



## Britain's Fight Against The 'Silver Lance'

### A Radical Overhaul of The U.K.'s Bribery Laws

**O**n November 20, 2008, the Law Commission of England and Wales<sup>1</sup> published its report, *Reforming Bribery*, thereby recommending a radical overhaul of the United Kingdom's existing bribery and corruption laws. Legal commentators in the United States and around the world have welcomed the Law Commission's "effort to bring in laws that are easy to understand and rightly impact on the same way on the public and private sectors."<sup>2</sup> It is widely believed that the U.K. is essentially playing "catch-up" with its cousin across the Atlantic and the proposed law is "a

clear echo of America's Foreign Corrupt Practices Act."<sup>3</sup> The proposed law is expected to be implemented in the U.K.'s next parliamentary session and, when passed, will radically alter the U.K.'s investigation and prosecution of bribery. With a Mutual Legal Assistance Treaty firmly in place between Great Britain and the United States, and with the increased level of cooperation between the law enforcement agencies of the two countries, U.S. white collar defense lawyers and in-house counsel of multinational corporations would do well to take heed of this development.

### Existing U.K. Bribery and Corruption Law

In England, bribery has been contrary to the law at least since the Magna Carta declared in the 13th century: "We will sell to no man ... either justice or right."<sup>4</sup> U.K. law has had a patchwork of bribery offenses dating back many years — indeed, some dating back to the 13th century.<sup>5</sup> The most important amongst these are the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916.<sup>6</sup> Originally, none of these statutes expressly referred to bribery of foreign public officials. In 2001, the U.K. enacted its Anti-terrorism, Crime and Security Act 2001. This Act amended the 1906

Act and the common law crime to expressly cover bribe recipients whose functions have no connection with the U.K. and are carried out outside the U.K. The 1889 Act was also amended similarly to extend the definition of public bodies to equivalent institutions outside the U.K.<sup>7</sup>

In the face of all these laws going back hundreds of years, a question arises as to why the U.K. is gearing up for a radical overhaul of its bribery laws. In order to understand the impetus for the U.K.'s push to overhaul its laws and image to combat international bribery and

**Author's Note:** "Fight with silver lances and you will never lose." Diogenianus, *Adagia*, ii, 81 (c. 125 A.D.). This was the response of the Delphian Oracle to Philip of Macedon when he asked how he might be victorious in war. See BURTON STEVENSON, *THE MACMILLAN BOOK OF PROVERBS, MAXIMS AND FAMOUS PHRASES* 241 (1947). Philip used to the full the crafty advice of the Delphian Oracle by bribing the rival commander. "Silver lance" is a euphemism for bribery.

BY ASHISH S. JOSHI

## BAE Systems and the *Al Yamamah* Deal<sup>8</sup>

BAE Systems plc is a global defense company with significant operations in the United States, Sweden, South Africa, Australia, Saudi Arabia, and India as well as in the U.K.<sup>9</sup> In 2007, with over \$25 billion in revenue, BAE was ranked as the third largest defense company in the world.<sup>10</sup>

In July 2004, a whistleblower's claims that BAE had a \$120 million "slush fund" to facilitate defense contracts triggered an investigation by the U.K.'s Serious Fraud Office ("SFO").<sup>11</sup> From 2004 until 2006, the SFO probed and investigated the allegations that in order to secure a lucrative arms contract, the *Al Yamamah* deal, BAE allegedly paid off several Saudi officials, including Prince Bandar bin Sultan bin Abdul Aziz Al Saud ("Prince Bandar").<sup>12</sup> Apart from allegations of bribes totaling approximately \$2 billion, there were also allegations that BAE provided certain Saudis with chartered aircraft, luxury limousines, exotic vacations, prostitutes, and settlement of the Saudis' gambling debts.

The SFO issued a statutory notice to BAE on October 14, 2005, requiring it to disclose details of payments to agents and consultants related to the *Al Yamamah* contracts. In response, BAE's solicitors wrote a confidential memorandum to the U.K.'s Attorney General, Lord Goldsmith, seeking to persuade him to halt the investigation on the grounds that it would be "seriously contrary to the public interest" and would "seriously affect relations between the U.K. and Saudi Arabian Governments." On December 6, 2005, the SFO and the Attorney General started what is known as "Shawcross exercise" in the U.K., a practice by which facts and opinions affecting public policy can be sought from Government ministers by the Attorney General in order to acquaint himself with all that is relevant in deciding whether it is in the public interest to pursue a prosecution.<sup>13</sup>

On December 16, 2005, the Cabinet Secretary responded to the Shawcross exercise. The Secretary noted that while it was ultimately for the Attorney General and the prosecuting attorneys to decide whether the investigation should continue, the commercial considerations of the *Al Yamamah* deal, the strategic importance of Saudi Arabia in the fight against Islamic terrorism, and the damage to British security interests should the investigation continue, must be considered before making any decision.

