IN THE HIGH COURT OF JUSTICE **CO/1567/2007**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

on the application of

(1) CORNER HOUSE RESEARCH
(2) CAMPAIGN AGAINST ARMS TRADE

Claimants

and

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant

and

BAE SYSTEMS PLC

Interested Party

WITNESS STATEMENT OF NICHOLAS HILDYARD

I, Nicholas Hildyard, Director, of Corner House Research, Corner House, Station Road, Sturminster Newton, Dorset DT10 1YJ SAY AS FOLLOWS:

Introduction

1. This witness statement is served on behalf of Corner House Research ("Corner House") in support of its claim for judicial review. Unless stated otherwise, the contents of this statement are within my own knowledge. Where I rely on sources other than my own personal knowledge, I have endeavoured to state the source and refer to the document. Rather than exhibiting numerous documents to this statement, references in square brackets are to the paginated judicial review

bundle. I have also read the witness statement of Ann Feltham made on behalf of Campaign Against Arms Trade ("CAAT") and, except for matters about the financial position of CAAT, about which I have no knowledge, I agree with it.

2. In this statement, I deal with the following issues:

   (a) The definition and scale of corruption and bribery in international trade;

   (b) The impact of corruption and bribery on economic investment and trade and investment;

   (c) The nexus between corruption, terrorism and national security;

   (d) The steps being taken by governments, intergovernmental institutions, and financial and business groups to combat corruption;

   (e) The background and purpose of the OECD Anti-bribery Convention;

   (f) The recent history of UK anti-corruption legislation;

   (g) UK government policy on combating corruption and bribery;

   (h) Saudi Arabia's international obligations in relation to counter-terrorist co-operation; and

   (i) Corner House's financial position and the need for a protective costs order.

3. I am a director and policy analyst at Corner House. Corner House is a not-for-profit organisation with a particular interest and expertise on overseas corruption and the role of the United Kingdom government in combating bribery. The aims of the organisation include research, education and campaigning. Corner House is a not-for-profit company limited by guarantee.

4. Corner House's interest and involvement in the issue of bribery and corruption is long-standing. Our work has included an extensive analysis of the role of Export

Credit Agencies in exacerbating overseas corruption (*Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department (ECGD); Underwriting Bribery: Export Credit Agencies and Corruption)* (pp.449-528); and a study of the shortcomings in UK enforcement of overseas corruption offences (*Enforcing the Law on Overseas Corruption Offences: towards a model for excellence*) (pp.529-565).

5. Corner House has given written and oral evidence to numerous policy and legislative bodies, including the OECD's Working Group on Bribery; the OECD's Export Credit Group, which is responsible for developing anti-bribery rules for OECD Export Credit Agencies; the OECD Working Group on Bribery's review of UK's implementation of the OECD Anti-Bribery Convention; the UK Parliament's Select Committee on Trade and Industry; the All Party Parliamentary Group on Africa; and the Joint Committee on the Draft Corruption Bill.

6. Corner House was also the Claimant in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, CA (pp.566-608). In this case, Corner House successfully challenged the refusal of the Export Credit Guarantee Department to consult on a watering-down of its anti-corruption procedures, which took place at the request of major exporters, including BAE Systems Plc ("BAE"). The case was eventually settled with the ECGD agreeing to hold the consultation sought and paying Corner House's costs. In addition, in this case, Corner House obtained the first full protective costs order made in a public law claim.

7. Corner House subsequently submitted evidence to the ECGD anti-bribery consultation that resulted from its claim for judicial review, following which, in March 2006, the ECGD reinstated the majority of the rules that it had previously rescinded under pressure from BAE and others. Commenting on Corner House's role in strengthening the ECGD's rules, the Trade and Industry Committee of the House of Commons (pp.609-619) concluded that "*without the efforts of The*

Corner House, the less effective [anti-bribery] procedures would have superseded [the more effective] procedures" (p.617) (Trade and Industry Committee, *'Export Credit Guarantee Department's Bribery Rules'*, Fifth report of Session 2005-06, 12 July 2006, paragraph 36). The full report can be found at: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtrdind/1124/1124.pdf.

8. In addition to strengthening the ECGD's anti-bribery policies, the work undertaken by Corner House has played a significant role in enhancing the OECD's Export Credit Group's *Action Statement on Bribery and Officially Supported Exported Credits* (pp.620-623) and the UK government's own anti-bribery and corruption policies, with recommendations made by Corner House being reflected in the Government's 2006 White Paper on International Development (pp.624-714) and the arrangements that have been put in place for ensuring more effective enforcement against bribery offences. In June 2006, the government established a new police unit to provide dedicated support to the Serious Fraud Office – a key recommendation of Corner House to the government for several years.

