 2010 and the allocation of expenditure for 2009/2010.

32. Corner House is principally funded through grants from charitable foundations. In addition, a very small proportion of its income is derived from the sale of reports and from the editing and research services it provides to the non-governmental sector.

33. Corner House's funds are divided into restricted and unrestricted funds. *Restricted funds* cannot be used for litigation – they are restricted to be used for the charitable purposes for which they were donated. To use funds donated by a charity for non-charitable purposes in breach of an agreement governing that funding would, of course, be unlawful. The *unrestricted funds* comprise monies received from consultancy and other work that are untied to any specific project but which are available for carrying out Corner House's general objects, including litigation.

34. The financial crisis has severely affected Corner House's ability to raise funds; one funder has had to cease its support because of cut backs. Corner House's staff have all taken a 20 per cent pay cut since March 2009 in order to continue Corner House's work.
35. To cut down on administrative expenses, Corner House does not employ an in-house accountant. The banking and accounts are undertaken by myself. Our accountants, Simon John Christopher Ltd, prepare a full set of accounts at the end of the year. Monthly accounts, however, are prepared by myself to check agreed budgets against actual expenditure. Whilst the figures given below for 2008 have been approved by our accountants, those for 2009 and 2010 are provisional and have not been adjusted for accruals or checked by a professional accountant. However, I confirm that they are accurate and correct to the best of my knowledge and belief.
36. Corner House's accounting period runs from 1st January to 31st December. A copy of the Annual Accounts for 2008, as drawn up by the company's accountants, Simon John Christopher Ltd, is attached. At the end of FY 2008, the total funds carried forward amounted to £24,309, of which £10,318 were restricted funds and £13,991 were unrestricted. As explained in the Accounts at para 1.5, the restricted reserves comprised the unexpended monies received from donors for specific projects and cannot be used for other purposes, including litigation.
37. In 2009, Corner House received a one-off addition to its unrestricted funds of £20,350 from a benefit concert held in 2007 to raise money to pay potential legal fees in the joint judicial review, undertaken with Campaign Against Arms Trade, of the Serious Fraud Office (SFO)'s decision to terminate its investigation into alleged bribery by BAE

Systems' in its dealings with Saudi Arabia. The money was raised through ticket sales. It was made clear in the concert programme that, in the event of the SFO being ordered to pay costs, the money raised (after expenses) would "go towards CAAT's and Corner House's ongoing campaigning work to end the arms trade and corruption". In the event, the High Court ordered that all of the two groups' legal costs should be born by the SFO. Of the £20,350 received from the benefit concert, £9,478 has been spent. The remainder has been allocated to cover salaries in 2010.

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40. As of 31 December 2009, the total funds available were £56,643, of which £32,182 were restricted and £22,786 were unrestricted, a sum which includes the already allocated benefit money. The total unallocated, unrestricted funds were £11,914.

41. Taking account of income and expenses since 1st January 2010, the figures for restricted and unrestricted funds were £52,392.43 and £22,859.01 respectively, as of 26 April 2010. The amount of unallocated unrestricted funds available was £11,986.76. Corner House is expecting the imminent deposit of one grant for US\$100,000 and another of £11,704. However, these monies consist of restricted funds and will not alter the amount available in unallocated, unrestricted funds.

42. All of the Directors, including myself, consider that this level of unrestricted funds is at or below what Corner House needs to maintain in order to have a minimum buffer for unexpected events or contingencies.

43. The unrestricted funds are available:

- a. to fund activities for which project funding has not been secured. Recent examples include enabling representatives of communities affected by UK-financed infrastructure projects to travel to the UK to meet with officials to relay their concerns;
- b. to cover shortfalls, or make provisions for shortfalls, between proposed budgets and received funding (as per the allocation of a portion of the benefit money to core costs in 2010);
- c. to cover cash flow shortages that may arise if funding applications take longer than anticipated. For example, we have in the past experienced a funding application to a US foundation being held up by several months, due to an internal review of policy within the foundation; and
- d. as a reserve against redundancy and staff welfare requirements (if our project funding falls in the future, employees will have to be made redundant and given appropriate payments, staff

illness must be covered along with leave eg. for family, maternity or paternity).

44. As will be appreciated from the above, Corner House would be left in a precarious and unsustainable position if it were to exhaust its unrestricted reserves.

45. A further consideration is that Corner House is already engaged in one other judicial review, over which its available unallocated, unrestricted funds (which we place at £5,000) must be spread.

46. For this reason, the Directors have concluded that they cannot risk the continued existence of the organisation on this litigation and ask the Court to make a protective costs order. Nor would it be proper for us to risk our restricted funds, which have been donated by primarily charitable organisations for particular charitable purposes unconnected with this litigation.

47. However, Corner House recognises that it should do what it can to raise money to ensure that it can make a reasonable contribution towards any costs ECGD might incur if it were to lose the claim. We have contacted interested individuals, NGOs and charities. We have with some considerable time and effort been able to obtain pledges for £10,000, such is the level of public concern over the ECGD's decision. However, raising these funds has not been easy and we do not believe that we will be able to raise any more money to support the judicial review.

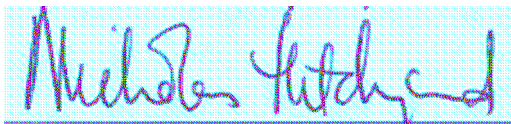
48. Corner House therefore joins its Co-Claimant in making the application for a PCO limiting the joint exposure of Corner House and Samata to a

total of £10,000. This figure has been reached as an aggregate sum that the two organisations could jointly afford, at a stretch, to pay in event that the claim is unsuccessful.

49. In the event that the Court is unable to make a protective costs order on the terms sought, we would have no option but to withdraw the claim because we cannot afford the risk of incurring any liability over and above £10,000. This outcome would be a source of great regret to us, but it would inevitably follow as we could not properly or prudently sustain an open-ended costs risk. Indeed, as a Director of Corner House, I would be acting improperly under Company law if I permitted Corner House to continue litigating without an appropriate Protective Costs Order.

STATEMENT OF TRUTH

I, Nicholas Hildyard, confirm that the facts in this witness statement are true:



Signed:

Dated: 30 April 2010