

pragmatic reasons or nostalgic notions of a special relationship between citizens and their national State, many countries do not want to change their laws preventing extradition of nationals. In this context, the position of the United Kingdom may have been affected by the traditional common law approach and the broad provisions of its own extradition law which allow for ad hoc extradition in some circumstances (though not with States with which there are regular arrangements), making too easily the assumption that other States could make similar flexible arrangements—if they chose to do so.⁴⁸ In any event, the case provides an important reminder of one of the limitations of international criminal cooperation, which often looks fragile where a fugitive is affiliated to the authorities of the requested State. In such circumstances constitutional guarantees tend to be afforded supremacy over conflicting international obligations.⁴⁹ This is despite the general rule that a State may not invoke provisions of its internal law as justification for its failure to perform a treaty obligation,⁵⁰ even if it is a constitutional provision.⁵¹

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III. THE BAE/SAUDI AL-YAMAMAH CONTRACTS: IMPLICATIONS IN LAW AND PUBLIC PROCUREMENT

A. Introduction

Recently, BAE Systems, a UK manufacturer of defence equipment has been embroiled in bribery allegations in respect of contracts to supply military aircraft¹ to the Government of Saudi Arabia. The allegations that have been levelled against BAE concerning these contracts include the payment of bribes to various members of the Saudi royal family and the use of various accounts to conceal these payments. This article will give a brief overview of the contracts between BAE and the Saudi Government; discuss the corruption allegations made against BAE and the investigations into these allegations by the Serious Fraud Office; and examine the UK's legal regime against the bribery of foreign public officials, assessing the UK's compliance with its obligations under the OECD Convention prohibiting such bribery. The article will conclude with an examination of the future prospects for BAE as the United States Department of Justice undertakes an investigation into the Al-Yamamah contracts.

⁴⁸ See United Kingdom Extradition Act (2003) s 194.

⁴⁹ eg the *Lockerbie* case. The argument is not, however, limited to cases where the requested subject has a relationship with the requested State. A similar argument could be advanced in relation to constitutional fundamental rights such as the prohibition of capital punishment (See eg *Venezia v Ministero di Grazia e Giustizia* (Italian Constitutional Court, 27 June 1996) Judgment No 223.79, 815 *Rivista Diritto Internazionale*).

⁵⁰ Vienna Convention on the Law of Treaties (1969) Art 27.

⁵¹ *Qatar v Bahrain* (Jurisdiction on admissibility) [1994] ICJ Rep 112, paras 24–5.

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¹ These contracts were called Al-Yamamah (The Dove) by the Saudi Government.

B. Background

The predecessor to BAE Systems, British Aerospace, was formed as a statutory corporation in 1977. Between 1981 and 1985, under Margaret Thatcher's privatization policies, the Government sold its stake in British Aerospace. BAE assumed its present form in 1999 after a merger with Marconi Electronic Company and the defence arm of General Electric Company. BAE Systems is currently among the top defence manufacturers in the world with annual sales in excess of £13 billion.²

BAE's relationship with Saudi Arabia dates back to 1966,³ but in terms of the Al-Yamamah contracts, the company's relationship with Saudi Arabia was formalized in September 1985, when a Memorandum of Understanding was signed committing the Saudi's to the purchase of 40 Tornado IDS aircraft, 24 Tornado ADV aircraft, 30 Hawk aircraft, and 30 PC-9 aircraft, together with associated support, services and ammunition at an initial cost of between £3 and £4 billion.⁴ The contract was entered into between the UK Government and the Saudi Government, with BAE acting as the supplier. The contract was to be paid for by means of an oil trading scheme, with a loan facility opened to meet any shortfall between the project costs and the funds generated by the oil deal.⁵

So far, the Al-Yamamah contracts have been conducted in two stages, with the second phase of the contracts signed in 1989. In 2006, the most recent series of contracts, dubbed *Al-Salam*, involved the supply of Euro-fighter Typhoon jets worth £5 billion to the Royal Saudi Airforce.⁶ It was announced on 18 September 2007, that BAE and the Government of Saudi Arabia had signed a contract worth more than £4 billion for the supply of the Euro-fighter.⁷