The SFO remained skeptical that Britain's economic or security interests merited terminating the investigation — especially when the U.K. had ratified the Organization for Economic Co-operation and Development's (OECD) international convention to combat bribery that specifically prohibited economic considerations from influencing investigation and prosecution of bribery. The investigation continued throughout 2006 until the SFO was about to obtain access to certain bank accounts in Switzerland. This provoked an explicit, blatant, and unprecedented threat from Saudi Arabia representatives to the U.K. government.

Prince Bandar approached the U.K. Prime Minister's office and threatened that if the SFO did not stop the investi-

gation, the *Al Yamamah* deal would be scrapped and intelligence and diplomatic relations between Saudi Arabia and the U.K. would be severed.<sup>14</sup>

On September 29, 2006, the Cabinet Secretary wrote to the Attorney General that the severe damage to the U.K.'s public interest was "imminent" if the BAE investigation were to continue. In addition, the U.K.'s Ambassador to Saudi Arabia informed the Director of the SFO that the threats made by the Saudis were "very grave" and that "British lives on British streets were at risk."

On December 5, 2006, Prince Bandar met with the U.K.'s foreign policy officials. Prince Bandar let it be known that he had spent the week in Paris negotiating the purchase of fighter aircraft — an alternative to the *Al Yamamah* deal with the U.K. — with President Chirac. On the evening of the same day, the Legal Secretary suggested to the Attorney General that Prime Minister Tony Blair be consulted in this matter.

In a memorandum dated December 8, 2006, the Prime Minister asked the Attorney General if the Attorney General would reconsider the public interest issues raised by the ongoing investigation as:

*"[T]he continuation of the SFO investigation into Al Yamamah risks seriously damaging Saudi confidence in the U.K. as a partner. It is also my judgment that such damage risks endangering U.K. national security, both directly in protecting citizens and service people, and indirectly through impeding our search for peace and stability in this critical part of the world."*

On December 11, 2006, the Prime Minister and the Attorney General met. While the Attorney General was concerned that halting the investigation would send a bad message about the U.K.'s credibility, the Prime Minister was of view that "higher considerations" and "supervening national interest" were at stake. The message from 10 Downing Street was clear: drop the case now.

The Attorney General and the SFO wrestled with a grave dilemma. If the BAE investigation indeed "caused another 7/7, how could we say that our investigation which at this stage might or might not result in a successful prosecution was more important?"<sup>15</sup>

In the end, the U.K. law officers were simply unable to disregard the explicit, and what they believed to be real, threat to the "British lives on British streets." On December 13, 2006, the Director of the SFO concluded that to continue the investigation risked "real and imminent damage to the U.K.'s national and international security and would endanger the lives of U.K. citizens and service personnel." He confirmed his decision in a press release the following day.

Immediately after the U.K. dropped the investigation, Saudi Arabia went through with its \$8 billion purchase of 72 Typhoon jet fighters.<sup>16</sup>

corruption, it is necessary to look back at the country's track record in investigating and prosecuting cases involving foreign bribery. One case stands out amongst all others — U.K.'s investigation of BAE Systems plc and the subsequent termination of the investigation under ignominious circumstances. The facts and the timing of the BAE investigation, the behind-the-screen maneuvering, international politics, and the sum of money involved created the perfect storm to generate an impetus for a complete revamp of the U.K.'s bribery laws and its enforcement of those laws.

The international community was outraged at the U.K.'s termination of such a high profile foreign bribery investigation. The abrupt termination of the BAE investigation had several ripple effects around the world.

