



THE  
CORNER  
HOUSE

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### **International Watchdog Criticises Cancellation of BAE Investigation**

The OECD's Anti-Bribery Working Group, an international watchdog that monitors corruption, has held that the UK authorities breached their obligations under international law when they cancelled a Serious Fraud Office (SFO) investigation in December 2006 into arms deals between BAE Systems and Saudi Arabia. The Corner House and the Campaign Against Arms Trade (CAAT) have welcomed the news as a vindication of their judicial review of the decision.

The OECD report released this morning recommends that the UK authorities consider reopening the investigation. The report states that the OECD's "serious concerns" that the decision to drop the investigation in December 2006 was not consistent with Article 5 of the OECD Anti-Bribery Convention have only been "reinforced and intensified". The Working Group does not believe that the decision of the House of Lords in July this year at the end of the judicial review process allays these concerns (para. 167, p.41).

The report notes the "effect on the whole process" leading up to the SFO decision of the commercial considerations repeatedly mentioned by the then Prime Minister, Tony Blair. It also finds that the SFO's Director, Robert Wardle, had been given insufficient access to security advice before he declared the investigation dropped on grounds of "national security". Instead, he was left to consult the UK's Ambassador to Saudi Arabia, who had himself been involved in the arms deal negotiations, which "could give rise to concerns about unconscious bias or perceptions of partiality".

Symon Hill of Campaign Against Arms Trade said:

"We're delighted. This is brilliant news for everyone who cares about justice and democracy. CAAT, The Corner House and the many, many people who supported us have been vindicated. Might is not right. Arms dealers are not above the law. The government must put public interest and international law ahead of subservience to the arms industry."

Nicholas Hildyard of The Corner House commented:

"The OECD's damning rebuke bears out what anti-corruption activists have been saying all along: the UK government has a big mouth when it comes to

the rhetoric, and in telling the rest of the world what to do, but it doesn't practise what it preaches. In fact, it takes action to do precisely the opposite. Parliament should urgently review the political, legal and constitutional issues raised without delay. There is an urgent need to strengthen parliamentary scrutiny of the advice upon which any decision to halt a criminal prosecution or investigation on national security grounds is taken."

Commenting more broadly, the OECD's scathing report describes the UK's laws on tackling corruption as "defective". It says that the draft Constitutional Renewal Bill, which would allow the Attorney General to cancel a foreign bribery investigation or prosecution on asserted national security grounds, "could seriously weaken public accountability" and "would represent a serious backward step in this area." Today, the Prime Minister will receive a petition of over 2,000 signatures calling for the proposal to be scrapped.

The report also questions whether the government's Export Credits Guarantee Department (ECGD) should be underwriting arms deals with Saudi Arabia in the light of the allegations about corruption. CAAT and The Corner House have long called for the ECGD not to use taxpayers' money to underwrite arms deals and to ensure that it does not underwrite bribery.

**ENDS**

#### **NOTES**

**1. The Campaign Against Arms Trade (CAAT)** works for the reduction and ultimate abolition of the international arms trade.

[www.caat.org.uk](http://www.caat.org.uk).

**The Corner House** is an environmental and social justice NGO.  
[www.thecornerhouse.org.uk](http://www.thecornerhouse.org.uk)

The **Serious Fraud Office (SFO)** is a UK government department that investigates and prosecutes complex fraud. It aims to contribute to "the delivery of justice and the rule of law." It is supposed to act independently of government.  
[www.sfo.gov.uk](http://www.sfo.gov.uk)

#### **2. OECD Phase 2bis report**

The full text of the report by the OECD Anti-Bribery Working Group can be read at <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.

"... the UK government did not engage in sufficient efforts to develop and explore alternatives to terminating the Al Yamamah investigation. They [Working Group] recommend that, in situations where dropping a foreign bribery case other than on the merits is being considered or recommended, the UK government thoroughly explore alternative solutions as appropriate." (para. 167, p.40).

"The lead examiners are also not convinced that the prosecutorial authorities sufficiently scrutinised the national security justifications with regard to the Al

Yamamah case. Among other things, those authorities should have questioned more intensively whether the alternatives to terminating the case had been considered and tried, and should have sought other views beyond those of the Ambassador and especially from the security services.” (para.167, p.41).

### **3. BAE-SFO-Saudi investigation and judicial review**

Since the 1980s, the UK has supplied Tornado fighter and ground attack aircraft and associated products and support services to the Kingdom of Saudi Arabia under a series of very high-value arms deals known as “Al Yamamah” (“The Dove”). The aircraft sold to Saudi Arabia under the Al Yamamah deals are all manufactured by BAE Systems, the UK’s largest arms manufacturer. (For more background, *see* Campaign Against Arms Trade: <http://www.caat.org.uk/issues/saudi-arabia.php>)

In 2004, the Serious Fraud Office (SFO) initiated an investigation into alleged bribery and false accounting by BAE in relation to the Al Yamamah deals, including corruption offences since March 2002, when bribery of foreign officials became a crime in the UK under Section 109 of the 2001 Anti-Terrorism, Crime and Security Act.

