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Further to Professor Alldridge's "Caffeinated" Article: What "Stuff" Did the Professor Have in Mind?

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Further to Professor Alldridge’s “Caffeinated” Article: What “Stuff” Did the Professor Have in Mind?

BRUCE W. BEAN*

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I. INTRODUCTION

For those interested in the struggle against overseas bribery, Professor Peter Alldridge has written a most valuable article. In *The U.K. Bribery Act: “The Caffeinated Younger Sibling of the FCPA,”*¹ he provides valuable insight into the evolution and development of the U.K. Bribery Act 2010 (Bribery Act or Act). Alldridge was an important participant in the surprisingly long process that culminated in the passage of that Act. He takes us through the history of bribery and corruption laws in the United Kingdom (U.K.), beginning in the late nineteenth century and extending through the thirteen-year gestation period,

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¹Peter Alldridge, *The U.K. Bribery Act: “The Caffeinated Younger Sibling of the FCPA*, 73 OHIO ST. L.J. 1181 (2012). The first reference to the Bribery Act as “caffeinated” is found in a Wall Street Journal blog. Joe Palazzolo, *Law Blog Job of Week: SFO Director*, WALL ST. J. L. BLOG (Oct. 25, 2011, 1:15 PM), <http://blogs.wsj.com/law/2011/10/25/law-blog-job-of-week-sfo-director/>.

marked by repeated hearings, public consultations, and Law Commission reports that ultimately culminated in the Bribery Act.

In this brief Essay, I focus on what Alldridge calls the “reform saga,”² the period from December 17, 1997, the date the U.K. signed the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention or Convention),³ to July 1, 2011, when the Bribery Act, mandated by the Convention, was finally implemented. Professor Alldridge and I agree on the characterization of the long path to implementation of the Bribery Act as “highly politicised.”⁴ However, we differ on what finally moved Parliament and the U.K. government to act.

In explaining these years of delay, Professor Alldridge notes, somewhat vaguely, that the process was “delayed for several years by political happenstance.”⁵ We are also admonished:

In seeking reasons for the delays and the wrong turnings, we should not look for conspiracies or for great forces at play in these events. From time to time, even the most admirably motivated and highly qualified individual agents get things wrong, and from time to time developments in one area are influenced by those in another. *Stuff, as Mr Rumsfeld reminded us, happens.*⁶

Alldrige does not elaborate on this Rumsfeldian “stuff.”

In Part II of this Essay, I set out why we must be concerned about the Bribery Act, which contains the unprecedented, strict liability corporate crime of failing to prevent a bribe.⁷ In Part III I delve into the legislative history to elaborate on the “stuff” to which Professor Alldridge so subtly alludes. It is this “stuff” which explains why the U.K. government’s lenient policies toward overseas bribery were finally overcome, ending more than a decade of discussions, deferrals, and delay.

II. WHY DO WE CARE?

To ask why the Bribery Act took the form it did is not an esoteric academic inquiry. This Act is of particular concern to non-U.K. firms because its problematic Section 7, “Failure of commercial organisations to prevent bribery,” imposes criminal sanctions upon a business when a bribe is *alleged* to

² Alldridge, *supra* note 1, at 1190–92.

³ Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (entered into force Feb. 15, 1999), *available at* <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf>.

⁴ Alldridge, *supra* note 1, at 1181.

⁵ *Id.*

⁶ *Id.* at 1215–16 (emphasis added).

⁷ Bribery Act 2010, c. 23, § 7(1) (U.K.).

have occurred, notwithstanding what Professor Alldridge accurately describes as a total lack of “knowledge, intention, or recklessness”⁸ on the part of that business. This provision of the Act, which imposes criminal “[l]iability without a conscious mental state,”⁹ is unprecedented and leaves the Act vulnerable to inevitable legal challenge, both because of its extraordinary jurisdictional grasp and because it denies procedural due process guaranteed by the European Charter on Human Rights (ECHR).

A. *Scope of This Strict Liability Crime*

In November 2008, eleven years after the U.K. agreed to comply with the OECD Convention, the U.K. Law Commission introduced the final version of the Bribery Act. In this proposed draft, the failure to prevent bribery crime included two limiting elements. The proposed section applied only to a business (i) “whose registered office is situated in England and Wales” and then only (ii) where a responsible party was negligent in his duty to prevent bribes.¹⁰ Such a law would have been well within traditional notions of territorial jurisdiction. When the Ministry of Justice submitted its version of the Law Commission’s draft to Parliament in March 2009, it materially extended the scope of this crime by eliminating the “registered in England and Wales” element. This made the offense applicable to any entity “which carries on a business, or part of a business, in England, Wales or Northern Ireland.”¹¹ A non-U.K. entity engaged in business in the U.K. is, of course, properly subject to whatever criminal laws Parliament may impose, however, debate continues as to what “part of a business” means for enterprises with only occasional contact with the U.K.