Corruption and Bribery: Definition and Scale

9. A common definition of corruption is "*the abuse of public or private office for personal gain*" (p.719) (Asian Development Bank, 'Anti-Corruption: Policies and Strategies, Description and Answers to Frequently Asked Questions', Manila, Philippines, 2000) (pp.719-732), an offence that takes many forms – from petty extortion to the amassing of personal wealth through embezzlement or other dishonest means. The UK government defines bribery as *"the receiving or offering/giving of any benefit (in cash or in kind) by or to any public servant or office holder or to a director or employee of a private company in order to induce that person to give improper assistance in breach of their duty to the government*

or company which has appointed them" (p.733) (Foreign and Commonwealth Office, 'UK Bribery and Corruption Law', May 2006) (pp.733-734).

10. According to Daniel Kaufman, Director of Global Governance at The World Bank Institute, "*the extent of annual worldwide transactions that are tainted by corruption [is] close to US$ 1 trillion [$1000 billion]*" (p.737) (Kaufman, D., 'Myths and Realities of Governance and Corruption', 2005) (pp.735-752) – a figure which the World Economic Forum notes was equivalent to 3 per cent of global GDP in 2004 (p.767) (Executive Summary, 'The World Competitiveness Report 2006-07', The World Economic Forum, 2006) (pp.753-768).

11. Worldwide, bribery and embezzlement have permitted billions of dollars to be amassed by corrupt politicians. According to the World Bank's 2006 Global Monitoring Report (pp.769-788), "*Nigeria's President Abacha embezzled between $2 billion and $5 billion; Zaire's President Mobutu, an estimated $5 billion. Kenya lost $600 million in one scandal alone in the early 1990s, and Angola lost an estimated $4 billion between 1997 and 2002*" (p.779).

12. Transparency International, a worldwide coalition of anti-corruption groups publishes an annual Corruption Perception Index (CPI), based on perceived levels of corruption, as determined by expert assessments and opinion surveys. Countries are scored against a set of indices, with those ranked lowest having the highest perceived levels of corruption. In the 2006 *Corruption Perceptions Index (CPI)* (pp.789-801), Britain is ranked 11th out of 163, France 18th, the USA 20th and Saudi Arabia 70th (pp.793-794).

13. More importantly for present purposes, Transparency International also conducts an annual 'Bribe Payers Index' (BPI) to measure the propensity of firms from industrialised countries to bribe abroad (pp.802-817). The 2006 *BPI Index* draws from the responses of more than 11,000 business people in 125 countries polled in the World Economic Forum's Executive Opinion Survey 2006. According to Transparency International's definitions, a score of 10 indicates a perception of no corruption, while zero means corruption "*is seen as rampant*" (p.820).

Switzerland leads the ranking, with a score of 7.81, and Britain comes 6th with a score of 7.39 (p.819).

The Impacts of Bribery on Trade and Investment

14. Corruption distorts markets and, like other forms of anti-competitive behaviour, such as the formation of cartels, damages all involved in the supply of goods and services – and ultimately national economies.

15. The preamble to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-bribery Convention) (pp.346-356) notes that "*bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive conditions*" (p.348).

16. Britain's Export Credits Guarantee Department (ECGD) has also pointed to the negative impacts of corruption on trade as a prime rationale for adopting anti-bribery rules: "*ECGD recognises that bribery and corruption distorts competition and investment, hinders free and fair trade, and represents an unacceptable cost to the business*" (p.824).

17. More specifically, corruption increases business risks, increases costs and is economically inefficient. As Control Risks notes in its International Business Attitudes to Corruption – Survey 2006 (pp.826-848): "*If good companies avoid investing because of concerns about corruption, host countries also lose out: the investors that they attract are likely to have lower standards, both of integrity and of professional competence. Reputation matters in another respect. When companies from emerging economies enter the international market, they find it harder to win the trust of partner companies*" (p.834).

18. Although some companies have sought to excuse bribery on the basis that jobs would be lost if bribes were not paid, the flip side of the coin is the extent to which companies lose business either because they are unwilling to pay bribes or because they are out-bribed by competitors. A 2006 survey by Control Risks (pp.826-848) reports: "*Overall, 43% of respondents believe that they failed to win new business in the last five years because a competitor had paid a bribe, and one-third had lost business to bribery in the last year . . . Even in the UK, a quarter of UK-based international companies say that they have lost business to corrupt competitors in the last five years*" (p.830). In Hong Kong the percentage of companies believing that they had lost business to bribery in the previous five years rose from 69% in 2002 to 76% in 2006. In The Netherlands, the percentage increased from 40% in 2002 to 46% in 2006, and in the US the figure rose from 32% to 44% (p.830).

19. Even if paying bribes wins contracts, it also incurs high reputational and other risks for companies. As Control Risks points out in another report, 'Facing up to Corruption' (pp.849-870): "*Corruption demands secrecy, but there are fewer secrets in an era of rapid, worldwide communication. Those who break the rules are more likely to be found out. A corruption scandal in one part of the world will affect a company's reputation – and its commercial prospects – thousands of miles away*" (p.853). In addition, bribe paying, like giving in to blackmail, has its own dynamic: "*Once a company has a reputation for paying, officials will seek an opportunity to levy their 'share'. It is hard to resist when a company's earlier behaviour suggests a willingness to pay*" (p.863). Moreover, the results of bribe paying are uncertain: "*The fact that bribery is illegal means that the bribe-payer has no control over the outcome, and cannot complain if they do not get what they paid for*" (p.863). Companies that bribe also have no 'security of tenure': "*They will face new pressures – and possibly new demands – when the person they bribed leaves office*" (p.864). Given these risks, Control Risks concludes: "*It is better not to pay in the first place*" (p.863).