C. The Allegations and the Investigation

Allegations that bribes were paid to secure the Al-Yamamah contracts began almost as soon as the contracts were signed. A newspaper report in October 1985, one month after the contracts were signed alleged the payment of bribes.⁸ In March 2001, the Serious Fraud Office (SFO) sent information to the Ministry of Defence (MOD) about allegations of fraud involving BAE in relation to Al-Yamamah.⁹ However, it was not

² See BAE Systems, Annual Report 2006, <<http://www.baesystems.com>>.

³ See BAE systems in Saudi Arabia, <<http://www.baesystems.com>>.

⁴ Government of the Kingdom of Saudi Arabia and the Government of the United Kingdom of Great Britain and Northern Ireland, 'Memorandum of Understanding for the provision of equipment and services for the Royal Saudi Air Force, September 1985', <http://image.guardian.co.uk/sys-files/Politics/documents/2006/10/27/PJ5_39AYMoUSep1985.pdf>.

⁵ C Chandler, 'Confidential Memo on arms sales unit on Commercial Negotiations for Tornado Project' (Jan 1986) <http://image.guardian.co.uk/sys-files/Politics/documents/2006/10/27/J5_40RiyadhreportconclusionJan86.pdf>.

⁶ D Robertson, 'BAE Confirms £5bn Eurofighter Sale to Saudi Arabia' *The Times Online* (19 Aug 2006).

⁷ S Hawkes and D Robertson, 'BAE Profits Surge Confounds US Sales Fears' *The Times Online* (9 Aug 2007); R Norton-Taylor, 'BAE and the Saudis Finally Sign £4.43b Eurofighter Deal' *The Guardian* (18 Sept 2007).

⁸ Bribes of £600 m in jets deal, *The Guardian* (21 Oct 1985).

⁹ *Hansard* HC vol 412, col 437W (3 Nov 2003) <<http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo031103/text/31103w13.htm>>.

until secret MOD documents were leaked to the press in 2004 that the SFO took action to investigate the allegations.¹⁰

The SFO was created to investigate and prosecute cases of serious and complex fraud.¹¹ Given that most cases of corruption involve elements of fraud, the SFO emerged as the focal point for the investigation of serious corruption cases¹² and is also responsible for investigating all allegations of foreign bribery.¹³ The SFO investigation was directed at allegations of suspected false accounting in relation to contracts for services between two travel and visa firms (Robert Lee International and Travellers World) and BAE in connection with contracts with the Saudi Government.¹⁴ The allegations were made by former employees of the firms, in a BBC programme¹⁵ where these employees alleged that as far back as 1989 they had been instructed by BAE to lavish cash, luxury gifts, and holidays on members of the Saudi Royal family responsible for overseeing the Al-Yamamah contracts.¹⁶ It was also alleged that BAE used a number of devices to disguise the payments and expenditures¹⁷ and that the money for these expenses, although provided by BAE in the first instance, were eventually paid for by the inflation of the contract prices by up to 32 per cent.¹⁸

After two years and an estimated expenditure of £2 million,¹⁹ the investigations by the SFO into the affairs of BAE, in so far as they relate to the Al-Yamamah arms deal, were abruptly terminated in December 2006. In a press statement, the Director of the SFO stated that the investigation was being discontinued on the basis of the need to safeguard national and international security and the necessity to balance the need to maintain the rule of law against the wider public interest and that no weight had been given to commercial interests or to the national economic interest.²⁰

¹⁰ Serious Fraud Office, Press Statement (3 Nov 2004) <http://www.sfo.gov.uk/news/prout/pr_337.asp?seltxt=>>.

¹¹ Section 1 (3) Criminal Justice Act 1987.

¹² C Nicholls et al, *Corruption and Misuse of Public Office* (OUP, Oxford, 2006) para 4.08–4.25.