This debate reached senior levels within the U.K. government. In March 2011, the Ministry of Justice sought to ease concerns regarding the vagueness of “part of a business”:

The Government would not expect . . . the mere fact that a company’s securities have been . . . admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a “relevant commercial organisation” for the purposes of section 7.¹²

⁸ Alldridge, *supra* note 1, at 1202.

⁹ *Id.*

¹⁰ See LAW COMM’N, REFORMING BRIBERY, 2008, H.C. 928, para. 7.1 (U.K.), available at http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_report.pdf.

¹¹ MINISTRY OF JUSTICE, BRIBERY: DRAFT LEGISLATION, 2009, Cm. 7570, at § 5(7) (U.K.), available at <http://www.official-documents.gov.uk/document/cm75/7570/7570.pdf>.

¹² MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 15 (2011) [hereinafter GUIDANCE], available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

Shortly thereafter Richard Alderman, at the time head of the Serious Fraud Office (SFO), the lead agency charged with enforcing the Bribery Act, flatly contradicted the Ministry. When asked whether foreign companies listed on a U.K. stock exchange fall within the jurisdiction of the Bribery Act, Alderman replied: “Exactly. You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on business in the UK.”¹³

If a stock exchange listing is doing “part of a business” in the U.K., is there a similar conclusion when a London bank is involved in a syndicated credit facility? Does “economic engagement” include the occasional sale of a product or a contractual term consenting to dispute resolution in the High Court or at the London Court of International Arbitration?¹⁴

B. Section 7 Becomes a Strict Liability Offense

During Parliamentary consideration of the Justice Ministry draft, certain non-governmental organizations attacked the negligence element of this crime as offering only a “narrow and complex solution to a pressing problem.”¹⁵ The Law Commission’s expert on criminal law, Professor Jeremy Horder, disagreed. As stated in the Report of the Joint Committee that reviewed the government’s draft law:

Professor Horder acknowledged the greater simplicity of dropping negligence as an element of the offence, but he did not believe that it would be fair to convict a company for the criminal act of its employee or agent *without requiring the prosecution to prove that the company was itself at fault*. He distinguished bribery as a “step up” in seriousness from any existing strict liability offence under health and safety or other legislation:

[It] is very different from attributing causal consequences, like earwigs in tins or deaths occurring on ships or wherever it may be, to a company [. . .] You can only fairly, in my view, connect a deliberate act of bribery by an employee or agent to a company via the company’s own

¹³ Jonathan Russell, *Serious Fraud Office Risks Clash with Ministry of Justice over Bribery Act*, TELEGRAPH (July 1, 2011, 5:45 AM), <http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8609486/Serious-Fraud-Office-risks-clash-with-Ministry-of-Justice-over-Bribery-Act.html>; see also Caroline Binham, *SFO Chief Warns of New Global Reach*, FIN. TIMES, May 23, 2011, at 4.

¹⁴ For more on this question see Bruce W. Bean & Emma H. MacGuidwin, *Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act 2010*, 18 ILSA J. INT’L & COMP. L. 323 (2012) [hereinafter *Expansive Reach*]; Bruce W. Bean & Emma MacGuidwin, *Unscrewing the Inscrutable: The U.K. Bribery Act 2010*, 23 IND. INT’L & COMP. L. REV. (forthcoming Jan. 2013) [hereinafter *Inscrutable*].

¹⁵ JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL, 2008-9, H.L. 115-I, H.C. 430-I, ¶ 76 (U.K.) (citing Celia Wells, *Bribery: Corporate Liability under the Draft Bill 2009*, 2009 CRIM. L. REV. 479).

fault, if I could put it that way, or here we have got it as [“]a responsible person or number of persons[.”]¹⁶

The directors of both the SFO and the Crown Prosecution Service also testified before this Joint Committee. Each agreed with Professor Horder that it would be unfair to eliminate the negligence element from the Section 7 crime.¹⁷ For reasons outlined in Part III, I suggest that Parliament, eager to overcome its own publicly reported corruption, ignored the expert views expressed by both Professor Horder and U.K. prosecutors, eliminated negligence from Section 7 and thereby enacted a draconian criminal law. By striking the negligence element, Section 7 became a strict liability offense that convicts a company with no trace of *mens rea* of a crime with unlimited fines.