20. It is for these reasons that the rigorous enforcement of anti-corruption rules is increasingly seen by major financial institutions as critical to maintaining their competitive advantage, and indeed the competitiveness of the financial centres where they are based. Responding to the SFO decision in December 2006 to terminate the investigation into the allegations of corruption by BAE Systems in Saudi Arabia, Mark Anson, chief executive of Hermes, wrote to Tony Blair saying the decision threatened the UK's reputation as a leading financial centre and would have a high, long-term cost for business and markets (p.871). Similar concerns have been publicly expressed by F&C Asset Management and Morley Fund Management (Financial Times, 23.12.06) (p.872).

Corruption and Security

21. Corruption also has profound implications for national security. This link has been acknowledged by the leaders of all of the G8 countries, among them the Prime Minister, Mr Blair, in their final communiqué from the 2006 St Petersburg Summit:

> "*Corruption threatens our shared agenda on global security and stability . . .*" (p.874)

and

> "*We recognize that corrupt practices contribute to the spread of organized crime and terrorism, undermine public trust in government, and destabilize economies*" (G8, Fighting High Level Corruption, July 2006) (p.874).

G8 refers to an international forum for the governments of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and Russia.

Together, the economies of the eight countries account for about 65 per cent of traded goods and services globally. The leaders of the countries meet once a year.

22. The Home Office's strategy document on combating organised crime (pp.876-947) similarly notes that: "*Bribery overseas can be a factor which supports corrupt governments, with widespread destabilising consequences. We are duty-bound to promote high standards of fairness and integrity and to ensure that UK citizens do not contribute to corruption either at home or abroad*" (p.902).

23. Corruption is also a major feature of what the Foreign and Commonwealth Office refers to as "failed states" (pp.948-954), contributing to and feeding off the lack of accountable government. As The Fund for Peace, a US think tank, notes in an article in *Foreign Policy* (p.961), summarising its 2006 'Failed States Index' (pp.955-960): "*Venality and vulnerability usually travel together. This year's index shows a strong correlation between Transparency International's perception of corruption scores and a state's instability. Eight of the 10 most stable countries also appear among the 10 least corrupt*" (p.961) (full document available at:

    http://www.foreignpolicy.com/story/cms.php?story_id=3420&page=3).

24. As the Foreign Office acknowledges, "weak" or "failing" states are frequently safe havens for terrorists, a connection that has led former Foreign Secretary Jack Straw to insist that the UK's national security is intimately bound to addressing state failure:

> " . . .*we need to remind ourselves that turning a blind eye to the breakdown of order in any part of the world, however distant, invites direct threats to our national security and well-being. I believe therefore that preventing states from failing and resuscitating those that fail is one of the strategic imperatives of our times*" (p.948).

25. Saudi Arabia is ranked 73rd out of 146 in the 2006 'Failed States Index' (p.957). In an in-depth report on Saudi Arabia (pp.962-963), The Fund for Peace specifically highlights corruption as a major area of concern: "*Although there have been increasing pressures for political reform, which led to the holding of municipal elections in 2005, Saudi Arabia remains an absolute monarchy with little transparency or accountability. In addition to continuing with these reforms, the government needs to address the issue of* ***corruption within the royal family****, and work to improve its human rights record*" (emphasis added) (p.963).

26. Corruption by ruling elites in the Middle East has also been cited as a factor motivating the leadership of terrorist organisations such as Al Quaeda. A fatwa issued by Osama bin Laden in 1996, entitled "Declaration of War against the Americans Occupying the Land of the Two Holy Places" (pp.964-990), cites corruption in Saudi Arabia and arms purchases by the Saudi government as major justifications for his call for a Jihad not only against the United States but also against the Saudi Royal family:

> "*Numerous princes share with the people their feelings, privately expressing their concerns and objecting to the corruption, repression and the intimidation taking place in the country. But the competition between influential princes for personal gains and interest had destroyed the country. Through its course of actions the regime has torn off its legitimacy . . .*" (p.967).

27. Bin Laden records that the Royal family rebuffed representation made to them, "*both privately and openly*" (p.967), to take "*corrective measures and repentance from the 'great wrong doings and corruption' that had engulfed even the basic principles of the religion and the legitimate rights of the people*" (p.968) and cites religious authority to conclude: "*to fight in defence of religion and Belief is a collective duty; there is no other duty after Belief than fighting the enemy who is corrupting the life and the religion*" (p.971).

