



UNITED KINGDOM: PHASE *2bis*

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 16 October 2008.

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EXECUTIVE SUMMARY

The Phase 2 bis Report on the United Kingdom evaluates certain aspects of the UK's track record of implementation of the OECD Anti-Bribery Convention that are of particular concern to the member states of the OECD Working Group on Bribery. Overall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK.

The Working Group is particularly concerned that the UK's continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations. The Working Group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date. The Group also strongly regrets the uncertainty about the UK's commitment to establish an effective corporate liability regime in accordance with the Convention, as recommended in 2005, and urges the UK to adopt appropriate legislation as a matter of high priority.

The Report finds that the unsatisfactory treatment of certain cases since the 2005 Phase 2 report has revealed systemic deficiencies, including the uncertainty over the application of Article 5 to all stages of the investigation and prosecution of foreign bribery cases, and the hurdle created by the special Attorney General consent requirement for foreign bribery prosecutions. The Report finds that these issues should be addressed and that the independence of the Serious Fraud Office should be strengthened. The Working Group also recommends that the UK ensure that the SFO attributes a high priority to foreign bribery cases and has sufficient resources to address such cases effectively.

The Working Group also highlights some positive aspects in the UK's fight against foreign bribery including the allocation of significant financial resources and nation-wide jurisdiction to a specialised unit of the City of London Police for foreign bribery investigations. The Group notes the UK's first conviction in September 2008 for foreign bribery in international business transactions, and its recent anti-corruption strategy to improve and strengthen the UK's law and structures to tackle foreign bribery. Reforms are urgently needed and should be dealt with as a matter of political priority.

In light of the numerous issues of serious concern, the Working Group has requested the UK to provide quarterly written reports on legislative progress for each Working Group meeting and may carry out follow-up visits to the UK. The Working Group may also take further appropriate action after it considers the reports or any on-site visits. The Working Group stresses that failing to enact effective and comprehensive legislation undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks.

The Phase 2 bis Report, which reflects findings of experts from Canada and France, was adopted by the Working Group along with recommendations. This Report is based on the laws, regulations and other materials supplied by the UK, and information obtained by the evaluation team during its on-site visit to London. During the three-day on-site visit in April 2008, the evaluation team met with representatives of UK government agencies, the private sector, and civil society. A list of these bodies is set out in an annex to the Report.

A. INTRODUCTION

1. This Phase 2 bis report evaluates certain aspects of the United Kingdom's track record of implementation of the OECD Anti-Bribery Convention that are of particular concern to the member states of the OECD Working Group on Bribery (WGB or Working Group). It reflects the UK authorities' written responses to the Phase 2 bis questionnaire (hereinafter, the "UK Memo"), interviews with government experts, representatives of the business community, lawyers and representatives of civil society encountered during the on-site visit in London from 1-3 April 2008 (see attached list of participants encountered in Annex 1), information provided by the UK after the on-site visit, and review of relevant legislation and independent analyses conducted by the lead examiners and the Secretariat.¹

1. The Phase 2 bis process

2. The Working Group has reviewed the UK's implementation of the OECD Convention on previous occasions. In the December 1999 Phase 1 Review, the Group expressed "serious concerns" over the UK's foreign bribery legislation and urged the UK to "enact appropriate legislation ... as a matter of priority". The UK amended its law in some respects in 2001. This led the Group to conduct a Phase 1 bis Review in October 2002, and to recommend that the UK "proceed at the earliest opportunity to enact a comprehensive anti-corruption statute" to address several outstanding concerns.

3. A Phase 2 Review followed in March 2005 in which the Group again recommended that the UK adopt modern foreign bribery legislation. The Group also made recommendations on the liability of legal persons for foreign bribery, and the investigation and prosecution of foreign bribery. In accordance with established procedures, the UK was asked to provide a Written Follow-up Report in March 2007 on the implementation of the Phase 2 Recommendations (UK Written Follow-up Report).²

4. In December 2006, prior to the UK Written Follow-up Report, the UK terminated a major foreign bribery investigation concerning the Al Yamamah arms sales contract involving BAE Systems plc and the government of Saudi Arabia. At its January 2007 meeting, the Working Group issued a press release expressing serious concerns about the discontinuance of the investigation. The Group indicated that it would consider the matter further in conjunction with the UK Written Follow-up Report.

5. In March 2007, the Working Group accordingly considered both the UK's implementation of the Phase 2 Recommendations and the termination of the Al Yamamah case. The Group reviewed the

¹ The examining team was composed of three lead examiners from Canada (Ms Lisette Lafontaine, Senior Counsel, Criminal Law Policy, Department of Justice Canada; Mr. Stephen Doust, Legal Officer, Criminal, Security and Treaty Law Division, Department of Foreign Affairs and International Trade; and Inspector Frank Smart, Officer-in-Charge, Calgary Commercial Crime Section, Royal Canadian Mounted Police), three lead examiners from France (Mr. Guillaume Vanderheyden, Adjoint au Chef de bureau "système financier international et préparation des Sommets", Direction générale du Trésor et de la politique économique, Ministère de l'Économie, de l'Industrie et de l'Emploi; Ms Valérie Dervieux, Vice président, Tribunal de grande instance de Paris; and Ms Patricia Dufour, Magistrat, Service Central de Prévention de la Corruption), one member of the Legal Directorate, OECD Secretariat (Mr. Nicola Bonucci, Director), and three members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD Secretariat (Mr. Patrick Moulette, Head of Division; Mr. David Gaukrodger, Principal Administrator - Senior Legal Expert, Co-ordinator Phase 2 bis Examination of the UK; and Mr. William Loo, Legal Analyst).

² The UK Written Follow-up Report and the Working Group's Summary and Conclusions thereof are available at www.oecd.org/dataoecd/43/13/38962457.pdf.

materials submitted by the UK and discussed them with the UK delegation. It concluded that the UK had not fully implemented several Phase 2 recommendations and requested the UK to report orally on developments regarding these recommendations in one year. In addition, because of serious concerns in several areas, the Group decided to conduct a supplementary Phase 2 bis Review that would focus on certain identified issues:

In light of these outstanding issues, the Working Group has decided to conduct a supplementary review of the United Kingdom (“Phase 2 bis”) focused on progress in enacting a new foreign bribery law and in broadening the liability of legal persons for foreign bribery. The Phase 2 bis review will also examine whether systemic problems (including some issues addressed in the general part above) explain the lack of foreign bribery cases brought to prosecution. The review will also address matters raised in the context of the discontinuance of the BAE Al Yamamah investigation. The Phase 2 bis review will include an on-site visit to be conducted within one year, *i.e.* by March 2008.³

2. Co-operation with the review and on-site visit

6. The UK provided a degree of co-operation leading up to the on-site visit. In the UK Memo, the UK provided, at the conclusion of a two-month period, a substantial amount of information in response to a detailed 125-question Phase 2 bis questionnaire. In the areas it addressed, the UK Memo generally provided helpful and responsive information. However, many questions were not answered, including in areas such as the Al Yamamah case, corporate liability, export credit policy and other matters. The examiners note that the Phase 2 bis review was contemporaneous with judicial review proceedings in the UK regarding the Al Yamamah case. Information produced by the parties in the judicial review was made available by the UK over time and it frequently allowed analysis of the issues notwithstanding the limitations of the responses to the questionnaire.

7. Because the UK Memo in response to the questionnaire did not refer to the questionnaire or any questions, it was difficult for the examining team to review the responses to particular questions or to identify unanswered questions. Requests by the examining team prior to the on-site visit for additional answers, or for inclusion of references to question numbers in the existing text, were not followed up.

8. Almost all key government agencies as well as business and civil society were ultimately well represented at the on-site visit. The examiners had extensive discussions with officials, including both senior and operational officials, from key agencies such as the Serious Fraud Office (SFO), the Attorney General’s Office (AGO) and the police. Representatives of different ministries and government agencies were generally co-operative during the on-site visit although there were varying degrees of openness.

9. In response to questions at the on-site visit and subsequently, the UK provided an additional memorandum in the same format as previously and accompanying documents on 18 July 2008, shortly before the draft report was sent to the UK (the “UK Supp. Memo”). The examining team notes that a more prompt provision of requested and promised information would have facilitated the preparation of the report. On 27 August 2008, one week ahead of the agreed deadline, the UK provided additional information and its comments on a draft of the report (“UK Second Supp. Memo”).

³ Summary and Conclusions of the Working Group on the UK’s Written Follow-up Report, para. 24. The visit ultimately took place from 1-3 April 2008 by mutual agreement of UK and the examining team with the consent of the Management Group.

3. Developments after the on-site visit

10. A number of significant developments took place after the April 2008 on-site visit. The UK reported that the number of open investigations continued to climb significantly and by August 2008 had reached a total of 17 SFO cases plus seven cases conducted by the City of London Police Overseas Anti-Corruption Unit (OACU). The increase in the number of open investigations is an important sign of commitment to enforce the foreign bribery offence.

11. In August 2008, the UK also reported its first conviction for foreign bribery in the context of a plea agreement in a case investigated by the OACU. This is also a positive development with regard to the UK's commitment to implementing the Convention. According to media reports, the case involved the 65-year-old managing director of CBRN Team, a UK security company, who paid GBP 83 000 in bribes in 2007-2008 to two Ugandan officials in relation to a GBP 210 000 contract. The briber received a five-month jail sentence suspended for one year.⁴ In a public statement, Ministers underlined the importance the government attaches to enforcement of the foreign bribery offence and to the funding of the OACU.⁵

12. The SFO is the lead agency responsible for investigating and prosecuting foreign bribery in the UK. In September 2007, the SFO submitted its first foreign bribery case (the EFT case) to the Attorney General for her consent to prosecute. Before the Attorney made her decision, a new SFO Director took office in April 2008. The new Director concluded that there was no reasonable prospect of conviction in the EFT case and withdrew the request for consent to prosecute in early June 2008. The case raises serious concerns about both substantive law and applicable procedures and is addressed below in the sections on application of the law to events occurring before 2002; the Attorney General consent requirement for foreign bribery prosecutions; and jurisdictional requirements.

13. Other developments related to the SFO's structure and policies. Around the time when the EFT case was terminated, the actual or expected departures of the Deputy Director and four senior prosecutors from the SFO were announced. The new Director also stated publicly that the SFO would place greater emphasis on consumer fraud and fraud prevention.⁶ Shortly thereafter, the UK advised the Working Group that an SFO request for ring-fenced funding for its overseas corruption unit had been refused. The SFO Director was also considering disbanding the unit and assigning foreign bribery cases to all units in the Office. These developments raise serious questions about the SFO's ability to investigate and prosecute foreign bribery cases effectively. The UK has explained that the ongoing reorganisation seeks to enable the SFO to conduct more timely investigations and prosecutions in cases of serious fraud and overseas corruption, that the appointment of the new Director with a remit to reform the department is a major statement of confidence in the future of the organisation and that the Director has already committed himself to ensuring that sufficient resources are provided to investigating and prosecuting overseas corruption.

⁴ "Government official guilty of corruption", City of London Police News Release (22 September 2008) (www.cityoflondon.police.uk); "Security boss escapes jail over Ugandan bribes", The Times (26 September 2008); "First executive convicted of foreign bribery escapes jail term", The Guardian (27 September 2008); "Ugandan is jailed in UK bribery crackdown", The Guardian (23 September 2008); "Government official guilty of £50,000 corruption", The London Daily News (23 September 2008).

⁵ See "Corruption case success celebrated", BERR website press release (22 August 2008) (www.wired.gov.net/wg/wg-wlabel-dti.nsf/wfArticle?ReadForm&unid=D56A2D4D9E790848802574AD00585A16).

⁶ See "SFO chief stands firm on consumer fraud", Accountancy Age (15 May 2008); "Fraud boss has smaller fish to fry", Financial Mail (25 May 2008); "White-collar crime: SFO boss plans to cut back on prosecutions and investigations", The Guardian (17 July 2008).

14. The UK reported another significant development very recently, during the week of the October 2008 Working Group meeting. In the context of a settlement with the SFO in October 2008, Balfour Beatty, a UK construction company, consented to a civil court order providing for a GBP 2.25 million payment pursuant to a law (the Proceeds of Crime Act) allowing the SFO to seek, in a civil proceeding, the recovery of proceeds of unlawful conduct. There was insufficient time and information to address this very recent matter in any detail in this report, but it is briefly discussed below in the section on the liability of legal persons.

4. The factual record in the Al Yamamah case

15. The Al Yamamah case and its discontinuance are relevant to a number of aspects of this review. The case raises important issues relating to investigation and prosecution, as well as to defects in the foreign bribery offence in the UK. At the time the WGB was considering the discontinuance in March 2007, the UK indicated to the WGB that judicial review proceedings in the UK would be considering the discontinuance of the case including with regard to the Convention. Since that time, the judicial review has resulted in the disclosure by the UK government of a number of contemporaneous documents, redacted in certain cases, that shed light on the events at issue.

16. In the judicial review proceeding, both the Divisional Court and the House of Lords relied on a written record primarily composed of the documents released by the government and the witness statements submitted to the Court by the Director and other government officials. As noted in more detail below, after the Divisional Court's decision, the Director submitted some additional written evidence to the House of Lords.

17. The general factual background to the discontinuance is recounted in the decisions of the Divisional Court and the House of Lords, which were rendered after the on-site visit. The examining team has used the factual record relied on by those courts in this evaluation, including in particular the basic chronology of events set forth at paras. 2-5 and 8-38 of the Divisional Court judgement and paras. 2-22 of the opinion of Lord Bingham of Cornhill in the House of Lords.⁷ Familiarity with the chronology is assumed. Additional facts are identified as necessary in the discussion below, in particular from the bundle of witness statements and documents jointly supplied by the parties to the UK court (the Bundle). The judicial review proceeded on the basis that threats were issued by Saudi officials because the claimants so alleged, the government did not deny the allegations, and the defendant's lawyer indicated that the Court should proceed to review the case on the basis of the facts as alleged by the claimants. The examining team has relied on the same basis for its analysis herein. Similarly, the examiners note that the issue in the judicial review was not related to the merits of the criminal case against BAE or any individual. They underline that this report also does not address the merits of any specific case.

5. Outline of the report

18. The balance of this report is structured as follows. The next two sections address the foreign bribery offence and the liability of legal persons for foreign bribery, including the explanations for the lack of reforms recommended by the Working Group. The report next reviews the domestic status in the UK of Article 5 of the Convention including in light of the arguments in the judicial review proceeding arising out of the discontinuance of the Al Yamamah investigation. The following sections review the issues raised by the roles of the Attorney General and Serious Fraud Office with regard to individual foreign bribery cases, including the Al Yamamah case, and reviews relevant current reform proposals in the UK. The body of the

⁷ The Divisional Court judgement is available at www.bailii.org/ew/cases/EWHC/Admin/2008/714.html. The House of Lords judgement is available at www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner.pdf.

report concludes with sections on certain issues relating to co-operation by the UK with other Parties to the Convention, the investigation and prosecution of foreign bribery generally, and export credit policies. Part K sets forth the recommendations of the Working Group and the issues that it has identified for follow-up.

19. A list of the principal acronyms and abbreviations used in the report is included in Annex 2. The role of the various investigative agencies is described in the Phase 2 Report and is summarised in Annex 3. The principal legislative provisions are reproduced in Annex 4.

B. FOREIGN BRIBERY OFFENCE

1. Current foreign bribery offences

20. The UK has two statutory offences that apply to foreign bribery as well as a common law offence. The offence in the Prevention of Corruption Act 1906 (the 1906 Act) is based on an agent/principal concept. It is an offence, *inter alia*, to give any consideration to any *agent* as an inducement for doing any act to show favour or disfavour to any person, in relation to his/her *principal's* affairs or business. Under the Public Bodies Corrupt Practices Act 1889 (the 1889 Act), it is a crime to corruptly give, promise or offer any gift, advantage etc. to officials of a public body.

21. Foreign bribery can also be covered by the common law offence of bribery, which does not rely on the agent/principal construct. A leading treatise defines this offence as “the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.”⁸

22. Originally, none of these offences expressly referred to bribery of *foreign* public officials. In 2001, Part 12 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act) amended the 1906 Act and the common law offence to expressly cover bribe recipients whose functions have no connection with the UK and are carried out outside the UK. The 1889 Act was also amended to extend the definition of public bodies to equivalent institutions outside the UK.⁹

2. Efforts to reform UK bribery offences

23. Efforts to reform the UK's patchwork of bribery offences date back over many years. A 1998 Law Commission report found that the law was “uncertain and inconsistent”. In accepting the need for reform in 2000, the Government “accept[ed] that there are difficulties of interpreting the language and concepts used in the statutes”.¹⁰ Multiple consultation papers, reports, studies and draft laws have been produced by the government, Parliamentary committees, a Royal Commission, the Law Commission, and NGOs. None have yet resulted in significant revisions to the substantive requirements of the law or any clarifications to make prosecution easier.

⁸ *Russell on Crime*, 12th ed. (1964), p. 381.

⁹ Part 12 of the Anti-terrorism, Crime and Security Act 2001.

¹⁰ Home Office (2000), *Raising Standards and Upholding Integrity: The Prevention of Corruption*, Cm 4759, Chapter 2.

24. The UK deposited its instrument of ratification of the Convention in December 1998. In the Phase 1 examination in December 1999, the Working Group raised serious concerns that the UK's bribery offences applied only to domestic bribery. It therefore urged the UK to enact "a statute specifically prohibiting the bribery of foreign public officials". The UK strongly contested this view, expressly maintaining that its law prohibited foreign bribery as well as domestic bribery.¹¹

25. In June 2000, following the Law Commission's 1998 recommendations and draft bill, the government published its own reform proposal largely based on the Commission's recommendations. The government also committed to bringing forward legislation that would be modelled on the Commission's draft bill, but only when Parliamentary time allowed.¹²

26. Before a bill was drafted to consolidate the law and address the general substantive difficulties with the law, the three bribery offences were amended by the 2001 Act to clarify that they apply to foreign bribery. In its subsequent October 2002 Phase 1 bis review, the Working Group noted that several areas of uncertainty remained because the 2001 Act left the essential elements of the various offences unchanged. The report noted that the UK government had committed to pursuing the wider reform of corruption law, and that the 2001 Act would be repealed and replaced as a part of that reform. The Working Group recommended (at pp. 16-17) that the UK "proceed at the earliest opportunity to enact a comprehensive anti-corruption statute". This recommendation has not been implemented in the six years since it was made.

27. The government's draft Corruption Bill arrived only in March 2003. A Joint Committee of the House of Commons and House of Lords sharply criticised a number of aspects of the bill, including its complexity and its reliance on an agent/principal construct. In December 2003, the government accepted some of the Committee's recommendations (but not its suggested elimination of the agent/principal construct) and undertook to introduce a revised Bill in Parliament.¹³ No revised bill was produced.

28. The Working Group's March 2005 Phase 2 Report on the UK "share[d] the widely-held view that the current substantive law on foreign bribery in the UK is characterised by complexity and uncertainty". Because of the deficiencies in the law, the report again recommended (§§ 181-194, 248) that the UK enact foreign bribery legislation at the "earliest possible date".

29. Two years after undertaking to revise the draft Bill, the government abandoned this course of action in December 2005. Instead, it opted for another consultation paper because it considered that there was no consensus on a bill. A number of NGO representatives at the Phase 2 bis on-site visit stated that the government had done little to achieve consensus. Notwithstanding the Phase 2 Report and recommendations, the December 2005 consultation paper stated that the existing law complied with the OECD Convention and opposed a standalone foreign bribery offence.¹⁴ The comment period ended in March 2006, but there was no government response to the comments in 2006.

¹¹ See, e.g., Phase 1 Report at 24 ("It is the view of the UK government that the 1906 Act applies to foreign public officials.")

¹² Home Office (2000), *Raising Standards and Upholding Integrity: The Prevention of Corruption*, Cm 4759.

¹³ Joint Committee on the Draft Corruption Bill (2003), *Report and Evidence*, HL Paper 157 / HC 705; Secretary of State (2003), *The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill Session 2002-2003 HL Paper 157, HC 705*.

¹⁴ Home Office (2005), *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper*, paras. 24-25.

30. In March 2007, a year after the end of the comment period and shortly before its Written Follow-up Report, the government published the results of its consultation and concluded that there was significant opposition to submitting the 2003 Bill to Parliament. The UK reiterated the undesirability of separate foreign and domestic bribery offences. Instead of drafting a new bill, the government referred the matter to the Law Commission for the second time on the grounds that the Commission was best placed to seek consensus on the model for reform.¹⁵

31. In its conclusions on the UK's March 2007 Written Follow-up Report, the Working Group decided that a supplemental on-site visit and report on the UK's implementation of the Convention were necessary because of, *inter alia*, the lack of meaningful progress with regard to reform of foreign bribery law. The lack of reform appeared to be attributable at least in part to the UK's view that "its current law complies with the Convention and that change is only a 'desirable measure of law reform,'" a position that the WGB found to be "surprising and of serious concern". The SFO Director had repeatedly stated in public that the UK corruption law was antiquated and "in need of overhaul".¹⁶ The Group again urged the UK to accelerate the reform process.

32. In November 2007, the Law Commission published a second consultation paper on bribery reform. The paper proposed a new general bribery offence and a separate foreign bribery offence, contrary to the government's position in 2005 and 2007.¹⁷ The consultation closed on 20 March 2008. At the on-site visit, the Law Commission stated that it expected to publish a report and draft bill by October 2008. After the visit, the UK stated that the Law Commission report was expected by early November 2008, *i.e.* shortly after the Working Group adopted the present Phase 2 bis Report.¹⁸

33. After the Law Commission publishes its report, the matter will revert again to the government. In an open letter to the Prime Minister, the UK government's "international anti-corruption champion" stated that "[o]nce [the Law Commission's] review is complete we will be seeking to bring forward legislative proposals as soon as we are in a position to do so. The challenge for the Government is to bring the Bill before Parliament in the 4th session [November 2008 to November 2009] and to be in a position to announce this in [the November 2008] Queen's speech."¹⁹ The examiners note that the UK has explained that this letter does not amount to a statement of Government intent.

34. The government's May 2008 draft legislative programme published after the on-site visit already signalled a longer timetable. The document only envisioned a draft bill being published – as opposed to a bill being considered by Parliament - during the 2008-2009 legislative session.²⁰

¹⁵ Home Office (2007), *Consultation on Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials – Summary of Responses and Next Steps*, paras. 2, 70 and 99.

¹⁶ Summary and Conclusions of the Working Group on the UK's Written Follow-up Report, para. 20; Interviews of Robert Wardle, then SFO Director in "Call for Reform of Anti-Corruption Laws" *Financial Times* (26 February 2007); "My Job Was Never on the Line over BAE 'Bribes' Case", *The Mail on Sunday* (18 March 2007). See also "Time Runs out for SFO Dogged by Delays and Embarrassment", *The Guardian* (17 July 2007); "The Fall Guy", *The Guardian* (18 April 2008).

¹⁷ Law Commission (2007), *Reforming Bribery – A Consultation Paper*, Consultation Paper No. 185.

¹⁸ UK Second Supp. Memo at p. 5.

¹⁹ Secretary of State for Business Enterprise & Regulatory Reform (December 2007), *UK Anti-Corruption Action Plan*. The Secretary of State was named by the Prime Minister as the government's international anti-corruption champion in the summer of 2007.

35. In an October 2008 letter to the Working Group Chair, the Lord Chancellor and Secretary of State for Justice “underlined [the UK’s] commitment to bribery law reform by announcing in May [2008] in the Draft legislative programme [the UK’s] intention to publish a draft Bill for pre-legislative scrutiny during the 2008/9 Parliamentary session. The scrutiny process should take about three months to complete. The next steps to implement law reform will be determined following the scrutiny exercise.” The examiners note with serious concern that no firm timetable is yet available.

Commentary:

The lead examiners are extremely disappointed and gravely concerned by the continuing lack of implementation of previous Working Group recommendations going back to the 1999 Phase 1 and 2002 Phase 1 bis Reviews that the UK enact foreign bribery legislation at the “earliest possible date”. The government has not yet even presented a bill to Parliament to address long-standing deficiencies. The lead examiners strongly recommend that the UK enact effective and modern foreign bribery legislation as a matter of high priority and make all possible efforts to ensure that the process is as speedy and effective as possible.

3. Specific issues

(a) Principal consent defence

(i) Current law

36. As noted above, the bribery offence in the 1906 Act 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 defence to the agent’s liability for breach of trust. Article 1 of the Convention does not contemplate an exception to the offence of foreign bribery where the person bribed acts with the consent of his/her principal. The question thus arises whether principal consent is a defence to foreign bribery under the 1906 Act.

37. The UK was categorical in Phase 2 that principal consent could not be a defence. In a letter to the Working Group in March 2005, the UK stated that principal consent was a “non-issue”:

There is [...] no ground in the [1906] Act for the idea that the principal’s consent makes any difference, nor in nearly 100 years of case law has there been any known attempt to allege that it does. This is a non-issue and we believe it could be counter-productive for the [Phase 2] report to raise it and suggest follow-up. While prosecutors have confirmed there is no ground for the view [that principal consent is a defence], and will rightly disregard it, some people could be misled. It will be unhelpful to our awareness-raising efforts if the Working Group lends its name to a view that the law does not apply on the spurious ground of “principal’s consent”.

It should be added that the 1906 Act is not the only offence that could be used in any case: there is a common law offence that applies to the bribery of anyone in a public office. Both were amended in 2001 to make clear their foreign application, and Phase 1bis concluded that “UK law now addresses the requirements set forth in the Convention”.²¹

²¹ UK’s submission to the Working Group dated 10 March 2005 concerning the draft Phase 2 Report. See also *Phase 2 Report: United Kingdom*, para. 182.

