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RE:COMMON

THE
CORNER
HOUSE

His Excellency Mr. Ferdinand Grapperhaus
Minister van Justitie en Veiligheid
Ministerie van Justitie en Veiligheid
Turfmarkt 147
2511 DP Den Haag
The Netherlands

10 January 2019

Dear Minister,

We write collectively as non-governmental organisations who, for the last six years, have been investigating Shell's acquisition of the OPL 245 oil and gas field in Nigeria.

Royal Dutch Shell Plc ("**RDS**") is currently on trial in Milan, charged with international corruption in relation to the OPL 245 deal. The prosecution is the outcome of an investigation by the Milan Prosecutor's Office, which was initiated as a result of a complaint submitted by three of our organisations. In Nigeria, complaints also lodged by our organisations have resulted in charges being brought against Shell Nigeria Exploration and Production Company ("**SNEPCO**") and Nigerian Agip Exploration ("**NAE**").

In September 2017, we submitted a complaint to the Prosecutor's Office in The Netherlands requesting a criminal investigation of RDS, Shell Petroleum N.V. ("**Shell Petroleum**") and Shell executives for offences under Dutch law relating to the deal.¹ As plaintiffs, we consider ourselves to be stakeholders in the case. We are still waiting for a formal response from the Prosecutor's Office on our complaint.

We are aware of the recent out-of-court settlement (high transaction) of a major Dutch money laundering case involving ING Bank N.V.² For reasons detailed below, we are concerned that a similar approach may be taken with RDS and Shell Petroleum. We hold that this would not be in the public interest unless stringent conditions are attached.

Our Concerns

We are, in principle, not opposed to out-of-court settlements in cases where the defendant is ineligible for a custodial sentence. However, any settlement that does not produce a remedy proportionate to the alleged crime could not be seen as just. In this case, RDS and Eni are accused of paying over a billion dollars into a vast bribery scheme to pay off Nigerian officials in exchange for extremely

¹ Prakken d'Oliveira, "Criminal complaint against Shell on account of corruption(OPL 245-deal)", Press Release, 5 December 2017, <https://www.prakkendoliveira.nl/nl/nieuws/2017/aangifte-tegen-shell-wegens-corruptie>.

² "Settlement Agreement Houston", Openbaar Ministerie, https://www.om.nl/publish/pages/58351/translation_settlement_agreement.pdf.

favourable access to one of Nigeria's most promising oil blocks. The cost to Nigerians of this "smash-and-grab raid" on the Nigerian Government (to use the phrase of the UK Crown Prosecution Service)³ is vast.

Indeed, for reasons set out below, we would contend that there are strong grounds for rejecting a settlement with Shell.

Firstly, as far as we are aware, neither RDS nor Shell Petroleum appear to have done anything to "earn" an out-of-court settlement. In the recent settlement with ING Bank N.V., ING co-operated with the Prosecutor's Office.⁴ By contrast, neither RDS nor Shell Petroleum has "self-reported" any crimes that they view as related to the OPL 245 deal.⁵ Similarly, there are no public reports of their having co-operated with the criminal investigation into OPL 245. On the contrary, they have vigorously denied any criminality. As a consequence, the Prosecutor's Office has had to undertake a wide-ranging investigation, presumably at considerable cost to the Dutch taxpayer. Should the companies now belatedly acknowledge criminality – a necessary part of any settlement – it would in our view be perverse to reward them by agreeing terms that would allow them to avoid a criminal conviction by the courts.

Secondly, a settlement with Shell would establish an undesirable precedent by signalling that the Dutch justice system is prepared to tolerate corporate recidivism. At the time that the OPL 245 deal was negotiated and bribes were allegedly paid, RDS was a party to a Deferred Prosecution Agreement with the US Department of Justice following an earlier Nigerian bribery scandal. In the agreement the company represented that "it has implemented and will continue to implement" a compliance and ethics programme designed to "prevent and detect" corruption "throughout RDS' operations".⁶ RDS also undertook that it had "*undertaken, and will continue to undertake in the future . . . a review of the existing internal controls*", where necessary adopting new or modified procedures designed to ensure "*a rigorous anti-corruption compliance code designed to detect and deter violations of the FCPA and other applicable anti-corruption laws.*"⁷ Were RDS to acknowledge corruption in the OPL 245 deal, as a necessary pre-requisite for a settlement, it would in effect also be acknowledging that it broke its legally-binding undertakings to the US Department of Justice. In our view, this should render RDS ineligible for a settlement agreement.