28. Subsequently, in 2004, a tape released by Bin Laden again criticises the Saudi Royal family as a "*a corrupt gang*" (p.996) and refers to defence contracts by Saudi Arabia as evidence of the regime's lack of concern for the increasing economic and social insecurity of its citizens (Middle East Media Research Institute, Osama Bin Laden, 16.12.04) (pp.991-998).

29. Jason Burke in his book *Al Qaeda: The True Story of Radical* Islam (I.B.Tauris & Co Ltd, London, 2004) includes the "*obvious corruption and ostentation on the part of the elite and government officials*" as two of the underlying "*root causes of the appeal of the Islamic radicals*" in Egypt following the 1981 assassination of President Sadat.

The Response to International Bribery and Corruption

30. The international community has recognised that if corruption is to be tackled, concerted inter-governmental action, backed by legislation and strengthened management controls within business, is needed. Without such action, those businesses and countries who eschew bribery will always be at risk from being undercut by less scrupulous competitors. A level playing field is needed if bribery is not to result in a race to the bottom. The creation of a level playing field depends on concerted international action.

31. Corruption has featured prominently in statements issued by the G8 and G7 (the G8 countries, less Russia), leading industrial countries in 2000 (pp.999-1008), 2001 (pp.1009-1013), 2002 (pp.1014-1027), 2003 (pp.1028-1030), 2004 (pp.1031-1032), 2005 (pp.1033-68) and 2006 (pp.874-875), with the leaders issuing strong calls for strengthened action against corruption. The 2005 Communiqué in particular stressed the G8's commitment to: "*Reduce bribery by the private sector by rigorously enforcing laws against bribery of foreign public officials, including prosecuting those engaged in bribery*" (p.1056).

32. At the United Nations, the General Assembly adopted a 'Declaration against Corruption and Bribery in International Commercial Transactions' in December 1996 (pp.1069-1073). Subsequently it adopted the UN Convention against Corruption on 31 October 2003 (pp.1074-1116). The Convention entered into force on 14 December 2005 and has been strongly welcomed by the UK, which is a signatory. The first Conference of the States Parties met in Jordan in December 2006.

33. It is widely acknowledged that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-bribery Convention) (pp.346-356) (adopted on 21st November 1997), and its accompanying Revised Recommendation of the Council on Combating Bribery in International Business Transactions (the so-called 1997 Revised Recommendation) (pp.364-373), adopted on 23 May 2007 are the cornerstone of international anti-bribery efforts and among the most effective of all the anti-corruption Conventions. The Convention, which aims to create a level playing field in international trade entered into force in 1999 and has been ratified by 36 countries, including all OECD member countries.

34. Commenting on its introduction into force, the World Bank stated: *"This represents a major change in the rules of the game . . . [N]ot only do companies based in signatory countries run the risk of being blacklisted by the Bank when they bribe officials to get Bank contracts, they also break the law in their own country . . . With the OECD action, . . . industrialized countries are taking a major step to shoulder their 'share of responsibility'. . ."* (p.1122). According to the U.S. Department of Commerce, the OECD Anti-bribery Convention *"is considered one of the strongest anticorruption conventions, and continues to serve as a model for new initiatives"* (p.1134).

35. The OECD instruments were rooted in a recognition of the need for multilateral action to establish a level playing field in international trade, following the unilateral enactment of the Foreign Corrupt Practices Act (FCPA) by the U.S. in

1977. The FCPA made it a criminal offence for USA companies, as well as any other company listed on the New York Stock Exchange, to pay bribes to a foreign public official.

36. The unilateral enactment of the FCPA raised concerns within the US business community – and the government – that the FCPA had created an *un-level* playing field, enabling companies outside the reach of the FCPA to secure commercial advantage through the payment of bribes, in a way that those falling under the FCPA could not. The US response was to press for a treaty to bring other states up to the standard set by the FCPA: "*the OECD began its work on bribery in international business in 1989 at the initiative of the United States*" (p.1026).

37. In 1996 the OECD Council took the significant step of agreeing to criminalize the bribery of foreign public officials. The Working Group prepared the 'Agreed Common Elements', which was to become the blueprint for the Convention, whilst at the same time working on the content of the Revised Recommendation. For a general history to the drawing up and signing of the Convention, I refer to Mark Pieth, Introduction in Pieth, M., Low, L.A., and Cullen, P.J. (eds), *The OECD Convention on Bribery: A Commentary*, Cambridge University Press, 2007. (pp.376-395).

38. In May 1997 the Council adopted the Revised Recommendation on Combating Bribery in International Business Transactions (pp.364-373) and in November 1997 the Convention on Combating Bribery of Foreign Bribery of Foreign Public Officials in International Business Transactions (pp.346-356).

39. The OECD Anti-bribery Convention is a highly targeted instrument that aims to prevent improper advantage in international trade being gained through bribery. It requires parties to make it a criminal offence "*for any person intentionally to offer, promise or give any undue pecuniary or other advantage whether directly or through intermediaries to a foreign public official, for that official or for a third party, in order that the official refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other*

improper advantage in the conduct of international business" (Article 1.1) (p.349).