38. This position sharply contrasts with the views of the Attorney General when the Al Yamamah investigation was dropped in late 2006. In a January 2007 interview, the Attorney stated that principal consent was the “principal obstacle” to the prosecution:

AG: [...] I very carefully considered this case. I talked it through over a matter of days with the SFO investigators and their lawyers. I had independent legal advice from a senior experienced criminal QC. My judgement was that this case at the end of the day wouldn't have led to a successful prosecution.

Interviewer: Can I just take you back...

AG: Let me just finish the point here. I just want to make this clear because I know the SFO have said something different. I entirely respect the SFO. They recognise they weren't going to prosecute for anything pre-2002. A lot of the stuff that's been in the newspapers and the comment has been about “this payment has been made here, that payment has been made there”. People saying, “what about this invoice and that invoice?” It's all pre-2002.

The SFO accepted that they wouldn't prosecute in relation to pre-2002 because that's when we changed the law. They said they would need another 18 months to investigate. They were clear that there remained, as they put it, issues to determine. My judgement was there were obstacles they would not overcome.

Interviewer: What were those obstacles?

AG: The principal obstacle, BAE were asserting that the payments they were making had been authorised at the highest level.

Interviewer: The highest level of the Saudi monarchy?

AG: Yes, the Saudis. I am using that in a general sense ... [pauses] ... Normally to produce a corruption case you normally will call somebody senior from the company to say, “good heavens, I never knew the marketing director was taking used £50 notes, or getting a free subscription to the golf club, or having his roof done”, or whatever it may be. That's the first person you call. How were the SFO going to deal with that in this case? Were they going to be able to call someone from Saudi to say this wasn't authorised? That's an insuperable problem.²²

39. At the on-site visit, several panellists disagreed with this view and did not see principal consent as a valid defence. As noted in the UK's submissions quoted above, the principal consent defence arises only for an offence under the 1906 Act. Offences under the common law and the 1889 Act (as amended) do not rely on the agent/principal concept and should thus be unaffected by principal consent. But regardless of the defence's status or scope in UK law, the Al Yamamah case shows that principal consent at a minimum interferes with the investigation and prosecution of foreign bribery cases in practice.

40. Another case corroborates these concerns over the principal consent defence. Sometime before 2004, Jersey investigated several major UK defence companies for bribing Qatari officials. It eventually

²² “Interview Transcript: Lord Goldsmith”, Financial Times (31 January 2007). The discussion of both the pre-2002 nature of the events and principal consent is included to ensure the full context is provided. The issue of the application of the law to pre-2002 events is addressed below.

discontinued the investigation because “written confirmation provided by the Emir of Qatar that the commission payments, made under the single advisor agreement that was under investigation, had been made with his knowledge and approval.” The UK considered and decided against opening its own investigation because the Emir’s confirmation was also “a material obstacle to any prosecution” in the UK for corruption.²³

41. To conclude, the examiners are concerned about the impact of this defence on the two cases referred to above. Whether principal consent is a valid defence in UK law may not be entirely clear. What is clear is that the defence has become a basis for terminating foreign bribery investigations and prosecutions. The UK should therefore promptly amend its law to expressly clarify that the defence does not exist with regard to foreign bribery.

Commentary:

The examiners recommend that the UK ensure that its legislation applicable to foreign bribery does not permit principal consent as a defence.

(ii) *The Law Commission’s proposal on the agent/principal concept*

42. The Law Commission has proposed a new foreign bribery offence which, on its face, does not rely on the agent/principal concept.²⁴ This is a major step forward, but it is questionable whether the principal consent defence has been fully eliminated.

43. The principal consent defence could reappear through two proposed defences. The Law Commission asked consultees to consider a defence of reasonable belief that an act of bribery is legally *permitted*. The Law Commission further proposed a defence of reasonable belief that an act of bribery is legally *required*. It is debatable whether these defences would apply to a briber who believes that a principal has consented to the payment of an advantage. Further concerns over these defences are discussed below.

(b) *Application of the foreign bribery offences to acts committed before 2002*

44. As noted above, at the time of the 1999 Phase 1 Review, the UK’s statutory and common law bribery offences did not expressly refer to foreign bribery. The Working Group accordingly expressed “serious concerns” that the offences did not apply to the bribery of foreign public officials. The UK strongly disagreed and maintained that its statutory and common law bribery offences applied to foreign bribery.²⁵ The question was resolved for the future when the 2001 Act came into force in 2002, which expressly added a foreign element to the offences.

45. The issue of whether the pre-2002 legislation applied to foreign bribery re-emerged in the Al Yamamah case. In addressing the House of Lords in December 2006 on the termination of the Al Yamamah investigation case, the Attorney General stated that the common law and statutory bribery offences did not cover pre-2002 conduct:

The SFO has divided its investigation of these matters into three periods.
The first period, which it has termed phase one, runs from the mid-1980s

²³ *Phase 2 Report: United Kingdom*, para. 140.

²⁴ Law Commission Consultation Paper, paras. 7.36-7.37.

²⁵ *Phase 1 Report: United Kingdom*, pp. 26-27.

until the coming into force of the Anti-terrorism, Crime and Security Act 2001. This Act extended the pre-existing law of corruption to the bribery of overseas officials. The view of the SFO in relation to these payments is that no prosecution should be brought before the coming into force of the new Act. That is a view with which I concur.²⁶

46. Subsequent events suggest that the SFO's position may be more nuanced. In any event, by September 2007 the SFO believed that it could prosecute pre-2002 conduct. At the on-site visit, the Director stated that there were three investigations involving alleged foreign bribery committed before 2002. Barrister's advice was sought in each case on whether prosecution of pre-2002 conduct is viable. One of the cases (the EFT case) was submitted to the new Attorney General (appointed in June 2007) in September 2007 to seek her consent to prosecute. The Attorney also sought independent legal advice and was expected to consider whether the statutory and common law bribery offences cover pre-2002 conduct. As discussed elsewhere in this report, the Director of the SFO appointed in April 2008 ultimately withdrew the request for consent to prosecute because he considered that the case lacked sufficient merit. The UK has stated that this decision was not based on the pre-2002 nature of the events, but was rather based on uncertainties relating to jurisdiction.

47. A second issue is whether the UK's bribery offences apply to bribe payments made after 2002 pursuant to an agreement made prior to that date. In the Al Yamamah case, the SFO uncovered evidence of GBP 3 million of undue payments of this nature.²⁷ The Attorney General appeared to have disregarded these payments when evaluating the strength of the Al Yamamah case.²⁸ The Working Group has insisted that bribes paid after the entry into force of the implementing legislation constitute bribery regardless of whether they are made pursuant to agreements that pre- or post-date the legislation.²⁹

48. The explanation of the termination of the Al Yamamah case casts doubt on whether the UK is prepared to act in practice on its view that its common law and statutory bribery offences apply to acts committed before 2002. This is especially unfortunate since there have been no judicial rulings to the contrary.

Commentary:

The UK has consistently stated to the Working Group that its common law and statutory bribery offences applied to foreign bribery that occurred before 2002. However, as noted above, some uncertainty on this issue has also been expressed. In cases where there is otherwise sufficient evidence, prosecution of cases to test and clarify the law on this point through court decisions should be considered to be in the public interest.

(c) Legal issues relating to possible role of UK government officials

49. In certain industries, a government can be closely involved in a business transaction between a company in that country and a foreign entity. If the transaction allegedly involves bribery, sensitive legal issues could arise. There are two aspects to the problem. First, the government's officials may know or

²⁶ Statement of the Attorney General in the House of Lords, Hansard HL vol. 687 cols 1711-3 (14 December 2006). As set forth above, the Attorney repeated this view in an interview in January 2007.

²⁷ SFO presentation to the Working Group, January 2007.

²⁸ Statement of the Attorney General in the House of Lords, Hansard HL vol. 687 cols 1711-3 (14 December 2006).

²⁹ For example, see Convention Art. 1; *Phase 1 Report: France*, pp. 5-6 and 30; and *Phase 1 Report: Chile*, para. 11.

even approve of the briber's actions. The briber may then assert alleged defences (or contend that he/she lacks the necessary intent) because the bribes paid were allegedly consistent with the government's policy.³⁰ Second, there may be complicity by government officials. The UK indicates that a UK public official who aids, abets, counsels or procures the commission of foreign bribery by a company is guilty of an offence.³¹

50. SFO investigators were aware from the outset of the issues of possible official approval or complicity in the Al Yamamah case. They indicated that they spent a lot of time examining government records and had not found any evidence of complicity at the time the investigation was discontinued.

(d) Bribery through a non-UK intermediary

51. The recent Law Commission consultation paper has identified a shortcoming that has so far been overlooked. Under UK law, it may not be a crime for a person to use a non-UK national as an intermediary to bribe a foreign public official if the act of bribery takes place outside the UK. This is because the UK has 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 UK territory, the intermediary has not committed a crime under UK law since he/she is not a UK national. It follows that the person who used the intermediary cannot be secondarily liable for aiding or encouraging the commission of a crime.³² At the on-site visit, the Ministry of Justice agreed that this is a correct statement of the law.

52. This is a significant shortcoming in the current UK law. It is widely accepted that the use of foreign intermediaries is a common *modus operandi* for companies that bribe foreign public officials. The present UK law may allow such companies to do so with impunity, which would clearly contravene Article 1 of the Convention. The Law Commission has made a series of proposals that would rectify this situation.³³ But given the general concerns over the delay in implementing the Law Commission's recommendations, the examiners believe that the UK should promptly amend its laws in order to eliminate this specific loophole.

53. On the eve of the Working Group meeting to discuss the draft Phase 2 bis report, the UK referred the lead examiners to the provisions on assisting and encouraging crime in the Serious Crime Act 2007. These provisions came into force on 1 October 2008 and, according to the UK, may resolve some of the problems with the current UK law on extraterritorial foreign bribery through non-UK intermediaries. Unfortunately, the lead examiners were unable to evaluate these provisions given the limited time.

³⁰ A similar argument was raised in a U.S. prosecution under the FCPA: *United States of America v. Giffen*, (8 December 2006), Court of Appeal 2d Cir. No. 05-5782-cr at pp. 3 and 7 (www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA1LTU3ODItY3Jfb3BuLnBkZg==/05-5782-cr_opn.pdf).

³¹ Section 8 of the Accessories and Abettors Act 1861 states that "Whoever shall aid, abet, counsel or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be tried, indicted and punished as a principal offender".

³² ATCSA 2001, Section 109; Law Commission Consultation Paper, paras. 7.23-7.24, 10.2-10.5, 10.13, 11.11-11.24 and 11.43.

³³ Law Commission Consultation Paper, paras. 11.54-11.66.

Commentary:

In light of the prevalence of bribery committed through intermediaries, the examiners recommend that the UK ensure that it criminalises extraterritorial foreign bribery committed through an intermediary who is not a UK national.

4. Additional issues concerning the Law Commission’s proposals

54. Consistent with previous Working Group practice, the examiners did not give the same level of scrutiny to the Law Commission’s proposals as to the present law. They note that the Law Commission’s proposals are of a preliminary nature. However, they did discuss several features of the proposals with various panellists during the on-site visit.

(a) Definition of foreign public officials

55. The present UK statutory bribery offences do not autonomously define foreign public officials, while the common law offence covers persons in public office. When the 2001 Act was debated in Parliament, the Attorney General gave assurance that these offences taken together would “cover all the categories of public officials that the OECD Convention require[s] to be covered”.³⁴ The Phase 2 Report noted that bribery of members of Parliament is covered by the common law offence but not the statutory one.³⁵

56. The Law Commission’s proposed foreign bribery offence does not define foreign public officials. At the on-site visit, the Law Commission stated that it would consider including a definition of foreign public official in its final report and draft bill.

(b) Act or omission outside of the competence of the foreign public official

57. The Convention covers bribery in order that an official “act or refrain from acting in relation to the performance of official duties”. This includes any use of the public official’s position, whether or not within the official’s authorised competence. For instance, as Commentary 19 notes, the offence should apply to the case where “an executive of a company gives a bribe to a senior official of a government, in order that this official use his office - though acting outside his competence - to make another official award a contract to that company”. In this regard, it appears that the proposed offence may be narrower than the Convention. It covers bribery in order that a foreign official act or omit to act in his/her *capacity* as a foreign public official. On its face, the offence does not cover an official who acts outside his/her competence.

(c) Foreign bribery through an intermediary and the defences of preventing an offence/harm and acting reasonably

58. As noted above, the present UK law criminalises bribery through an intermediary via the concept of secondary liability. The intermediary is guilty of foreign bribery as a principal offender. The briber is liable as an accessory who assists or encourages the intermediary (secondary liability).³⁶ The Law Commission has proposed a defence to secondary liability. A briber who uses an intermediary would not be guilty if (a) he/she acts “for the purpose of preventing the commission of an offence or to prevent or

³⁴ Hansard HL vol. 629 cols. 818-9 (4 December 2001).

³⁵ *Phase 2 Report: United Kingdom*, paras. 184-185.

³⁶ Law Commission Consultation Paper, paras. 7.24, 10.2-10.5 and 10.13.

limit the occurrence of harm”, and (b) it was reasonable to so act in the circumstances. Put differently, the briber is not liable if he/she “was seeking to prevent greater harm.”³⁷

59. The defence could contravene the Convention. Article 1 does not contemplate liability being qualified in such terms. Furthermore, the Consultation Paper does not delimit the scope of “harm”. The defence presumably goes beyond the prevention of *physical* harm, which is the subject of a separate proposal by the Law Commission (see defence of emergency below). If so, the defence could arguably have broad application, *e.g.*, bribery in order to avoid losing a contract and jobs, which could be economically harmful to a community.

(d) Defences of “emergency” and reasonable belief that an act of bribery is required or permitted

60. The Law Commission proposes two new defences for bribery cases, including foreign bribery, and invites comment on a third. First, it proposes a defence for a person who reasonably believes that the act of bribery is legally required. The onus would be on the prosecution to disprove the defence once the defendant has met an evidential burden. The Law Commission also invited submissions on a defence of reasonable belief that an act of bribery is legally *permitted*.³⁸ These defences of mistaken belief go beyond Commentary 8, which allows bribes permitted or required by the law of the foreign public official’s country only under specific circumstances; it does not include a mistaken belief that a bribe is legally permitted or required. Commentary 8 is limited to the *written* law or regulation of the foreign public official’s country, including case law. The defences of reasonable belief do not have such a requirement. As noted above, the defences could also reintroduce a *de facto* defence of principal consent.

61. Second, the Law Commission proposes a defence of “emergency”. The generally applicable defences of duress by threats and duress of circumstances arise when a person commits a crime in order to avoid imminent threats of *death* or *serious* injury. The proposed defence of emergency, which would apply only to bribery offences, would extend the principle to imminent danger to any physical harm to the offender or someone else. The offender must also reasonably believe that bribery is the only realistic way of avoiding the threat.³⁹

62. These defences raise several questions. Article 1 of the Convention does not contemplate defences of this nature. As well, all three defences are not general defences under UK law; they would be specific defences applying only to (domestic and foreign) bribery. The reason for this special treatment is not clear. From a policy perspective, the defences could have broad application and could be open to abuse.

(e) The proposed general bribery offence

63. The Law Commission proposes the creation of two bribery offences: a general bribery offence and a foreign bribery offence. However, the former can still be applied to bribery of foreign public officials. In other words, the prosecution may choose between the two offences.⁴⁰ This proposed flexibility is welcome particularly since the general offence may evolve over time. The general offence also avoids some of the potential pitfalls in the foreign bribery offence. For instance, there is no requirement that a bribed official act or omit to act in his/her capacity as an official.

³⁷ Law Commission Consultation Paper, paras. 10.15-10.16 and 10.24; Law Commission (2007), *Participating in Crime*, Law Com No. 305, paras. 5.1-5.23.

³⁸ Law Commission Consultation Paper, paras. 8.15-8.32.

³⁹ Law Commission Consultation Paper, paras. 8.9-8.14.

⁴⁰ Law Commission Consultation Paper, paras. 7.1-7.6 and 7.42.

64. On the other hand, the general offence may have its own shortcomings when applied to foreign bribery. The prosecution is required to prove that the official breached a legal or equitable duty. The Law Commission acknowledges that this would create “an unacceptable burden” in the case of foreign bribery. It would also require proof of foreign law and thus render the offence non-autonomous. Furthermore, the offence does not define a public official and hence may not cover all types of foreign public officials contemplated by the Convention. As well, the Law Commission acknowledges that the proposed offence will not cover all cases in which a person bribes an official “to do the right thing”, e.g., when the payment made no difference to the official’s performance of his/her functions.⁴¹ Finally, the briber must also intend or foresee a serious risk that the advantage would be the *primary reason* for the official to perform an improper act. The Phase 2 Report (para. 191) criticised a similar requirement in the 2003 Draft Corruption Bill.

Commentary:

In conformity with standard procedures, the Working Group will assess any relevant new bribery legislation after it is enacted.

C. LIABILITY OF LEGAL PERSONS

65. The issues in this area primarily involve an evaluation of the UK explanations for its lack of action with regard to the Phase 2 recommendation to strengthen the rules on liability. An understanding of the context for the Phase 2 bis review is relevant to evaluating the UK explanations. The context includes in the first instance both previous Working Group reports and the UK responses thereto. It also includes a WGB response to a Law Commission description of the WGB’s alleged prior findings concerning the UK. This section then addresses whether there is any evidence that the regime has become more effective since the Phase 2 review and the experience of law enforcement authorities, and particularly the SFO, with corporate liability; and evaluates the government’s explanations for its lack of action to date with regard to the recommendation.

1. Context for the Phase 2 bis review

(a) *Previous Working Group reports and UK responses*

66. The March 2005 Phase 2 Report on the UK by the WGB analysed the law on the liability of legal persons in the UK. It found that (1) only one company has ever been prosecuted for bribery since the UK adopted bribery legislation in 1906 and the conviction was overturned on appeal; (2) the doctrinal requirements for corporate liability preclude any likelihood of liability for most companies; and (3) the law was such as to dissuade in practice any attempts to prosecute. Based on this finding that the law did not create effective liability, the WGB, citing Article 2 of the Convention, recommended that the UK “broaden the level of persons engaging the criminal liability of legal persons for foreign bribery offences”.⁴²

⁴¹ Law Commission Consultation Paper, paras. 4.51-4.53, 5.18-5.19 and 5.47-5.55.

⁴² UK Phase 2 Report § 255(c).

67. A November 2005 Home Office consultation paper on bribery law reform stated the government position that the UK is in compliance with Article 2 notwithstanding the lack of effectiveness of the liability of legal persons.⁴³ It stated (§ 26) that the Phase 2 recommendation “does not imply non-compliance with the OECD Convention, as it goes beyond its scope”. No reform efforts were undertaken and the 2005 consultation paper did not seek input on the issue of corporate liability.

68. Under normal WGB procedures, in March 2007, approximately two years after its Phase 2 Report, the UK produced a Written Follow-up Report for the Working Group’s review. The UK restated its 2005 view that it is in compliance with Article 2 and that reform is not required. Based in part on the deficiency of UK law, the Working Group decided to conduct a supplementary Phase 2 bis review specifically focused on “progress ... in broadening the liability of legal persons for foreign bribery”.⁴⁴

(b) *The Law Commission’s treatment of corporate liability for bribery and the Working Group’s response*

69. A long-standing Law Commission project involving codification of UK criminal law (which is currently found in a large number of discrete statutes as well as in judicial decisions comprising the common law) was re-launched in 2002.⁴⁵ The Law Commission agreed with the government that it would review of Part 1 of its 1989 Draft Criminal Code, which focuses on a series of broad issues including corporate liability. As of March 2008, however, the Law Commission website on the codification project did not refer to any ongoing work on corporate liability.⁴⁶

70. The government’s March 2007 reference to the Law Commission with regard to bribery law did not refer to corporate liability. However, the Commission’s November 2007 consultation paper does address corporate liability to some degree because the Commission was concerned about whether current law adequately met the UK’s international commitments in relation to bribery. The Commission, however, found that the no attention to corporate liability is required to meet the standards of the Convention because it considered that the OECD (in practice the WGB) accepted in the Mid-term Study of Phase 2 Reports that UK law complies with the Convention in this area.⁴⁷

71. In January 2008, the WGB responded by a letter to the Commission.⁴⁸ The letter quoted the Phase 2 findings and recommendation. It also pointed out that the Phase 2 bis review was directed at, *inter alia*, deficiencies in corporate liability. The letter disagreed with the suggestion that the Mid-term study

⁴³ See Home Office (2005), *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper* (www.homeoffice.gov.uk/documents/450272/2005-cons-bribery?view=Binary).

⁴⁴ Summary and Conclusions of Working Group with regard to the UK’s Written Follow-up Report § 24.

⁴⁵ See Secretary of State for the Home Department, the Lord Chancellor and the Attorney General (July 2002), *Justice for All*, para. 7.16, CM 5563 (www.cjsonline.gov.uk/downloads/application/pdf/CJS%20White%20Paper%20-%20Justice%20For%20All.pdf). In addition to corporate liability, the issues are the external elements of offences (including causation); fault; corporate liability; defences; incapacity and mental disorder; and the inchoate offences of attempt and conspiracy.

⁴⁶ See www.lawcom.gov.uk/codification.htm (reviewed in March 2008).

⁴⁷ The Mid-term study, a review of the first 21 Phase 2 country reports, is available at www.oecd.org/dataoecd/19/39/36872226.pdf.

⁴⁸ This background section describes only the pre-on-site visit WGB response to the paper. The paper’s proposals are discussed more generally below.

constituted a finding that UK law is compliant with the Convention. The letter also noted relevant parts of other Working Group reports and in particular the 2006 *Phase 2 Report: New Zealand*:

[T]he 2006 Phase 2 report on New Zealand notes that New Zealand applies the same case law principles as in the UK to the liability of legal persons (in particular *Tesco v. Nattrass* and *Andrews-Weatherfoil*). The Working Group, including the UK, approved the report stating that “[t]he lead examiners consider that the current regime of liability of legal persons for foreign bribery in New Zealand is inconsistent with Article 2 of the Convention.”⁴⁹ It recommended that New Zealand “broaden the criteria for the criminal liability of legal persons for foreign bribery”.⁵⁰

72. At the time of the on-site visit, the Law Commission had not issued its final report or otherwise responded to the letter. As noted above, its final report is expected to be issued in November 2008.

2. Issues in the Phase 2 bis review

73. In this context, the Phase 2 bis review examined (1) whether there was any evidence that the regime had become more effective since the Phase 2 review and the experience of law enforcement authorities, and particularly the SFO, with corporate liability; (2) the reasons for the lack of government action to date with regard to the recommendation; and (3) the outlook for the future.

(a) Views about the current regime and the need for reform

74. This review has further confirmed the ineffectiveness of the existing regime of corporate liability for bribery. The UK Memo confirms that there has still only been one (unsuccessful) prosecution of a company for domestic or foreign bribery since the introduction of the 1906 Act. Neither the SFO nor CPS have any record of carrying out any recent prosecution where a company was the intended subject of a prosecution for bribery, domestic or foreign. The UK has never sanctioned a company for engaging in bribery.

75. During the on-site visit, SFO representatives made clear that the SFO considers that current law on corporate liability for bribery is ineffective and unsatisfactory. The SFO’s written response to the Law Commission consultation paper underlined the vital importance of corporate liability to meaningful enforcement of anti-bribery law and cast doubt about the UK’s compliance with applicable international conventions:

We are very concerned that there is a missed opportunity to address the real nature and scale of the problem: corporate liability. [...]

Anti-bribery measures are directed in general at *corporate* activities, it is in the pursuit of corporate objectives that individual employees use bribes. Individuals do the bribing, corporations benefit. Thus to sideline the key player/offender is to ignore the essence of the problem. This is not a case of an offence which *sometimes corporations also commit*, such as for example fraud or even manslaughter. The mischief at which the bribery offences are directed is almost entirely confined within business activity (or organisational activity if public authorities [are] included). [...]

⁴⁹ *Phase 2 Report: New Zealand* at 59 (www.oecd.org/dataoecd/57/38/37658136.pdf).

⁵⁰ *Id.* at 70.

We do not believe that [the Law Commission proposal] will comply with our international Conventions.⁵¹

76. The SFO made clear in its submission to the Law Commission and at the on-site visit that it considers that “[t]he urgency in reforming corporate liability for bribery is much greater than in relation to other offences”. It underlines that many other business related offences are already subject to strict liability.

77. Current SFO policy with regard to whether it is appropriate to prosecute only individuals, only the company, or both, is unclear.

78. The Law Commission emphasised that there was intense business interest in the issue of corporate liability for bribery and business representatives made clear they favoured delaying the issue until, at some later date, it can be considered for all intentional offences. While it is recognised that it might be desirable for the regime to apply to all intentional offences, this argument is no longer acceptable in light of the time the UK is taking to introduce the reform. As many on-site panellists noted, any appropriate harmonisation of the law relating to bribery with a broader corporate liability regime could be addressed if broader reform is subsequently achieved.

(b) Government explanations for the lack of reform

79. As noted above, the UK has not taken any significant action since 2005 with regard to the Phase 2 recommendation. The UK authorities have defended the UK’s decision not to proceed with reform of corporate liability notwithstanding the March 2005 WGB recommendation by contending that the WGB recommendation allegedly goes beyond the scope of Article 2 of the Convention. The examining team does not find this to be a satisfactory explanation for the lack of implementation of the WGB’s March 2005 Recommendation. They consider that there is a lack of political will to achieve compliance with the Convention.