C. Defense to the Failure to Prevent Bribery

The sole defense for a company charged under Section 7 is the “adequate procedures” defense. Section 7(2) sets out this defense and requires the company to assume the burden of proving its innocence: “But it is a defence *for [the company]* to prove that [it] had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct.”¹⁸

Alldridge notes that the Act does *not* require prosecution of the alleged bribe that was not prevented¹⁹ and he concedes that the “jurisdiction for this offence is wide.”²⁰ This is wildly understated. Subsection 5 of Section 12 applies to the Section 7 offense. Subsection 5 reads “[a]n offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.”²¹ The fatal weakness of the Act is that it applies to entities doing only “part of a business in the United Kingdom” and criminalizes an act occurring “without the knowledge, intention or recklessness” of that business.

Lost in the simplicity of Section 7(2) is any indication of what constitutes adequate procedures. “Adequate” seems inapt when we are considering that a bribe apparently did occur despite such procedures.²² Professor Alldridge most likely was not thinking of non-U.K. companies doing only “part of a business” in the U.K. when he defended this provision as follows: “Crucially, a defence is provided where the commercial organisation can show it had adequate procedures in place to prevent persons associated with it from bribing. This

¹⁶ *Id.* at ¶ 83 (emphasis added).

¹⁷ *Id.*

¹⁸ Bribery Act 2010, c. 23, § 7(2) (U.K.) (emphasis added).

¹⁹ Alldridge, *supra* note 1, at 1202.

²⁰ *Id.*

²¹ Bribery Act 2010, c. 23, § 12(5) (U.K.).

²² I have commented extensively on the lack of any meaningful explanation of the curiously chosen word “adequate” elsewhere. See *Expansive Reach* and *Inscrutable*, *supra* note 14.

means that *any organisation that does have in place adequate procedures will avoid liability.*²³ Restating the language of the Act adds nothing. The question is—What are “adequate procedures?”

We know from the legislative history of the Bribery Act that “adequate” does *not* mean “reasonable,” as this term was explicitly rejected in Parliamentary hearings.²⁴ Alldridge quotes the Ministry of Justice Guidance explaining that “whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case.”²⁵ Alldridge further states:

This part of the legislation was never intended primarily to give rise to prosecutions and arguments in courts as to whether a given corporation had in place adequate procedures. Rather the effect will be that all major corporations include these procedures in their corporate-governance compliance procedures and that inclusion will impact significantly upon the primary rates of offending by employees.²⁶

While I acknowledge that the Professor was intimately involved with the lengthy preparatory discussions of this law, it nevertheless requires an unlikely leap of faith to believe a business will be content to assume that prosecutorial discretion and the prosecutor’s exercise of “common sense”²⁷ will protect the enterprise from an ambitious prosecutor. In American practice we are quite familiar with the phenomenon of government prosecutors establishing aggressive reputations and then proceeding through the revolving door to a richly compensated position in the private sector. Recent departures from the SFO indicate that this phenomenon may develop in London as well.²⁸

²³ Alldridge, *supra* note 1, at 1202 (emphasis added).

²⁴ 16 Mar. 2010, PARL. DEB., H.L. (2010) 55–69 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200910/cmpublic/bribery/100316/pm/100316s03.htm>.

²⁵ GUIDANCE, *supra* note 12, at 6; *see also* Alldridge, *supra* note 1, at 1206.

²⁶ Alldridge, *supra* note 1, at 1209–10.

²⁷ GUIDANCE, *supra* note 12, at 15 (“As regards bodies incorporated, or partnerships formed, outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business ‘in any part of the United Kingdom’ will again be answered by applying a common sense approach.”).