40. As the Commentaries on the OECD Anti-bribery Convention (pp.357-363) note, the Convention only addresses 'active bribery' meaning the "*offence committed by the person who promises or gives the bribe, as contrasted with 'passive bribery', the offence committed by the official who receives the bribe*" (p.357) The Convention does not deal with the demand-side – the public official in the host state.

Enforcement of the OECD Anti-bribery Convention

41. Enforcement, investigation and prosecution are dealt with by Article 5, which states that "*[I]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved*" [p.351]. According to one commentator (Cullen, P., 'Article 5: Enforcement') (pp.396-417), "*Article 5 is…very much part of the raison d'etre of the Convention*" (p.409).

42. According to Cullen's analysis of the enforcement provisions of the OECD instruments (pp.396-417), examination of the travaux préparatoires reveals the drafters' concern "*to lay the ground for effective investigation and prosecution of the foreign bribery offence by removing any hindrances which might stand in the way*" (p.400).

43. The same analysis concludes that Article 5 and Paragraph 6 thus "…*endorse the principle of independent prosecution as a principle to be applied by all signatories to the Convention"* (p.400) and that in the light of its official commentary, Article 5 "*contains a general obligation to exercise professional judgement when deciding when to prosecute a case. This obligation exists over*

and above the particular requirements contained in the second sentence of Article 5 (exclusion of political influence under any of the specifically-named grounds)" (p.298). It also argues that the requirement stated in the official commentary for 'serious investigation' suggests that discretion should be used '*in favour of investigation"* (p.402).

Discretionary Systems of Prosecution and the Public Interest

44. Cullen's commentary states:

> "*Virtually in unison, state Parties subject to Phase 1 monitoring by the WGB* [Working Group on Bribery] *sing their reassurance to the OECD that investigations and prosecutions have never been, and never will be, influenced by considerations of national economic interest. This is difficult to reconcile with the existence of discretionary systems which precisely call upon the prosecution to take account of the 'public interest' in their decisions about investigation and prosecution. There would be no contradiction between a public interest requirement for prosecution and Article 5, if that requirement were always interpreted in a positive sense in favour of investigation and prosecution. This is the approach which the WGB recommends. State Parties should identify it as 'in the public interest' to tackle bribes paid in breach of the Convention, just as they should regard it as in the public interest to pursue money-launderers*" (p.410).

National Interest

45. There is no definition of 'national economic interest' in the Convention or in the *travaux préparatoires*. According to Cullen, however, the reports of the Working Group on Bribery usefully indicate that "*there are no national economic*

considerations which could justify a decision not to go ahead with an investigation or prosecution" (p.410).

National Security

46. Cullen (p.413) specifically discusses the issue of national security and defence contracts:

> "*Bribes paid to promote or protect defence production in a state, by securing exports, are squarely covered by the prohibition of the Convention. In the view of leading commentators, the application of the Convention to the defense sector is indeed of vital importance. It offers the prospect, if fully implemented, of 'cleaning up' this sector, in which bribery by major OECD exporting countries is prevalent. Such bribes are covered by the Convention precisely because they are intended to advance economic interests; there will indeed always be an economic interest in sale of weapons, so it is almost impossible to separate defence interests from economic interests (except perhaps in time of war).*
>
> *There is certainly no defence exception to the Convention. National security arguments based on considerations of international relations would also, clearly, fall foul of the Article 5 prohibition. The central question which arises, however, is whether a discrete notion of national security can be used as a ground legitimately to influence any aspect of an investigation or prosecution. Such influence may take different forms. It might take the form of direct pressure to stop or delay the investigation, or it might amount to less direct obstruction, by denial of information to the judicial or police authorities*."

Cullen continues (pp.413-414):

> *"Some commentators would leave narrow room for national security to intervene in investigations of foreign corruption in such cases. But to be capable of trumping a clear international law obligation to facilitate the*

investigation of transnational bribery, an ordre public *exception on the ground of national security would have to be very compelling in nature and have a clear basis in national law. Even if such a legal basis were found to exist, it should be interpreted and applied so far as possible in accordance with the obligations of the Convention.*

The main problem with allowing such an exception is the likelihood of its being abused. State Parties would almost certainly tend to employ it for precisely the reasons which the Convention seeks to exclude. The most likely grounds for concealment of information from police or judicial authorities are not genuine national security concerns but a desire to protect economic interests, shield national politicians or not to damage relations with another state (i.e. considerations expressly banned by Article 5)."

Recent history of UK anti-corruption legislation

47. The United Kingdom signed the OECD Anti-bribery Convention on 17 December 1997, and deposited its instrument of ratification on 14 December 1998. The UK's ratification was extended to the Isle of Man in 2001.

48. Despite its early ratification of the OECD Convention, however, the UK was slow to introduce key provisions of the Convention into UK law. In March 2005, the OECD Working Group on Bribery published a highly critical evaluation of the UK's implementation of the Convention (United Kingdom: Phase 2 report) (pp.1213-1285).