In November and December 2006, it was widely reported that the Government of Saudi Arabia had threatened to suspend diplomatic ties with the UK and cancel a further proposed order for 72 Eurofighter Typhoon aircraft if the SFO investigation was not halted. (For more background, *see The Guardian's* BAE files: <http://www.guardian.co.uk/bae/files/page/0,,2096320,00.html>)

On 14th December 2006, the government and the Serious Fraud Office declared that they were dropping the investigation into BAE’s Saudi arms deals.

CAAT and The Corner House brought a full judicial review hearing against the SFO decision, arguing that it was unlawful because it contravened the OECD Anti Bribery Convention and because the SFO Director, in allowing threats/blackmail to influence his decision, did not uphold the “rule of law”. On 10 April 2008, the High Court ruled that the decision was unlawful, but on 30 July 2008, the House of Lords overturned this ruling on the grounds that the SFO Director was exercising his legal discretion. (For a timeline of the legal challenge with links to key documents arguments and background, *see*: <http://www.controlbae.org/jr/>)

### **4. The Organisation of Economic Cooperation and Development (OECD)**

describes itself as a “club of like-minded countries”, now 30 in number, which believe in market economics and pluralistic democracy. It provides a forum for discussion on economic and social policy issues for governments, as well as producing research, policy papers, and international treaties and agreements.

The **OECD Anti Bribery Convention** (the “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”) is a multilateral treaty aiming to ensure that all 30 OECD countries, as well as 7 other non-member signatory countries, present a combined and united front against bribery

and corruption of foreign public officials. The UK signed the Anti Bribery Convention in 1998.

Article 1 of the Convention requires parties to make it a criminal offence to bribe a foreign public official. The UK did so in the 2001 Anti-Terrorism, Crime and Security Act.

Article 5 makes provisions to enforce Article 1. It rules out the termination of corruption investigations on grounds other than the merits of the case. Signatory governments specifically undertake not to be influenced “by considerations of national economic interest, the potential effect [of an investigation or prosecution] upon relations with another State or the identity of the natural or legal person involved” in deciding whether to terminate an investigation.

The SFO Director and the Attorney General\* repeatedly informed the public, Parliament and the OECD that the decision to halt the SFO’s BAE-Saudi investigation had been taken in accordance and compliance with the OECD Anti Bribery Convention, Article 5 in particular.

In a statement to the House of Lords on 14 December 2006, for example, Attorney General Lord Goldsmith said:

“Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions precludes me and the Serious Fraud Office from taking into account considerations of the national economic interest or the potential effect upon relations with another state, and we have not done so.”

(<http://www.theyworkforyou.com/lords/?id=2006-12-14d.1711.2>)

SFO Director Robert Wardle said in his first witness statement in the judicial review hearing:

“In reaching my decision, and throughout my consideration of the issues in the case, I had well in mind that the United Kingdom is a signatory to the OECD Convention. In particular, I had in mind Article 5 of the Convention.”

(para 44,

<http://www.thecornerhouse.org.uk/pdf/document/WardleWitState.pdf>.)

In a subsequent public submission to the OECD in March 2007, the SFO Director assured the OECD that the UK’s domestic courts would determine whether the decision to halt the BAE-Saudi investigation was compatible with Article 5 of the Convention.

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The Attorney General is a political appointee, member of the Government and the Government’s chief legal adviser. The office also has a legal role, however, in being responsible for all crown or state litigation. In addition, the Attorney General superintends the Director of the Serious Fraud Office.  
[www.attorneygeneral.gov.uk/](http://www.attorneygeneral.gov.uk/)

Yet during the judicial review brought by The Corner House and Campaign Against Arms Trade of the SFO decision, the SFO Director stated to the courts categorically that he would have taken the same decision regardless of the UK's obligations under the Convention and that Article 5 "was not a critical or decisive matter for me".

"I should emphasise that my understanding of the effect of Article 5 was not a critical or decisive matter for me. . . [E]ven had I thought that discontinuing the investigation was not compatible with Article 5 of the Convention, I am in no doubt whatever that I would still have decided . . . that the investigation should be discontinued."

(Robert Wardle, First Witness Statement, para 50,  
<http://www.thecornerhouse.org.uk/pdf/document/WardleWitState.pdf>)

The UK government and SFO Director also argued that the SFO Director had no legal duty to abide by Article 5 of the Anti Bribery Convention because it had not been incorporated into UK law. In the UK, an international treaty usually has to be incorporated by an Act of Parliament so as to give it domestic legal effect. But it is a well-established principle of UK public law that where a public body had stated that it has complied with, or taken into account, an international law obligation when making a decision, the court has jurisdiction to review the decision so as to assess compliance with that obligation.

The House of Lords final judgment in the judicial review makes it clear that the UK has failed to incorporate Article 5 of the Anti Bribery Convention into domestic law, and that the Article's provisions are completely unenforceable in the UK. This means that, regardless of whether or not it was unlawful for the SFO to halt the BAE investigation, the UK is in breach of its international law obligations.