### America Steps in Where Britain Feared to Tread

On May 12, 2007, U.S. Department of Justice officers served a subpoena on Michael Turner, then CEO of BAE, at the Houston airport. The officers also seized and examined Turner's computer and the documents that he was carrying. Apparently, the U.S. prosecutors had stepped in where the Brits feared to tread — though not without raising concerns on the part of corporate America.<sup>17</sup> Not surprisingly, the U.S. subpoena sought evidence about payments BAE had made to secure an \$85 billion arms deal with Saudi Arabia. The U.S. actions appear to serve to defend an international treaty that 37 nations, including the U.K., have signed — OECD's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.<sup>18</sup>

Of course, another reason the United States jumped in may be to justify its own aggressive record of bribery prosecution since it has investigated and charged more companies for bribery than any other nation in the world.<sup>19</sup> Yet another reason could be that in early 2007, Prince Bandar had deposited some \$2 billion in payments into accounts at Riggs Bank in Washington, D.C., while the Prince was serving as Saudi ambassador to the United States. These bank accounts could have drawn the attention of the U.S. investigators (and provided jurisdiction) as well. Under the Foreign Corrupt Practices Act, the United States can prosecute a foreign person or entity for bribery if it causes "an act in furtherance of the cor-

rupt payment to take place within the territory of the United States."<sup>20</sup>

The United States was not alone in stepping into the BAE investigation; the Swiss opened a criminal investigation into possible money laundering at BAE Systems as well.<sup>21</sup> Also, the Austrian police recently executed a search warrant while investigating whether BAE unlawfully influenced defense procurements in a number of countries.<sup>22</sup>

At the time that the other countries stepped in to investigate BAE Systems, British activist groups moved Britain's courts to reopen the BAE investigation.

### Activists Seek Review Of U.K. Decision

In early 2007, two British activist groups filed a lawsuit seeking judicial review of the U.K. government's actions in the British High Court — a mid-level court in the U.K.<sup>23</sup> The claimants challenged the SFO and the Attorney General's decision to terminate the investigation on six grounds including that it was "unlawful" for the Director of the SFO to accede to the threat made by Prince Bandar and that such conduct was contrary to the U.K.'s constitutional principle of the rule of law.<sup>24</sup>

The U.K. government's defense essentially was that "the law is powerless to resist the specific ... attempt by a foreign government to pervert the course of justice in the United Kingdom."<sup>25</sup> The government's stance was that "whilst it is a matter of regret, what happened was a part of life. The court cannot intervene but should leave the Government to judge the best course to adopt in response to the threat."<sup>26</sup> The High Court was faced with a case where it felt that "so bleak a picture of the impotence of the law invite[d] dismay, if not outrage."<sup>27</sup> The Court was aware it had "to identify a legal principle that may be deployed in defense of so blatant a threat" because "if there was no identifiable legal principle by which the threat may be resisted, then the court must itself acquiesce in the capitulation."<sup>28</sup>

The British High Court did identify such legal principle and in April 2007 ruled in favor of the activists. Amongst other reasons, the Court ruled: "Submission to a threat is lawful only when it is demonstrated to a court that *there was no alternative course open to the decision-maker*."<sup>29</sup> The Court ruled that the government had not met this burden. The High Court accordingly quashed the decision made by the Director of the SFO and remitted it to him for reconsideration.

The SFO immediately appealed to the U.K.'s highest court, the House of Lords.<sup>30</sup> Unfazed by the international outcry following the U.K.'s termination of the BAE investigation, in July 2008 the House of Lords overturned the High Court's decision, thereby leaving the BAE investigation closed.<sup>31</sup> The Lords held: "The issue in these proceedings is not whether [the Director's] decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision that the Director was lawfully entitled to make."<sup>32</sup> In the opinion of the House, the Director's decision was one he was lawfully entitled to make. The Lords upheld the SFO Director's legal right to close a case based on his own discretion, without interference from the government.<sup>33</sup> As to the High Court's finding that the government had not met its burden of demonstrating that there was no alternative course but to succumb to the Saudi threat, the Lords opined that the Director of the SFO was not in a position to try to dissuade the Saudis from carrying out their threat and had to rely on the assurances of others that the threats were real.<sup>34</sup>

Ten days after the House of Lords decision, the Saudis announced that they would contract with BAE for an *additional* 48 to 70 Typhoon jet fighters.<sup>35</sup>

### OECD Slams U.K. on Track Record for Combating Foreign Bribery

Until the U.K. dropped its investigation of BAE Systems, the Paris-based OECD, a group of 30 industrial nations committed to democracy and market reforms, was doing quite well in overseeing a global anti-bribery treaty.<sup>36</sup> The United States was prosecuting a record number of corporate bribery cases, Germany had prosecuted Siemens AG, Europe's largest engineering company, and France was pursuing its engineering giant, Alstom, on corruption allegations.<sup>37</sup> Then the U.K. came along and dropped its probe of BAE payments made to a Saudi prince and others in the face of an *explicit* and *blatant* threat from Saudi Arabia's representatives.