¹³ The Law Officers Department, *Departmental Report 2006* (Cm 6811–Cm 6838) part 3, 61, at <http://www.sfo.gov.uk/publications/pdfs/LO_DepartmentalReport2006.pdf>. See Nicholls et al (n 12) 4.25–4.32.

¹⁴ See Serious Fraud Office, Press Statement (3 Nov 2004) <http://www.sfo.gov.uk/news/prout/pr_337.asp?seltxt=>>.

¹⁵ M Robinson, 'BBC Money Programme—BBC lifts the lid on secret BAE slush fund' (5 Oct 2004), repeats the information provided in a programme 'Bribing for Britain' aired on BBC 2 on 5 October 2004.

¹⁶ 'SFO to Investigate BAE Contracts' See BBC News (3 Nov 2004) <<http://news.bbc.co.uk/2/hi/business/3978703.stm>>.

¹⁷ D Leigh, 'Saudi Arms Deal Inquiry Closes in on Secret Papers' *The Guardian* (20 Nov 2006).

¹⁸ Chandler (n 5). See also D Leigh and R Evans, 'The Secret Whitehall Telegram that Reveals Truth Behind Controversial Saudi Arms Deal' *The Guardian* (28 Oct 2006).

¹⁹ OECD, 'United Kingdom: Phase 2 Follow-up Report on the Implementation of the Phase 2 Recommendations' (21 June 2007) 5.

²⁰ Serious Fraud Office, Press Statement (14 Dec 2006) <http://www.sfo.gov.uk/news/prout/pr_497.asp?seltxt=>>.

As expected, there was a furore over the termination of the investigation and the UK Government was also criticized by the OECD over the termination of the investigation.²¹

D. The Legal Framework Against Overseas Corruption

The statutory framework on corruption is contained in three statutes,²² together referred to as the Prevention of Corruption Acts 1889–1916. Although these statutes are aimed at domestic corruption, the Government had insisted that the statutes were applicable to the bribery of foreign public officials where the necessary nexus with the UK existed,²³ and there was evidence to suggest that UK judges would be willing to apply these statutes to the bribery of foreign officials where required.²⁴

The criminalization of the bribery of foreign public officials is a recently new phenomenon in international law and may be indirectly traced to the passage of the US Foreign Corrupt Practices Act 1977,²⁵ and directly traced to the activities of the Organisation for Economic Co-operation and Development (OECD).²⁶ In 1994, the OECD issued a Recommendation on Bribery in International Business Transactions,²⁷ which provided that OECD Members take appropriate action to prevent and combat the bribery of foreign public officials,²⁸ including criminalizing the bribery of foreign public officials,²⁹ the reform of tax law,³⁰ and accounting and banking reform.³¹

The Recommendation was later revised,³² to propose the passage of an international convention to criminalize bribery.³³ This Convention³⁴ was adopted in November 1997 and commits signatories to ensuring that it is 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 act or refrain from acting in relation to

²¹ OECD (n 19) 7. For further details, see HC Constitutional Affairs Committee, ‘The Role of the Attorney-General’ (2006–7) HC 306, paras 43–6, 54–6 and Evidence of the Director for the Serious Fraud Office and the Attorney-General, Qus 217–314, 315–68 (27 June 2007).

²² The Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.

²³ Home Office, ‘Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials (A Consultation Paper)’ (Dec 2005) para 9.

²⁴ *R v Raud* [1989] Crim LR 809.

²⁵ Pub L No 95-213, 91 Stat 1494. Although this is a piece of domestic legislation, it is regarded as the genesis of extraterritorial attempts at controlling corruption. See M Maris and E Singer, ‘Foreign Corrupt Practices Act’ [2006] Am Crim L Rev 575; A Posadas, ‘Combating Corruption under International Law’, (2000) 10 Duke J of Comparative and Intl L 345.

²⁶ P Johnstone and G Brown, ‘International Controls of Corruption: Recent Responses from the USA and the UK’ (2004) 11 J Financial Crime 217.