49. Under the Convention, which has been in force since 1999, the UK is required to take action to deter, detect, investigate and prosecute UK companies, or individuals, that bribe a foreign public official.

50. The OECD's 2005 evaluation (pp.1213-1285) criticises the UK for its lack of prosecutions for bribery. It states (para 16) that *"it is surprising that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK"*, especially given the size and nature of its exports (p.1220).

51. The OECD report identifies fundamental problems with the law, law enforcement systems, and level of resources for dealing with overseas corruption. In particular, the report identifies the following deficiencies:

    1. 'Complexity and uncertainty' of existing anti-corruption laws;

    2. Legal barriers to the prosecution of companies;

    3. 'Excessive fragmentation of efforts, lack of specialised expertise, lack of transparency ... and problems in achieving coherent action' (para 116) (p.1249) among law enforcement agencies dealing with overseas corruption;

    4. Lack of resources for investigating foreign bribery cases, processing money laundering reports and handling requests for mutual legal assistance;

    5. High level of proof required by law enforcement agencies to open an investigation;

    6. Potential for 'national interest' considerations, such as damage to the UK economy, to influence the decision as to whether to open an investigation or not.

52. Despite these shortcomings, the UK has introduced legislation that specifically outlaws the bribing of foreign officials by UK citizens. In December 2001, the UK enacted the Anti-Terrorism, Crime and Security Act 2001 Chapter 24 (the '2001 Act') (pp.1286-1294). Part 12 of the 2001 Act imports a "foreign" element

into the offences of domestic bribery under the Prevention of Corruption Act 1906 and the common law, and establishes nationality jurisdiction for these offences (pp.1293-1294). Although bribery of a foreign official was arguably a criminal offence under the UK Prevention of Corruption Act 1906, the 2001 Act made this clear beyond argument. English legal public policy is clear and resolute: "*obtaining contracts by bribery is an evil which offends against the public policy of this country*" (*R (Corner House) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [137]) (pp.566-608).

53. Nonetheless, the OECD has expressed concern that the involvement of the Attorney-General in giving consent for a prosecution "*involves the possible consideration of UK interests that [Article 5 of] the Convention expressly prohibits in the context of decisions about foreign bribery cases*" (para 170) (p.1266). In response, the Attorney-General, responding on behalf of the United Kingdom:

> "*specifically confirmed that none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute. Moreover, the Attorney-General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution*" (para 171) (p.1266).

54. Since the decision to abandon the investigation into the Al-Yamamah contracts was announced, the OECD have continued to express serious concerns about the UK's compliance with the Convention and the decision made in this case. On 14 March 2007, and despite protests by the UK government, the OECD repeated its concerns and directed that an international team visit the UK to investigate further:

"At its March 2007 meeting, the OECD Working Group on Bribery reaffirmed its serious concerns about the United Kingdom's discontinuance of the BAE Al Yamamah investigation and outlined continued shortcomings in UK Anti-Bribery legislation. It urged the UK to remedy these shortcomings as quickly as possible and decided to conduct a further examination of the UK's efforts to fight bribery.

The Working Group, which brings together all 36 countries that have signed and ratified the OECD Anti-Bribery Convention, acknowledged that the UK has taken a number of important measures to implement the Convention in the two-year period since a Phase two review of its policies in March 2005 which include extensive awareness-raising about foreign bribery issues.

However, the 2005 Phase two report on the United Kingdom recommended, as did an earlier 2003 Working Group report, that the UK enact modern foreign bribery legislation at the earliest possible date. The Working Group is seriously concerned that this recommendation, which reflected deficiencies of UK law on foreign bribery, remains unimplemented. In addition, UK law on the liability of legal persons remains deficient and the Working Group reaffirms that it should be modified in accordance with its 2005 recommendation.

In 2005, the Working Group recommended that the UK monitor decisions to open or close foreign bribery investigations. While the Working Group welcomes recent increases in resources for investigations, the continuing lack of any prosecution as of March 2007 may raise broader issues.

The recent discontinuance of a major foreign bribery investigation concerning BAE SYSTEMS plc and the Al Yamamah defence contract with the government of Saudi Arabia has further highlighted some of these

concerns. The Working Group notes that the UK has stated that the discontinuance was based on national and international security considerations and that the matter is subject to judicial review in the UK. The Working Group underlines in this respect that bribery of foreign public officials is contrary to international public policy and distorts international competitive conditions. In accordance with Article Five of the Convention, in exercising prosecutorial discretion, parties to the Convention shall be mindful of their obligations and of the object and purpose of the treaty. The Working Group welcomed the additional explanations from the UK authorities and the openness of the UK delegation. Nonetheless, it maintains its serious concerns as to whether the decision was consistent with the OECD Anti-Bribery Convention.