The OECD felt that Britain's caving in to the Saudi threat seriously undermined the treaty. In October 2008, the OECD's Working Group released a 75-page report slamming the U.K. for its abysmal failure to stop bribes being paid by its companies dealing in foreign markets.<sup>38</sup> The OECD Report stated that the Working Group was "disappointed and

seriously concerned with the unsatisfactory implementation of the Convention by the U.K.<sup>39</sup> The Group pointed out that the U.K. had “systemic deficiencies” in investigating and prosecuting foreign bribery cases.<sup>40</sup> The Group was concerned that the U.K. had failed to address its deficiencies and had actually hindered investigations. The Working Group reiterated its previous recommendation — made in 2003, 2005, and 2007 — that the U.K. enact new foreign bribery legislation at the earliest possible date.<sup>41</sup> The Group stressed that the U.K.’s failures in combating bribery undermined the credibility of its legal framework and potentially triggered the need for increased due diligence over its companies by its partners and other multinational institutions.<sup>42</sup>

The OECD also criticized the U.K.’s existing laws in combating bribery and policing corruption at British companies.<sup>43</sup> The OECD highlighted specific concerns and longstanding deficiencies with the U.K.’s current laws that apply to foreign bribery,<sup>44</sup> to wit:

(a) The U.K.’s Prevention of Corruption Act 1906 is based on an agent/principal concept. Under the

general principles of the law of agency, the informed consent of the principal to the agent’s actions is a defense to the agent’s liability for any breach. The question therefore arises as to whether principal consent is a defense to foreign bribery under the 1906 Act. When this deficiency was pointed out to the U.K. in 2005, the U.K. was categorical in its submissions before the OECD that principal consent could not be a defense. However, this position was in sharp contrast with the views of the U.K.’s Attorney General when the *Al Yamamah* investigation was dropped in 2006 and the AG publicly stated that principal consent was the “principal obstacle” to the prosecution.<sup>45</sup> Also, sometime before 2004, Jersey investigated several major U.K. defense companies for bribing Qatari officials. It eventually discontinued the investigation because of the written confirmation provided by the Emir of Qatar that the “commission payments” had been made with the Emir’s knowledge and approval.<sup>46</sup> The U.K. decided against opening its own investigation because the

Emir’s confirmation was also “a material obstacle to any prosecution” in the U.K. for corruption.<sup>47</sup>

(b) Another concern of the OECD was whether the U.K.’s pre-2002 legislation applied to foreign bribery. In the BAE case, the Attorney General admitted that the U.K.’s common law and statutory bribery offenses did not cover pre-2002 conduct.<sup>48</sup>

(c) There is a complication related to a possible role of the U.K. government officials in a transaction allegedly involving bribery. In the U.K., the government is closely involved in some business transactions between a private entity and a foreign entity. If the government’s officials know or approve of certain actions, the briber may assert a defense that the bribes were allegedly consistent with the government’s policy.<sup>49</sup>

(d) Under existing U.K. law, it may not be a crime for a person to use a non-U.K. national as an intermediary to bribe a foreign public official if the act of bribery takes place outside the U.K. This is because the U.K. has

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implemented bribery through intermediaries under Article 1 of the OECD Convention via the doctrine of secondary liability. Under this doctrine, when the act of bribery takes place outside the U.K. territory, the intermediary has not committed a crime under U.K. law since he or she is not a U.K. national. And the person who used the intermediary cannot be secondarily liable for aiding or encouraging the commission of a crime. The U.K. does not dispute this anomaly.<sup>50</sup>

- (e) Last but not least is the U.K.'s statutory requirement for Attorney General consent for prosecutions of foreign bribery or for assisting or encouraging foreign bribery. There are cases where the SFO has proposed filing criminal charges for foreign bribery and the Attorney General has simply failed to decide on the request for months.

The Law Commission of England and Wales, in its November 2008 report, raised similar concerns over the U.K.'s current law concerning bribery.<sup>51</sup> Having set forth severe criticism of the U.K.'s existing law to combat foreign bribery, the OECD Working Group also condemned the U.K.'s handling of the BAE investigation. The Group concluded that the U.K. "did not engage in sufficient efforts to develop and explore alternatives to terminating the *Al Yamamah* investigation." Notwithstanding Britain's House of Lords decision, the OECD Working Group expressed serious concerns about whether the U.K.'s actions in the BAE investigation were consistent with the Convention.<sup>52</sup>

The OECD's damning report came as a wake-up call to British businesses and government. It did not help matters when soon after the OECD report was released, the head of the U.K.'s Financial Services Authority, Lord Turner, warned that the fallout from the current financial crises would result in an end to so-called "light touch" regulation.<sup>53</sup>

Having been slammed and shamed for their dropping the BAE investigation worldwide, the Brits finally swung into action.