²⁷ (1994) 33 ILM 1389.

²⁸ Art I 1994 Recommendation.

²⁹ Art III (i) 1994 Recommendation.

³⁰ Art III (iii) 1994 Recommendation. The 1994 recommendation was followed in 1996 by the OECD Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (1996) 35 ILM 1311.

³¹ Art III (iv) and (v) 1994 Recommendation.

³² OECD Revised Recommendation of the Council on Combating Bribery in International Business Transactions (1997) 36 ILM 1016.

³³ Art III 1997 Revised Recommendation.

³⁴ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1998) 37 ILM 1 (hereafter, ‘the Convention’).

the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.³⁵

The penalties for this bribery are to be the same for domestic bribery.³⁶ The Convention defines a foreign public official to include persons holding a legislative, administrative or judicial office and any person exercising a public function for a foreign country.³⁷ The Convention also required signatories to take appropriate measures to establish jurisdiction over the offence where it is committed in whole or in part in its territory,³⁸ such as where the offer, acceptance or agreement to the offence takes place in the territory of the signatory.³⁹

The Convention was signed by the UK in December 1997 and ratified a year later,⁴⁰ and although the Government had initially asserted that the existing legal framework on corruption was sufficient to comply with the Convention,⁴¹ in 2001, Parliament enacted the Anti-Terrorism, Crime and Security Act 2001 (ACSA 2001), which contained legislative provisions implementing the Convention.

The Anti-Terrorism Act did not alter the existing legal framework on corruption in the UK, but extended the existing laws to the bribing of foreign officials.⁴² In particular, the Act extends the statutory bribery offences in the Prevention of Corruption Acts 1889–1916 to the bribery of foreign public officials, including foreign members of parliament, foreign judges, ministers and ‘agents’, as long as the offence is committed by a UK national or company incorporated under UK law,⁴³ irrespective of any territorial connection with the UK.⁴⁴

E. The UK's Compliance with the OECD Convention: Domestic Law and the BAE Investigation

Although the ACSA 2001 is intended to implement the Convention, there are several areas in which the Act fails to properly implement the Convention. In the first place, because the Act merely extends the existing legislation to foreign officials, all the shortcomings in the Prevention of Corruption Acts 1889–1916 will affect foreign bribery cases.⁴⁵ For instance the existing laws did not provide for situations where the bribe is given to a third party, such as a spouse or associate of the public official. Consequently, the Act does not expressly criminalize foreign bribery involving the payment of the bribe to a third party.⁴⁶ This is at odds with the Convention which requires the criminalization of foreign bribery where the bribe is given to a third party,

³⁵ Art 1 (1) Convention.

³⁷ Art 1 (4) Convention.

³⁹ United Kingdom-Phase 1: Report on Implementation of the OECD Anti-Bribery Convention June 2000, 11 <<http://www.oecd.org/dataoecd/8/24/2754266.pdf>>. In the UK, a phone call into the UK relating to the bribe will be sufficient to establish jurisdiction.

⁴⁰ OECD Convention on Combating Bribery of Foreign Public Officials: Ratification Status, <<http://www.oecd.org/dataoecd/59/13/1898632.pdf>>.

⁴¹ United Kingdom-Phase 1: Report on Implementation of the OECD Anti-Bribery Convention (n 39) I and 24.

⁴³ Section 109 ACSA 2001.

⁴⁵ T Swanson, ‘Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law’ (2007) 35 *Georgia J Intl & Comparative L* 397, 423–31.

⁴⁶ See UK-Phase 1 Bis: Report on Implementation of the OECD Anti-Bribery Convention (Mar 2003) 15.

³⁶ Art 3 (1) Convention.

³⁸ Art 4 (1) Convention.

⁴² Section 108 ACSA 2001.