Thirdly, any settlement without a full and clear statement of facts and admission of guilt would be contrary to the interests of open justice. An admission of criminality by RDS and Shell Petroleum in this case would be an admission to participation in one of the most egregious bribery schemes in history, a scheme that defrauded Nigeria of billions of dollars. The beneficiaries were two of the richest companies in the world. The victims were some of the poorest people on Earth: Nigerians, the vast

³ Malabu Oil & Gas Ltd vs Crown Prosecution Service, Southwark Crown Court, Transcript 24 November 2015, p.31.

⁴ "Settlement Agreement Houston", Openbaar Ministerie, https://www.om.nl/public/pages/58351/translation_settlement_agreement.pdf. Paragraph (e): "ING cooperated with the criminal investigation Houston"

⁵ Although Shell has reported former Shell manager Peter Robinson for allegedly taking kickbacks relating to the divestment of Shell's interest in Nigeria's OML 42 oil field, Shell maintains that this is separate from the OPL 245 case.

⁶ United States of America v Shell Nigeria Exploration and Production Company Ltd, "Deferred Prosecution Agreement", 1 November 2010, para 12. Available at: <https://www.justice.gov/archive/opa/documents/shell-dpa.pdf>
RDS represented "that "*it has implemented and will continue to implement a compliance and ethics program designed to prevent and detect violations of the FCPA [Foreign Corrupt Practices Act] and other applicable anti-corruption laws throughout RDS's operations, including those of its subsidiaries, affiliates, agents and joint ventures, and those of its contractors and subcontractors whose responsibilities include interacting with foreign officials and engaging in other high risk activities.*"

⁷ United States of America v Shell Nigeria Exploration and Production Company Ltd, "Deferred Prosecution Agreement", 1 November 2010, para 13. Available at: <https://www.justice.gov/archive/opa/documents/shell-dpa.pdf>

majority of whom live on less than \$2 a day, and whose future access to health and other services has been severely compromised by the deal. Those victims are entitled to a transparent sentencing process through a public trial where representations can be made by third parties. Such a process is even more necessary given the prominence of RDS and Shell Petroleum within the political and economic life of The Netherlands. Justice will not be served if there is the remotest suspicion that Shell was able to negotiate lenient treatment through a settlement reached behind closed doors. Particularly if that settlement appears to reflect the economic interests of Shell and the Dutch authorities over and above those of the victims and justice. This principle is also critical for Nigeria, given RDS' continued dominant role in the country. If the administration of justice is seen to favour Shell how can Nigerians have faith that companies operating in their country and exploiting their resources will not continue to operate in such a predatory manner?

In our experience – and as clearly demonstrated by the circumstances at play during the lead up to the deal for OPL 245 – settlement agreements result all too often in little more than a “cost-of-doing business” fine. No-one is sanctioned, and the company concerned proceeds to the next corrupt deal. Addressing grand corruption in this way is clearly not a deterrent. The public process of a court appearance and the independence of the courts in setting fines, are essential to preventing corruption in the future.

Minimum Conditions

If, notwithstanding the above concerns, you deem a settlement to be in the public interest, then we would expect the following minimum conditions to apply:

1. An admission of guilt

We understand that there is no legal requirement for a defendant to plead guilty as part of the settlement. We therefore warmly welcome your recent statement that defendants in future settlement agreements “*will have to admit the facts as found by the public prosecution services*”.⁸ We would expect nothing less.

We note that RDS is currently being prosecuted in Milan on charges for international corruption relating to the OPL 245 deal. RDS denies the charges. It is critical that any OPL 245 settlement in The Netherlands should not undermine or jeopardise these court proceedings, meaning that attention should be paid to the following elements:

- any settlement should be agreed with the Milan Prosecutor;
- any acknowledgement by RDS of the facts that underpin the prosecutor’s case must be accompanied by an admission of guilt to the charges being prosecuted in Milan; and
- Shell’s admission – and all underlining evidence – will be handed over to the Italian prosecutors to form part of the evidence against other defendants in the Milan trial.