80. The UK suggestion that the March 2005 recommendation is beyond the scope of Article 2 of the Convention raises important issues. The Working Group has repeatedly indicated that it disagrees with that position, most recently in its June 2007 Summary and Conclusions with regard to the UK’s Phase 2 follow-up Report and in deciding to conduct a Phase 2 bis review on the issue of corporate liability. However, because the UK position is the asserted basis for the UK’s lack of action with regard to the March 2005 Recommendation, it is briefly reviewed further herein.

81. Article 2 provides that “[e]ach Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”. The object and purpose of Article 2 of the Convention was to require countries to establish regimes of corporate liability for foreign bribery that would help achieve the overall purpose of the Convention, fighting foreign bribery. Article 2 left member States latitude in choosing how to attain the required liability. In particular, it does not mandate either criminal or administrative liability. However, the form of liability must be effective in order to achieve the purpose of the Convention. Liability that exists only in theory and that cannot be applied in practice to companies that bribe does not achieve the purpose of Article 2.

82. The UK does not suggest that liability in the UK is effective and, as set forth above, such a claim would be inconsistent with the findings in the Phase 2 review and this review.⁵² The UK suggests instead

⁵¹ Response of the Serious Fraud Office to the Law Commission Consultation paper Number 185 Reforming Bribery at pp. 1, 14 (emphasis in original).

that Article 2 requires only that the treatment of corporate liability for foreign bribery be the same, *i.e.* proportionate, to that for other intentional offences.

83. However, it is well established that treaties must be interpreted as a whole. Article 3 requires that sanctions on legal persons must be effective, proportional and dissuasive. As the Working Group has found, only an effective system of corporate liability allows a member country to meet its Article 3 obligation to impose effective and dissuasive sanctions.⁵³ No matter how severe they are in theory, sanctions that cannot be applied in practice are neither effective or dissuasive. Only a requirement of effective liability under Article 2 is consistent with Article 3 of the Convention.

84. The examining team does not consider that the reference in Article 2 to liability being established “in accordance with its legal principles” permits a member state to avoid its obligation to establish effective corporate liability for foreign bribery. This interpretation would defeat the purpose of Article 2, which is to hold companies responsible for engaging in bribery. Article 2 does not specifically require criminal liability in order to allow member countries for which criminal liability of legal persons was unknown and considered inconsistent with its legal tradition to adopt or apply administrative liability of legal persons. This option is reflected in the Commentary to Article 2 and in Article 3(2). While the reference and the generality of the terms of Article 2 allows significant flexibility in terms of how effective liability is achieved, it would undermine the entire structure and purpose of the Convention if it were interpreted to allow for ineffective liability for some countries. The UK has not provided information on any existing non-criminal corporate liability regime that could apply to foreign bribery.

85. As a number of NGO representatives underlined, the UK has created a new regime of statutory corporate criminal liability for manslaughter as a separate offence. The regime eliminates the directing mind requirement to “allow[] an organisation’s liability to be assessed on a wider basis ...”⁵⁴ It is also noteworthy that administrative law regimes allow for substantial financial sanctions against companies in other areas.

86. The March 2008 UK Memo did not refer to any actual or planned government work on corporate liability for bribery. Shortly thereafter, however, during the April 2008 on-site visit, representatives of BERR referred to the government having commenced consideration of some possible administrative or civil law measures that might be developed for companies that engage in bribery. Although the time frame and scope of the activity remain unclear, the examiners note this recent government attention to considering corporate liability. They also note that development of a new administrative law regime could also be a positive undertaking.

⁵² Following the on-site visit, the UK indicated that there had been 16 prosecutions and three convictions of companies (for offences other than bribery) between 2002 and 2006. The facts and legal reasoning have not been supplied. Given the limited information and the absence of any opportunity to discuss the cases during the on-site visit, the examiners’ conclusions about the effectiveness of the regime for bribery remain unchanged.

⁵³ See *Phase 2 Report: Chile*, para. 184 (“The absence of effective liability [for legal persons] precludes effective sanctions.”); *Phase 2 Report: New Zealand*, Commentary following para. 206 (“The examiners consider that New Zealand does not apply effective, proportionate and dissuasive sanctions on legal persons for foreign bribery as required by the Convention principally because of the considerations set forth above relating to the regime for the liability of legal persons.”)

⁵⁴ Ministry of Justice (2007), *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007* at p. 3.

3. Outlook

87. With regard to the existing regime of corporate criminal liability for foreign bribery that was the subject of the Phase 2 Report, the Law Commission indicated at the on-site visit that its general work on corporate criminal liability has begun. However, it does not expect to complete it for another two years and more time could be required if other priorities arise. The Commission could not indicate when the government would respond to a future report of this type; the Commission frequently has to attempt to draw attention to unaddressed reports.

88. The examiners note that the government has committed to give prompt attention to the Law Commission's forthcoming November 2008 report on bribery law. This report could include proposals on corporate criminal liability if the Law Commission reconsiders its decision in its initial consultation to not develop concrete proposals for reforming the law in this area.

4. Balfour Beatty case

89. The examiners note also that the UK reported on the Balfour Beatty case during the week of the October 2008 Working Group meeting. The case related to "irregular payments" by a subsidiary of Balfour Beatty, a UK construction company, relating to a construction project in Egypt and their accounting treatment. The SFO settled the case with Balfour Beatty in October 2008. The SFO discontinued its criminal investigation with regard to both the company and individuals in the context of the settlement. The company consented to a court order providing for a GBP 2.25 million payment pursuant to a law (the Proceeds of Crime Act) allowing the SFO to seek, in a civil proceeding, the recovery of proceeds of unlawful conduct. In the context of the settlement, the unlawful conduct was identified as being the accounting treatment of the payments. It was the first such civil recovery order obtained by the SFO since it became empowered to seek such orders in April 2008.⁵⁵

90. These new SFO powers add an important tool for the treatment of foreign bribery cases, including in cases involving companies. At this time, it is not possible to make any judgement about the relationship between the recovery order amount and the seriousness of the allegations in the Balfour Beatty case because of the very limited factual disclosure about the case. No underlying documents or court papers have been made available and the SFO press release provides only skeletal information. Because the case was only settled days before the October 2008 meeting of the Working Group, the examiners also did not have a chance to discuss it with experts at an on-site visit.

91. The company also "voluntarily agreed to introduce certain compliance systems, and to submit these systems to a form of external monitoring for an agreed period."⁵⁶ There are no sanctions for the company if it fails to comply with these voluntary undertakings. The Director of the SFO, however, indicated that the SFO could re-open its investigation.

92. As noted, because the SFO decided not to pursue its criminal proceedings in the context of the settlement, the provisions at issue in the court order permitted only the recovery of illegal gains, not fines. While this very recent development is of significant interest and importance, the focus of the Phase 2 bis

⁵⁵ The powers were created in the Proceeds of Crime Act 2002 and were previously attributed to a different agency.

⁵⁶ "Serious Fraud Office successfully obtains first ever Civil Recovery Order involving major plc.", SFO press release (6 October 2008); "Balfour Beatty reaches full settlement of issues relating to Bibliotheca Alexandrina project", Balfour Beatty news release (6 October 2008); "Balfour Beatty agrees to £2.25m over allegations of bribery in Egypt", The Guardian (7 October 2008); "SFO uses new powers to penalise Balfour Beatty", The Telegraph (6 October 2008).

inquiry has been about the regime for imposing liability on legal persons leading to the possibility of monetary sanctions such as fines as required under Article 3(2) of the Convention.

Commentary:

The lead examiners are seriously concerned about the lack of reform of corporate criminal liability for foreign bribery and they consider UK law to be deficient with respect to Articles 2 and 3 of the Convention. Article 3 requires effective, proportionate and dissuasive sanctions on legal persons for foreign bribery, including monetary sanctions. The absence of effective liability in the UK precludes effective or dissuasive sanctions. The examiners recommend that the UK adopt appropriate legislation on a high priority basis irrespective of any broader reform efforts on corporate liability.

D. DOMESTIC STATUS OF ARTICLE 5 OF THE CONVENTION

93. The status of Article 5 in domestic law and practice involves several aspects. It involves of course the status of Article 5 in the domestic legal order. But it also relates to the application of the requirements of Article 5 in practice including the invocation of the Article by prosecutors and others in appropriate cases and oversight mechanisms. The overall record in the UK in this critical area is mixed.

1. Inadequate status of Article 5 in the domestic legal order

94. Under current law, the Director of the SFO makes decisions about investigations of foreign bribery allegations in accordance with section 1(3) of the CJA 1987. It gives him/her a broad discretion, stating that the Director “may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud”. It does not refer to Article 5 or require that considerations of national economic interest, relations with other states or the identity of the persons at issue not influence the Director’s decisions. Prosecutors in the CPS and SFO make decisions concerning foreign bribery prosecutions in accordance with the Code for Crown Prosecutors (CCP), which was issued pursuant to section 10 of the Prosecution of Offences Act 1985. As noted in the Phase 2 Report, the CCP contains public interest criteria that can be read to be inconsistent with Article 5.

95. Because Article 5 has not been incorporated in UK domestic legislation or in the CCP, the Director of the SFO is not generally subject to Article 5 with regard to the exercise of his/her discretionary powers over investigations and prosecutions under the CJA 1987.⁵⁷ It was common ground between the parties to the Al Yamamah case that the general rule under *Brind v. Secretary of State for the Home Dept* is that Article 5 does not apply in domestic law; the issue was only whether an exception applied to the

⁵⁷ See *Brind v. Secretary of State for the Home Dept*, [1991] 1 AC 696 (decision-makers are under no obligation to exercise discretionary powers conferred upon them in domestic law so as to comply with unincorporated international obligations); *R (Hurst) v. London Northern District Coroner*, [2007] 2 AC 189 (HL) (same). It appears that a different approach may be taken in at least some other Commonwealth countries, as is noted in the New Zealand Phase 2 report. See New Zealand Phase 2 Report § 8 and note 4 (citing *Tavita v. Minister of Immigration*, [1994] 2 NZLR 257 (Ct. App.) (Minister should have considered treaty in exercising statutory discretion over deportation order)).

decision to terminate the Al Yamamah investigations. The NGO claimants contended that Article 5 exceptionally applied while the Director argued that Article 5 was not applicable.

96. The Divisional Court found that Article 5 was applicable, as a matter of domestic law, to the decision to terminate based on an exception to the *Brind* principle established notably in *R v. Secretary of State for the Home Department, ex parte Launder*, [1997] 1 WLR 839 (HL). The court essentially found that although the decision-maker is not required to consider unincorporated international law, where he/she announces that he/she does so, he/she must, as a matter of UK domestic law, correctly interpret that law. On appeal, the House of Lords found to the contrary that Article 5 did not apply to the Director's decision. It reaffirmed the general *Brind* principle that unincorporated treaties do not limit the statutory discretion of decision-makers such as the Director. The opinions by the Lords cited a variety of reasons for distinguishing *Launder*. The precise distinctions with *Launder* under UK domestic law do not require extensive analysis here.

97. Neither the application of Article 5 nor its binding nature in the UK domestic sphere should depend on a discretionary decision to consider it in an individual foreign bribery case.⁵⁸ Article 5 does not leave any room for discretion with regard to its prohibited considerations.

98. One ground for distinguishing *Launder* is, however, of particular concern. In the Al Yamamah case, the then SFO Director did consider Article 5 and thought that he acted in accordance with it. The House of Lords distinguished *Launder*, however, based at least in part on the Director's further assertion that he would have taken the same decision to discontinue the case even if he had thought that it was contrary to Article 5. The same argument could be made if the Director considered Article 5, but decided that in his/her view the national economic interest nonetheless prevailed. The UK government has not explained how such action would be consistent with the Attorney General's commitment to the Working Group that Article 5 will apply (see Phase 2 Report, para. 171).

99. The UK has suggested that "[s]tatutory implementation of the UK's obligations under Article 5 is not required as the criteria set out therein are relevant to the exercise of prosecutorial policy in individual cases". (UK Memo at 33) However, the examining team considers that the UK recognition that Article 5 imposes obligations that directly address a critical issue of domestic policy – whether to prosecute in individual foreign bribery cases - underlines the need for the provision to be clearly binding in the UK domestic sphere (although not necessarily through legislation). Given that the commitment by the Attorney General to the Working Group noted above has not been modified, introducing Article 5 as a limit on prosecutorial discretion should not be difficult.

100. The March 2005 Phase 2 Report, which predated the debate about the domestic status of Article 5 in the Al Yamamah case, recommended that the UK "amend where appropriate the [CCP], the Crown Prosecution Service Manual and other relevant documents" to ensure compliance with Article 5.

101. The 2007 Working Group Summary and Conclusions with regard to the UK Phase 2 Follow-up Report noted that the UK had not implemented the recommendation. The CCP had not been amended. The Working Group noted that "particularly in light of intervening events since the Phase 2 Report, the text of the CCP remains of concern". The UK intended to amend the CPS Manual, but had not done so.

102. UK has indicated that it amended the CPS Manual in January 2008 to include a reference to Article 5. This is a significant step and should assist in raising awareness. However, the examiners consider that modification of the CCP also continues to be necessary, particularly in light of the Al Yamamah case.

⁵⁸ As noted below, there is no requirement for any public disclosure of the reasons for a decision not to open or to terminate a foreign bribery case.

103. The change to the CPS Manual also raises other concerns. First, the manual is addressed only to the CPS and not to other key agencies, such as the SFO, the police or the AGO. The SFO has its own manual, which does not refer to Article 5, and there is no evidence that relevant police manuals refer to Article 5. The AGO indicated in 2005 that it generally relies on the CCP; while the previous Attorney General then clarified to the Working Group that Article 5 would be respected, that commitment is not reflected in any internal AGO rule or document. After the on-site visit, the SFO stated that it was about to update its own manual and would look into including Article 5 in the manual. It also stated that it would raise the issue of Article 5 with the police through a Home Office circular. Second, presumably because of its target audience, the CPS Manual refers to Article 5 only with regard to the prosecution stage during which “the CPS decides to review a file for a possible prosecution”. It does not refer to the application of Article 5 to investigations or Attorney General consent determinations.

2. Procedural and practical aspects of the application of Article 5 in the domestic sphere

104. UK practice with regard to the status of Article 5 has improved substantially in one area since Phase 2 and has significant potential in another.

105. First, awareness and reliance on Article 5 by investigators and prosecutors has improved. Article 5 will be of little effect unless key constituencies – and in the first instance investigators and prosecutors – are aware of it and rely on it in appropriate cases, which will often be sensitive cases. The Phase 2 Report expressed serious concern about Article 5 in connection with the absence of investigation in the 2001-2004 period of serious allegations relating to the Al Yamamah contracts. There was little evidence of any awareness of Article 5 among investigators and prosecutors, and there were serious concerns about the consideration by prosecutors of the national economic interest in a decision not to open an investigation of the allegations.⁵⁹

106. The situation in this regard has improved. The documents in the Al Yamamah judicial review proceeding make clear that after the Phase 2 Report the Attorney General, SFO and MDP were generally aware of Article 5 of the Convention at all relevant times. The SFO, MDP and SFO outside counsel relied generally on Article 5 in arguing in December 2005 and January 2006 that suggestions by BAE and Ministers that the investigation should be discontinued because of the economic consequences should be rejected. The Attorney General affirmed that the investigation should continue in January 2006 notwithstanding the economic interest and national security arguments put forward at that time. In September 2006 the Attorney General reaffirmed that the investigation should continue notwithstanding ‘representations by Saudi representatives about repercussions which they say will ensue if the investigations proceeds’. (See Bundle at 157).

107. As discussed elsewhere in this report, a number of very serious issues exist about the events of November-December 2006 and the discontinuance of the Al Yamamah investigation. But the overall record, as disclosed in the judicial review proceedings, shows a strong improvement in general awareness of Article 5 and general reference to it by prosecutors.

108. Second, providing the issues concerning the status of Article 5 in the domestic legal order are resolved, mechanisms to provide accountability with regard to Article 5 are well-developed. It is evident that judicial review in the UK has the potential to provide an effective procedural basis for reviewing the application in practice of Article 5 including by providing a forum in which the basis of decisions can be carefully reviewed in light of relevant facts and documents (including, importantly, facts and documents not made available by the government to parliament or the public). The combination of broad standing

⁵⁹ The investigation was opened in late July 2004, shortly after the Phase 2 on-site visit. See First Wardle Witness Statement § 4, Bundle at 88.

rules allowing NGOs to bring judicial review proceedings in appropriate cases and public-interest based costs rules that makes cases possible in practice has demonstrated its effectiveness in providing accountability. (See further below, however, in the section on proposed reforms relating to the Attorney General regarding concerns about proposals that would curtail judicial review).

Commentary:

The lead examiners consider that Article 5 must be equally applicable in all member states of the Working Group. Because the Article addresses investigation and prosecution decisions taken in the domestic legal order, it must apply with full force and effect in that sphere, both as a practical and legal matter, in order for its purposes to be achieved.

The lead examiners consider that the uncertain application of Article 5 in the domestic sphere as a substantive matter is inconsistent with the Convention. Rather than being generally applicable, Article 5 may only apply at most in highly specific factual contexts of uncertain boundaries. They note the January 2008 amendments to the CPS Manual to refer to Article 5, but, for the reasons stated above, do not consider this to sufficiently address the need for effective application of Article 5. The lead examiners accordingly recommend that the UK take all necessary measures to ensure that Article 5 applies to all investigation and prosecution decisions in foreign bribery cases.

E. THE ATTORNEY GENERAL, THE SFO AND DECISIONS ABOUT INDIVIDUAL FOREIGN BRIBERY CASES

1. The Attorney General, the SFO and the consideration of the public interest⁶⁰

(a) *The Director's responsibility to decide about SFO investigations*

109. The UK authorities have consistently underlined that the Criminal Justice Act 1987 makes the Director the proper party to decide about the opening, continuation and closing of an SFO investigation, including in cases that may raise questions about national security:

By section 1(2) of the Criminal Justice Act 1987, the Director of the SFO discharges his functions under the “superintendence” of the Attorney General. In that capacity the Attorney General is routinely briefed and consulted by the SFO about sensitive cases; but in such cases the SFO and its Director remain the actual decision-maker.⁶¹

110. The Director also decides on SFO cases that give rise to an exceptional procedure known as a “Shawcross exercise”. Under UK practice, a Shawcross exercise is the means by which facts including any consideration affecting public policy can be sought from Government ministers by the Attorney General in order to acquaint himself with all that is relevant to his decision whether it is in the public interest to

⁶⁰ As outlined above, familiarity with the chronology of events as set forth in the Divisional Court decision is assumed.

⁶¹ UK January 2007 Note for WGB.

pursue a prosecution. (The exercise was described in a 1951 statement by then Attorney General Hartley Shawcross, known as the Shawcross statement.) According to the UK, the Director decides about an SFO investigation at the conclusion of a Shawcross exercise as in other cases:

Where ... views are provided [pursuant to a Shawcross exercise], it is well understood that the final decision is a matter for the relevant prosecuting authority (in this case, the SFO). Both the SFO and (in carrying out his superintendence function) the Attorney General act independently of government.

111. These views expressed to the WGB in January 2007, shortly after the discontinuance, were reaffirmed in the March 2008 UK Memo.⁶² The government's view that decisions about individual SFO investigations are properly for the Director is thus clear. While Attorneys General have asserted a power to issue directions in individual cases, the power has not been exercised in recent times. The UK Memo notes that "in practice, this point has never been settled definitively and successive Attorneys General have not sought to give formal directions to the prosecuting authorities." At the on-site visit, the then-Director indicated that the Director (and others subject to Attorney General superintendence, such as the DPP) have not conceded the existence of such a power.⁶³ He indicated that if such a direction were given, he would have had to resign. The judicial review proceeding, in which the Director is the sole defendant, was similarly based on the government's position that the Director properly took the decision.

112. In the Al Yamamah case, a critical point may have been reached the day before the decision to terminate was made (13 December 2006) after (1) the Attorney General had reviewed the case in detail and confirmed his view that the case was weak on the merits because of the principal consent issue; and (2) the SFO made clear that it could not accept a decision to discontinue based on the view that the case was weak. (Bundle at 178-79). The SFO Director was faced with the possible uncomfortable prospect of a superintending Minister intervening to terminate a two-year GBP 2 million SFO investigation as meritless. It is troubling that this merits-based argument arose from views about a possible principal consent defence. As discussed above, such a defence would be contrary to the Convention and to previous UK descriptions of its law to the WGB.

(b) *Absence of recorded reasons or guarantees of publicity*

113. There is no guarantee of publicity for decisions in the UK to shut down viable investigations based on the public interest (or not to open investigations for the same reason). No statistics are kept. The existence of allegations not investigated for public interest reasons may never become known to the public; if the allegations were received in confidence by the SFO, they also may remain secret after the case is closed.

114. There is also no general requirement for any written recording of the public interest reasons for termination of the investigation. The only written recording of reasons by the Director of the SFO in the Al Yamamah case is in the very short SFO press release. (Bundle at 180). The Director has explained that he did not record other reasons in light of the Attorney General's statement to the House of Lords and because the claimants in the judicial review proceeding first issued their letters of claim to the Director and others

⁶² See UK Memo at 9 ("The note dated 12 January [2007] referred to above also dealt with how decisions on prosecutions are reached and the respective roles of the Attorney General and the Director of the SFO. In short, whilst the Attorney General is routinely briefed and consulted by the SFO about sensitive cases, the SFO and its Director take the final decision.")

⁶³ All references herein to the Director's statements at the on-site visit refer to the then-Director. The current Director took office after the on-site visit on 21 April 2008.

on 18 December 2006, just four days after the decision was taken. The Director felt that a recording of reasons after the letter was received could look self-serving.⁶⁴

115. Those who issue threats to obtain the discontinuance of legal proceedings may well also seek to ensure that there is little or no publicity given to the matter. In these cases, the public interest decision may never come to light particularly since certain national authorities may also not have any strong incentive to disclose the matter. This did not occur in the Al Yamamah case because of some special conditions. The investigation was public knowledge and the company's shares were publicly traded, so the information was market-sensitive and needed to be promptly disclosed. Intense parliamentary, media and international interest resulted in numerous relatively contemporaneous public explanations of the discontinuance by the principal parties.⁶⁵

2. Appointment and removal of the Director of the SFO by the Attorney General

116. The appointment of the Director of the SFO was renewed for only one year in February 2007. This decision occurred shortly after the Attorney General and Director publicly disagreed about the merits of the Al Yamamah case. In response to questions, the UK Memo provided information about the general rules for appointment of the Director, but did not explain the legal basis or circumstances of the one year extension.

117. The Director of the SFO is appointed by the Attorney General. The UK has indicated that there is an open competition supervised by Civil Service Commissioners and involving a recruitment panel. The person specification, job advertisements etc. are drawn up in consultation with the Law Officers and approved by them and by the First Civil Service Commissioner. For the appointment of the present Director, the recruitment panel was chaired by the First Civil Service Commissioner. The other members of the Panel comprised the Senior Presiding Judge of England and Wales, the Treasury Solicitor and one of the SFO's non-executive Directors. The interview panel makes a recommendation to the Attorney General. The degree to which the Attorney General is or can be active during the process, by such means as his/her own contacts with the candidates or rejection of the recommended candidate, remains unclear. The rules regarding the openness of the process have also not been explained.

118. The Director's contract can be of any length and can be terminated by the Attorney General at any time.⁶⁶ The appointment may also be renewed by the Attorney General for any period.⁶⁷ (See further below the section on current reform proposals with regard to the Attorney General for proposed changes with regard to the nomination of the Director).

Commentary:

In order to ensure the independence of the Director, the lead examiners recommend that the UK clarify that the Attorney General's superintendence role does not include the power to give

⁶⁴ Second Wardle Witness Statement § 214, Bundle at 113.

⁶⁵ As discussed further below, however, a number of key documents relating to the discontinuance did not become public for almost a year and did so only in the context of the judicial review proceeding.

⁶⁶ The UK has indicated that the contract of the Director as of March 2008 stated as follows: "Your employment requires performance consistent with the high standards expected of members of the senior Civil Service. Your performance will be subject to regular reviews, with an opportunity to discuss that performance with the Attorney General who may terminate your employment as Director of the Serious Fraud Office if he considers you have not met these high standards." (UK Memo at 8)

⁶⁷ See Ministry of Justice (2008), *The Governance of Britain – Constitutional Renewal*, Part 1 of 3, § 82.

directions to the Director in individual foreign bribery cases. The lead examiners also consider that the rules for the appointment and removal of the Director should reinforce his/her independence in making sensitive decisions about foreign bribery cases. They note recent government attention to these issues and recommend that the Working Group follow up with regard to developments relating to the governing statutes for the Attorney General and Director, and with regard to their powers.

3. Attorney General consent to prosecution in foreign bribery cases

119. The issue of Attorney General consent was extensively discussed in the Phase 2 Report and general reference is made to that discussion. The issues raised by Attorney General consent to prosecution raise many of the same issues as with regard to Attorney General intervention in individual investigations. However, the consent requirement is based on statute and its elimination would require parliamentary action.

120. The common law offence of bribery (which also applies to foreign bribery) continues to apply without a consent requirement. As at the time of the Phase 2 review, there is no evidence of any abusive prosecutions for that offence.

(a) Absence of law reform

121. During Phase 2, the UK assured the WGB that the government had publicly indicated its intent to eliminate the Attorney General consent requirement for foreign bribery and replace it with a requirement that prosecution be approved by the DPP.

122. The UK assurances to the WGB in Phase 2 were still reflected in the Home Office December 2005 consultation on bribery which explicitly expanded the persons empowered to give consent to the Director of the SFO as well as the DPP.⁶⁸ In February 2007, the UK again affirmed to the WGB the Government “will replace the existing statutory requirement for the Attorney General’s consent with a requirement for the consent of the Director of Public Prosecutions or a nominated deputy, [or] the Director of the SFO.... These changes will be taken forward in future legislation.”⁶⁹

123. The SFO considers that the prosecution of bribery offences should require the consent of the Director but not the Attorney General.⁷⁰ However, the government has not made any changes to the applicable rules and Attorney General consent continues to be required. (See below for current reform proposals in this area.)