⁴⁴ Section 108 ACSA 2001.

or given for the purposes of the third party as long as the intention behind the bribe is the inducement of the foreign public official.⁴⁷

Another shortcoming of the Act is that the consent of the Attorney General is required for any prosecution to be initiated under the Act.⁴⁸ This requirement for consent is a vestige of the Prevention of Corruption Acts 1889–1916,⁴⁹ which require similar consent for a prosecution for statutory domestic corruption. In providing this consent, the AG is required to consider similar factors that are considered by Crown Prosecutors in instituting prosecution for other offences. These factors include whether there is a significant prospect of success, whether there is sufficient evidence, whether prosecution will harm international relations and national security and whether or not prosecution is in the general public interest.⁵⁰

Although consent prior to the initiation of certain prosecutions is usual in the UK, the OECD Working Group on Bribery has criticized this requirement as reducing the effectiveness of the Convention by delaying the preparation of foreign bribery cases leading to a loss of evidence.⁵¹ The Working Group is concerned that the requirement may also conflict with Article 5 of the Convention which prohibits considerations of national economic interest or international relations in deciding whether to prosecute an offence of foreign bribery. Another concern is that since defendants may seek judicial review of the decision to grant consent, this may further delay prosecution.⁵²

A final shortcoming of the Act is the removal of the presumption of corruption in relation to gifts in the procurement context.⁵³ This creates a dichotomy between foreign bribery and domestic bribery where such a presumption exists and may make it more difficult for prosecutors to prove cases of foreign bribery.

In relation to the SFO investigation into the Al-Yamamah contracts, it is not clear whether the termination of the investigation on the grounds of ‘national and international security’ was in compliance with the UK’s obligations under the OECD Convention.

As stated above, Article 5 of the Convention expressly prohibits a State taking into account considerations of national economic interest, the potential effect upon relations with another State and the identity of the persons involved in deciding to prosecute foreign bribery. In that respect, the SFO decision to terminate the investigation may be in breach of the provision prohibiting taking into account the effect of the investigation upon relations with another State.⁵⁴ Although the reasons given by the SFO for terminating the investigation deny the presence of Article 5 considerations, the Attorney-General in explaining the decision at the House

⁴⁷ Art 1 (1) Convention.

⁴⁸ See the limitations of this consent in Johnstone and Brown (n 26) 229.

⁴⁹ Section 4 (1) 1889 Act; s 2 (1) 1906 Act.

⁵⁰ See Crown Prosecution Service, *Code for Crown Prosecutors* (2004).

⁵¹ OECD, ‘United Kingdom Phase 2—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’ (17 Mar 2005) 53–7.

⁵² *ibid* 55. See *R v Attorney General ex parte Rockall* [1999] All ER 312.

⁵³ Section 110 ACSA 2001. See s 1, Prevention of Corruption Act 1916.

⁵⁴ S Rose-Ackerman and B Billa, ‘Treaties and National Security’ [2007] *New York Univ JI of Intl L and Politics* (forthcoming).

of Lords expressly stated that 'continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation'.⁵⁵ In addition, the former Prime Minister, Tony Blair, in defending the Government's decision to terminate the investigation stated that the investigation was dropped to prevent the 'wreckage of a vital strategic relationship' with Saudi Arabia and the loss of British jobs.⁵⁶

The OECD Convention is silent as to whether national security considerations may be taken into account in deciding to investigate or prosecute a case of foreign bribery, and it is unclear whether this means that an *implicit* national security exception may be read into the Convention.⁵⁷ However, academic authority is weighted against this possibility,⁵⁸ especially as many international treaties which provide a national security exception, expressly say so.⁵⁹

It must be noted, however, that Article 5 is in some respects contradictory in the sense that although it provides that the investigation and prosecution of an offence should be subject to the laws of a State Party, which in the UK permit the taking into account of 'public interest' considerations, including international relations, the Convention is silent as to the position where domestic prosecutorial discretion conflicts with the considerations prohibited by Article 5.⁶⁰ Where this occurs, two interpretations are possible: first that one of the sentences should be read as superseding the other, or secondly, that the second part of Article 5 creates an obligation on a signatory to transpose those principles into domestic law. Although this has not been done in the UK, and the ACSA 2001 does not mention Article 5, it is submitted that this does not detract from the UK's obligation to comply fully with the provision.⁶¹