## The United Kingdom Responds

The U.K.'s response to the global criticism was twofold: one, to up the ante on enforcement and two, to enact tougher new legislation. On the enforce-

ment side, the U.K. has reported that the number of "open" investigations relating to foreign bribery has significantly increased — by August 2008, it had reached a total of 17 SFO cases plus seven cases being investigated by the City of London Police Overseas Anti-Corruption Unit.<sup>54</sup> Also, the U.K. secured its first conviction against an individual for involvement in foreign corruption. The case involved the 65-year-old managing director of CBRN Team, a U.K. security company, who paid British Pounds Sterling ("GBP") 83,000 in bribes in 2007-2008 to two Ugandan officials in relation to a GBP 210,000 contract. The individual received a five-month jail sentence suspended for one year.<sup>55</sup>

Further, in October 2008, the SFO announced a settlement with a U.K. construction company, Balfour Beatty, relating to "irregular payments" and questionable accounting practices made by a subsidiary of the company in Egypt. Balfour Beatty agreed to surrender GBP 2.25 million in unlawful proceeds. It was the first such civil recovery order obtained by the SFO since it became empowered to seek such orders.<sup>56</sup> Also in October, the U.K. detained and questioned two individuals, one an Austrian Count and the other a BAE executive as a part of an investigation into bribery in a Czech arms deal. The SFO has stated that it is investigating other allegations of bribery against British companies, including BAE, in Qatar, South Africa, Tanzania, Romania, Chile, and the Czech Republic.<sup>57</sup> Nevertheless, despite its newly found zeal in investigating and prosecuting foreign bribery, the U.K. has still a lot of catching up to do in comparison with the United States. The United States has prosecuted 105 foreign bribery cases in the past 11 years, compared with only one in the U.K.<sup>58</sup>

On November 20, 2008, the Law Commission of England and Wales published a report, *Reforming Bribery*, which recommends drastic overhaul of the U.K.'s current laws concerning bribery and corruption. The Commission proposes a complete repeal of the common law offense of bribery, the whole of 1889, 1906 and 1916 Acts and all or parts of a number of other statutory provisions.<sup>59</sup>

Briefly speaking, these offenses are proposed to be replaced by two general offenses of bribery and with one specific offense of bribing a foreign public official. The first of the general offenses will be concerned with the conduct of the payor and will hold the briber liable. The

second of the general offenses appears to be concerned with the conduct of the recipient.<sup>60</sup> These offenses will be confined to the activity of a business, professional or public in nature. Distinction between private enterprise and public or government-held companies would no longer be reflected.<sup>61</sup> Performance of a function or activity will be "improper" if it is carried out in breach of: (a) good faith, (b) impartiality, or (c) position of trust.<sup>62</sup> Further, these general offenses will apply to acts done outside the U.K., if they would have amounted to an offense within the U.K. and the person accused is, amongst other possibilities, a British citizen, an individual ordinarily resident in the U.K., or a body incorporated in the U.K.

The Law Commission has also strived to meet the OECD's criticism concerning the required consent of the Attorney General for foreign bribery prosecutions. The Commission recommends that the consent of the Attorney General should be required only in cases with an "international dimension" to them.<sup>63</sup> In other cases, the Commission proposes that the Director of the prosecution authority give the consent.<sup>64</sup>

There is a separate offense of bribing a foreign public official ("FPO").<sup>65</sup> The offense will be committed if a person offers or gives any "advantage not legitimately due" to a FPO, or to another person with the FPO's assent ... (a) intending to influence the FPO in his or her capacity as a FPO and (b) intending to obtain or retain business.<sup>67</sup> This appears to be in line with America's Foreign Corrupt Practices Act provision.<sup>68</sup> The Commission has proposed an affirmative defense to the discrete offense of bribery of a foreign public official, by which the accused can prove that he or she reasonably believed that he or she was legally permitted or legally obliged to confer the advantage in question by the law of the foreign country.<sup>69</sup> What is reasonable? Steps taken to discover the true legal position before the advantage is conferred should be considered in answering this question.<sup>70</sup>