(b) Consent request relating to the EFT case

124. At the time of the April 2008 on-site visit, the consent requirement was delaying the prosecution of a foreign bribery case that the SFO considered to be ready for prosecution. The SFO proposed criminal charges for foreign bribery to the Attorney General in September 2007. Seven months later, the Attorney

⁶⁸ Home Office (2005), *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper*, para. 18 (www.homeoffice.gov.uk/documents/450272/2005-cons-bribery?view=Binary); see also www.archive2.official-documents.co.uk/document/cm60/6086/6086.pdf (Government’s 2003 public acceptance of the change).

⁶⁹ See February 2007 UK Written Follow-up Report at pp. 14-15.

⁷⁰ Response of the SFO to the Law Commission Consultation Paper Number 185 Reforming Bribery at p. 12.

General had still not decided on the request for consent. The reasons for the delay have not been satisfactorily explained.

125. The matter then took another twist in June 2008, after the on-site visit. Before the Attorney decided whether to consent, a new SFO Director took office in April 2008 (shortly after the on-site visit). On 1 June 2008, after considering a new outside legal opinion that the Attorney General had obtained, the new Director decided that the case lacked sufficient merit for prosecution. The principal weakness related to establishing territorial jurisdiction which was necessary because the facts pre-dated the entry into force of the 2001 legislation creating nationality jurisdiction. (See below section on territorial jurisdiction for the legal issues relating to jurisdiction).

126. The EFT case raises further serious questions about the consent process. It is difficult to sustain momentum or even a case team over an uncertain and lengthy period of inactivity. The consent process adds yet more layers of review, especially if, as in the EFT case, the Attorney General has recourse to additional outside counsel to personally advise him/her both on the merits and the public interest. The SFO has access to expert counsel including outside counsel, and regularly use them in complex cases. Recourse to further levels of review at the Attorney General level should not be needed to obtain expertise.

127. The consent request had been pending for over seven months at the time the former Director left the SFO in April 2008. The UK did not indicate when the Attorney General obtained new outside legal advice, but did state that the former Director saw the advice before leaving office.⁷¹ It is evident that the advice was not sufficient to cause him to change his mind about the merits of the case.

128. The examiners are surprised that a lengthy investigation leading to a case team and Director of the SFO considering that it had a case suitable for prosecution could be dropped based on views about the merits from outsiders or newcomers. They note the explanation of the current SFO Director that, before withdrawing the case, he had extensive discussions with counsel on the case and reviewed the opinion of a second outside counsel. In any event, the examiners consider that a seven-month delay in responding to a request for consent before the case is returned to the SFO for it to be dropped by a new Director raises concerns.

(c) New Attorney General consent requirement adopted in 2007

129. Section 53 of the Serious Crime Act 2007 requires that the Attorney General's consent be obtained respecting any prosecution for assisting or encouraging crime, in circumstances where there is an extra-territorial dimension to the case (as defined in Schedule 4 to the 2007 Act). Section 53 will thus require consent if it is alleged that someone has assisted or encouraged foreign bribery. The Act has received royal assent but as of 22 May 2008 had not entered into force. Neither the foreign bribery offence nor the Phase 2 recommendation were considered in the context of preparing or adopting this law.

Commentary:

The lead examiners recommend that the UK eliminate the statutory requirements for Attorney General consent for prosecutions of foreign bribery or for assisting or encouraging foreign bribery.

⁷¹ UK Second Supp. Memo Annex A at p. 2.

4. The Al Yamamah case

130. The discontinuance of the investigation or prosecution of serious allegations of foreign bribery for reasons other than on the merits of the case is subject to very close scrutiny by the Working Group. It has been one of the issues of most concern to the WGB, as illustrated by the two press releases issued by the WGB with regard to the termination of the Al Yamamah case.

(a) Scope of the lead examiners' inquiry and need for strict scrutiny

131. The UK has sought to draw broad conclusions about the application of Article 5 to national security from prior WGB reports in the UK judicial review proceeding arising out of the Al Yamamah case. The Divisional Court noted these arguments in its judgement. (§ 125, 157) Similar arguments were made to the House of Lords.

132. The lead examiners do not consider that the WGB's prior reports resolve the issues in broad terms. The WGB has been confronted to date with a number of situations in which national laws or guidelines may include provisions which permit or invite consideration of factors with regard to investigations or prosecutions that raise concerns about Article 5. In these cases, the primary response of the Group to date has been to insist that the provisions reflect the text of Article 5. The Group generally notes provisions that could raise Article 5 issues and that Article 5 is not reflected in them. It accordingly recommends that Article 5 be reflected. In this area, it has generally adopted the same approach, without engaging in analysis of the scope of Article 5, with regard to references to consideration of international relations or national security.

133. It does not seem appropriate to propose an interpretation of the scope of Article 5 in the context of a country report. However, assuming solely for purposes of analysis that national security could constitute an exception under Article 5 as the UK suggests, the Al Yamamah case would then conceivably present a situation in which a prosecutor was being advised to drop a major case based on both Article 5 and non-Article 5 factors. In such cases, the lead examiners consider that prosecutors must subject the non-Article 5 factors to strict scrutiny in order to dispel doubts that the Article 5 factors are in fact influencing the decision. The strength of the Article 5 interests and arguments will be a factor in reviewing how prosecutors have acted with regard to the case: generally the stronger the interests and arguments relating to Article 5 factors, the more intensively prosecutors should review proffered non-Article 5 justifications for dropping a case.

134. Review in this area is focused on investigative and prosecutorial authorities in the first instance, but also encompasses the role of the broader government in at least two respects where relevant: (1) the search for alternatives to dropping a case; and (2) efforts to refrain from making arguments to prosecutors based on Article 5 factors. In both these areas, proper government action may be necessary to assist prosecutors in their efforts to comply with Article 5.

135. The lead examiners' views expressed below are based on a review of the information-gathering process leading to the decision to discontinue the investigation; the advocacy of discontinuance of foreign bribery cases based on the UK economic interest and other Article 5 factors by government officials other than prosecutors; and the action by prosecutors and the government generally with regard to alternative options to dropping the investigation.

(b) Review of the discontinuance of the Al Yamamah investigation

(i) The information-gathering process generally

136. At least as conducted in the Al Yamamah case with regard to an SFO investigation, the Shawcross process involved very limited consultations about the public interest. Although the Director was the ultimate decision-maker, he indicated that the Attorney General organised the consultation process regarding the public interest, including national security, in the context of a Shawcross exercise. Overall, the process seems disjointed and somewhat incoherent.

137. First, and most importantly, there was practically no consideration given to alternative responses to the Saudi threats other than discontinuing the case. With regard to the role of the Attorney General and/or Director, they could have asked searching questions on the assessment of the risk in this area of the security services as well as Ministers and others before deciding to terminate a major case.⁷² But the government, and not just the prosecutorial authorities, should have been involved in the search for alternatives. This critical issue is addressed further below.

138. Second, the SFO minute from 14 December 2006 -- the day the discontinuance decision was taken -- suggests that the SFO recognised that it had very limited information on security. The SFO assumed that the Attorney General's views on that issue were based on more information, including advice from the Security Services:

On questions of security, we had to take the advice of others. The SFO had only heard first hand from HM ambassador, we assumed that the AG had better advice, including advice from the Security Services. At the meeting at FCO attended by [a senior AGO official] we had been told that "British lives on British streets" were at risk ...⁷³

139. Third, while some consultations with the UK Ambassador to Saudi Arabia may have been appropriate, it is unclear why he was the sole expert consulted first hand by the SFO. As noted in the 14 December 2006 SFO minute, the agency had identified the security services as a "better" source of information. The threats dated from September 2006 and there was time to consult other experts. In addition, the original BAE submission to the SFO on the public interest had highlighted the apparent role of the UK Ambassador in the commercial negotiations with the Saudi government concerning the government-to-government Typhoon contract;⁷⁴ such direct involvement in negotiating an immensely important export contract could give rise to concerns about unconscious bias or perceptions of partiality, and should have led to broader consultations.

140. The Attorney General, but not the Director, called and attended a meeting with the security services on 14 December 2006, the day the discontinuance was announced. This appears to be the only

⁷² Although the memo from the Cabinet Office refers to the "Government's" view, at least one key minister, the government's Anti-Corruption Champion, was apparently not consulted.

⁷³ Note dated 14 December 2006, of meeting on 13 December 2006 between the Attorney General, Director and others by Assistant SFO Director Helen Garlick, Bundle 178 (emphasis added).

⁷⁴ See Memorandum for Director of Serious Fraud Office from BAE Systems plc dated 8 December 2005, Bundle at 151-152 (referring to 25 November 2005 meeting between Saudi government and UK Ambassador that made arrangements for a December 2005 visit by UK Secretary of State for Defence to Saudi Arabia for meeting with a view to signing a memorandum of understanding for sale of 72 Typhoons); see also UK Memo at 16 (MOU relating to the Typhoons signed by UK Defence Secretary and Saudi Minister of Defence and Aviation in December 2005).

time the security services were directly consulted by the Attorney General; they were never directly consulted by the SFO. It is unclear if the Director was aware of the meeting at the time because he has indicated that his decision to discontinue was not based upon or made with reference to any views expressed at the 14 December meeting of the Attorney General with the security services. (See Bundle at 53) At the on-site visit, the Director indicated that he was not in charge of the fact-finding process relating to the public interest. He also indicated that he felt under intense time pressure in the final days because he was being told that co-operation was shutting down. However, even in the final weeks before the discontinuance, the Director met three times with the Ambassador so there was time to seek other views at that stage. The representations made by the Ambassador appear to have played a decisive role in the Director's thinking.

141. It also appears that the choice of the Ambassador as the person to consult with respect to security issues was not the result of any considered decision by the SFO. From the SFO's perspective, its consultations with the Ambassador were initiated for reasons related to the merits of the case. The SFO did not share the Attorney General's strong concerns about a possible principal consent defence because it considered that even if consent were possible and legally relevant, the company would be unable to show that any possibly relevant official had provided consent on an informed basis. Because of the Attorney General's concerns, however, the SFO "reluctantly" agreed to contact the Ambassador to review the possibility of contacting the relevant Saudi official. It quickly became apparent, as the SFO expected, that contacts with any possibly relevant public official to obtain evidence were not feasible. While from the perspective of the SFO this meeting thus resolved little from the perspective of the merits,⁷⁵ the Ambassador also made representations about the public interest and national security. The two subsequent meetings with the Ambassador then apparently focussed only on the public interest.

142. The lack of SFO consultation of the security services is also noteworthy because the public statements about their views do not appear to have squarely addressed the likelihood of the realisation of the risk. (See Bundle 51-52) The statements focus on their views about the fact that the threats were real, *i.e.* not imagined, and that if carried out, the consequences would be serious. There is little public information about their views about the likelihood that they would be carried out. The then-Attorney General, for example, referred to the security services' views as follows:

The SIS has made it clear publicly that it shares the concerns of others within government over the possible consequences for the public interest of the SFO investigation. Naturally, it did not say that the Saudis would be bound to withdraw co-operation, but certainly no one disagreed with the overall assessment that the Saudi threats were real. Before the SFO decision was taken, I discussed the matter with the head of the [security services], whose view was that the Saudis might withdraw their co-operation if the SFO investigation continued and that they could decide to do so at any time. [...]⁷⁶

143. The statement that the "Saudis might withdraw their co-operation if the SFO investigation continued and that they could decide to do so at any time" is very general and does not appear to express any position with regard to the likelihood of realisation of the risk. In the absence of direct consultation of the security services, the Director principally relied instead on the views of the Ambassador who

⁷⁵ As indicated by the 14 December 2006 memo describing the SFO's views about the merits at the time the case was discontinued, the inability to obtain evidence from a senior Saudi official disproving alleged consent was not dispositive for the SFO.

⁷⁶ Statement to the House of Lords (18 January 2007).

considered that the risk of a cessation of co-operation was “acute” and that “in his opinion the authorities in Saudi Arabia would simply cease to co-operate on the intelligence and security issues”.⁷⁷

144. Fourth, other than from the Ambassador, public interest input was provided directly to the Attorney General, not to the Director. For example, the Director was shown the Prime Minister’s note to the Attorney General at a 11 December 2006 meeting, but apparently did not receive a copy for review.⁷⁸ The Director did not attend a meeting between the Prime Minister and the Attorney General on 11 December; the Divisional Court noted (§ 34) that it was also not clear whether the Director ever saw the 12 December note from the Prime Minister’s principal Private Secretary to the Legal Secretary recording the highlights of the 11 December meeting. While the Director apparently thus had some access to most of the written materials supplied to the Attorney General, the Director might have felt constrained in asking questions about a process and meetings from which he was excluded.

145. Fifth, the consultations did not include any recourse to international law expertise or any significant analysis of the purpose or scope of Article 5. The only analysis of the scope of Article 5 that appears in the numerous internal memos about the case prior to its discontinuance is Ministers’ suggestion that Article 5 might not apply to the “early stage” of determining the viability of an investigation. (see below). At the on-site visit, the SFO indicated that no specialised international law advice was sought by the SFO or provided by the AGO. Nor is there any indication that the Legal Adviser of the FCO was formally consulted by the Director.

146. Broader consultations could have improved the process by ensuring that critical issues, including whether there were alternative course of action available, were thoroughly explored before any consideration was given to discontinuing a serious case other than on the merits.

(ii) *Advocacy of discontinuance of foreign bribery cases based on the national economic interest and other Article 5 factors by government officials other than prosecutors*

147. At various times, Ministers or other public officials confidentially advised the Attorney General and SFO that the public interest supported discontinuance of the investigation based on the national economic interest or other Article 5 considerations.

148. The AGO initially indicated to Ministers that their Shawcross submissions should take account of Article 5. The initial 6 December 2005 AGO letter to Ministers seeking public interest input specifically drew attention to Article 5, quoted the Article in full and then stated that “you will need to have regard to the Convention in any comment made in response to this letter”. (See Bundle at 143-145)

149. In their response, Ministers did not suggest that Article 5 was irrelevant to their submissions, but rather that it might have a narrow scope.⁷⁹ They considered that it might not apply for purposes of taking an “early view” on the viability of an investigation. On that basis, the note addressed Article 5 considerations. Ministers referred extensively to the impact of the investigation on the UK economic interest and on relations with Saudi Arabia.⁸⁰ The AGO did not make further attempts to limit such

⁷⁷ First Wardle Witness Statement §§ 34, 40, Bundle at p. 96.

⁷⁸ First Wardle Witness Statement §35, Bundle at 96.

⁷⁹ Note attached to letter dated 16 December 2005 from Sir Gus O’Donnell, Secretary of the Cabinet and Head of the Home Civil Service, to Jonathan Jones, Legal Secretary to the Law Officers, Bundle at 145.

⁸⁰ See, e.g., *id.*, Bundle at 146 (noting that the SFO investigation could lead to “a high risk that the Saudis would take their business elsewhere, at the least the Typhoon procurement, if not the maintenance of the existing equipment”); *id.* (referring to the “close bilateral relationship we have with the Saudi authorities” in a wide variety of fields being “endangered by an investigation of this kind”).

arguments. Nine months later, in a 29 September 2006 note to the Attorney General, the Cabinet Secretary reaffirmed the Government's view that all of the public interest considerations set forth in the December 2005 note still applied.⁸¹

150. In its March 2007 Note to the WGB, the UK suggested that the issue of government arguments based on Article 5 fell outside the scope of the Convention and the Working Group's role because only the actions of the decision-maker are relevant:

The fact that [persons other than the Attorney General or Director] may have ... expressed views about the commercial implications or other aspects of the case is unsurprising but is of no consequence: the Director alone, under the superintendence of the Attorney General, was responsible for taking the relevant decision. Article 5 of the Anti-Bribery Convention is concerned with decisions about "the investigation and prosecution" of bribery of foreign public officials. It is no part of the Convention or the OECD's role to govern what others inside or outside government may have thought or said about the case.⁸²

151. The March 2007 Note did not refer to the then still-confidential December 2005 Attorney General advice to Ministers to have regard to the Convention or the Government response.⁸³ These documents became available to the public in February 2008 as a result of the judicial review proceeding.

152. In his minute of 8 December 2006 to the Attorney General, the Prime Minister referred to his personal concern about the Typhoon contract negotiations. The minute notes that Article 5 prohibits the Attorney General from being influenced by the national economic interest and only urges consideration of the public interest with regard to the national security considerations. However, it underlines the Prime Minister's personal concern with "the serious damage being done to our bilateral relationship [with Saudi Arabia] ... not least because of the critical difficulty presented to the negotiations over the Typhoon contract".⁸⁴

153. In addition to the confidential documents forming part of the Shawcross exercise, there were also a number of public statements by senior government officials about the effect of the case on various British interests. For example, the Prime Minister repeatedly referred to the impact on British jobs if the investigation had continued. "This investigation, if it had gone ahead, would have involved the most serious allegations and investigations being made of the Saudi royal family, and my job is to give advice as to whether that is a sensible thing, in circumstances where I don't believe the investigation (inaudible) would have led anywhere, except to the complete wreckage of a vital strategic relationship for our country

⁸¹ Letter dated 29 September 2006 from Sir Gus O'Donnell, Secretary of the Cabinet and Head of the Home Civil Service, to Jonathan Jones, Legal Secretary to the Law Officers, Bundle at 155 ("The public interest considerations as the Government saw them in relation to the SFO investigations were set out fully in the paper attached to my letter to you of 16 December 2005. Those considerations still apply and if anything the significance of UK/Saudi co-operation on counter-terrorism and the broader search for stability in the Middle East has become even more compelling").

⁸² See Further Note to OECD by United Kingdom § 9 (8 March 2008).

⁸³ The Phase 2 bis Questionnaire (Question 44) again asked about whether domestic law placed any restraints on advocacy of discontinuance of foreign bribery investigations based on the UK commercial interest by UK government officials. The UK Memo did not address this question.

⁸⁴ Personal minute from the Prime Minister to the Attorney General, 8 December 2006, Bundle at 161.

in terms of fighting terrorism, in terms of the Middle East, in terms of British interests there. Quite apart from the fact that we would have lost thousands -- thousands -- of British jobs.”⁸⁵

154. Considerations advanced by Ministers also included references to broad foreign policy goals. For example, the Attorney General referred to “seriously negative consequences for the United Kingdom public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East”.⁸⁶ The Prime Minister also referred to the termination of the Al Yamamah case being appropriate because of the importance of the Saudi relationship with regard to UK policy “in terms of the broader Middle East, in terms of helping in respect of Israel-Palestine”.⁸⁷

155. All of these statements and representations form part of the context in which the Director had to operate. The lead examiners take note of the reassurances offered by the Director that these factors did not taint his final determination, but strongly regret their effect on the whole process.

(iii) *Consideration and action with regard to alternatives other than terminating the investigation.*

156. Responses to a threat of withdrawal of co-operation could involve a broad range of political, diplomatic, economic and other action. Starting shortly after the discontinuance, in February 2007, the WGB asked a series of written questions to the UK relating to whether the “UK consider[ed] trying to deal with any pressure using a less drastic measure than stopping a Convention case [and to] [w]hat measures were considered and/or taken”.⁸⁸ Working Group and lead examiner questions about possible alternative actions, including requests for explanations as to why they were not done or considered, have included the following:

- efforts to (i) engage bilaterally with Saudi Arabia in order to find out whether the investigation could continue without harming bilateral intelligence and security co-operation; and (ii) engage multilaterally to determine whether there were ways to ensure that the UK’s national security interests would not be harmed if the UK proceeded with this case.
- consultation with any security allies with regard to the intelligence and security aspects of this matter, including with regard to the international security aspects.
- complaining to the Saudi government, privately or publicly, about the interference with the normal operation of the UK criminal justice system in a foreign bribery case, or informing the United Nations Security Council about threats to withhold anti-terrorism co-operation, including in relation to Security Council Resolution 1373.

157. Despite these WGB and lead examiner questions about alternative measures since February 2007, the UK did not provide any evidence of use of such alternatives to the Working Group either in its March 2007 memo (responding to the February 2007 WGB questionnaire) or in the March 2008 UK Memo.

⁸⁵ See President Bush Meets with Prime Minister Blair of the United Kingdom in Heiligendamm, Germany (transcript of 7 June 2007 press conference), www.whitehouse.gov/news/releases/2007/06/20070607-2.html.

⁸⁶ Statement of the Attorney General in the House of Lords, Hansard HL vol. 687 cols 1711-3 (14 December 2006).

⁸⁷ See www.pm.gov.uk/output/Page10610.asp (statement of 15 December 2006).

⁸⁸ See WGB Supplementary Questionnaire to the UK dated 15 February 2007.

158. The issue of whether the UK properly considered other options has also had significant importance in the judicial review proceeding. The Divisional Court clearly expressed its view that the UK government had failed to search for alternatives to discontinuing the case. The Court found (§ 87) that there was no evidence that anyone in the Government had meaningfully considered alternative courses of action. The Court considered this to be of critical importance in its analysis of the rule of law under domestic law.

159. Following the April 2008 decision of the Divisional Court, the Director exceptionally made new evidence available to the House of Lords in the context of the appeal. The new evidence addressed the consideration of alternatives.

160. In its decision of 30 July 2008, the House of Lords did not agree with the Divisional Court that the issue of whether other options were considered was of critical importance as a legal matter under applicable UK domestic law. It found (§§ 31, 38) that the Director had very broad discretion and that the issue was not whether there were alternative options; it was whether he was acting within the bounds of his discretion in deciding that the public interest in pursuing an important investigation was outweighed by the public interest in protecting the lives of British citizens.

161. Notwithstanding this finding, the Lords did address to some degree the question of the availability of other options. Different views were expressed. Four of the Lords expressed some doubt whether the Director could have responsibly decided otherwise. They considered in particular that the new evidence made the Divisional Court's finding untenable on the facts. Baroness Hale, however, found that terminating the investigation was not the only decision the Director could have taken.⁸⁹ The four Lords criticised the Divisional Court's finding that there was insufficient evidence of efforts to avoid terminating the case because the Court had "overlook[ed] the important fact that the Director was a prosecutor with no diplomatic access to representatives of the Government of Saudi Arabia".

162. As discussed above, the House of Lords was not considering Article 5 in this context. It was also considering only the proper role of the prosecutor and not that of the government. As noted above, the examiners consider that Article 5 encompasses the role of the broader government in searching for alternatives to dropping a case. In this context, lack of government action to explore other options in response to threats is not explained by limits on the action of a prosecutor.

163. The evidence before the courts is the only material provided by the UK in response to long-standing WGB questions in this area. The examiners are compelled to underline the very limited evidence of contemporaneous government consideration of options other than stopping the investigation.

164. For example, the principal option referred to in the new evidence presented to the House of Lords was to inform the Saudi authorities about SFO independence. The Divisional Court had pointed to this as an example of an option that had not been considered or employed.⁹⁰ As the House of Lords noted (§ 40), the new evidence does include evidence of statements by UK officials to Saudi officials that the SFO is independent. However, it appears no actual representations were made to the Saudi authorities by the UK government after the threats were made or after the SFO met with the Ambassador.⁹¹ In his discussions with the SFO after the threats were issued, the Ambassador considered that such an approach would not be

⁸⁹ House of Lords judgement, paras. 42, 49, 50, 55, 58.

⁹⁰ See Divisional Court Judgement para. 90.

⁹¹ All of the documents in the new evidence on this issue predate the SFO's meetings with the Ambassador. All but one predate the threats; the one remaining document refers only to earlier undated conversations and does not refer to the threats.

successful because he thought (as recalled by a senior SFO official) that “the Saudis had a very different understanding of criminal justice systems and despite a great deal of experience in dealing with the West, the Saudis would find it difficult to accept, in comparison with their own system, that the UK Government and the Prime Minister could not stop the investigation if they chose to do so”.⁹² However, his hesitations do not adequately explain the lack of any effort, particularly in the absence of any expressed reasons not to try.⁹³

165. The new evidence also highlights the very limited government attention to making broader representations to persuade the Saudi authorities, such as about the possible damage from the threats to wider Saudi interests. As of October 2006, the SFO underlined the absence of any “reference ... to any risk analysis [by the UK government] as to why the Saudi government would allow the personal interests of [senior figures in Saudi Arabia] to result in damage that extends far beyond the Al Yamamah contract and other UK commercial interests, to wider bilateral and geo-political interests.”⁹⁴ There is no evidence of any significant government attention to this issue even after it had been specifically raised by the SFO. At the on-site visit, the Director indicated that he spoke to the Ambassador about this issue, but such limited consultations and the reasons given by the Ambassador for inaction were insufficient to demonstrate that the question was properly explored.

166. Despite the exceptional new evidence presented to the House of Lords, there is also still no evidence of consideration by the UK of consultations with security allies or of engaging multilaterally to address the threat.

167. In light of Article 5 and the proper role of the government, prosecutors should resist dropping a case, unless, after strict scrutiny, they are satisfied that, under the circumstances, sufficient efforts have been made to explore and use other options or there are compelling reasons why efforts should not be made. While the House of Lords found that the Director’s reliance on the Ambassador was acceptable in the context of the requirements of domestic law, which provides the Director with broad discretion, the examiners consider that Article 5 requires a more searching approach in foreign bribery cases where Article 5 factors are strongly present.

Commentary:

Based on the information provided by the UK to date, and for the reasons stated above, the lead examiners consider that the UK government did not engage in sufficient efforts to develop and explore alternatives to terminating the Al Yamamah investigation. They 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.