Whether or not the investigation was halted for genuine national security considerations,⁶² or over fears about the loss of subsequent aircraft sales⁶³ and the effect upon UK/Saudi relations, the termination of the investigation may send the wrong signal to UK firms doing business overseas and to other countries that the UK Government is not prepared to back its anti-corruption rhetoric where the stakes are high.⁶⁴ Although the investigation has ended, the fall-out of the decision has not

⁵⁵ 'BAE Systems: Al Yamamah Contract' *Hansard* HL, vol 688, col 780 (18 Jan 2007) <<http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70118-0002.htm#07011849000062>>.

⁵⁶ PM defends BAE decision 7 June 2007, <<http://www.pm.gov.uk/output/Page11882.asp>>.

⁵⁷ Rose-Ackerman and Billa (n 54).
⁵⁸ P Cullen, 'Article 5: Enforcement' in M Pieth, L Low and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (CUP, Cambridge, 2007) 322.

⁵⁹ Rose-Ackerman and Billa (n 54).

⁶⁰ F Bennion, 'Prosecutions: The Al-Yamamah Incident' (2007) 171 JP 6.

⁶¹ See, however, Bennion (n 60), who asserts that Art 5 has no legislative force and may be disregarded.

⁶² Bennion (n 60). See also, D Leppard, 'Blair Hit by Saudi "bribery" Threat' *The Times Online* (19 Nov 2006).

⁶³ G Brown, 'Prevention of Corruption: UK legislation and enforcement' (2007) 15 J Financial Regulation & Compliance 180, 184.

⁶⁴ See G Rodmell, 'Corruption—Economic Crime or Economic Reality' (2007) 28 *Company Lawyer* 259.

abated,⁶⁵ and in June 2007, the United States Government announced its decision to investigate BAE in respect of the Al-Yamamah contracts.

F. United States Involvement and Future Prospects for BAE

Although the SFO has ended the investigations based on the Al-Yamamah contracts, and is concentrating on investigating BAE's dealings in other countries, the US Government has decided to investigate BAE's activities in Saudi Arabia.

The US, through the Foreign Corrupt Practices Act 1977 (FCPA), criminalizes the bribery of foreign public officials where the necessary connection exists with the US.⁶⁶ The investigations into BAE activities being carried out by the US Department of Justice are premised on the fact that certain illegal payments were made to Saudi Royal officials through US bank accounts.⁶⁷ Under the FCPA, any person who bribes a foreign public official where the briber has American nationality⁶⁸ or the offence includes an act that establishes a connection with US territory⁶⁹ is liable under the FCPA, whether or not the person is resident or does business in the US.⁷⁰ The FCPA extends to payments made to a third party if the payments would be used by the third party to contravene the Act.⁷¹ However, foreign public officials cannot be prosecuted,⁷² and employees cannot be prosecuted unless their employer is found guilty under the FCPA.⁷³ Under the FCPA, relevant companies are also required to maintain certain accounts and records to prevent the concealment of illegal transactions.⁷⁴

Where a firm is found liable under the anti-bribery provisions of the FCPA, it may be liable on conviction to a fine of up to \$2 million.⁷⁵ Breaches of the accounting provisions may lead to a fine of up to \$25 million.⁷⁶ Individuals convicted under the FCPA's accounting provisions may be liable for a fine of \$5 million and sentenced to a maximum of 20 years' imprisonment,⁷⁷ and individuals convicted of contravening the anti-bribery provisions may be liable for a fine of up to \$100,000 and five years' imprisonment.⁷⁸

⁶⁵ The Committee Against Arms Trade (CAAT) and Corner House launched judicial review proceedings into the validity of the SFO's decision to terminate the investigation. See <<http://www.caat.org.uk/issues/sfo/sfo-latest.php>>. On 19 April 2007 the plaintiffs lodged full grounds for judicial review, see *Detailed Statement of Grounds, Claim No CO/1567/2007*, <http://www.caat.org.uk/issues/sfo/JR_grounds.pdf>. Judicial review was refused on 29 May 2007 and the application was renewed for an oral hearing. The NGOs were granted leave to seek judicial review of the decision to discontinue the investigation. A hearing is expected early in 2008 (<<http://www.thecornerhouse.org.uk/item.shtml?x=558414>>).