Any settlement must also protect prosecutions in Nigeria and be agreed with the Nigerian prosecutors. Although RDS and Shell Petroleum have not been charged with OPL 245-related offenses, Shell’s Nigerian subsidiary SNEPCO is being prosecuted for official corruption in relation to the deal,⁹ charges which it denies. It is essential that any settlement reached in The Netherlands does not apply to SNEPCO and that the prosecution in Nigeria is allowed to run its

⁸ Kamerstukken II 2017-2018, Aanhangsel van de Handelingen, nr. 2207.

⁹ Federal Republic of Nigeria vs Shell Nigeria Exploration Company Ltd and others. High Court of Abuja. Charge No: CR/124/17. 28 February 2017

course. A settlement with RDS and Shell Petroleum in The Netherlands should also not preclude the possibility of both companies being prosecuted in Nigeria.

2. Executives must be prosecuted if there is sufficient evidence

We also noted that in the recent money laundering case involving ING Bank N.V., no individuals were prosecuted. As reported, it was deemed that the acknowledged offenses could not be attributed to specific persons, or even the management of ING. Instead, the crimes were said to have resulted from “a structural lack of attention” to anti-money laundering compliance and, consequently, were only attributed to ING Bank N.V. as a legal entity.¹⁰ Even if, in the case of OPL 245, it is demonstrated that both RDS and Shell Petroleum suffered structural failures that could have played a role in enabling the alleged criminality, we believe there are strong grounds for prosecuting a number of former Shell managers and high-level executives. Should the Dutch Prosecutor have sufficient evidence, we would expect those prosecutions to go to trial, even if a settlement option were available. White collar crime cannot, and should not, be treated more leniently than other crime if future wrongdoing by company managers is to be deterred.

We also note that four former Shell employees, including a former RDS executive, are already being prosecuted in Italy for international corruption. It is therefore critical that any settlement reached in The Netherlands does not undermine that prosecution.

3. Crime must not pay

It is axiomatic that crime should not pay. Any settlement with RDS and Shell Petroleum must therefore remove any advantage gained by Shell through offenses for which the Prosecutors have sufficient evidence to prosecute.

What advantage did Shell and Eni gain? Most obviously, they obtained an investment oil and gas field that Shell, in its internal documents at the time of the deal, valued at \$3.2 billion (excluding the value of the gas) at an oil price of \$80 a barrel,¹¹ a valuation that would need to be independently assessed.

But the companies also obtained fiscal terms governing the block that were hugely beneficial. A study which we recently commissioned from oil experts at Resources for Development¹² found that pursuant to these fiscal terms agreed over 2011/2012, the block would only generate \$9,8 in *government* revenue over the lifespan of the project. In comparison, according to the report by Resources for Development, previous fiscal terms agreed in 2003 and 2005 would generate \$14,3 and \$15.6 billion respectively.¹³

It would be unacceptable if a settlement agreement was reached with RDS and Shell Petroleum that allowed the companies to continue to profit from the alleged corruption in the OPL 245 deal

¹⁰ "ING pays 775 million due to serious shortcomings in money laundering prevention", Openbaar Ministerie, 4 September 2018, <https://www.om.nl/@103952/ing-pays-775-million/>

¹¹ OPL 245 Brief, 23 September 2010.

¹² Resources for Development, “Government Revenues from OPL 245 Assessing the Impact of Different Fiscal Terms”, November 2018, <http://www.res4dev.com/opl245>.

¹³ The potential reduction of between \$4.5 billion and \$5.9 billion in the 2005 fiscal when compared to the 2003 or 2005 terms, is due to the removal of the central feature of the production sharing system: a share of Profit Oil for the government. For more information about the revenue calculations of the block, we refer to our latest report ‘Take the Future’ as well as the underlying reports of Resources for Development Consulting, available through the website of Global Witness at: <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/take-the-future/>.

at the expense of Nigeria and its peoples. Crime simply must not pay. Any settlement agreement should therefore require Shell to surrender the OPL 245 license.