²⁸ The following senior personnel have left the SFO for private practice in the past few years: Kathleen Harris, Head of SFO’s Fraud Business Group, now at Arnold & Porter LLP; Charles Monteith, SFO’s Head of Assurance, now at White & Case LLP; Robert Wardle, former SFO Director, now at DLA Piper LLP; Robert Amaee, former Head of SFO’s Anti-Corruption and Proceeds of Crime Units, now at Covington & Burling LLP; Helen Garlick, former SFO Assistant Director, now at Fulcrum Chambers; Kwadjo Adjepong, led SFO’s probe into the collapse of London hedge fund Weaving Capital, now at Goldman Sachs as vice president in its compliance department; and Vivian Robinson, Former SFO General Counsel, now at McGuire Woods LLP. *See generally* TRANSPARENCY INT’L UK, CABS FOR HIRE?: FIXING THE REVOLVING DOOR BETWEEN GOVERNMENT AND BUSINESS (2011),

D. ECHR Article 6 Due Process

As a final factor requiring us to wonder what “stuff” might have led Parliament to enact such an overly broad act, I note that the U.K. is a party to the ECHR. Article 6, paragraph 2 contains a familiar statement of the presumption of innocence: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”²⁹ As we have seen, both U.K. criminal prosecutors and the Law Commission’s criminal law expert opposed removing the negligence element from the Section 7 offense, because this placed the burden of proving adequate procedures on the business already guilty under Section 7(1). In rejecting this expert advice, Parliament produced a law that violates the ECHR as well as the U.K. Human Rights Act³⁰ by requiring non-U.K. companies doing only “part of a business” in the U.K. to prove their innocence.

III. WHAT “STUFF” MOTIVATED PARLIAMENT TO ENACT THIS DRACONIAN ACT?

A. U.S. Prosecution of U.K. and Other Non-U.S. Businesses

One of the factors that ultimately moved the U.K. government and Parliament to enact the Bribery Act may have been the high profile successes that the U.S. Securities and Exchange Commission and Department of Justice have had in recent years in reaching lucrative settlements with major international businesses. The Siemens \$1.6 billion settlement with U.S. and German agencies announced in 2008 was featured in much of the world’s media at the time.³¹ Even more important for the U.K. government and Parliament was the multimillion dollar BAE Systems, plc (BAE) settlement with U.S. authorities discussed *infra*.³² A related factor may have been that the huge fines and penalties extracted by U.S. authorities were overwhelmingly from non-U.S. companies.³³ While the importance of these developments cannot be precisely

available at <http://www.transparency.org.uk/our-work/publications/10-publications/132-cabs-for-hire-fixing-the-revolving-door-between-government-and-business>.

²⁹ European Convention on Human Rights art. 6, para. 2, June 1, 2010, C.E.T.S. No. 194.

³⁰ Human Rights Act 1998, c. 42, § 6(2) (U.K.).

³¹ See, e.g., Cary O’Reilly & Karin Matussek, *Siemens to Pay \$1.6 Billion to Settle Bribery Cases*, WASH. POST, Dec. 16, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/15/AR2008121502926.html>.

³² See *infra* Part III.C.

³³ See, e.g., Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 492–93 (2011). This article summarizes major FCPA settlements between 2008 and 2010, the period during which the U.K. government and Parliament finally completed the Bribery Act. It notes that \$1.379 billion in settlements were won by U.S. authorities with just seven entities in this period, only one of which was a U.S. based company, see *id.* at 492–94, and then

determined, the impact of other factors directly impacting the government and Parliament is more obvious.

B. *Unrelenting Outside Pressures*

From the initial signing of the OECD Convention by the U.K. in 1997, there was a call for modernizing of the antiquated trio of U.K. bribery and corruption laws (U.K. Corruption Acts) discussed by Alldridge.³⁴ The official position of the government, however, was that these laws were sufficient to satisfy the U.K.'s obligations under the Convention.

The following statement from a 2008 Report summarizes the view of an OECD Working Group, organized to monitor compliance with the mandates of the OECD Convention, on U.K. compliance a decade after the Convention was signed.

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.*³⁵

Professor Alldridge labels this Report "seriously condemnatory."³⁶ Why the U.K. reluctance to comply with the OECD Convention? Buried in footnote 103 of his article we find Alldridge quoting language from the Working Group Report: "The examining team . . . consider[s] that there is a *lack of political will* to achieve compliance with the Convention."³⁷ One explanation for this lack of political will is surely that the British have never been enthusiastic about curtailing overseas bribery. As the Professor concedes, U.K. tax policy long

notes: "During the first twenty-eight years that the FCPA was in force, the SEC and the DOJ typically initiated just two or three cases a year. Fines, when assessed, seldom exceeded \$1,000,000." *Id.* at 495 (footnote omitted).