In light of these outstanding issues, the Working Group has decided to conduct a supplementary review of the United Kingdom ("Phase two bis") focused on progress in enacting a new foreign bribery law and in broadening the liability of legal persons for foreign bribery. The Phase two bis review will also examine whether systemic problems explain the lack of foreign bribery cases brought to prosecution as well as other matters raised in the context of the discontinuance of the BAE Al Yamamah investigation. The Phase two bis review will include an on-site visit to be conducted within one year" (p.1295).

UK Government Policy Commitments on Corruption

55. Government Ministers have consistently underlined the need for the UK to take a strong line in prosecuting corruption.

56. Introducing the Government's 2005 Consultation (pp.1296-1323) on the draft legislation to reform the Prevention of Corruption Acts, Fiona MacTaggart MP, Parliamentary Under-Secretary of State at the Home Office, stated: "*Constant vigilance is needed to ensure the UK maintains its high standards domestically*

and that UK nationals and companies do not contribute to bribery overseas" (p.1298).

57. The recent government White Paper on International Development also recognises that combating bribery requires active pursuit of bribe givers as much as of bribe takers. The 2006 White Paper on International Development (pp.624-714) states: "*The UK is committed to tackling corruption, bribery and money laundering. This includes making sure that we rigorously enforce relevant UK laws so that people who pay bribes are prosecute…*" (p.656).

58. Other government departments have also made explicit their commitment to combating corruption. In 2006, for example, the ECGD reintroduced strengthened anti-bribery procedures that had previously been weakened under pressure from three major ECGD clients – BAE, Rolls Royce and Airbus. The new rules (pp.1324-1381) are intended to:

    * "*deter illegal payments, corrupt practices and money laundering by applicants for ECGD's support;*

    * *ensure, as far as is practicable, that all transactions that ECGD supports are in compliance with all applicable laws, regulations and international agreements to which the UK is a party*" (p.824)

59. The Department of Trade and Industry, which has responsibility for promoting corporate social responsibility under the Government's Sustainable Development Policy, has also explicitly cited combating corruption as one of the positive *"contributions that business can make to the UK's objectives on international sustainable development . . ."* (International Priorities, 2005) (p.1385).

60. UK Trade and Investment, the government organisation that supports companies in the UK doing business internationally and overseas enterprises seeking to set up or expand in the UK, strongly condemns corruption and advices its clients: "*Bribery is bad for business. A culture of corruption is a disincentive to trade and investment and payment of bribes is unacceptable behaviour for UK companies or*

nationals. By upholding the law and promoting transparency in business activities British companies enhance their own reputations and staff morale." (pp.1388-1389) UKTI also addresses concerns that action against bribery may result in lost business: "*UK companies may lose some business by taking this approach, but equally there will be those who choose to do business with UK companies precisely because we have a no-bribery reputation, and the costs and style of doing business are more transparent*." (Frequently Asked Questions about Bribery and Corruption, DTI and FCO) (p.734).

Saudi Arabia's international counter-terrorism co-operation obligations

61. I understand that the position of the Serious Fraud Office is that the government of Saudi Arabia threatened to withdraw diplomatic co-operation in anti-terrorist matters if the SFO investigation was not dropped. Even if this threat were true, by so doing, Saudi Arabia would be in serious breach of important international law obligations.

62. Security Council Resolution 1373 (pp.1393-1396), adopted in the aftermath of the terrorist atrocity on 11 September 2001 required states to co-operate to prevent any repetition. Article 2 of the Resolution required states to "*take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information*" (Article 2b)(p.1394) and "*afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings*" (Article 2f) (p.1394). Article 3 called upon states to "*co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts*" (p.1395). Article 6 created a monitoring committee and a reporting mechanism (p.1395).

63. On 19 September 2002, the Minister of Foreign Affairs of Saudi Arabia, Prince Saud al Faisal gave a speech to the General Assembly of the United Nations (pp.1397-1401) in which he reaffirmed the Kingdom of Saudi Arabia's support for resolution 1373:

> *"The position of Saudi Arabia regarding terrorism has always been very clear. This is not surprising since our country was honoured by God to be the custodian of the Muslims' holiest sites, and it is also the birthplace of the heavenly message of Islam.*
>
> *The Kingdom of Saudi Arabia reaffirms its support for all Security Council Resolutions related to the question of terrorism, and has cooperated with the international community in implementing these resolutions with the aim of combating it…*
>
> *The appropriate authorities in Saudi Arabia have taken action to implement Security Council Resolution 1373 (2001). Moreover, the Government of Saudi Arabia has lent its support to every international effort, within the framework of the Security Council, to crack down on terrorism by all means approved by other states" (p.1398).*

64. Pursuant to the reporting mechanism in Resolution 1373, Saudi Arabia has been asked numerous questions about its counter-terrorist co-operation procedures, and has given assurances to the Security Council about them. For example, on 29 May 2003, the Saudi Ambassador to the UN provided a response to various queries raised by the Security Council about Saudi Arabia's implementation of Resolution 1373 (pp.1402-1414):