⁶⁶ See generally, J Colares, 'The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer' (2006) 5 Wash Univ Global Studies Rev 1; M Maris and E Singer, 'Foreign Corrupt Practices Act' (2006) American Crim L Rev 575.

⁶⁷ J Werdigier, 'US Investigates Saudi deal for British arms' *New York Times* (27 June 2007).

⁶⁸ 15 USC § 78 dd-1 (g), 78 dd-2 (i).

⁶⁹ 15 USC § 78 dd-1 (a), dd-2 (a), dd-3 (a).

⁷¹ 15 USC § 78 dd-1 (a); 3-15 USC § 78 dd-3 (a) 3.

⁷² *United States v Blondek* 741 F Supp 116, 119-120 (ND Tex, 1990).

⁷³ *McLean v International Harvester Co*, 902 F 2d 372 (5th Cir 1990).

⁷⁴ 15 USC § 78 m (b) 2 (B); 15 USC § 78 m (b) 5.

⁷⁵ 15 USC § 78 dd-2 (g) (1) (A) to 78 ff (c) (1) (A).

⁷⁶ 15 USC § 78 ff (a).

⁷⁷ *ibid.*

⁷⁸ 15 USC § 78 dd-2 (g) (2) (A), 78 dd-3 (e) (2) (A), 78 ff (c) (2) (A).

Apart from the criminal and civil penalties that may exist against BAE if convicted in the US, another issue that arises is the likely debarment (exclusion) of BAE from US federal government contracts. Debarment is an administrative remedy available to the Government to disqualify contractors or individuals from obtaining government contracts⁷⁹ for alleged breaches of law or ethics.⁸⁰ The US Federal Acquisition Regulations (FAR)⁸¹ provide that a person or firm may be debarred for receiving a conviction or a civil judgment for inter alia, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, and tax evasion.⁸² In addition, debarment may be imposed for a conviction or civil judgment for any offence indicating a lack of business integrity or honesty that affects the present responsibility of a contractor.⁸³

Where a company is debarred, its name is listed on a website known as the Excluded Parties List System,⁸⁴ and such a firm is from the time of its listing excluded from obtaining public contracts and no federal agency may solicit offers from, award contracts to, or consent to subcontracts with such person.⁸⁵ A listed contractor is also precluded from dealing with the Government as the agent or representative of another contractor.⁸⁶ Debarment constitutes the exclusion of all the divisions and organizational elements of a contractor, unless the debarment decision is otherwise limited.⁸⁷ The effect of debarment is prospective and does not affect the completion of existing contracts.⁸⁸ Debarment is discretionary and is only to be imposed in the public interest,⁸⁹ where the contractor's present and future responsibility is in doubt.⁹⁰ The existence of a cause for debarment does not necessarily require that a contractor be debarred and debarment officials must consider the seriousness of the contractor's actions before a debarment decision is taken.⁹¹

In relation to BAE, the possible debarment of BAE will have serious repercussions for the firm as the US delivers \$9 billion in sales to BAE annually⁹² and BAE recently expanded its operations in the US and is determined in the future to increase its business in the US.⁹³

While the forecast for future US contracts appears dim for BAE if convicted in the US, there is evidence to suggest that even if BAE is debarred, such a debarment is likely to be waived by other federal agencies if there are compelling reasons for doing so.⁹⁴ Although 'compelling reason' is not defined in the FAR, guidance may be found in the Defence Federal Acquisition Regulations (DFARS), which provides as examples of compelling reasons, the fact that only a listed contractor can provide the supplies or

⁷⁹ S Schooner, 'The Paper Tiger Stirs: Rethinking Suspension and Debarment' (2004) 5 PPLR 211, 212–13. See FAR 9.405.