The lead examiners also consider that the UK government did not engage in sufficient efforts to restrict arguments to prosecutors based on Article 5 factors. The lead examiners consider that consultations of government ministers about individual criminal cases, as conducted in the

⁹² Second Witness Statement of Helen Garlick § 5 (submitted to the House of Lords).

⁹³ The only other alternative resolution that was considered was to approach the company to propose a plea bargain. It is noteworthy that this originated from the SFO. This reached an advanced stage of preparation but was postponed after further representations by the Prime Minister. (See First Wardle Witness Statement §§ 29-32, Bundle at 94-95) Again, it does not appear that this option was tested with the Saudi authorities. It was not pursued with the company.

⁹⁴ The statement is a sentence previously redacted from a 27 October 2006 SFO letter to the AGO that was presented to the Divisional Court. See Bundle at 158-59; Second Witness Statement of Helen Garlick § 4. The reasons for the government’s change in redaction policy are not explained.

Shawcross procedure, may generally not be appropriate in foreign bribery cases, in which the national economic interest and relations with other states will frequently be involved. The circumstances in which such consultations may be requested or considered, if any, should be carefully and narrowly defined. Any exceptional consultation of the government with regard to an individual foreign bribery case should rigorously exclude any reference to Article 5 factors in order to the minimise the risk that decisions will be seen as based in reality on Article 5 factors notwithstanding a different stated rationale.

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.

The lead examiners recall that the Working Group expressed serious concerns in January and March 2007 about whether the Al Yamamah discontinuance was consistent with the Convention. They consider that the new developments since then, including the additional information gathered in the context of the on-site visit and provided in connection with the judicial review proceeding, have reinforced and intensified the serious concerns with regard to its consistency with the Convention. They do not believe that the decision of the House of Lords in the Al Yamamah case allays these concerns.

(iv) *Evolution and evaluation of a threat over time*

168. Where a threat may interfere with operation of the criminal justice system and have resulted in the discontinuance of a case, it is important to recognise that the situation relating to the threat may evolve over time.

Commentary:

The lead examiners recommend that the UK consider re-opening the Al Yamamah investigation if the UK were satisfied that the circumstances that led to the decision to discontinue the investigation sufficiently changed.

5. The proposed “early view” limitation of Article 5

169. As noted above, Ministers considered that Article 5 might not apply for purposes of taking an “early view” on the viability of an investigation, and the Attorney General did not ever expressly address this proposed interpretation. The examining team considers that Article 5 applies to all stages of the treatment of a foreign bribery allegation, including for purposes of taking an early view of the viability of an investigation. The Working Group has paid intensive interest to the standard for the opening of foreign bribery investigations in each jurisdiction and to ensuring that Article 5 factors do not influence decisions at that stage. Cases are perhaps particularly subject to being discontinued based on Article 5 factors at that early stage.

Commentary:

The lead examiners do not consider that there is any early stage of consideration of the viability of an investigation during which Article 5 factors can be considered. They recommend that the UK government raise awareness about the broad application of Article 5 to all phases of a foreign bribery case from the initial receipt of the allegations.

F. CURRENT REFORM PROPOSALS WITH REGARD TO THE ATTORNEY GENERAL

1. Background

170. In December 2006 the House of Commons Constitutional Affairs Select Committee (now the Justice Committee) announced an inquiry into the constitutional role of the Attorney General. As described in the Committee's press release, the Committee's July 2007 report found that reform of the Attorney General's position was necessary, particularly in relation to his/her role in individual criminal cases:

Current conditions make the tensions between the political and legal elements of the role of the Attorney General unsustainable and it must be reformed. Recent controversies over the ending of the BAE Systems fraud investigation and the Attorney General's potential deciding role in the "cash-for-peerages" investigation have compromised or appeared to compromise the position of the Attorney General and raised serious concerns about how independence and impartiality in the role can be guaranteed. Public confidence in the present system has been significantly affected by the issues around the ... ending of the SFO investigation into the BAE Systems/Al Yamamah case. The heart of the problem of the Attorney General's role at present is the need for real and perceived independence in ... making decisions about important and sensitive prosecutions that may involve Government, while sitting in that same Government as a Cabinet level office holder, appointed by the Prime Minister and taking the party whip.⁹⁵

171. In this regard, it is noteworthy that the practice with regard to the Attorney General's attendance at Cabinet meetings has significantly changed in recent years. Prior to 2005, the Attorney General attended cabinet meetings on an ad hoc basis to advise on legal or constitutional aspects of matters being considered by Cabinet or when matters relating to the prosecutorial authorities or criminal justice policy were discussed. In 2005, the Prime Minister decided that the Attorney General should routinely be invited to attend Cabinet meetings, a practice that continues at present.⁹⁶ After the on-site visit, the UK indicated that as of October 2008 the Attorney General would again no longer routinely attend all cabinet meetings.

172. The Committee acknowledged that its report had not provided a "detailed blueprint for reform". However, it supported substantial change: "On balance we have concluded that legal decisions in prosecutions and the provision of legal advice should rest with someone who is appointed as a career lawyer and who is not a politician or a member of the Government". It concluded (§ 104) that "depoliticising the prosecution role should one of the central purposes of reform".

⁹⁵ Constitutional Affairs Committee, Press Release No. 42 of Session 2006-2007, Attorney General's Role "Not Sustainable" Says Committee (internal quotations omitted) (www.parliament.uk/parliamentary_committees/conaffcom/cacpn190707.cfm). Taking the party whip refers to an MP or Lord taking instructions from their political party with regard to attendance in Parliament or voting in a particular way. Breach of a whip can have serious consequences in extreme cases, such as expulsion from the parliamentary political group.

⁹⁶ See House of Lords Select Committee on the Constitution, Reform of the Office of Attorney General: Report with Evidence (April 2008), available at www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/93/93.pdf.

173. The Ministry of Justice published a green paper on the Governance of Britain in July 2007 and indicated that the Government would “review the role of the Attorney General to ensure that the office retains the public’s confidence.”⁹⁷ The Green Paper indicated an intent to restrict the Attorney General’s powers to direct prosecutors in individual cases:

The Government will seek to surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive (subject to consultation with interested parties and, where necessary, legislation). These include powers to ... direct prosecutors in individual criminal cases.⁹⁸

174. In late July 2007, the AGO published a Consultation on the Role of the Attorney General. The Consultation paper proposed that Ministerial input into individual cases generally be eliminated. It contained an annex briefly reviewing the role of the Attorney General and senior prosecutorial officials in a variety of jurisdictions. But it proposed special rules for certain cases, including those considered to involve national security.⁹⁹

2. The proposed bill

175. The Draft Constitutional Renewal Bill (Draft Bill) and its lengthy accompanying materials were made public on 25 March 2008, less than a week before the on-site visit.¹⁰⁰ At the visit, many panellists had had only a limited or no opportunity to review them. However, the Draft Bill was subject some sharp criticism by a number of panellists who had been able to review it at least in part. Although the examiners thus did not have an opportunity to review and discuss the Draft Bill with a range of informed panellists, they have serious concerns about aspects of the Draft Bill that would affect the investigation and prosecution of foreign bribery.

176. Since the on-site visit, a number of parliamentary committees have expressed very different views about the parts of the Draft Bill relating to the Attorney General. A June 2008 Justice Committee report is highly critical and reaffirms many of the views of the earlier Justice Committee (Constitutional Affairs Committee) report.¹⁰¹ A Joint Committee of the House of Commons and House of Lords specially struck to review the entire Draft Bill essentially argued in a July 2008 report that little or no change was required with regard to the current functions and role of the Attorney General.¹⁰² The context for the

⁹⁷ The Green paper deals with a number of other issues as well, including an expanded role for Parliament in approving treaties.

⁹⁸ Ministry of Justice (2008), *The Governance of Britain – Constitutional Renewal* at p. 6 (www.official-documents.gov.uk/document/cm71/7170/7170.pdf).

⁹⁹ *The Governance of Britain – A Consultation Paper on the Role of the Attorney General*, CM 7192, § 3.9. See also §§ 2.13-2.15, 3.16-3.18 (www.attorneygeneral.gov.uk/attachments/Consultation%20on%20the%20Role%20of%20the%20AGO.pdf).

¹⁰⁰ Ministry of Justice (2008), *The Governance of Britain – Constitutional Renewal* (www.justice.gov.uk/whatwedo/governance.htm).

¹⁰¹ House of Commons Justice Committee (June 2008), *Draft Constitutional Renewal Bill (Provisions Relating to the Attorney General) – Fourth Report of Session 2007-08*, HC 698. Available at www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/698.pdf.

¹⁰² Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill Vol. 1: Report* (July 2008) and *Vol. 2 Evidence* (August 2008) are available at www.parliament.uk/parliamentary_committees/jedcrb.cfm.

various reports appears to include some uncertainty about the appropriate procedures for scrutiny of the draft bill: for example, the Justice Committee report criticises the government for deciding that a new special Joint Committee should review the draft bill rather than the existing Justice Committee.¹⁰³

177. The government intends to present a bill on constitutional renewal (not just a draft bill) to Parliament during the 2008-2009 session. There is some evidence that the government appears to be proceeding on an expedited basis with regard to the reforms. For example, the Joint Committee report (§ 7) criticised the unusually short time given to the Committee to conduct its pre-legislative evidential inquiry and prepare its July 2008 report. Since it normally takes about two months for the government to respond to pre-legislative scrutiny and prepare its bill, it may produce a bill for presentation to Parliament in the autumn 2008. The UK has indicated, however, that the development of the bill is not subject to any fast-track treatment.

178. It is apparent that there are sharply different views about the need for reform relating to the Attorney General. The Justice Committee reaffirmed that the major problem remains the difficulty of combining the political and legal duties of the Attorney General. In contrast, the Joint Committee was not persuaded of the case for separating the Attorney General's legal and political functions. A minority of the Joint Committee generally shared the Justice Committee's concerns.¹⁰⁴

179. The discussion below focuses on the issues of particular interest to the WG and in particular whether the Attorney General will have a role in deciding on individual foreign bribery investigations and prosecutions, and accountability for any such decisions. But it is apparent that views on the proper Attorney General role in individual cases vary significantly depending on the nature of the Attorney General position and its degree of institutional and operational independence.

(a) Decisions to terminate individual investigations or prosecutions

(i) Creation of an explicit statutory power allowing the Attorney General to terminate individual prosecutions and SFO investigations

180. As noted above in the section on the Director's responsibility to decide about SFO investigations, the UK government has repeatedly emphasized that the Director was the proper official to take the decision to terminate an SFO investigation on national security grounds. The Divisional Court similarly found that Parliament intended for the Director to make decisions about individual investigations under the Act creating the SFO, including in cases involving national security:

By the [Criminal Justice Act 1987], Parliament has conferred on [the Director] alone the power to reach an independent, professional judgment, subject only to the superintendence of the Attorney General. Whatever superintendence may mean, it does not permit the Attorney General to

¹⁰³ Justice Committee report §§ 10-12. The Committee noted that the two committees were nonetheless cooperating and sharing evidence. An earlier April 2008 report by a House of Lords Committee seeks to provide a neutral overview of the issues; because of its timing, this report does not consider the specific proposals made by the government in late March. See House of Lords Select Committee on the Constitution, Reform of the Office of Attorney General: Report with Evidence (April 2008), available at www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/93/93.pdf.

¹⁰⁴ The minority sought to replace the entire section of the report on the Attorney General, but the proposed amendment was not accepted. See Joint Committee Report at p. 145, 148, 156.

exert pressure on the Director, let alone make a decision in relation to an investigation which the Director wishes to pursue.¹⁰⁵

181. The proposals in the Draft Bill would change this law. Although it would make clear that the Attorney General generally does not have the power to intervene in individual investigations or prosecutions, the Draft Bill would give the Attorney General broad statutory powers to block any prosecution, regardless of the evidence or merits of the case, where he/she is satisfied that it is necessary to do so for national security. The Draft Bill would also allow the Attorney General to stop SFO investigations, but not other investigations, on the same basis. The Draft Bill would thus allow the Attorney General to stop an investigation or prosecution of a potential foreign bribery case carried out by the SFO. The lengthy explanatory materials do not fully address why the government considers that it is no longer appropriate for the Director to take the decision on SFO investigations and prosecutions where national security is at issue.

182. During the on-site visit, a wide variety of commentators expressed serious concerns about attributing the decisional role on investigations to the Attorney General in this context because of the risks of political interference. After questioning the Attorney General on this issue in June 2008, the Justice Committee was “not convinced that any Attorney General would substitute his or her judgement on national security so as to override that of the Prime Minister by whom they were appointed.”¹⁰⁶

183. The various committee reports express sharply different views in this area. The Justice Committee considered (§§ 39-40, 52, 81, 103) that the power to terminate cases in the national interest should exist, but that the power should be exercised by the Directors or, apparently, by an Attorney General without political functions. It expressed particular concerns about the special provisions allowing the Attorney General to terminate SFO investigations but not other investigations. In contrast, the Joint Committee recommended (§ 114) that the Attorney General should have the power to give directions in all cases and not just those involving national security. (Contrary to the views stated above, it considered that this power exists under current law and thus that no legislation is necessary.)¹⁰⁷

184. Another concern relates to the manner in which alleged national security concerns would be raised in the context of individual cases. In the Al Yamamah case, the public interest considerations were first raised in a 7 November 2005 letter from BAE’s Group Legal Director to the Attorney General attaching a “strictly private and confidential” memo for the Attorney General. The Legal Secretary to the Law Officers responded that it was “not appropriate for representations to be made to the Attorney General on such a private and confidential basis”.¹⁰⁸ The Draft Bill does not make clear that submissions by parties to the Attorney General on the public interest in national security should not be made on a confidential basis. It is also unclear if prosecutors would be made aware of them.

185. As noted above, investigators and prosecutors in the UK are not bound by Article 5 of the Convention. None of the government or parliamentary reports to date give significant consideration to the UK’s special obligations with regard to the investigation and prosecution of foreign bribery cases. For example, as noted in the Phase 2 Report, foreign bribery raises additional and different concerns relating to

¹⁰⁵ Divisional Court judgement § 70. The House of Lords did not address the nature of the superintendence relationship in this regard.

¹⁰⁶ House of Commons Justice Committee (June 2008), *Draft Constitutional Renewal Bill (Provisions Relating to the Attorney General) – Fourth Report of Session 2007-08*, HC 698, para. 50.

¹⁰⁷ As noted above, whether the AG currently actually has the power to direct in individual cases is the subject of debate. The power has not been exercised in recent times.

¹⁰⁸ See Letter from Jonathan Jones, Legal Secretary to the Law Officers, to Michael Lester of BAE Systems plc, 10 November 2005, Bundle at 132.

the Attorney General from those in other cases: the traditional concern about the Attorney General is that he/she may allow him/herself to be swayed by party political advantage – this, for example, is the one (and only) consideration that is clearly banned in principle under the Shawcross process. Article 5, however, requires that the UK take action to ensure that considerations that may be normally permissible in ordinary cases, such as the impact on international relations expressly cited as a proper consideration in the CCP, cannot influence foreign bribery cases. The lack of attention to Article 5 is surprising because the Al Yamamah case is routinely cited, including in the various reports, as one of the two or three most controversial recent cases relating to the role of the Attorney General.¹⁰⁹ As also noted above, the Attorney General expressly committed to the WGB in 2005 that Article 5 factors would not be considered.

(ii) *The national security determination*

186. National security is a concept that can be broadly interpreted by governments in various contexts. See, e.g., *Rehman v. SSHD* [2003] 1 AC 153 (House of Lords 2001) (interests of national security could be threatened not only directly by action against the United Kingdom, its system of government or its people but also indirectly by activities directed against other states). As demonstrated by the Al Yamamah case, government officials may consider that co-operation of a particular state with regard to situations in third countries is important to national security. The draft Bill does not limit or define the notion of national security in any way. There is no requirement that the peril be serious or imminent.

(iii) *Consideration of other policy options before discontinuing a foreign bribery case*

187. There is no requirement that the government engage in any efforts to resolve the national security peril at issue through the many policy tools available to the government other than discontinuing a criminal case. As noted above, the examining team is seriously concerned about the lack of any evidence of ministerial or government action to seek to resolve the threat in the Al Yamamah case (other than arguing that the public interest supported discontinuance).

188. The pre-decision procedural requirements could also be improved in other ways in the light of the Al Yamamah experience. There is no requirement that the security services be consulted. The public interest in prosecuting cases on the merits as a matter of the equal application of the law is not affirmed.

(b) *Accountability*

189. The Draft Bill could seriously weaken public accountability for decisions to discontinue foreign bribery cases on asserted national security grounds. As noted above, current UK law and practice has demonstrated its effectiveness in ensuring accountability. The Draft Bill would represent a serious backward step in this area. Both judicial review and Parliamentary oversight with regard to the investigation and prosecution of foreign bribery would be weakened.

(i) *Judicial review*

190. The Draft Bill provides that the national security determination – both the existence of the threat and the finding that it was necessary to discontinue the case – would be conclusively established in any judicial review proceeding by a certificate from any Minister. Coupled with the broad discretion of the Attorney General to terminate a prosecution or investigation “if satisfied” of the need to do so, these

¹⁰⁹ See, e.g., Joint Committee report § 78.

provisions would exclude the Attorney's decision from judicial review in practical terms, according to the Justice Committee.¹¹⁰

191. The purpose of this proposal is unclear. During the on-site visit and subsequently, the examining team asked the UK government to identify any negative impact on national security from the existing procedures, as exemplified notably in the judicial review arising from the Al Yamamah discontinuance. The UK Supp. Memo recognised that the Al Yamamah judicial review proceedings "did not raise any national security concerns for the government". In absence of such concerns under existing procedures, the proposed weaker accountability appears unnecessary. The Justice Committee likewise saw no case for the inclusion of such a provision.¹¹¹

192. The certificate system does not only protect national security information. It would mandate a finding that the proffered national security justification was the real one. Any exploration of allegations that Article 5 considerations influenced the decision would be excluded or sharply curtailed. This would cut to the very core of the application of Article 5 in foreign bribery cases.

193. There is no requirement that the Attorney General consider Article 5 in foreign bribery cases. This could leave little if any domestic law basis to inquire whether the decision was in fact based on other grounds such as the national economic interest. The argument that the true reason was the national economic interest would be precluded by the certificate. Some contingent arguments for the possible application of Article 5 might be available, but could be weakened by what could be seen as Parliament's decision to ignore Article 5 in a detailed provision adopted in the wake of the Al Yamamah judicial review case.

194. The certificate would also mandate a finding that dropping the case was the only way to deal with the threat. This is a critical weakness. It would preclude any judicial inquiry into whether the government considered and used other available policy options before considering a discontinuance.

195. It is also unclear why certificates are limited to criminal prosecutions. National security issues may arise in a wide variety of contexts in court cases. In a wide-ranging constitutional renewal bill, it is unclear why there should be a special rule for judicial review of prosecutions. The examiners consider that terminating viable foreign bribery prosecutions should not be a normal tool for responding to national security threats and that judicial inquiry is if anything more justified in such cases than in other contexts.

196. The concern about weaker accountability is that it creates a risk of making discontinuances more frequent. It may also encourage a broad reading of national security because the issue would not be subject to review under domestic law and not even be subject to disclosure. The system will encourage threats and provide a road map to discontinuance and non-disclosure. The lead examiners welcome the UK government's expressed intent to reconsider this part of the Draft Bill.

(ii) *Parliament*

197. The Draft Bill attempts to balance the weakening of accountability due to the certificate by providing for disclosure of national security-based terminations to Parliament as soon as practicable. However, it gives the Attorney General the power to delay the report indefinitely or not make it at all if he/she considers that it would prejudice national security. This provision could be frequently applicable in cases of discontinuances based on foreign threats; if a threat is sufficient to override the normal rule of law

¹¹⁰ House of Commons Justice Committee (June 2008), *Draft Constitutional Renewal Bill (Provisions Relating to the Attorney General) – Fourth Report of Session 2007-08*, HC 698, paras. 51-52.

¹¹¹ *Ibid.*

requirement that serious cases be addressed on their merits, it would almost certainly be sufficiently serious to justify a lack of disclosure of the circumstances to Parliament. The issuer of the threat could adjust its scope to include issues of disclosure. Indeed, such concerns may be at the core of the reasons for the threat in the first place because the foreign bribery law does not apply to foreign officials.

198. The Justice Committee believes that the provisions on disclosure to Parliament are an insufficient safeguard because such reports are unlikely to contain all of the information relevant to the termination.¹¹² The examining team notes that despite intense parliamentary interest, much of disclosure of the concrete circumstances of the Al Yamamah termination occurred only in the context of the judicial review in which key contemporaneous documents were made available by the government.

199. There is also no requirement that the Attorney General make a contemporaneous written record of the reasons for the decision to terminate the case or to withhold disclosure to Parliament. Such a requirement could assist in providing accountability and in ensuring that all relevant issues are addressed even under high-pressure circumstances.

200. The power to withhold disclosure to Parliament extends beyond national security to cases where the Attorney General considers that it would seriously prejudice international relations. (See Draft Bill §§ 14(3)(b), 17 (3)) International relations are broadly defined to include the UK's relations with any State or international organisation, the UK's interests abroad or its promotion thereof. These provisions could potentially apply to limit disclosure with regard to many major foreign bribery cases.

(c) Appointment and removal of the Director

201. The original consultation paper on the role of the Attorney General did not address the issue of the appointment or removal of the Director. (As noted above, at present his/her appointment can in effect be terminated by the Attorney General at any time.) The Draft Bill appears to improve the situation in this area somewhat. The Director would continue to be appointed by the Attorney General. However, the Bill would provide for five-year fixed-term appointments for, *inter alia*, the Director and the DPP.

202. The Bill (§ 5(6)), would limit the power of the Attorney General to remove the Director to cases where the Attorney General is “satisfied that the Director is unable, unfit or unwilling to carry out the functions of the office”. The proposed statutory test remains a subjective one based solely on the views of the Attorney General. However, objective factors for consideration are identified.

203. One of the objective factors relates to a “protocol”, which the Draft Bill (§ 3) calls for the Attorney General to prepare in consultation with the Director of the SFO and the other Directors. The protocol is to govern the relationship between the Attorney General and the Directors. While the Draft Bill specifies some possible types of provisions, it essentially leaves them up to the Attorney General to decide. The protocol must be laid before Parliament. The Draft Bill has been criticised for giving significant power to the Attorney General to dismiss a Director for failure to have regard to the duty to obey an, as yet unwritten, protocol.¹¹³

204. The lead examiners welcome continued government attention to strengthening the independence of the Director.

¹¹² *Ibid.* para. 52.

¹¹³ See Justice Committee report §§ 53-58 & 59-63.

Commentary:

In conformity with standard procedures, the Working Group will assess any relevant new legislation relating to the role of the Attorney General after it is enacted.

G. CO-OPERATION WITH OTHER PARTIES TO THE CONVENTION

1. Co-operation with foreign investigations of the Al Yamamah case

205. The general issue of MLA was not studied as part of this Phase 2 bis review. However, Parties to the Convention have sought MLA from the UK in connection with the Al Yamamah investigation. They have not received the requested MLA as of the date of this report. Article 9 of the Convention provides that each Party shall, “to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention”. The Al Yamamah situation raises additional concern regarding consideration of Article 5 grounds in the MLA context.

Commentary:

The lead examiners are seriously concerned about the lengthy delay by the UK in acting on requests for MLA with regard to a major foreign bribery case. They consider that the reasons for the delay have not been adequately explained. They recommend that the UK authorities, including the Home Office, act promptly and effectively to provide MLA, as required by Article 9 of the Convention.

2. Possible new powers to block extradition

206. Schedule 13 of the Police and Justice Act 2006 contains two provisions which would, if they enter into force, amend the Extradition Act 2003 to provide a further ground on which the courts may refuse extradition. The amendment would require the court considering a request for extradition from the UK to consider whether it should be barred on the basis that a significant part of the conduct in respect of which extradition is sought occurred in the UK and that it would not be in the interests of justice for the offence in question to be tried in the state requesting extradition. This has been described as a “forum” bar to extradition.

207. The UK authorities have recognised that “introducing a ground for refusal of extradition based on forum is not only unnecessary, but would make the [Extradition] Act operate in a manner that is inconsistent with all of the UK’s bilateral extradition treaties”.¹¹⁴ The provisions would also appear to be contrary to the Convention. For example, the extradition of a UK national could apparently be blocked without the person being referred to UK prosecutorial authorities for prosecution.

¹¹⁴ Explanation from UK received 26 March 2008.

208. The new power to block an extradition has been adopted by Parliament, but has not entered into force. It can be brought into force by the government or by a joint declaration of both Houses of Parliament. The government has indicated that it has no current plans to bring it into force and that it would oppose a parliamentary resolution seeking entry into force. If the government's view changes, however, the provisions could be brought into force by the Home Secretary without any further meaningful parliamentary scrutiny.

Commentary:

The “forum” provisions in the Police and Justice Act 2006 raise serious concerns. The lead examiners take note that the UK government. The current UK government does not intend to bring the provisions into force.

H. INVESTIGATION AND PROSECUTION GENERALLY

209. Criminal offences in the UK fall into three categories: (1) indictable offences; (2) summary offences; and (3) offences triable either as an indictable or summary offence, known as “either way” offences. Indictable offences (such as the common law bribery offence) are tried in Crown Court. Summary offences are tried in Magistrates’ Court. For offences triable either way (such as the statutory foreign bribery offence under the 1906 Act), a magistrate holds a “committal proceeding” to determine the appropriate court for trial.