The Law Commission also recommended a new corporate offense of negligently failing to prevent bribery by an employee or agent.<sup>71</sup> It would be a defense for the company to show that there were "adequate procedures" in place designed to prevent persons from committing bribery.<sup>72</sup> However, this defense will not apply if the person or persons whose responsibility it was to prevent the bribery was a director, manager, or equivalent person with the com-

pany.<sup>73</sup> It is noteworthy that in contrast to the reliance of the United States on vicarious liability, the Commission proposes a negligence standard for prosecuting companies for the conduct of their employees. British companies could be prosecuted if they *negligently* failed to prevent bribery by an employee or agent — a lower threshold of culpability, negligence rather than the usual requirement of intent.<sup>74</sup>

The Commission recommends that the general offense of bribery or the offense of bribing a foreign public official can lead to imprisonment up to 10 years or fine or both. The corporation guilty of negligently failing to prevent bribery would be liable for the statutory maximum fine upon conviction.<sup>75</sup>

The U.K.'s Ministry of Justice spokesman has stated that the Government was giving "close consideration" to the Law Commission's recommendations.<sup>76</sup> It is widely anticipated that the forthcoming bill before the Parliament on this issue will be heavily influenced by the Commission's report. The Commission's proposals herald a dramatic change in the U.K.'s legal landscape and its approach towards combating corruption and bribery. The current Director of the SFO has pledged to allocate "substantial new resources to tackling corruption" and to adopt a "U.S.-styled" approach to dealing with bribery and corruption.<sup>77</sup> The fallout of the BAE case, the resulting international outrage and condemnation, and the Law Commission's proposed law reforms promise one thing: turning a blind eye to bribery and corruption or a "light touch" regulation of these offenses is no longer an option for the U.K. law enforcement.<sup>78</sup>

## Notes

1. The Law Commission is a public body that reviews and recommends improvements to existing areas of law in the U.K. The Law Commission's report is expected to form the base of a draft bill that could come before the British Parliament in the first half of 2009. See Richard Lloyd, *A Dose of Reform for British Bribery Laws*, THE AMERICAN LAWYER, November 24, 2008.

2. Frances Gibb, *Bribery Law Reform Focuses on Overseas Work*, TIMES ONLINE, Nov. 20, 2008, <http://business.timesonline.co.uk/tol/business/law/article5193514.ece>.

3. Richard Lloyd, *A Dose of Reform for British Bribery Laws*, THE AMERICAN LAWYER, November 24, 2008.

4. *Reforming Bribery*, The Law Commission, November 19, 2008, available

at [www.lawcom.gov.uk/bribery.htm](http://www.lawcom.gov.uk/bribery.htm).

5. OECD Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, United Kingdom: Phase 2bis, October 16, 2008 (hereinafter "OECD Report"), page 9; also see *Britain's Bribery Laws to Be Overhauled*, INT'L HERALD TRIB., November 20, 2008.

6. *Reforming Bribery*, *supra* note 4.

7. OECD Report at 9, citing Part 12 of the Anti-Terrorism, Crime and Security Act 2001.

8. The facts are adopted from the Divisional Court's Judgment in *R. (Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office* [2008] EWHC 714 (Admin); 2008 WL 833707 (DC), paragraphs 8-38 (The cites to the British court's judgments refer to the Westlaw version). The Divisional Court opinion and judgment is available at [www.bailii.org/ew/cases/EWHC/Admin/2008/714.html](http://www.bailii.org/ew/cases/EWHC/Admin/2008/714.html). The House of Lords judgment is available at [www.publications.parliament.uk](http://www.publications.parliament.uk).

9. Woolf Committee Report, Ethical Business Conduct in BAE Systems plc — The Way Forward 7 (May 2008). In June 2007, BAE commissioned a committee, headed by Lord Woolf, the former chief justice of England and Wales, to study the company and recommend ethical reforms. However, the Saudi arms deal was off-limits to the Woolf committee and its job was to point "the way forward." See Sue Reisinger, *Mission Critical*, CORPORATE COUNSEL, December 2008.

10. Defense News Top 100 (2007); [www.defensenews.com](http://www.defensenews.com).

11. The SFO is England's equivalent of the U.S. Department of Justice's Criminal Fraud Section. See Sue Reisinger, *supra* note 9. The SFO is the lead agency responsible for investigating and prosecuting foreign bribery in the U.K. The power of the Director of the SFO to investigate a suspected offense is conferred by a statute in the U.K. See Section 1(2) of the Criminal Justice Act 1987. Although the Director is required to discharge his functions under the superintendence of the Attorney General, any decision that he makes as to investigation or prosecution is for him to reach independently. See the OECD Report at 7.