**5. The OECD's Working Group on Bribery (WGB)** comprises public servants from the 37 country signatories to the Convention. It monitors parties' performance in implementing the Convention through a peer review process to which parties agree when they sign and ratify the Convention. The monitoring process usually comprises just two stages: Phase 1 assesses legislation and Phase 2 examines overall implementation. In rare cases, however, where countries fail to meet their commitments, a follow-up evaluation of key weaknesses, Phase 1*bis*/Phase 2*bis*, is carried out. Today, the OECD published its Phase 2*bis* report on the UK.

On 18 January 2007, the WGB issued a press release stating that it "has serious concerns as to whether the [SFO] decision [to stop the BAE-Saudi investigation] was consistent with the OECD Anti-Bribery Convention."

([http://www.oecd.org/document/43/0,3343,en\\_2649\\_37447\\_37948971\\_1\\_1\\_1\\_37447\\_00.html](http://www.oecd.org/document/43/0,3343,en_2649_37447_37948971_1_1_1_37447_00.html))

On 14 March 2007, the WGB reaffirmed its "serious concerns" about the halting of the investigation; highlighted additional concerns about deficiencies in the UK's foreign bribery and corporate liability laws and its systems for investigating and prosecuting foreign bribery; and announced its decision to conduct a supplementary

Phase 2*bis* review of UK implementation of the OECD Anti-Bribery Convention (*see* <http://www.oecd.org/dataoecd/43/13/38962457.pdf>.)

The UK's Phase 2*bis* review focused on:

- progress in enacting a new foreign bribery law;
- progress in broadening the liability of legal persons for foreign bribery [to encompass corporations as well as individuals];
- whether systemic problems ... explain the lack of foreign bribery cases brought to prosecution;
- matters raised in the context of the discontinuance of the BAE . . . investigation.

The earlier Phase 2 report on the UK's implementation of the Anti Bribery Convention, released on 17 March 2005, highlighted the following weaknesses:

- complexity and uncertainty of existing anti-corruption laws;
- inadequacy of the basis for engaging corporate liability;
- excessive fragmentation and lack of specialised expertise among law enforcement agencies dealing with overseas corruption;
- lack of resources for investigating foreign bribery cases, processing money laundering reports and handling requests for Mutual Legal Assistance (MLA);
- high level of proof required by law enforcement agencies to open an investigation;
- potential for 'national interest' considerations, such as damage to the UK economy, to influence the decision to open an investigation or not.

This report made several recommendations aimed at enhancing the UK's capacity to deter, detect and sanction foreign bribery offences. Two of these recommendations were to focus on:

“the performance of the SFO and other relevant agencies with regard to foreign bribery allegations...including in particular with regard to decisions not to open or to discontinue an investigation.”

“[taking measures to] ensure that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved [Article 5].”

## **6. Updating the UK's bribery and corruption legislation**

In November 2007, the Law Commission (a statutory independent body that reviews the law and recommends reform where needed) announced a public consultation on reforming the UK's corruption laws, and said it would publish a final report and draft Bill before the end of 2008. (*See* The Corner House submission to this consultation: <http://www.thecornerhouse.org.uk/pdf/document/LawComCHSub.pdf>)

On 18 December 2007, the Secretary of State for Business Enterprise and Regulatory Reform, John Hutton MP, whom the Prime Minister had appointed as “international

anti-corruption champion”, announced a UK Anti-Corruption Plan that included this 2008 date.

Yet the Government’s latest “UK Strategy on Tackling Foreign Bribery”, published just two days before the OECD Phase *2bis* review, has pushed this date back to 2009 – a whole decade since the OECD Anti Bribery Convention came into force, and well over a decade since the UK signed up to it (*see* “UK Note on the new UK Government strategy on tackling foreign bribery”, Ministry of Justice, undated, but deposited with House of Commons and House of Lords on 15 October 2008. [www.parliament.uk/deposits/depositedpapers/2008/DEP2008-2382.doc](http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-2382.doc)).

### **7. Draft Constitutional Renewal Bill**

Despite the UK’s tardiness in updating its anti-corruption legislation, it has proposed legislation, the draft Constitutional Renewal Bill published on 25 March 2008, to make sure that the Government, through the Attorney General, can stop a bribery investigation or any prosecution by invoking “national security”, that there is no meaningful judicial or parliamentary scrutiny of such a decision, and that “international relations” can be cited as a reason not to provide information to Parliament. The practical effect of such legislation would be to sanction legally the UK Government to ignore international anti-bribery legislation whenever it wanted to.

*See:*

--“Note on draft Constitutional Renewal Bill for OECD” by Dinah Rose QC, Ben Jaffey, Richard Stein and Jamie Beagent, 31 March 2008, <http://www.thecornerhouse.org.uk/summary.shtml?x=561252>

--“Government proposes legislation to make BAE-Saudi corruption judicial review impossible in future”, Corner House press release, 4 April 2008, <http://www.thecornerhouse.org.uk/pdf/document/PRConsRenBill.pdf>