⁸⁰ S Williams, 'The Mandatory Exclusions for Corruption in the New EC Procurement Directives' (2006) 31 Eur LR 711, 715.

⁸² FAR 406-2 (a) (3).

⁸⁴ See <<http://www.epls.gov/>>.

⁸⁶ *ibid.*

⁸⁹ FAR 9.402 (b). See D Duvall, 'Moving Towards a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractor' (1987) 36 American Univ LR 693.

⁹⁰ *Shane Meat Co v Department of Defense*, 800 F 2d 334, 338 (3rd Cir 1988).

⁹¹ FAR 9.406-1 (a).

⁹³ *ibid* 10.

⁸¹ Codified at 48 CFR pt 1.

⁸³ FAR 406-2 (a) (5).

⁸⁵ FAR 9.405 (a).

⁸⁸ FAR 9.405-1.

⁸⁷ FAR 9.406-1 (b).

⁹² BAE Systems Annual Report 2006 (n 2) 12.

⁹⁴ FAR 9.406-1 (c).

services;⁹⁵ the exigencies of urgency;⁹⁶ or where national defence requires continued business dealings with the listed contractor.⁹⁷ The upshot is that any waivers must be necessary to prevent a severe disruption of the agency's operation to the detriment of the Government or the general public.⁹⁸

The possibility that any debarment against BAE may be waived remains a real one, if one draws an analogy with the recent high-profile suspension (temporary debarment of up to 18 months)⁹⁹ of Boeing from US public contracts. This suspension was twice lifted to permit Boeing to receive substantial contracts from the US Government,¹⁰⁰ and it has been argued that the consolidation of the defence industry in the US has made it impossible to suspend or debar major defence firms from public contracts.¹⁰¹ In addition, the lack of competition that follows the exit of a major contractor from the marketplace as a result of a debarment¹⁰² has in the past led to price increases for the Government—another reason behind Boeing's short-lived suspension from US Government contracts.

Although BAE may survive its conviction and possible subsequent debarment in the US, the conviction of BAE in the US may have potential consequences for the company's business in the European Union. This is because, in 2004, the latest revision to the European Community (EC) procurement directives¹⁰³ made it mandatory for contracting authorities in the EC to exclude or debar firms that had received a conviction for corruption.¹⁰⁴ This means that if BAE is convicted of corruption in the US, EC contracting authorities will be required to exclude BAE from obtaining public contracts in the EC. This might mean that future contracts from countries like the UK, Sweden and Denmark, where BAE has significant interests, may be in jeopardy.

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IV. THE GOVERNANCE OF BRITAIN

One of the first actions of the Government of Prime Minister Gordon Brown, who took office on 27 June 2007, was to publish a Green Paper called 'The Governance of Britain'.¹ Although the document looks forward to the possibility of a comprehensive,

⁹⁵ DFARS 209.405 (a) (i).

⁹⁷ DFARS 209.405 (a) (iv).

⁹⁹ FAR 9.407-1.

¹⁰⁰ J Zucker, 'The Boeing Suspension: Has Increased Consolidation Tied the United States Department of Defense's Hands' (2004) 5 PPLR 260.

¹⁰² A Schutz, 'Too Little Too Late: An Analysis of the General Service Administration's Proposed Debarment of WorldCom' (2004) 65 Administrative L Rev 1263, 1273.

¹⁰³ Directive 2004/18/EC of the European Parliament and of the Council of March 31 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L/134/114 (hereafter public sector directive); Directive 2004/17/EC of the European Parliament and of the Council co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1 (hereafter utilities directive).

¹⁰⁴ Art 45 public sector directive. See Williams (n 80) 715.

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¹ 'The Governance of Britain' Cm 7170 (July 2007) ('GB'). See also the Prime Minister statement to the House of Commons, *Hansard HC* vol 462 col 815–(3 July 2007).

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