12. Prince Bandar helped negotiate the \$85 billion arms deal between the Kingdom of Saudi Arabia and the British government in 1985, with BAE's precursor as the prime contractor. The deal was ironically termed Al Yamamah ("The Dove" in Arabic). Prince Bandar is a son of the deputy

prime minister of the Kingdom of Saudi Arabia. Known for his flamboyance, Prince Bandar served as Saudi ambassador to the United States from 1983 to 2005, becoming so close to President George H.W. Bush and President George W. Bush that they referred to him as "Bandar Bush." See Sue Reisinger, *Mission Critical*, CORPORATE COUNSEL, December 2008.

13. "Shawcross exercise" is based on a statement made by Sir Hartley Shawcross QC, then the Attorney General, in the U.K.'s House of Commons in 1951. The effect of the statement was that when deciding whether or not it is in the public interest to prosecute where there is sufficient evidence to do so, the Attorney General may, if he chooses, invite opinion among his ministerial colleagues. However, the ultimate decision rests with the Attorney General and he is not to be put under pressure in the matter by his colleagues. See *R. (Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office*, [2008] UKHL 60, on appeal from [2008] EWHC 246 (Admin).

14. See THE SUNDAY TIMES, June 10, 2007, cited in *R. (Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office* [2008] EWHC 714 (Admin). Also, it is noteworthy that while the U.K. government has not specifically admitted these facts, the government has not denied the threats emanating from Saudi Arabia's representative.

15. The July 7, 2005, London bombings (also called the 7/7 bombings) were a series of coordinated bomb blasts that hit London's public transport system during the morning rush hour. Carried out by British Islamist extremists, the suicide bombings were motivated by Britain's involvement in the Iraq War and other conflicts.

16. See Sue Reisinger, *Mission Critical*, CORPORATE COUNSEL, December 2008.

17. *Id.* The U.S. action has raised concerns as well as legal issues amongst corporate America. Several questions arise. Does the Justice Department have jurisdiction to delve that deeply into the actions of foreign entities? What differentiates a bribe from a legal commission? How do general counsel in America ensure that their international employees do not make the same mistakes as those of BAE's?

18. Sue Reisinger, *A Dressing-Down*, CORPORATE COUNSEL, December 2008; The U.K. signed the OECD Anti-Bribery Convention on December 17, 1997, and ratified it on December 14, 1998. See Homer Moyer Jr., *Getting the Deal Through — Anti-Corruption 2007*, at 105.

19. See Sue Reisinger, *Mission Critical*, CORPORATE COUNSEL, December 2008, citing data from Transparency International.

20. 15 U.S.C.A. § 78 dd-1 *et seq.*

21. Nicola Clark, *Swiss Investigating BAE in Money Laundering Case*, N.Y. TIMES, May 15, 2007.

22. David Crawford and Daniel Michaels, *Police Look for Bribery Evidence in Case Against BAE*, WALL ST. J., October 1, 2008. It is noteworthy, however, that the Austrian search warrant specifically excluded a search for evidence connected to the sale of BAE products to Saudi Arabia. *Id.*

23. *R. (Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office* [2008] EWHC 714 (Admin); 2008 WL 833707 (DC). In the U.K., the decisions of a prosecutor are susceptible to judicial review; however, the courts have traditionally been most reluctant to interfere with the exercise of prosecutorial discretion. See *Sharma v. Brown-Antoine* [2007] 1 WLR 780; *R. (Birmingham) v. Director of SFO* [2007] QB 727.

24. *Id.* at 49.

25. *Id.* at 6.

26. *Id.* at 73.

27. *Id.* at 7.

28. *Id.*

29. *Id.* at 99 (*emphasis added*).

30. Currently in the U.K., the upper house of Parliament, the House of Lords, serves as the country's highest judicial body. There has been a movement in the U.K. to create a separate supreme court, and a constitutional amendment is expected to be passed in 2009.

31. *R. (Corner House Research and Campaign Against Arms Trade) v. Director of the Serious Fraud Office*, [2008] UKHL 60, on appeal from [2008] EWHC 246 (Admin); 2008 WL 2872469 (HL).