> *"1.13 The CTC would be grateful to know the institutional mechanism by which Saudi Arabia provides early warning of any anticipated terrorist activity to another Member State, whether or not the States are parties to bilateral or multilateral treaties with Saudi Arabia.*
>
> *Response*

In the event that the competent authorities in the Kingdom of Saudi Arabia come into possession of information on the possibility that a terrorist offence might occur within the territory of a State or States, against their nationals or persons resident within their territory or against their interests, the Kingdom communicates to that State or States the information in its possession through notification of a possible terrorist offence, transmitted through the embassy of the targeted State or States in Saudi Arabia if such State or States have no bilateral or multilateral treaties with the Kingdom. If, however, security arrangements or treaties exist between Saudi Arabia and a particular State or States, the notification is addressed to the competent counter-terrorism authority in the State or States whose interests, nationals or residents are targeted" (p.1412).

65. Saudi Arabia has also confirmed that it has signed a specific Memorandum of Understanding with the UK on counter-terrorist co-operation:

> *"1.14… Saudi Arabia engages in mutual assistance… under bilateral agreements with individual States, such as the… Memorandum of Understanding on the Fight against Terrorism, the Sale of Narcotics and Organized Crime signed with the United Kingdom. Under these agreements mutual assistance is provided, such as the exchange of information, expertise and know-how with a view to improving security standards and the exchange of expertise on new terrorist threats and the organizational structures prepared for dealing with them" (pp.1412-1413).*

66. Saudi Arabia has therefore assured the UN that it will comply with its duty of co-operation and information provision in anti-terrorist matters embodied in Regulation 1373, has explained that it will continue to do so through diplomatic channels, and has explained that its willingness to co-operate with the UK in particular is so strong that it has signed a Memorandum of Understanding to

facilitate such contact. The Memorandum of Understanding does not yet appear to be a public document.

Corner House's financial position

67. Corner House has very limited financial resources. It has three full-time employees and one other consultant who is currently on maternity leave.

68. Corner House is principally funded through grants from charitable foundations. In addition, a very small proportion of its income is derived from the sale of reports and from the editing and research services it provides to the non-governmental sector. Corner House's funds are divided into restricted and unrestricted funds. Restricted funds cannot be used for litigation – they are restricted to be used for the (normally charitable) purposes for which they were donated. To use funds donated by a charity for non-charitable purposes in breach of an agreement governing that funding would of course be unlawful. The "unrestricted" funds comprised monies received from consultancy and other work which are untied to any specific project but which are available for carrying out Corner House's general objects, including litigation.

69. In order to cut down on administrative expenses, Corner House does not employ an in-house accountant. The banking and accounts are undertaken by myself. Our accountants, Simon John Christopher Ltd, prepare a full set of accounts at the end of the year. Monthly accounts, however, are prepared by myself to check agreed budgets against actual expenditure. Whilst the figures given below for 2005 have been approved by our accountants, those for 2006 are provisional and have not been adjusted for accruals or checked by a professional accountant. However, I confirm that they are accurate and correct to the best of my knowledge and belief.

70. Corner House's accounting period runs from 1st January to 31st December. A copy of the Annual Accounts for 2005, as drawn up by the company's accountants, are attached. At the end of FY 2005, the total funds carried forward amounted to

£178,485, of which £166,637 were restricted funds and £11,848 were unrestricted. As explained in the Accounts at para 1.5, the restricted reserves comprised the unexpended monies received from donors for specific projects and cannot be used for other purposes, including litigation.

71. At the end of 2006, the total funds carried forward were £166,062, of which £154,964 were restricted and £11,099 were unrestricted. The current level of unrestricted funds is £11,709.

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

73. The unrestricted funds are available:

    a. to fund activities for which project funding has not been secured. Recent examples include enabling representatives of communities affected by UK-financed infrastructure projects to travel to the UK to meet with officials to relay their concerns;

    b. to cover shortfalls, or make provisions for shortfalls, between proposed budgets and received funding;

    c. to cover cash flow shortages that may arise if funding applications take longer than anticipated. Recently, for example, one funding application to a US foundation took several months longer than anticipated to be approved, due to an internal review of policy within the foundation; and

    d. as a reserve against redundancy and staff welfare requirements (if our project funding falls in the future, employees will have to be made redundant and given appropriate payments, staff illness must be covered along with leave eg. for family or maternity).

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

For this reason, the Directors have concluded that they cannot risk the continued existence of the organisation on this litigation and ask the Court to make a protective costs order. Nor would it be proper for us to risk our restricted funds, which have been donated by primarily charitable organisations for particular charitable purposes unconnected with this litigation. In the event that the Court is unable to make a protective costs order, we will have no option but to withdraw the claim. This outcome would be a source of great regret to us, but it would inevitably follow as we could not properly or prudently sustain an open-ended costs risk. We believe that £5,000 is the most that Corner House can possibly risk of our extremely limited unrestricted funds.

Statement of Truth

I believe that the facts set out in this statement are true.

. . . . . .

Nicholas Hildyard

Date: 19 April 2007