210. All cases under the common law foreign bribery offence and most statutory foreign bribery cases under the 1906 Act will be tried in Crown Court. The magistrate may decide that a less serious statutory bribery case should be tried in Magistrates’ Court, but only if the accused consents; if the case is serious or the accused does not consent to trial in Magistrates’ Court, the accused is committed to Crown Court for trial.¹¹⁵ In addition, if a case is serious or complex, the SFO Director may issue a notice to transfer the case from Magistrates’ Court to Crown Court.¹¹⁶

1. Opening of investigations

(a) Phase 2 concerns

211. The Phase 2 Report expressed serious concerns about the standard for opening an investigation. As of July 2004, the UK appeared to be very slow to open foreign bribery investigations even where there were serious allegations, whistleblowers and apparently substantial amounts of evidence. The Phase 2 Report criticised the treatment of the BAE/Al Yamamah allegations during the period 2001-2004 (§§ 150-151). During the Phase 2 on-site visit, the UK authorities recognised that an insufficient investigation had occurred.

212. Paragraph 151 of the Phase 2 Report stated in particular serious concerns about the absence of investigation of the Al Yamamah case in 2001-2004:

¹¹⁵ Sprack (2006), A Practical Approach to Criminal Procedure (11th ed.), paras. 8.01-8.25.

¹¹⁶ CJA 1987, Sections 4-5.

151. The UK's handling of this case raises a number of serious concerns including the following: (1) the extremely high level of proof that appears to be required to open an investigation into suspicious transactions including into alleged transactions with substantial events occurring in the UK; (2) the consideration by the UK authorities of the impact of an investigation on the UK economy, contrary to article 5 of the Convention; and (3) the adequacy of checks and balances regarding decisions by investigatory agencies to not investigate serious allegations of foreign bribery.

213. The UK authorities have not addressed the question why no investigation was commenced by the SFO, Ministry of Defence Police (MDP), other police authorities or the Companies Office during that period. Contemporaneous internal SFO correspondence and SFO-Ministry of Defence correspondence regarding the case raised serious concerns that the national economic interest had been considered in conjunction with the decision not to open an investigation. It did not appear as if relevant agencies were aware of the Convention.

(b) *Allegations received and investigations opened as of August 2008*

214. The UK now has a greater number of cases under investigation. The UK Register of allegations of Overseas Corruption has been maintained since 2002 (and by the SFO since 2005). All foreign bribery allegations are transmitted to the SFO. As at 31 January 2008, 131 allegations have been made.

215. As of the on-site visit in April 2008, the SFO was investigating 13 cases in which foreign bribery was the suspected offence or one of the offences under consideration. The City of London Police Overseas Anti-Corruption Unit (OACU) were investigating one other offence in which foreign bribery was suspected and were shortly to commence a second. Proceedings had been brought in one case in which foreign bribery was suspected but where available evidence was limited to fraud offences.

216. The SFO reported that 38 allegations were not capable of verification, did not involve overseas corruption, or were repeats of or parts of earlier allegations. 29 preliminary enquiries were closed because of insufficient evidence to justify a formal investigation.

217. The SFO or OACU will research the remaining allegations to ascertain whether there is sufficient evidence to launch formal investigations.

218. As noted in the Introduction, following the on-site visit, the UK indicated that the number of open investigations has increased significantly since the on-site visit: as of August 2008, the SFO had 17 open investigations and the OACU had an additional seven. These developments are very encouraging.

(c) *Standard for opening an investigation*

219. The UK has provided some additional information about the legal standard for opening an investigation, including the evidentiary threshold for opening a case. However, some questions still exist with regard to the standard for opening investigations. It is important in this context to distinguish between the evidentiary threshold and the special importance criteria for SFO cases.

(i) *Evidentiary threshold*

220. In order for the SFO to open an investigation, there must be "a suspected offence which appears to the Director on reasonable grounds to involve serious or complex fraud" (CJA 1987 s. 1(3)). This

appears to set a reasonable standard for the opening of an investigation: a “suspected” offence of a certain kind. The statutory language does not require that the suspicion meet any particular evidentiary standard.

221. However, the evidentiary standard applied in practice appears somewhat unclear. The UK Memo (at 17) states that for there to be a “suspected offence”, there must be “credible information to show that an offence has probably taken place”. (emphasis added) At the on-site visit, the SFO representative responsible for vetting foreign bribery cases indicated that in practice a reasonable suspicion is required. The Review of the SFO also suggests that the Director applies a different standard, namely that there must be “some evidence” of a crime.¹¹⁷ While some of these variations could be differences in expression, it does appear that there may be a variety of standards.

222. The SFO can itself launch an inquiry without a referral if there is reason to believe that a serious or complex fraud has been committed. No complaint is required. A press article is not sufficient on its own to open an investigation, but can lead to the opening of an investigation. Once the SFO vetting unit sees or receives notice of a press article, steps are taken to verify the nature of the allegation. Once it is substantiated, it is general practice to open a vetting/preliminary investigation file. Preliminary enquiries are then undertaken to ascertain whether there are reasonable grounds to believe that an offence has been committed and whether it is appropriate to begin a formal enquiry. These steps would include contact with an overseas authority and might now include use of section 2-style notices (under new section 2A CJA 1987).

(ii) *Specific criteria for the SFO taking on an investigation*

223. The Director retains a discretion whether to open an investigation or not even when a suspected offence appears to the Director on reasonable grounds to involve serious or complex fraud. This is reflected in the use of the term “may” and has been recognised in several case decisions. The discretionary criteria for the SFO taking on a case principally relate to the necessary relationship to fraud and to the importance of the case. The key criterion for accepting a case is whether the investigation should be in the hands of those responsible for the prosecution. Another key factor is the amount at stake and specifically whether the monies at risk are at least GBP 1 million. In foreign bribery cases, this figure is applied to the size of a contract obtained through bribery, not the amount of the bribe. While the figure is only a guideline, it nevertheless indicates that the SFO will only take on significant cases.¹¹⁸

224. Where an allegation does not appear likely to meet the discretionary SFO criteria for investigation, the SFO will, where appropriate, attribute the case directly to the City of London Police Overseas Anti-Corruption Unit, another police force or a prosecution authority.¹¹⁹ It is unclear whether this procedure was followed in a recent foreign bribery case. In late March 2008, the SFO decided not to investigate the Safaricom case after “taking into account the prospects of success against the demands on resources.”¹²⁰ The UK did not report whether the SFO referred the case to another law enforcement agency after declining to open an investigation.

¹¹⁷ Review of the SFO (June 2008), pp. 130-2
(www.sfo.gov.uk/publications/pdfs/JdeGrazia_Final_Review_of_SFO.pdf)

¹¹⁸ The full list of factors is at pp. 17-18 of the UK Memo.

¹¹⁹ Revised Memorandum Of Understanding On Implementing Part 12 Of The Anti-Terrorism, Crime And Security Act 2001, para. 12. See also UK Second Supp. Memo, Annex B, p. 5.

¹²⁰ “SFO rules out further inquiry into Vodafone’s Kenyan partner”, The Independent (29 March 2008).

Commentary:

The lead examiners note that the UK has significantly more cases under investigation than in 2004, which constitutes important progress.

The lead examiners note that the standard applied in practice for opening an investigation may be somewhat uncertain and recommend that the UK clarify it. . They also recommend that the SFO ensure that cases that do not meet its discretionary criteria for investigation are referred to other law enforcement agencies for consideration where appropriate.

2. Conduct of investigations and investigative techniques

(a) Gathering evidence and information

(i) Section 2 notices for gathering documents

225. The SFO has significantly greater power than the police to obtain documents in foreign bribery cases. Under Section 2 of the Criminal Justice Act 1987 (CJA), the SFO Director may issue a written notice requiring a person under investigation or any other person to provide relevant information or documents. Failure to comply with a notice without reasonable excuse is an offence and may also result in the issuance of a search warrant. Section 2 powers were recently extended to the vetting stage in foreign bribery cases. When deciding whether to formally open a foreign bribery investigation, the SFO Director may gather additional information via Section 2 notices if he considers it expedient to do so.¹²¹

(ii) Access to tax information

226. Section 19 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) permits but does not require the UK tax authorities to disclose information subject to secrecy obligations for use in criminal investigations or proceedings. As noted in the Phase 2 Report (paras. 62-63), law enforcement agencies make numerous requests for information to the tax administration. Inland Revenue provides information in most cases. For a small number of requests, the tax authorities ask the requesting agency to clarify the purpose or extent of the request before deciding whether to provide the information. The UK stated that it could not indicate whether tax information was provided or refused to investigators in foreign bribery cases. It explained that all such cases are on-going.¹²² However, the examiners note that EFT case has now been withdrawn and hence information about the case should be available. Information about the quality of the co-operation of tax authorities in the Al Yamamah case could also be made available if it would not interfere with other continuing investigations.

227. It is less clear whether the SFO and UK police can readily access tax records in the Crown Dependencies (CDs) and Overseas Territories (OTs). Section 19 of the ATCSA does not appear to apply in these circumstances. Given the role of many CDs and OTs as offshore financial centres, the SFO's ability to access tax information in these jurisdictions could be vital to foreign bribery investigations. To address this problem, the UK hopes to conclude Tax Information Exchange Arrangements (TIEAs) with OTs. Two such arrangements have been concluded with Bermuda and the Isle of Man and negotiations on others with BVI, Guernsey and Jersey are at a late stage. Whether TIEAs allow the exchange of tax information for use in criminal (as opposed to tax-related) proceedings depends on the specific terms of each arrangement, according to the UK. However, information about the actual terms of the arrangements has not been supplied.

¹²¹ Criminal Justice and Immigration Act, Section 59, which adds a new Section 2A to CJA 1987.

¹²² UK Second Supp. Memo at p. 3.

Commentary:

The examiners recommend that the UK take steps to ensure that the SFO can access information held by tax authorities in CDs and OTs in foreign bribery cases. They also recommend that the Working Group follow up whether tax information is provided or refused to investigators in foreign bribery cases.

(iii) *Access to government information*

228. The SFO cannot use Section 2 powers to obtain information from other government departments. Legal powers cannot be exercised against the Crown absent express statutory authority. Nonetheless, the UK has indicated that government departments are obliged to provide evidence or other relevant material to investigators unless there is a statutory barrier to disclosure. The UK did not specify the source of this obligation, however. For SFO cases, section 3(3) CJA 1987 only permits (but does not require) disclosure of information subject to statutory secrecy obligations (other than those in an enactment contained in the Taxes Management Act 1970). In addition, the Cabinet Office has issued guidance on co-operation in investigations. Many government departments also have “statutory gateways” for disclosure of confidential information under an MOU or agreement. In the Al Yamamah case, the UK has indicated that the MOD co-operated fully with the SFO by furnishing access to documents and staff.

229. Difficulties were encountered in the Al Yamamah case with regard to documents held by the National Audit Office (NAO), the public sector auditor. All of the NAO’s reports are submitted to the House of Commons Public Accounts Committee and eventually made available to the public. The only exception is a 1992 report of an investigation into the Ministry of Defence (MOD) on the accounting arrangements involving the Al Yamamah transactions, which has never been publicly disclosed.¹²³ The SFO wrote to and met the NAO to seek a copy of the report. The NAO, however, refused the request on grounds that the report was subject to Parliamentary privilege which could only be waived by Parliament. Despite this assertion of privilege, the NAO provided copies of the report to the MOD and the Foreign and Commonwealth Office (FCO). The UK has indicated that the SFO did not ask the MOD or the FCO for the report since it believed that Parliamentary privilege would also prohibit disclosure by these government departments. It is unclear why the SFO did not ask Parliament to waive privilege. It could have argued, for example, that the rationale for non-disclosure to the public would appear insufficient to justify non-disclosure in the different context of a serious criminal investigation of an alleged fraud involving public funds. More recently, the House of Commons recommended publication of every future audit report of the Eurofighter Typhoon contract between BAE and Saudi Arabia.¹²⁴

¹²³ Instead of providing the report to the full Committee, the NAO submitted it to the Committee Chairman who decided to hear the evidence in camera with one other Committee member. The Chairman then stated that he found no evidence of fraud or wrongdoing in the government. However, he refused to release the report because he considered it would upset the Saudi authorities and impact jobs in the defence industry. Since then, the NAO and successive governments have consistently resisted release of the report. In 2004, the Parliamentary Ombudsman also refused disclosure. She found that the report was subject to parliamentary privilege and hence disclosure was for Parliament to decide. In 2006, several members of Parliament (including the then Public Accounts Committee Chairman) publicly supported releasing the report, but a 2007 Parliamentary motion to that end was defeated. See Parliamentary Ombudsman (2004), *Access to Information: Investigations Completed July 2003 – June 2004*, HC 701, pp. 34-39; “Parliamentary Auditor Hampers Police Inquiry into Arms Deal”, *The Guardian* (25 July 2006); Liberal Democrats Web site (7 February 2007), “House of Commons – Al Yamamah Arms Agreement (Lib Dem Opposition Day)” (www.libdems.org.uk).

¹²⁴ “Ministers call for tougher scrutiny of arms deals”, *The Guardian* (17 July 2008).

Commentary:

The examiners recommend that the UK ensure that the SFO can access information held by the NAO and other government agencies that may be relevant to a foreign bribery investigation.

(iv) *Special investigative tools*

230. Wiretap evidence remains inadmissible at trial in the UK. A Privy Council Review in January 2008 found that wiretap evidence ought to be allowed at trial. The government has stated that it accepts these recommendations¹²⁵ and expects to pass legislation in the 2009-2010 Parliamentary session. In the meantime, some law enforcement agencies such as the Special Organised Crime Agency (SOCA) and the London Metropolitan Police are authorised to seek wiretapping warrants to gather intelligence. The SFO does not have this power, however.¹²⁶ At the on-site visit, SOCA stated that it could ask for a warrant to conduct wiretaps at the SFO's request.

231. The SFO also has limited powers to conduct surveillance. The SFO may conduct covert surveillance to obtain private information about a person, but only if the surveillance is not intrusive. The SFO also cannot engage in "property interference", e.g., deploying surveillance devices on vehicles or trespass on private land.¹²⁷ However, other law enforcement agencies can and have performed these activities on the SFO's behalf.

232. The SFO may use covert human intelligence sources (CHIS) but does not do so as a matter of policy. (A CHIS is a person who establishes or maintains a relationship with a person to covertly obtain information.) If it is necessary in a particular case, the SFO will leave the matter to other authorised agencies, e.g., the police and SOCA.¹²⁸ At the time of this report, the SFO was reconsidering this situation as part of a broader review of its directive surveillance powers. General criminal intelligence is available through SOCA.

233. The 2005 Phase 2 Report noted that witness protection programmes were run at the local level which resulted in variations from agency to agency. In April 2006, Sections 82-94 SOCPA on witness protection came into force. The provisions introduced some new measures such as requiring public authorities to assist law enforcement authorities in providing protection, but many of the provisions merely codified existing practice. The Central Witness Bureau, a joint initiative of the Home Office, Ministry of Justice and CPS, was established to assist local law enforcement agencies.

(b) *Obtaining co-operation from defendants and witnesses*

(i) *Plea bargaining*

234. Limited forms of plea bargaining are available in the UK. For instance, the prosecution may agree to accept a plea by the accused to a lesser offence, or to one or more counts in an indictment. The

¹²⁵ UK Memo, p. 29. The Review's Report is available at www.official-documents.gov.uk/document/cm73/7324/7324.pdf.

¹²⁶ Regulation of Investigatory Powers Act 2000, Sections 1-7; SFO Operations Handbook, "Evidence Gathering – RIPA".

¹²⁷ Regulation of Investigatory Powers Act 2000, Sections 26-28; SFO Operations Handbook, "Evidence Gathering – RIPA – Surveillance".

¹²⁸ Regulation of Investigatory Powers Act 2000, Sections 29-30; SFO Operations Handbook, "Evidence Gathering – RIPA – Covert Human Intelligence", pp. 143-145.

defendant may agree to plead guilty on a set of facts agreed with the prosecution. “Indicative sentencing” is also available for cases heard in Crown Court.¹²⁹ Under this procedure, the court indicates the maximum sentence that would be imposed based on a set of facts agreed to by the prosecution and the defence.¹³⁰ Several factors influence the sentence after a guilty plea. The court is required to consider guidelines that suggest a discount of one third for a plea at the first reasonable opportunity, one quarter after a trial date is set, and one tenth just before or during a trial.¹³¹

235. The SFO and other UK law enforcement bodies have repeatedly suggested that an effective system of plea bargaining would help reduce the time needed for investigation and trial preparation.¹³² At the on-site visit, SFO officials stated that defendants in serious fraud cases generally do not plead guilty or do so just before trial for several reasons. Sentences upon conviction for fraud are low (only three years’ imprisonment on average) so there is limited incentive for a plea. In the 2007 Fraud Review, 94% of the respondents favoured reform. In April 2008, the Attorney General published a consultation paper which proposed a framework for “plea negotiations” in fraud cases.¹³³ The SFO is also considering using plea bargaining more frequently and supports the Attorney General’s reform proposals.¹³⁴

236. The examiners are encouraged by these reform efforts but nevertheless have some reservations. The lack of effective corporate liability for foreign bribery will prevent plea bargaining from being an effective option. In addition, the proposed reform does not appear to result in greater sentencing discounts for early pleas. A more effective solution may involve increasing the maximum sentence for foreign bribery. The Review of the SFO and the Fraud Review have recommended that the maximum sentence for fraud be increased to 14 years;¹³⁵ penalties for foreign bribery should be the same as for fraud. Especially in connection with higher potential sanctions, the UK could also consider increasing the discount rates applied to early pleas. The current plea bargaining reform proposal would not be available for the foreign bribery offence because it applies only to fraud.

237. Despite these concerns, the UK recently secured through plea bargaining its first foreign bribery conviction in an OACU case.¹³⁶ Only limited information about the case is available from media reports. The UK authorities explained that they could not provide additional details about the case because of on-

¹²⁹ The Crown Court tries “either-way” offences if the case is serious or complex. It also tries all indictable offences, such as the common law foreign bribery offence.

¹³⁰ For a fuller discussion of plea bargaining and indicative sentencing, see Sprack (2006), *A Practical Approach to Criminal Procedure* (11th ed.), paras. 17.29-17.32; and *R. v. Goodyear*, [2005] EWCA Crim 888.

¹³¹ Sentencing Guidelines Council (2004), *Reduction in Sentence for a Guilty Plea*; Attorney General (2005), *Guidelines on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise*.

¹³² See also “SFO Chief Backs Overseas Bribe Case Deals”, *Financial Times* (29 June 2008); “SFO’s New Chief Lobbies for Radical Overhaul”, *The Guardian* (21 April 2003); “Top Fraud Investigator Calls for Plea Bargaining”, *The Guardian* (3 March 2005); “Plea Bargaining Urged to Help Gain Information”, *The Guardian* (July 19 2005); see also O’Keefe (2006), “The Serious Fraud Office’s Perspective on Sentence Canvassing” (www.isrcl.org).

¹³³ Attorney General’s Office (2008), *The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales: a Consultation*.

¹³⁴ “SFO to allow company plea-bargains over fraud”, *The Times* (17 July 2008); “Fraud Office to adopt US-style plea bargaining”, *The Daily Telegraph* (9 September 2008); UK Second Supp. Memo, Annex A, p. 5.

¹³⁵ Review of the SFO (June 2008), p. 87.

¹³⁶ “Corruption case success celebrated”, Department for Business, Enterprise and Regulatory Reform (22 August 2008).

going related legal proceedings. The examiners find these developments encouraging, but a full assessment of the case is possible only with more detailed information such as the details of the plea agreement, any understanding regarding sanctions, and any proceedings against or agreements with the company involved.

238. According to press reports, in August 2008, the 65-year-old Danish managing and financial director of CBRN Team, a UK-based weapons security company, pled guilty to one count of bribery under the 1906 Act. The director had paid GBP 83 000 in bribes in 2007-2008 to two Ugandan officials in relation to a GBP 210 000 contract. A second count of transferring criminal property in the amount of GBP 38 000 was dismissed after the prosecution tendered no evidence. A third count of money laundering was in effect brought to an end without entering a verdict. In September 2008, the director received a 5-month jail sentence suspended for one year.¹³⁷

Commentary:

The examiners recommend that the UK make its system of plea bargaining more effective and include the foreign bribery offence within the scope of the reform efforts. They also recommend that the UK provide further information to the Working Group about the first conviction in the UK for foreign bribery, and that the Working Group assess the case when such information becomes available.

(ii) *Co-operative witnesses - Queen's evidence and immunity*

239. Reduction in sentences for defendants in exchange for co-operation (known as “Queen’s Evidence”) is permitted under UK case law. The practice was codified by statute in 2006 and is available in cases tried in Crown Court. The Review of the SFO noted that the SFO is only “beginning to use SOCPA powers to develop co-operators” and that it has yet to fully avail itself of this tool.¹³⁸ Under this framework, a defendant must agree in writing with the prosecution to assist in the investigation or prosecution of an offence. A reduction in sentence is normally between one-half and two-thirds of the sentence that would otherwise be passed, but could exceed three-quarters in the most exceptional cases. The discount is in addition to any that may apply for guilty pleas. If the defendant knowingly fails to provide the assistance as agreed, then the prosecutor may ask the court to increase the sentence, but only if the defendant is still serving his/her sentence.¹³⁹

240. A defendant who reneges on his/her agreement may be brought back to court only if he/she is still serving a sentence. This suggests that the prosecution would be pressured to quickly advance an investigation/prosecution and allow the defendant to assist (*e.g.*, provide court testimony) before the defendant’s (likely very short) sentence expires.

241. The recent legislation provides two additional means for prosecutors to obtain co-operation from witnesses. A prosecutor may offer any person (including a defendant) an undertaking that information provided by that person would not be used in any proceedings against him/her. As well, a prosecutor may

¹³⁷ “Government official guilty of corruption”, City of London Police News Release (22 September 2008) (www.cityoflondon.police.uk); “Security boss escapes jail over Ugandan bribes”, The Times (26 September 2008); “First executive convicted of foreign bribery escapes jail term”, The Guardian (27 September 2008); “Ugandan is jailed in UK bribery crackdown”, The Guardian (23 September 2008); “Government official guilty of £50,000 corruption”, The London Daily News (23 September 2008). “Guilty plea to bribery sets legal landmark”, Financial Times (23 August 2008).

¹³⁸ Review of the SFO (June 2008), p. 127; see also *Phase 2 Report: United Kingdom* at para. 134.

¹³⁹ Serious Organised Crime and Police Act 2005 (SOCPA), Sections 73-75A; *R. v. P*; *R. v. Blackburn*, [2007] EWCA Crim 2290.

grant immunity from prosecution (in writing) to a person. A prosecutor may invoke either provision if he/she deems it “appropriate” to do so.¹⁴⁰ More recently, the new Director of the SFO stated that it would consider deferring prosecutions against companies in return for co-operation and/or the implementation of internal company controls to prevent foreign bribery.¹⁴¹ In the absence of monetary sanctions, such sanctions would raise questions about the sufficiency of sanctions. After the on-site visit, the SFO stated that it was examining the U.S. approach to deferred prosecutions,¹⁴² a system which imposes substantial fines and internal controls against corporations under such arrangements. Fines are obviously highly unlikely for companies in plea bargaining scenarios when there is no effective regime of corporate liability.

Commentary:

The examiners recommend that the UK ensure that defendants in foreign bribery cases who co-operate with the authorities, or who enter into deferred prosecution agreements or similar agreements, are nevertheless subject to sanctions that are effective, proportionate and dissuasive. They also recommend that the Working Group follow up the use of co-operative witnesses and deferred prosecution of companies in foreign bribery cases as practice develops.

3. Delays in investigations and prosecutions

242. Delay has become a major concern in SFO cases. In the two years after Phase 2, the average time needed for the SFO to take a major fraud or corruption case to court has doubled to almost five years, though this figure fell to 25.5 months in 2007-2008.¹⁴³ Delay appears to be principally caused by the SFO’s disclosure obligations, and the availability and use of resources.

(a) The prosecution’s disclosure obligations

243. Disclosure in the UK is very labour-intensive and time consuming in cases of complex economic crime. In conducting an investigation, an investigator must pursue all reasonable lines of inquiry. He/she is then required to retain all relevant material and to record all information relevant to an investigation in a durable or retrievable form. Material is relevant if it has some bearing on any offence or person under investigation, or on the surrounding circumstances of the case. The prosecution must then disclose to the defence the material on which it relies to prove its case (known as “used material”). It must also disclose “unused material”, *i.e.* material that does not form part of the prosecutor’s case but “might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.” Thereafter, the prosecution has a continuing duty to produce additional unused material

¹⁴⁰ SOCPA, Sections 71 and 72.

¹⁴¹ “SFO to allow company plea-bargains over fraud”, *The Times* (17 July 2008).

¹⁴² UK Second Supp. Memo, Annex A, p. 5; “Fraud Office to adopt US-style plea bargaining”, *The Daily Telegraph* (9 September 2008).

¹⁴³ SFO Annual Report 2006/2007, p. 14; “Time runs out for SFO dogged by delays and embarrassment”, *The Guardian* (17 July 2007); SFO Annual Report 2007/2008, p. 5.

that meets the test for disclosure.¹⁴⁴ Failure to meet disclosure obligations can have grave consequences. A court may find that there has been an abuse of process and stay the proceedings.¹⁴⁵

244. The duty to retain all relevant material and information can result in voluminous records, especially when electronic information is involved. A single search and seizure of computers could involve millions of pages of documents. Investigators and prosecutors must in theory examine all of this material and provide disclosure of all material favourable to the accused. Providing the defence with the “warehouse key” (*i.e.* all of the material) is prohibited. Software tools and techniques such as dip sampling ameliorate but do not resolve the problem. To reduce the amount of materials gathered and the resulting disclosure obligations, the SFO has used Section 2 notices to compel suspects to produce evidence. However, this approach risks the destruction of evidence. At the on-site visit, UK police officers stated that they prefer search warrants to Section 2 notices whenever the former is available.