32. *Id.*

33. *Id.* at 41-42. The House also commented that the decision by the Director of the SFO to drop the investigation "was a courageous decision, since the Director could have avoided making it by disingenuously adopting the Attorney General's view (with which he did not agree) that the case was evidentially weak. Had he ... made ... the decision in the absence of an explicit Saudi threat it would seem that the Divisional Court would have upheld the decision." *Id.* at 35.

34. *Id.* at 54.

35. See Sue Reisinger, *Mission Critical*, CORPORATE COUNSEL, December 2008.

36. *The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

37. See Sue Reisinger, *A Dressing-Down*, CORPORATE COUNSEL, December 2008.

38. Alex Spence, *U.K. Slammed for 'Inaction' on Foreign Corruption*, TIMES ONLINE, Oct., 17, 2008, <http://business.timesonline.co.uk/tol/business/law/article4962037.ece>.

39. OECD Report at 4.

40. *Id.*

41. *Id.*

42. *Id.*

43. Richard Lloyd, *A Dose of Reform for British Bribery Laws*, THE AMERICAN LAWYER, November 24, 2008.

44. *Id.* at 12-17, 31.

45. See "Interview Transcript: Lord Goldsmith," FINANCIAL TIMES (January 31, 2007) cited by the OECD Report at 13.

46. OECD Report at 14.

47. *Id.*

48. *Id.* at 15.

49. A similar argument was raised in a U.S. prosecution under the Foreign Corrupt Practices Act, see *United States v. Giffen*, No. 05-5782-cr (2nd Cir. December 8, 2006) at 3, 7.

50. See the OECD Report at 16; see Section 109 of the Anti-Terrorism, Crime and Security Act 2001.

51. *Reforming Bribery*, *supra* note 4, at 10-12.

52. OECD Report at 40-41.

53. Alex Spence, *U.K. Slammed for 'Inaction' on Foreign Corruption*, TIMES ONLINE, Oct., 17, 2008, <http://business.timesonline.co.uk/tol/business/law/article4962037.ece>.

54. OECD Report at 7.

55. *Id.* at 7.

56. *Id.* at 24.

57. See Sue Reisinger, *A Dressing-Down*, CORPORATE COUNSEL, December 2008; Transparency International's Progress Report 2008, at 36.

58. Alex Spence, *U.K. Slammed for 'Inaction' on Foreign Corruption*, TIMES ONLINE, Oct., 17, 2008, <http://business.timesonline.co.uk/tol/business/law/article4962037.ece>.

59. *Reforming Bribery*, The Law Commission, November 19, 2008, at xiii, available at [www.lawcom.gov.uk/bribery.htm](http://www.lawcom.gov.uk/bribery.htm).

60. *Id.*

61. *Id.* at xiv.

62. *Id.*

63. *Id.* at 152.

64. *Id.*

65. *Id.* at xv.

66. The phrase "legitimately due" appears to invite controversy and future litigation. The proposed law allows a foreign official to accept an advantage if it is "legitimately due." As an illustration, the Commission provides a following hypothetical: "P asks R, a civil servant in Blueland, to process quickly P's application for a license to engage in construction work in Blueland. R says that will only be possible if P helps to provide the help. The law applicable to R says that favorable treatment may be given to for-

eign businesses if they agree to fund genuinely charitable work in Blueland." First, it is not clear whether such advantage can be accepted only in face of affirmative law of a foreign country. Would custom or practice suffice? Second, in countries where rule of law is not comparable to western and other well established democracies and/or the government agents are themselves susceptible to corruption, enactment of such "law" — especially at a local level — may not pose a problem for the violators.

67. *Id.*

68. Richard Lloyd, *A Dose of Reform for British Bribery Laws*, THE AMERICAN LAWYER, November 24, 2008.

69. *Reforming Bribery*, *supra* note 4 at 157.

70. *Id.*

71. *Id.* at xvi, 157.

72. *Id.* at xvi.

73. *Id.*

74. Frances Gibb, *Bribery Law Reform Focuses on Overseas Work*, TIMES ONLINE, Nov. 20, 2008, <http://business.timesonline.co.uk/tol/business/law/article5193514.ece>.

75. *Id.* at 158.

76. Gibb, *supra* note 74.

77. *Id.*

78. Alex Spence, *U.K. Slammed for 'Inaction' on Foreign Corruption*, TIMES ONLINE, Oct., 17, 2008, <http://business.timesonline.co.uk/tol/business/law/article4962037.ece>. ■

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