In addition, financial penalties should be imposed that reflect the scale of the advantages that Shell gained through its participation in the alleged OPL 245 bribery scheme and the harm done to the people of Nigeria. We would suggest that, in order to establish an appropriate level of financial penalty, the Prosecutor should seek an independent valuation of the block (including the value of its gas), as well as an evaluation of the advantages to Shell of the fiscal terms agreed under the 2012 “PSA” in addition to an evaluation of the impact of corruption on the Nigerian people.¹⁴ Based on our own research, we would expect the total penalty to amount to many billions of dollars.

4. Monitoring

Settlement agreements in corruption cases typically require defendants to commit to implementing improvements to their internal anti-corruption controls. We would expect such a condition to be part of any settlement reached with RDS and Shell Petroleum. However, as noted above, RDS has brazenly flouted previous legally-binding commitments to the US Department of Justice to implement a compliance programme to prevent bribery. SNEPCO was party to the same agreement.

Given this history, RDS’s compliance should be strictly and independently monitored, with reports being made public. We would expect that the monitoring programme be no less rigorous than any such programme that the Government of The Netherlands might seek to apply to the return of any funds to Nigeria. We also note that the Federal Government of Nigeria has expressed its openness to civil society organisations’ monitoring of returned funds. We would expect Shell to be similarly open to such monitoring of its compliance regime and would recommend that such civil society monitoring is made a condition of any settlement.

If a settlement agreement with RDS requires improved anti-corruption controls also to be implemented in any of Shell’s Nigerian subsidiaries, clarification should be sought from RDS as to the extent to which it is in a position to ensure implementation of such a programme. We would recall that RDS has repeatedly denied that it has any control over its subsidiaries.¹⁵

Given the above, any undertakings by RDS with regard to its Nigerian subsidiaries should be accompanied by a public statement setting out RDS’ powers to control the operations of its subsidiaries.

Finally, any settlement agreement with RDS, mandating the implementation of revised anti-corruption procedures, should ensure that executives are similarly held to account for the implementation of such procedures. This should mean that the designated accountable executives (we would suggest the CEO and the CFO) should, for each new deal struck by the company and its subsidiaries, sign off that such procedures have been followed. Where it is later

¹⁴ 2012 Production Sharing Agreement.

¹⁵ Brandjes, M. (2016), Witness Statement, Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd. High Court, CLAIM NO: HT-2015-000241, paras 11-13.

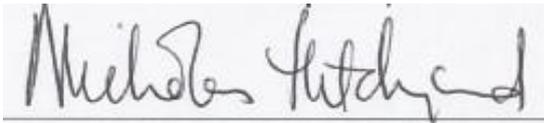
In a witness statement to the UK High Court in 2016, RDS’ then Company Secretary, Michiel Brandjes was unequivocal: “[RDS] does not direct operational decision making or mandate how any general business objectives are to be achieved by individual operating companies. On the contrary, each operating company is autonomous, with its own properly constituted board of directors, its own management, its own business purpose, its own assets and its own employees appropriate for that purpose. Its board and management take the operational decisions necessary to run its business . . .”

demonstrated that corruption has occurred, the designated signatories should be prosecuted on the basis that they knew, or should have known, that their procedures were not being followed.

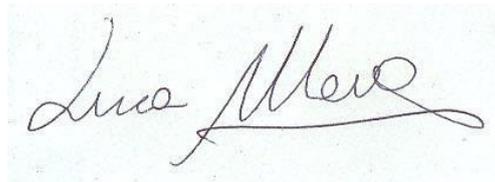
We are copying this letter to the Prosecutor's Office. We will also make this letter public as we believe that out-of-court-settlements should be subject to transparency and public scrutiny.

We would welcome a meeting at the earliest opportunity to discuss our concerns and to address any queries that you might have.

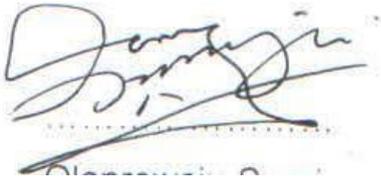
Yours sincerely



Nicholas Hildyard, The Corner House



Luca Manes, Re:Common



Olanrewaju Suraju, HEDA



Simon Taylor, Global Witness