245. Recent comprehensive reviews of fraud practice and the SFO have concluded that the current disclosure regime is not suited for cases of complex economic crime. The Fraud Advisory Panel¹⁴⁶ has called the regime “unfit for purpose” in complex fraud cases. The UK Government’s Fraud Review found that there was a general consensus that “complex cases, including serious fraud, present particular problems for trial management and the handling of disclosure issues”.¹⁴⁷ The Review of the SFO concluded that disclosure diverts a massive amount of SFO resources from investigative work and may drive away good staff. At the on-site visit, SFO representatives were also of this view. However, solicitors from the private bar did not express any concerns. In the press release announcing the issuance of the Review of the SFO was published, the Attorney General rejected the Review’s proposal for reforming disclosure but stated that the regime would be kept under active review.¹⁴⁸

(b) SFO resources

246. Despite increases in recent years, the SFO’s budget appears low compared to those of other enforcement agencies in the UK. The budget rose from GBP 23 million in 2003-2004 to GBP 35 million in 2005-2006, mostly because of the SFO’s major new role in prosecuting cartel cases (Phase 2 Report, para. 127). By 2007-2008, the budget had risen to GBP 43.3 million, but was still less than 10% of the 2006-2007 budget for the Serious Organised Crime Agency (SOCA) and 15% of the 2007-2008 budget for the Financial Services Authority. At the end the 2006-2007 financial year, the SFO had 314 permanent and

¹⁴⁴ CPIA Code of Practice, paras. 2.1, 4.1-4.4 and 5.1-5.6; SFO Operational Handbook IV. Evidence Gathering – Disclosure of Unused Material; CPIA 1996, Part I; Criminal Procedure Rules 2005, Part 22-28; CPS, Disclosure Manual, Chapter 12; Court of Appeal, Protocol for the Control and Management of Unused Material in the Crown Court, paras. 20-22; Attorney General’s Guidelines on Disclosure, paras. 10-12 and 24; Blackstone’s Criminal Practice, D9.

¹⁴⁵ Attorney General’s Guidelines on Disclosure, paras. 32-41; CPS, Disclosure Manual, Chapter 30, paras. 3-7; Review of the SFO (June 2008), Chapter 5. It should be noted, however, that a court will stay proceedings only in exceptional circumstances. At the on-site visit, a judge stated that the prosecution would be given more leeway in cases involving serious and complex charges. SFO officials also could not cite any SFO cases that were judicially stayed due to a failure to make timely disclosure. See also CPIA 1996, Section 10; Protocol on the Control and Management of Heavy Fraud and other Complex Cases (2005), Section 5.ii); and Blackstone’s Criminal Practice 2008, D3.58-3.62.

¹⁴⁶ The Fraud Advisory Panel is a body that works on policy and legal reform in the area of fraud, among other things. It includes representatives from the legal and accountancy professions, law enforcement, and academia (www.fraudadvisorypanel.org/index.html).

¹⁴⁷ Fraud Review, Chapter 9.

¹⁴⁸ “Attorney General Ministerial Statement on de Grazia Report into the Serious Fraud Office” (10 June 2008) (www.attorneygeneral.gov.uk).

non-permanent staff, compared to SOCA's approximately 4 200. Thereafter, the SFO's budget is set to shrink by almost 10% to approximately GBP 39.0 million in 2008-2009, with further slight reductions in the following two years.¹⁴⁹

247. Since it began actively investigating foreign bribery cases in 2004, the SFO has spent significant resources on foreign bribery cases. The precise amounts expended are not clear. The UK indicated that approximately one-third of the SFO's work since 2004 has involved foreign bribery.¹⁵⁰ However, it also stated that in 2007, the "resource budget" for foreign bribery was approximately GBP 4 million,¹⁵¹ which roughly equals 9% of the overall 2007-2008 SFO budget of GBP 43.3 million. The UK also indicated that in 2007 twelve permanent SFO staff worked on foreign bribery as well as a contracted team of seven consisting largely of counsel.¹⁵² This would appear to amount to only approximately 6% of the 314 permanent and non-permanent SFO staff in 2006-2007. Finally, the UK also stated that the SFO "believe that around 23% of current investigator/prosecutor resources were devoted to overseas corruption in 2007-08".¹⁵³ It is difficult to draw any general conclusions from these various statements.

248. The UK expects SFO resources devoted to foreign bribery to remain unchanged for 2008-09. It has explained that the percentage of investigator/prosecutor resources and the available budgetary funds will remain at 23% and GBP 4 million respectively. The UK has indicated that a further GBP 500 000 will be allocated to MLA to assist foreign investigations.

249. Overall SFO budget figures do not include special requests for funding an overseas corruption unit. In spring 2008, an SFO request for ring-fenced funding for such a unit was denied. The unit would have been similar in size to the Al Yamamah case team, *i.e.* three case controllers, four investigative lawyers, four to five financial investigators, and temporary staff.

250. These SFO budget figures also do not include expenditures in "blockbuster" cases, *i.e.* those exceeding GBP 7.5 million over the life of an investigation and prosecution. The Treasury provides additional funding for blockbusters through the Reserve on a case-by-case basis, though there is no complete data on how much funding was actually allocated.¹⁵⁴ Nevertheless, the UK has indicated that in January 2007 Treasury approved GBP 22.8 million over five years for the SFO to investigate cases arising from the UN Oil-for-Food programme for Iraq.¹⁵⁵ However, these alleged cases involve sanctions-busting and not foreign bribery. After the on-site visit, the UK stated that an additional GBP 6 million has been designated for Oil-for-Food cases.¹⁵⁶

251. The SFO's budget is spent mainly on non-police resources, and much of it on non-SFO personnel. Around GBP 10 million is spent annually on outside expertise. This includes outside counsel, who are used to prosecute all cases.¹⁵⁷ The reliance on external counsel has hindered the retention of

¹⁴⁹ UK Memo, pp. 10-12; SFO Annual Report 2006/07, p. 9; SOCA Annual Plan, 2006/07, p. 7; FSA Business Plan 2008-2009, p. 39. See also SOCA Annual Plan, 2008/09, p. 8.

¹⁵⁰ UK Supp. Memo, p. 6.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ UK Second Supp. Memo, Annex A at p. 6. Reliable data before 2006-2007 were not available because of fluctuating numbers in staff. See UK Supp. Memo, p. 6.

¹⁵⁴ UK Memo at 12-14; additional information provided by the UK at the on-site visit.

¹⁵⁵ Summary and Conclusions of the Working Group on the UK's Written Follow-up Report, para. 10.

¹⁵⁶ UK Second Supp. Memo at p. 7 and Annex A, p. 6.

¹⁵⁷ UK Memo at pp. 13-14.

expertise within the SFO, as noted in the Review of the SFO.¹⁵⁸ When necessary, the SFO will also hire outside forensic accountants and experts to assist an investigation. The balance of the budget is spent on in-house case controllers, investigative lawyers, financial investigators, administrative staff, and overhead.¹⁵⁹

252. The examiners are somewhat concerned that resources for foreign bribery cases may be inadequate. These cases are often time-consuming and costly because they are very complex and entail gathering evidence from abroad. The Safaricom case illustrates these considerations. In late March 2008, the SFO decided not to investigate the case after “taking into account the prospects of success against the demands on resources.”¹⁶⁰ The UK authorities did not provide information about the anticipated difficulties in the case. At the on-site visit, the then SFO Director stated plainly that the Office did not have enough resources. Other SFO officials added that these stringent budgetary conditions have resulted in staff salaries that are lower than those at other law enforcement agencies. This in turn has affected staff morale and made it difficult to hire and retain qualified investigators. Blockbuster funding provides some welcome relief but is not ideal. It is generally used to hire temporary external staff who tend to leave the SFO - with their investigative expertise and experience - when their contracts expire. This has at least partly contributed to a shortage of skills at the SFO, according to the Review of the SFO (Chapter 9).

253. The examiners further believe that these resource problems may worsen. The SFO expects foreign bribery cases to grow in number and complexity, but it has yet to determine how to handle the consequent resource implications.¹⁶¹ Furthermore, as noted above, the new Director announced in May 2008 that the SFO would put greater emphasis on areas such as consumer fraud and fraud prevention. The Director later indicated that “[t]here may well be less spent on investigating and prosecuting fraud because there will be other things we’ll be doing within our financial envelope”.¹⁶² Foreign bribery cases may therefore face growing competition for resources. It was also noted above that five of the most senior prosecutors at the SFO had left or were expected to leave the Office. Such an extraordinary turnover in senior management in a short period of time will likely deplete the SFO of invaluable expertise in foreign bribery investigations.

254. After the on-site visit, the SFO explained that the purpose of the “ongoing reorganisation” was to “enable the SFO to conduct more timely investigations and prosecutions”. Upon taking office, the new Director of the SFO was of the view that the SFO’s overseas corruption unit was too small to cope with the workload. In October 2008, he explained to the Working Group that he intended to make overseas corruption one of the three publicly-identified core work areas of the SFO. At the time the Working Group discussed this report, a new head of the overseas corruption area had also just been appointed. The Director also indicated to the Group that he expected to increase resources for overseas corruption cases from present levels. However, the specific budget figures were still being determined.

Commentary:

The examiners are very concerned about the SFO’s high level of staff turnover and extensive use of temporary staff, which appear to be exacerbated by current funding arrangements. They are

¹⁵⁸ Review of the SFO (June 2008), Chapter 10.

¹⁵⁹ UK Memo, pp. 13-14; Review of the Serious Fraud Office – Final Report (June 2008), p. 56; SFO Operational Handbook - III. Case Planning – Counsel and External Legal Expertise and Accountants.

¹⁶⁰ “SFO rules out further inquiry into Vodafone’s Kenyan partner”, The Independent (29 March 2008).

¹⁶¹ SFO Annual Report 2006/07, p. 36; UK Supp. Memo p. 6.

¹⁶² “SFO chief stands firm on consumer fraud”, Accountancy Age (15 May 2008); “Fraud boss has smaller fish to fry”, The Financial Mail (25 May 2008); “White-collar crime: SFO boss plans to cut back on prosecutions and investigations”, The Guardian (17 July 2008).

also concerned about the amount of resources expended on outside barristers. They recommend that the UK (a) consider whether SFO salaries and other conditions of employment are sufficiently competitive to attract and retain staff, and (b) consider using in-house barristers to prosecute its cases. They also recommend that the UK continue its active review of the disclosure regime for prosecutors in complex commercial cases and that the Working Group follow up in this area.

The examiners are also concerned that the SFO may not have sufficient resources to investigate and prosecute foreign bribery cases. Resource pressures will likely rise due to the SFO's decreasing budget, ongoing reorganisation, and new initiatives on consumer fraud and fraud prevention. A dedicated overseas corruption unit with ring-fenced funding could have resolved some of these difficulties. While that option has been rejected, the examiners note that the Director of the SFO will be increasing resources for overseas corruption cases. The examiners recommend that the UK ensure that the SFO has sufficient human and financial resources so as to carry out its role effectively in foreign bribery cases.

(c) Police resources, including for the SFO

255. The SFO does not have in-house police resources. Until 2006, it had to request police support from various external police bodies. According to the SFO, such requests are rarely refused but the available support could often be limited in various ways. The SFO attempted to get around the problem by relying on temporary staff or retired police officers. It was also increasingly forced to rely on police officers with no experience in fraud investigations.

256. This situation improved in November 2006 with the creation of the City of London Police Overseas Anti-Corruption Unit (COLP OACU). At present, the Unit works exclusively on foreign bribery cases except in emergencies, *i.e.* to save life and limb. It supports all foreign bribery investigations conducted by the SFO except those assigned to the Ministry of Defence Police (MDP). It also has conduct of foreign bribery cases which the SFO has declined to investigate. The OACU had ten officers in April 2008, all of whom were drawn from the COLP Economic Crime Department.¹⁶³ The Unit is funded by the Department for International Development (DFID) and the Department for Business Enterprise and Regulatory Reform (BERR). The funding was initially for three years from November 2006 but was later extended to April 2011.¹⁶⁴ DFID will contribute over GBP 3 million during this period, while BERR will provide GBP 140 000 per year from April 2008 for two officers. As of October 2008, the unit thus had twelve officers. The DFID funding had been earmarked for poverty reduction in developing countries, but the UK considers that all of the officers in the OACU may also investigate bribery of foreign officials of developed countries.

257. The jurisdiction of the COLP was expanded from South-east England to all of England and Wales on 1 April 2008. This greatly expands the OACU's territorial competence and largely eliminates the need to rely on local police in foreign bribery cases. The development is thus a major improvement, provided that the OACU has sufficient resources. While the change is welcome, its nature and permanence are uncertain. Despite requests, the UK has not provided further information about the decision such as who made it, how it is funded, or its nature and the date.

258. The MDP investigates foreign bribery cases involving Ministry of Defence (MOD) employees or defence contracts to which the MOD is party. As such, it has supported the SFO in the Al Yamamah

¹⁶³ Information provided by the UK in its response to the Phase 2 bis questionnaire and at the on-site visit. See also Web site of the OACU (www.cityoflondon.police.uk/CityPolice/ECD/anticorruptionunit).

¹⁶⁴ This date corresponds to the funding arrangements for all other police forces and bodies in the UK.

investigation. Foreign bribery investigations are conducted by the MDP's Economic Crime Unit and funded from the existing MOD budget. There is no data on the amount of financial and human resources allocated by the MOD for this purpose. The MOD is considering whether to seek dedicated funding for this work.¹⁶⁵ The examiners unfortunately could not obtain additional information as the MDP did not attend the on-site visit.

259. Police forces other than the OACU and the MDP could be involved in future foreign bribery cases. A Proceeds of Crime Team within the Metropolitan Police investigates and recovers money laundered through the UK financial system by politically exposed persons.¹⁶⁶ The unit could conceivably provide useful information to foreign bribery investigations. The SFO may also ask SOCA to perform tasks that can be done more effectively or efficiently by a central agency, or where SOCA has competencies or knowledge not widely available elsewhere. In 2006/07, SOCA assisted 21 police forces and five government agencies with (presumably domestic) corruption investigations.¹⁶⁷

260. The examiners believe that the creation of the OACU is a very significant improvement, though some concerns remain. Current funding extends to 2011.¹⁶⁸ Officials at the on-site visit suggested that the Home Office may assume future financial responsibility but that is far from certain at this point. It is also unclear whether the current funding is sufficient, since the OACU's 12 officers are now responsible for 26 foreign bribery investigations, with more cases expected in the near future. Officials at the on-site visit stated that additional COLP officers can be assigned, subject to availability. The examiners also received very limited information about the MDP's resources.

Commentary:

The examiners recommend that the Working Group follow up whether there are sufficient police resources to investigate foreign bribery cases, including in SFO cases.

4. Jurisdictional issues

(a) Nationality jurisdiction over legal persons from the Crown Dependencies and Overseas Territories

261. The UK has established nationality jurisdiction to prosecute natural persons from the CDs and OTs for foreign bribery, but not for legal persons incorporated in those jurisdictions. (See Phase 2 Report § 210). The reasons for this distinction are not clear. The absence of nationality jurisdiction over legal persons in the CDs and OTs in foreign bribery cases is not due to any legal impediment.

262. In *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Limited* (2002), 536 U.S. 88 (2002), the U.S. Supreme Court was faced with the issue whether a company from an OT (the British Virgin Islands, BVI) is a "citizen or subject" of the UK. In a brief submitted to the Court as *amicus*

¹⁶⁵ UK Memo, p. 13.

¹⁶⁶ DFID has committed GBP 1.8 million to the Team until 2011.

¹⁶⁷ SOCA Annual Report 2006/07, pp. 6 and 26. SOCA involvement might not alleviate resource shortages in an originating investigating agency (*e.g.*, SFO), since the latter may have to compensate SOCA for its services (SOCPA Sections 23-24). As well, SOCA allocates relatively few resources (10%) to supporting other law enforcement agencies (SOCA Annual Report 2006/07, p. 30).

¹⁶⁸ See www.cityoflondon.police.uk/CityPolice/ECD/anticorruptionunit/Dfid.htm.

curiae,¹⁶⁹ the UK government argued it had twice sent Diplomatic Notes to the U.S. to state “in unmistakable terms” that “corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom.”¹⁷⁰ The UK brief made clear that “the United Kingdom retains responsibility for and sovereignty over the affairs of the BVI government and people” and that the BVI constitution reserves to the Queen the power to legislate directly for the “peace, order and good government” of the Virgin Islands.¹⁷¹ The UK government stated specifically that the UK has adopted legislation regulating the extraterritorial actions of companies incorporated in OTs. Many of these laws concern areas involving the UK’s international obligations (*e.g.*, anti-terrorism).

Commentary:

The examiners recommend that the UK amend its legislation to establish nationality jurisdiction in foreign bribery cases over legal persons incorporated in the OTs.

(b) Territorial jurisdiction

263. The EFT case raises further questions about possible jurisdictional impediments to the effective prosecution of foreign bribery cases. In explaining why it terminated the prosecution, the UK stated that its courts will exercise jurisdiction over a case “only where a substantial part of the criminal acts are committed [in England and Wales].”¹⁷² This is more restrictive than permitted under Article 4 and Commentary 25 of the Convention. In addition, it is more restrictive than the law as described in Phase 1 and Phase 2. The Phase 2 Report noted that UK prosecutors had “confirmed that there is no requirement for a substantial part of the offence to have taken place in the United Kingdom to establish jurisdiction”.¹⁷³

264. As noted earlier, there was a difference of opinion about the merits of the case: the original case team and former Director considered that the case was appropriate for prosecution; the new Director, after consulting a new legal opinion from outside counsel obtained by the Attorney General, ultimately decided that the case lacked merit on jurisdictional grounds. The UK has not clarified whether the difference of opinion about the jurisdictional merits of the case was based on differing views about the applicable legal test for territorial jurisdiction. As noted above, the former SFO Director apparently saw the new opinion, but was not persuaded that it justified withdrawing the request for consent.

¹⁶⁹ See Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioner, 2002 WL 257562. The UK government has formally taken a similar position in at least two other cases before U.S. courts. *III Finance Ltd. v. Aegis Consumer Finance, Inc.*, No. 00-7016 (2d Cir. 2000); and *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir. 2000).

¹⁷⁰ *Ibid.*, p. 3; Diplomatic Notes No. 90/2001 (5 October 2001) and No. 13/2000 (2 February 2000).

¹⁷¹ In its brief, the UK also noted that it had recently exercised its power to make such laws, and this included examples where the laws were adopted over the opposition of an OT government. For example, the UK government adopted the Caribbean Territories (Criminal Law) Order 2000 (decriminalising homosexual acts between consenting adults in private) in order to achieve compliance by certain OTs with the European Convention on Human Rights. While the OTs were given an opportunity to adopt the necessary legislation themselves, the UK government adopted the Order when it became clear that the territories were unwilling to legislate themselves. See www.montserratreporter.org/news1100-3.htm; see also “Britain to Legalise Gay Sex in Colonies”, *The Independent* (12 November 2000).

¹⁷² UK Supp. Memo 2, Annex A, p. 7.

¹⁷³ *Phase 2 Report: United Kingdom*, para. 207. See also *Phase 1 Report: United Kingdom* at p. 11. The UK indicated territorial jurisdiction can be invoked in “instances where the benefits of the bribe payment returned to the United Kingdom, or where a telephone conversation relative to the offence took place within the territory.”

265. The UK has indicated that the prosecution “could not show where the relevant acts had allegedly been committed”.¹⁷⁴ Despite the examiners’ request, the UK did not provide the factual background of the case or the facts relevant to territorial jurisdiction, including those on which the case team and the former SFO Director relied in concluding that the case was suitable for prosecution.

Commentary:

The examiners are seriously concerned that the UK has territorial jurisdiction over foreign bribery only where a substantial part of the criminal acts are committed in the UK. They recommend that the UK satisfy the Working Group, by enacting legislation or otherwise, that it has established a broad territorial basis for jurisdiction that does not require an extensive physical connection to the bribery act.

5. Seeking mutual legal assistance

266. Other than informal police contacts, the SFO has three principal means of obtaining evidence from overseas: (1) under a memorandum of understanding (MOU), (2) a request in the absence of a treaty, convention, or MOU, or (3) a request based on an applicable treaty or convention. Requests are made by the SFO via a Letter of Request.

267. The SFO frequently requires MLA from Crown Dependencies (CDs) and Overseas Territories (OTs) in its foreign bribery investigations. Resort to formal mechanism is required in many cases, *e.g.*, when seeking banking records from the OTs. This can slow co-operation significantly.¹⁷⁵ At the on-site visit, an SFO investigator alluded to problems with obtaining banking information from OTs and CDs, as well as non-UK off-shore financial centres.

268. Particular attention should be paid to the British Virgin Islands (BVI), an OT with less than 24 000 people but 802 850 companies as of June 2007.¹⁷⁶ BAE is alleged to have used a BVI company to channel bribe money.¹⁷⁷ Requests to BVI for MLA are executed by the BVI Financial Services Commission (FSC).¹⁷⁸ It usually takes five to six months to execute a letter of request, though there is no information on the complexity of the requests.¹⁷⁹ Overseas requests for information on BVI companies are handled by the Financial Investigation Agency, which is staffed by one retired senior UK police officer and five staff. These resource issues do not appear to be unique to BVI. The UK noted that many OTs similarly operate under severe resource constraints. The UK is accordingly ready to provide support and resources for capacity building to the OTs, including the provision of secondments, training and legislative drafting expertise.¹⁸⁰

269. Dual criminality requirements may also prevent CDs and OTs from providing MLA to the UK in foreign bribery cases. At least some OTs and CDs require dual criminality before they provide co-

¹⁷⁴ UK Supp. Memo at pp. 6-7.

¹⁷⁵ UK Memo, p. 7 and 32; SFO Operational Handbook, pp. 51-59.

¹⁷⁶ British Virgin Islands Financial Services Commission, Statistical Bulletin, vol. 7, June 2007.

¹⁷⁷ “Questions over secret bank transfers”, The Guardian (11 June 2007).

¹⁷⁸ The FSC was also recently accepted as a member of the International Organisation of Securities Commission (IOSCO).

¹⁷⁹ UK Memo, p. 32.

¹⁸⁰ UK Second Supp. Memo, Annex B, p. 7.

operation, e.g., BVI for MLA,¹⁸¹ and Jersey and Guernsey for some types of assistance.¹⁸² Many OTs (e.g., BVI) still have not adopted foreign bribery legislation.¹⁸³

270. As noted above in the section on nationality jurisdiction, the UK can and has directly legislated over the opposition of OT governments in certain cases, notably where compliance with international conventions is at issue. Regarding whether to legislate directly for the OTs, the UK has recognised that “it is a matter of good policy and administration to consult OTs on the adoption of legislation rather than imposing legislation directly.”¹⁸⁴ The examiners consider that, as in the case of other international conventions, lengthy inaction by the OTs despite consultations should be taken into account in deciding the appropriate policy.

Commentary:

The examiners recommend that the UK take steps to ensure that OTs adopt foreign bribery legislation so that dual criminality would not impede the provision of MLA. They further recommend that the UK (1) take steps to improve the ability of CDs and OTs to provide MLA to the UK, such as by eliminating formal requirements and by increasing the resources available; and (2) analyse the causes of delay in obtaining MLA from CDs and OTs.

I. EXPORT CREDIT

271. One of the four branches of the discontinued SFO Al Yamamah investigation involved alleged bribery-related fraudulent misrepresentations by BAE to ECGD, the UK’s export credit agency.¹⁸⁵ In February 2007, the WGB asked the UK whether ECGD had taken any action with regard to existing or future credit support relating to Saudi Arabia in light of the impossibility of a criminal investigation of serious allegations relating to that country.

272. In March 2007, the UK indicated that the SFO and MDP were “proposing to meet the ECGD to discuss the ramifications of the [discontinuance]”. SFO representatives indicated during the April 2008 Phase 2 bis on-site visit that they had supplied to ECGD the evidence of bribery-related fraud against it. The SFO indicated that it considered that under the circumstances it was up to the ECGD, as a UK public body, to determine what to do with the evidence that it had allegedly been defrauded.

¹⁸¹ Government of the British Virgin Islands and the Financial Services Commission (2007), *Handbook on International Co-operation and Information Exchange: A Guide for Law Enforcement Officials and Regulators*, p. 18 (www.bvifsc.vg/Publications/InternationalCooperation/tabid/256/Default.aspx).

¹⁸² *Ibid.*; Criminal Justice (International Co-operation) (Jersey) Law 2001, Sections 6-7; Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law, 2001, Section 7.

¹⁸³ *Phase 2 Report: United Kingdom* at paras. 212-223; Summary and Conclusions of the Working Group on the UK’s Written Follow-up Report, para. 15. Those jurisdictions with foreign bribery offences have usually adopted a model similar to the present UK legislative scheme (e.g., the agent/principal approach) and thus have similar shortcomings.

¹⁸⁴ UK Second Supp. Memo, Annex B, p. 7.

¹⁸⁵ Statement by SFO at 16-18 January 2007 WGB meeting.

273. The examining team has focused in particular on two aspects of ECGD's approach to cases of suspected bribery and/or related suspected fraud where the criminal investigation of the suspected bribery and fraud is discontinued other than on the merits: (1) ECGD's reaction to the receipt of alleged evidence of bribery-related fraud by an existing client against ECGD with regard to its existing contracts; and (2) ECGD's reaction, in particular with regard to its applicable contractual terms for new contracts, to the future possibility that UK criminal investigations of alleged foreign bribery by its clients may be discontinued on grounds other than the merits.¹⁸⁶

1. ECGD's reaction to the receipt of alleged evidence of bribery-related fraud with regard to its existing contracts.

274. The UK Memo states that ECGD's existing contracts terminate and/or have recourse provisions upon "either conviction or admission of Corrupt Activity as defined". These provisions would not appear to allow for the ECGD to terminate support for contracts where there is suspected bribery that cannot be investigated: no conviction is possible and there is no likelihood of any admission of corruption.

275. The evidence gathered by the SFO, however, related to allegations of bribery-related fraud involving alleged misrepresentations by the company to ECGD in connection with the issuance of insurance. The general law of insurance "imposes heavy duties on those applying for insurance" and allows the insurer to avoid the policy -- treat it as if it never existed -- if, *inter alia*, the policyholder makes an incorrect statement of material fact.¹⁸⁷ ECGD's contractual documents both refer to general law and contain specific provisions providing for avoidance rights in the event of certain misrepresentations.¹⁸⁸ The evidence gathered by the SFO may thus give rise to rights of avoidance by ECGD.

276. The Phase 2 bis questionnaire (Q121-122) asked the UK to describe actions taken by ECGD with regard to this SFO evidence of bribery-related fraud. In response, the UK Memo indicated only that the contracts are still in force and did not describe any action by ECGD. It stated that the sum insured had not been extended by ECGD, but this may simply reflect the absence of any claim to date.

¹⁸⁶ In accordance with the mandate for the Phase 2 bis review, this report reviews only export credit policy issues raised by the Al Yamamah case.

¹⁸⁷ See Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Breach of Warranty and Non-Disclosure by the Insured: A Summary*, § 6.1 (2007):

The law imposes heavy duties on those applying for insurance. Potential policyholders are required to volunteer information to the insurer about anything that would influence a prudent underwriter's assessment of the risk. If the policyholder fails in this duty, and the insurer can show that, if it had been given the information it would not have agreed to the policy on the same terms (or at all), the insurer may "avoid the policy". This means that the insurer can. Similarly, the insurer may avoid the policy if the policyholder makes an incorrect statement of fact that is material. It does not matter that the policyholder had no reason to know that the statement was untrue, or that it was material to the insurer.

(Footnotes omitted. Available at www.lawcom.gov.uk/docs/cp182_summary.pdf)

¹⁸⁸ See for example, ECGD's current Proposal for an Export Insurance Policy (which applicants must complete to request support). It includes provisions that certain misrepresentations by the applicant would allow ECGD to "forthwith upon giving written notice to [the applicant], avoid the resulting insurance policy from its inception" and require repayment of any amounts paid. See Proposal for an Export Insurance Policy § 8.1); see also *id.* (Introductory note) (noting that failure to disclose all material facts may nullify any Export Insurance Policy based on this Proposal); *id.* § 3. While these provisions date from 2006, earlier contracts may have also included provisions allowing nullification in the event of misrepresentations particularly since such provisions reflect general principles of insurance law.

277. At the on-site visit, the ECGD representatives described at some length the complex regime of public and private law to which it is subject. However, its representative declined to provide the requested information about whether ECGD had taken any action with regard to the evidence of alleged fraud. He stated that ECGD had received legal advice to the effect that responding would breach its private law obligations of commercial confidence with regard to information supplied by its client in confidence.

278. The examiners note that their questions relate to whether ECGD has taken any action, not to the substance of the alleged misrepresentations or fraud. ECGD could provide general information on its actions, (*e.g.*, whether it engaged in an audit, considered avoiding the relevant contracts or contacted BAE to obtain an explanation) without disclosing any commercial information provided by BAE.

279. Anti-bribery provisions in export credit contract documents will be of little use in deterring bribery if they appear to remain unused by the export credit agency in relevant cases. The examining team of course expresses no views about the underlying allegations in this case, but it notes that they were sufficient for the SFO to commence a full-scale investigation. In this context, and in light of the discontinuance of the SFO investigation, they are seriously concerned both about the lack of evidence of any response by ECGD to the fraud allegations, the absence of any explanation for the inaction and ECGD's proffered justification for declining to provide information in this area.

280. ECGD stressed during the on-site visit that it does not have any investigative powers and that it principally relies in this regard on the criminal law enforcement agencies. The government has made clear that it does not intend to change this policy and excluded the issue of whether the ECGD should have investigative powers from the planned review of ECGD anti-corruption policies in 2009.¹⁸⁹ While this reliance on criminal investigations may make sense as a general rule, its rationale is undermined when the criminal process is blocked.

2. ECGD's policy response to address foreign bribery allegations relating to ECGD-supported transactions that cannot be investigated by law enforcement authorities.

281. The December 2006 discontinuance raises several new issues for ECGD and its anti-corruption policy. Questions arise in particular with regard to the recent Typhoon sale agreement between the UK government and the Saudi government. It was formalised in an Understanding Document signed by the UK Defence Secretary and the Saudi Minister of Defence and Aviation on 21 December 2005. BAE Systems was designated Prime Contractor for the new programme. A formal Letter of Offer and Acceptance (LOA) for the supply of the aircraft was signed by the two Governments in September 2007. The sale thus involves understandings or agreements both before and after the discontinuance of the criminal case. ECGD has extended coverage to the 2007 Typhoon contract, which post-dates the discontinuance.

282. First, and most broadly, there is the policy question of the appropriate export credit policy with regard to exports to countries whose senior officials have interfered with UK criminal investigations of foreign bribery. The continuing provision of export credit support for exports to such countries under the same conditions as for other countries may not be consistent with a general anti-foreign bribery policy. There is no evidence that ECGD has considered this question to date.

¹⁸⁹

See The Government's Response to Recommendations made by the Trade and Industry Committee in its Fifth Report of the 2005-06 Session published on 25 July 2006 - Export Credits Guarantee Department's bribery rules ("the [2009] review will not include consideration of possible changes to ECGD's statute to enable it to assume regulatory and investigatory powers as the Government does not accept the relevant recommendation") (www.publications.parliament.uk/pa/cm200506/cmselect/cmtrdind/1670/167005.htm).

283. Second, if support is still to be provided under some circumstances where there is risk of foreign interference with UK criminal proceedings, a second more technical policy question relates to who should bear the risk of financial loss if there is alleged bribery by a client or someone acting on its behalf in relation to an insured contract after the insurance is issued, but it cannot be proved in court because investigation is precluded under UK law by national security or other concerns unrelated to the merits. Given the current standard which requires a conviction or an admission of bribery, it would appear that this risk may remain with ECGD which may not be appropriate.

284. A variety of approaches could be considered. Consideration could be given to requiring clauses that would seek to exclude coverage in the event of any foreign government interference in the future with regard to the newly covered transaction. Such clauses would appear to be justified not only by the fight against corruption, but also by the financial interests of the export credit agency because its recourse may be limited in the event criminal proceedings are discontinued.

285. Changes could include giving ECGD the power to terminate its support or seek recourse in defined circumstances. They could also include a requirement that insured contracts in appropriate cases expressly clarify that any “confidentiality” understandings, such as those that were alleged to be implicit in the Al Yamamah arrangement, should be understood by all parties not to affect normal UK criminal proceedings.¹⁹⁰ They could provide ECGD with special audit and other rights if the criminal process is terminated other than on the merits.

286. Discussions at the on-site visit made clear that ECGD has not to date given any consideration to policies of this nature. Accordingly, even under ECGD’s post-2006 contracts, a company that benefits from a discontinuance may well be able to claim on its ECGD export credit insurance even if there are serious reasons to believe bribery has occurred.

287. As the UK notes, the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits does not explicitly address situations where investigations into allegations of bribery are discontinued other than on the merits or where prosecution is not possible for other factors, such as expiry of the statute of limitations. However, it does recommend generally that members take “appropriate measures to deter bribery in international business transactions benefitting from export credit support.” The examiners consider that a pro-active anti-bribery policy should examine appropriate measures to address situations of concern even where they are not expressly identified in the 2006 Recommendation.

Commentary:

The lead examiners are seriously concerned about the lack of evidence of any response by ECGD to the serious allegations of bribery-related fraud relating to the Al Yamamah contracts. The lead examiners invite the UK government to provide information in this regard in a manner that does not require any disclosure of commercial information disclosed by a client of the agency.

The examiners note that ECGD considers that it does not have any investigative powers and that it principally relies in this regard on the criminal law enforcement agencies. Reliance on the criminal law enforcement authorities is not appropriate where a criminal investigation is blocked for reasons other than the merits. In such cases, the lead examiners consider that ECGD should make vigorous use of all of its powers to review the situation, including notably its audit powers. Contracting policies should be reviewed to determine if additional powers should be available to the ECGD in such cases.

¹⁹⁰ See, e.g., Bundle at 136; House of Lords Judgement §§ 3, 13.

Threats by foreign states that interfere with criminal law proceedings in foreign bribery cases raise numerous additional issues for ECGD. The lead examiners are concerned about the limited information made available in this area by the UK authorities. They recommend that ECGD take all necessary measures, including enhanced due diligence when appropriate, to ensure that applicants for export credit support, or anyone acting on their behalf, have not engaged in, and will not engage in, foreign bribery or foreign-bribery-related fraud against ECGD. Such measures should address in particular the issues raised by cases where criminal proceedings may be blocked for reasons unrelated to the merits.

K. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW UP

The Working Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK. The continued failure of the UK to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations. The Working Group reiterates its previous 2003, 2005 and 2007 recommendations that the UK enact new foreign bribery legislation at the earliest possible date. The Group also strongly regrets the uncertainty about the UK's commitment to establish an effective corporate liability regime in accordance with the Convention, as recommended in 2005, and urges the UK to adopt appropriate legislation as a matter of high priority.

The Working Group recognises that the UK government has taken some measures to strengthen the fight against foreign bribery and notes a first conviction in September 2008 for foreign bribery in international business transactions. It also notes the recent UK anti-corruption strategy to improve and strengthen the UK's law and structures to tackle foreign bribery. Reforms are urgently needed and should be dealt with as a matter of political priority.

The Working Group understands that the Law Commission will deliver its final report in November 2008 and that the Government will publish a draft bill for pre-legislative scrutiny early next year. The Working Group expects that a bill be introduced in Parliament in 2009.

The Working Group's priority is indeed to ensure that the UK will enact new legislation on foreign bribery which is effective and comprehensive (including on liability of legal persons). In this context, the Working Group will seek to confer with the Law Commission about this Report and the concerns raised therein prior to the Commission's publication of its report. In addition, the Group welcomes the invitation of the UK government to discuss the content of the Law Commission report soon after its publication in order to fully apprise the UK of the views of the Working Group before a draft bill is submitted for pre-legislative scrutiny. The modalities of such discussion will need to be agreed between the United Kingdom and the Management Group.

In addition, in light of the numerous issues of serious concern, the Working Group requests the UK to provide a written report on legislative progress at each Working Group meeting and reserves the right to carry out follow-up visits to the UK as it deems appropriate. The Working Group may also take further appropriate action after it considers the reports or any on-site visits.

The Working Group stresses that failing to enact effective and comprehensive legislation undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks.

In light of the above and based on its findings regarding the UK's implementation of the Convention and the Revised Recommendation, the Working Group also (i) makes the following recommendations to the UK under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

1. Regarding the offence of foreign bribery, the Working Group recommends that the UK:
 - (a) enact effective and modern foreign bribery legislation in accordance with the Convention at the earliest possible date and as a matter of high priority (Convention Article 1);
 - (b) ensure, in particular, that such legislation does not permit principal consent as a defence to foreign bribery and criminalises extraterritorial foreign bribery committed through an intermediary who is not a UK national (Convention Article 1).
2. Regarding the liability of legal persons, the Working Group recommends that the UK adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery (Convention Articles 2 and 3).
3. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that the UK:
 - (a) satisfy the Working Group, by enacting legislation or otherwise, that it has established a broad territorial basis for jurisdiction that does not require an extensive physical connection to the bribery act (Convention Article 4(1));
 - (b) enact legislation to establish, for foreign bribery cases, nationality jurisdiction over legal persons incorporated in the Crown Dependencies and Overseas Territories (Convention Article 4(2)).
4. Regarding the application of Article 5, the Working Group recommends that the UK:
 - (a) take all necessary measures to ensure that Article 5 applies effectively to investigators and prosecutors at all stages of a foreign bribery investigation or prosecution, and in respect of all investigative and prosecutorial decisions including those made by the SFO, police and Attorney General (Convention Article 5);
 - (b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5 so that they can assist investigators and prosecutors to act in accordance with that Article (Convention Article 5).
5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that the UK:
 - (a) ensure that the Attorney General's superintendence role does not include the power to give directions to the Director in individual foreign bribery cases, and eliminate the statutory requirements for the Attorney General to consent to prosecutions of foreign bribery (Convention Article 5; Revised Recommendation Paragraphs I and II);

- (b) take steps to ensure that the SFO can obtain access to information that may be relevant to a foreign bribery investigation and which is held by the National Audit Office, tax authorities in the Crown Dependencies and Overseas Territories, and other UK government agencies (Revised Recommendation Paragraphs I and II);
- (c) include the foreign bribery offence within the scope of the current reform efforts to make its system of plea bargaining more effective (Revised Recommendation Paragraphs I and II);
- (d) improve the ability of the Crown Dependencies and Overseas Territories to provide MLA to the UK, including by eliminating formal requirements and increasing the available resources; ensuring that the Overseas Territories adopt, and encouraging the Crown Dependencies to adopt, foreign bribery legislation, and analysing the causes of delay (Convention Article 9; Revised Recommendation Paragraphs I, II.vii and VII);
- (e) consider re-opening the Al Yamamah investigation if the UK were satisfied that the circumstances that led to the decision to discontinue the investigation sufficiently changed (Convention Article 5).

6. Regarding resources for foreign bribery cases, the Working Group recommends that the UK ensure that the SFO and the relevant investigative agencies have sufficient human and financial resources so as to carry out their role effectively in foreign bribery cases (Revised Recommendation Paragraphs I and II).

7. Regarding export credits, the Working Group recommends that Export Credits Guarantee Department (ECGD):

- (a) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on the merits, make vigorous use of all of its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4), Revised Recommendation Paragraph I);
- (b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4), Revised Recommendation Paragraph I).

Part II. Follow-up by the Working Group

8. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- (a) the rules for appointing and removing the SFO Director, and the powers of the Attorney General and SFO Director in foreign bribery cases (Convention Article 5; Revised Recommendation Paragraphs I and II);
 - (b) the results of the UK's continuing active review of the disclosure regime for prosecutors in complex commercial cases as they apply to foreign bribery and the need for resources in such cases (Revised Recommendation Paragraphs I and II);
 - (c) the use of co-operative witnesses and deferred prosecution of companies in foreign bribery cases (Revised Recommendation Paragraphs I and II).

ANNEX 1 - PARTICIPANTS IN THE ON-SITE VISIT

- Foreign and Commonwealth Office
- Department for Business, Enterprise and Regulatory Reform
- Serious Fraud Office
- Attorney General's Office
- Ministry of Justice
- Home Office
- Crown Prosecution Service
- Serious Organised Crime Agency
- City of London Police
- Association of Chief Police Officers
- Export Credit Guarantee Department
- HM Treasury
- Department for International Development
- Cabinet Office
- Law Commission
- Criminal court judges
- Criminal and corporate lawyers
- Large UK company
- Business associations
- Academics
- Non-governmental organisations

ANNEX 2 - PRINCIPAL ACRONYMS AND ABBREVIATIONS

AG	Attorney General
AGO	Attorney General's Office
ATCSA	Anti-Terrorism, Crime and Security Act 2001
BERR	Department for Business Enterprise and Regulatory Reform
BVI	British Virgin Islands
CDs	Crown Dependencies
CHIS	covert human intelligence sources
CJA 1987	Criminal Justice Act 1987
COLP	City of London Police
CPS	Crown Prosecuting Service
DFID	Department for International Development
DPP	Director of Public Prosecutions
ECGD	Export Credits Guarantee Department
FCO	Foreign and Commonwealth Office
FSA	Financial Services Authority
FSC	Financial Services Commission (British Virgin Islands)
GBP	pound sterling
ICJ	International Court of Justice
MDP	Ministry of Defence Police
MLA	mutual legal assistance
MOD	Ministry of Defence
MOU	memorandum of understanding
NAO	National Audit Office
NGO	non-governmental organisation
OACU	Overseas Anti-Corruption Unit
OTs	Overseas Territories
PACE	Police and Criminal Evidence Act
SFO	Serious Fraud Office
SOCA	Special Organised Crime Agency
SOCPA	Serious Organised Crime and Police Act 2005
UK	United Kingdom
WGB	OECD Working Group on Bribery in International Business Transactions

ANNEX 3 - INVESTIGATIVE AGENCIES

Serious Fraud Office (SFO)

- The SFO is a Government department headed by a Director under the superintendence of the Attorney General. It investigates and prosecutes cases which appear to its Director to “*involve serious and complex fraud*” (CJA §1(3))
- The SFO “vets” (initial review) all foreign bribery allegations to determine whether to proceed. All law enforcement agencies are instructed to forward all foreign bribery allegations to the SFO; the SFO maintains a register of all such allegations.
- If, after vetting, the SFO takes on a case itself, the investigation team will comprise lawyers, financial investigators, and police officers. Officers are generally drawn from the City of London Police Overseas Anti-Corruption Unit (COLP OACU), except as described below. The SFO also retains outside barristers to prosecute its cases.
- If the SFO decides not to investigate an allegation itself, the case can be investigated by other police agencies as described below.

Ministry of Defence Police (MDP)

- The MDP is a civil police force that is part of the Ministry of Defence (MOD). It replaces the COLP OACU as the police force in foreign bribery cases if the allegations are against MOD employees or defence contracts to which the MOD is a party.

Local police

- The 43 separate local police forces in England and Wales are heavily focused on local concerns. However, in theory could be called on to investigate foreign bribery in non-SFO and non-MDP cases.
- Where the allegation involves a UK incorporated body, it would be the force where its registered office is located. Where the allegation is against a UK national (and no incorporated body is involved), it would be the force where his last known UK address is located. In practice, the key agency may be the COLP, which has jurisdiction throughout England and Wales.

Serious Organised Crime Agency (SOCA)

- The SOCA is responsible for preventing and detecting serious organised crime. SOCA has special investigative powers which can be used to investigate bribery and corruption offences.
- However, SOCA can only investigate suspected serious or complex fraud with the agreement of the SFO or if the SFO declines to act.

Metropolitan Police Proceeds of Crime Team

- The team investigates money laundering through the UK financial system by politically exposed persons. The unit could conceivably provide useful information to foreign bribery investigations.

Crown Prosecution Service (CPS)

- The CPS is the main prosecutorial authority in England and Wales. It is headed by the Director of Public Prosecutions (DPP) who is appointed by the Attorney General.
- Its traditionally limited role in the police investigations has become much more active, especially in complex cases. Nonetheless, the police still maintain control over the investigation.

ANNEX 4 - EXCERPTS FROM RELEVANT LEGISLATION

Prevention of Corruption Act 1906

1 Punishment of corrupt transactions with agents

(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanour, and shall be liable--

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

(4) For the purposes of this Act it is immaterial if--

(a) the principal's affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom;

(b) the agent's functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.

2 Prosecution of offences

(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General.

Public Bodies Corrupt Practices Act 1889

1 Corruption in office a misdemeanour

(1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.

2 Penalty for offences

Any person on conviction for offending as aforesaid shall, at the discretion of the court before which he is convicted,--

(a) be liable--

(i) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and

- (ii) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both; and
- (b) in addition be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and
- (c) be liable to be adjudged incapable of being elected or appointed to any public office for five years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and
- (d) in the event of a second conviction for a like offence he shall, in addition to the foregoing penalties, be liable to be adjudged to be for ever incapable of holding any public office, and to be incapable for five years of being registered as an elector, or voting at an election either of members to serve in Parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and
- (e) if such person is an officer or servant in the employ of any public body upon such conviction he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

4 Restriction on prosecution

- (1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General.
- (2) In this section the expression "Attorney General" means the Attorney or Solicitor General for England, and as respects Scotland means the Lord Advocate.

7 Interpretation

In this Act--

The expression "public body" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above:

The expression "public office" means any office or employment of a person as a member, officer, or servant of such public body:

The expression "person" includes a body of persons, corporate or unincorporate:

The expression "advantage" includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

Anti-terrorism, Crime and Security Act 2001

Part 12 Bribery and Corruption

109 Bribery and corruption committed outside the UK

- (1) This section applies if--
 - (a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and
 - (b) the act would, if done in the United Kingdom, constitute a corruption offence (as defined below).
- (2) In such a case--
 - (a) the act constitutes the offence concerned, and
 - (b) proceedings for the offence may be taken in the United Kingdom.
- (3) These are corruption offences--
 - (a) any common law offence of bribery;
 - (b) the offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (c 69) (corruption in office);
 - (c) the first two offences under section 1 of the Prevention of Corruption Act 1906 (c 34) (bribes obtained by or given to agents).

- (4) A national of the United Kingdom is an individual who is--
- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
 - (b) a person who under the British Nationality Act 1981 (c 61) is a British subject, or
 - (c) a British protected person within the meaning of that Act.

110 Presumption of corruption not to apply

Section 2 of the Prevention of Corruption Act 1916 (c 64) (presumption of corruption in certain cases) is not to apply in relation to anything which would not be an offence apart from section 108 or section 109.

Criminal Justice Act 1987

Part I Fraud Serious Fraud Office

1 The Serious Fraud Office

- (1) A Serious Fraud Office shall be constituted for England and Wales and Northern Ireland.
- (2) The Attorney General shall appoint a person to be the Director of the Serious Fraud Office (referred to in this Part of this Act as "the Director"), and he shall discharge his functions under the superintendence of the Attorney General.
- (3) The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.
- (4) The Director may, if he thinks fit, conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it.
- (5) The Director may--
- (a) institute and have the conduct of any criminal proceedings which appear to him to relate to such fraud; and
 - (b) take over the conduct of any such proceedings at any stage.
- (6) The Director shall discharge such other functions in relation to fraud as may from time to time be assigned to him by the Attorney General.

2 Director's investigation powers

- (1) The powers of the Director under this section shall be exercisable, but only for the purposes of an investigation under section 1 above, or, on a request made by an authority entitled to make such a request, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.
- (1A) The authorities entitled to request the Director to exercise his powers under this section are--
- (a) the Attorney-General of the Isle of Man, Jersey or Guernsey, acting under legislation corresponding to section 1 of this Act and having effect in the Island whose Attorney-General makes the request; and
 - (b) the Secretary of State acting under section 15(2) of the Crime (International Co-operation) Act 2003, in response to a request received by him from a person mentioned in section 13(2) of that Act (an "overseas authority").
- (1B) The Director shall not exercise his powers on a request from the Secretary of State acting in response to a request received from an overseas authority within subsection (1A)(b) above unless it appears to the Director on reasonable grounds that the offence in respect of which he has been requested to obtain evidence involves serious or complex fraud.
- (2) The Director may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.
- (3) The Director may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and--
- (a) if any such documents are produced, the Director may--
 - (i) take copies or extracts from them;
 - (ii) require the person producing them to provide an explanation of any of them;

(b) if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

(4) Where, on information on oath laid by a member of the Serious Fraud Office, a justice of the peace is satisfied, in relation to any documents, that there are reasonable grounds for believing--

(a) that--

- (i) a person has failed to comply with an obligation under this section to produce them;
- (ii) it is not practicable to serve a notice under subsection (3) above in relation to them; or
- (iii) the service of such a notice in relation to them might seriously prejudice the investigation; and

(b) that they are on premises specified in the information,

he may issue such a warrant as is mentioned in subsection (5) below.

(5) The warrant referred to above is a warrant authorising any constable--

- (a) to enter (using such force as is reasonably necessary for the purpose) and search the premises, and
- (b) to take possession of any documents appearing to be documents of the description specified in the information or to take in relation to any documents so appearing any other steps which may appear to be necessary for preserving them and preventing interference with them.

...

(18) In this section, "documents" includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form ; and "evidence" (in relation to subsections (1A)(b), (8A), . . . and (8C) above) includes documents and other articles.

2A Director's pre-investigation powers in relation to bribery and corruption: foreign officers etc

(1) The powers of the Director under section 2 are also exercisable for the purpose of enabling him to determine whether to start an investigation under section 1 in a case where it appears to him that conduct to which this section applies may have taken place.

(2) But—

- (a) the power under subsection (2) of section 2 is so exercisable only if it appears to the Director that for the purpose of enabling him to make that determination it is expedient to require any person appearing to him to have relevant information to do as mentioned in that subsection, and
- (b) the power under subsection (3) of that section is so exercisable only if it appears to the Director that for that purpose it is expedient to require any person to do as mentioned in that subsection.

(3) Accordingly, where the powers of the Director under section 2 are exercisable in accordance with subsections (1) and (2) above—

- (a) the reference in subsection (2) of that section to the person under investigation or any other person whom the Director has reason to believe has relevant information is to be read as a reference to any such person as is mentioned in subsection (2)(a) above,
- (b) the reference in subsection (3) of that section to the person under investigation or any other person is to be read as a reference to any such person as is mentioned in subsection (2)(b) above, and
- (c) any reference in subsection (2), (3) or (4) of that section to the investigation is to be read as a reference to the making of any such determination as is mentioned in subsection (1) above.

...

(5) This section applies to any conduct which, as a result of section 108 of the Anti-terrorism, Crime and Security Act 2001 (bribery and corruption: foreign officers etc), constitutes a corruption offence (wherever committed).

(6) The following are corruption offences for the purposes of this section—

- (a) any common law offence of bribery;
- (b) the offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (corruption in office); and
- (c) the offences under section 1 of the Prevention of Corruption Act 1906 (corrupt transactions with agents).