³⁴ Public Bodies Corrupt Practices Act 1889, 52 & 53 Vict., c. 69 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1889/69/pdfs/ukpga_18890069_en.pdf; Prevention of Corruption Act 1906, 6 Edw. 7, c. 34 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1906/34/pdfs/ukpga_19060034_en.pdf; Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf.

³⁵ ORG. FOR ECON. CO-OPERATION & DEV., 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, 4 (Oct. 16, 2008) (emphasis added), *available at* <http://www.oecd.org/investment/briberyinternationalbusiness/anti-briberyconvention/41515077.pdf>.

³⁶ Alldridge, *supra* note 1, at 1197.

³⁷ *Id.* at 1197 n.103 (emphasis added).

avored its businesses with the ability to deduct the overseas payments which the Bribery Act now criminalizes.³⁸ If consistent criticism from OECD Working Groups for more than a decade did not spur action in either the government or Parliament, what did finally move them? A large part of their motivation to finally enact a bribery law was the U.K.'s embarrassment arising from bribery and corruption scandals directly involving Parliament and the government.

C. Embarrassing the U.K. into Action

The need to update the “old, irrational, and cranky”³⁹ U.K. domestic bribery and corruption laws had been known for decades. In 1995, the Nolan Committee, established to consider questionable outside compensation received by some Members of Parliament, issued its report, “Standards in Public Life,”⁴⁰ calling for revisions to existing corruption laws. This report referred to the 1976 Salmon Report which had made a similar recommendation in connection with an earlier Parliamentary scandal.⁴¹ Both Committees’ findings were ignored.

In 2009, as the draft Bribery Bill was being considered, the “Rotten Parliament” scandal directly implicated hundreds of Members of Parliament. This affair involved inappropriate claims for reimbursement of allowances and Members’ expenses.⁴² As cast by the press: “the ‘Rotten Parliament’ appeared to line politicians’ pockets with taxpayer money . . . For many, it was hypocrisy at its worst.”⁴³

³⁸ *Id.* at 1186.

³⁹ *Id.*

⁴⁰ COMMITTEE ON STANDARDS IN PUB. LIFE, STANDARDS IN PUBLIC LIFE: TWENTIETH CENTURY CASES OF MISCONDUCT AND CURRENT PUBLIC OPINION, 1995, Cm. 2850-1, para. 10 (U.K.).

⁴¹ ROYAL COMMISSION ON STANDARDS OF CONDUCT IN PUBLIC LIFE, REPORT, 1976, Cmnd. 6524, para. 34 (U.K.).

⁴² See Paul Hechinger, *Infamous British Political Scandals: Expenses and the ‘Rotten Parliament’*, BBC AM. (Jan. 11, 2012), <http://www.bbcamerica.com/anglophenia/2012/01/infamous-british-political-scandals-expenses-and-the-%E2%80%98rotten-parliament%E2%80%99/> (“In 2009, The Daily Telegraph ran a series of articles over several weeks detailing expense filings, from leaked computer discs, of British members of Parliament. The British public was outraged to hear that they, the taxpayers, were, in effect, paying for everything from gardening and tennis court repairs to flat-screen TVs and even pornographic videos for their elected officials. Some MPs used public funds to pay mortgages on their relatives’ homes, or, in some cases, cited by The New York Times, they claimed money for mortgages that had already been paid off. The news resulted in lengthy investigations, many resignations (including that of the Speaker of Parliament), the implementation of new expense rules and accounting—and a whole lot of embarrassment. The scandal of the ‘Rotten Parliament,’ as it came sometimes to be called, also resulted in criminal charges, convictions and even prison sentences.”); see also *Times Topics: British Parliament Expense Abuses*, N.Y. TIMES (Feb. 5, 2010), http://topics.nytimes.com/topics/reference/timestopics/organizations/b/british_parliament/expense_abuses/index.html.

⁴³ Hechinger, *supra* note 42.

While these Parliamentary affairs likely did inspire the government to take action on the Bribery Act, the BAE scandal was the key driver in this process. In December 2004, BAE, the world's second largest defense contractor and a major employer in the U.K., reported that it was being investigated by the SFO. The BAE investigation had many facets but principally involved a huge defense contract and bribery of officials in Saudi Arabia.⁴⁴ A media maelstrom arose over the \$1 billion in bribes, the alleged direct involvement of three successive Prime Ministers—Margaret Thatcher, John Major and Tony Blair,⁴⁵ and a televised interview of Saudi Prince Bandar bin Sultan apparently conceding the receipt of these bribes and saying “so what?”⁴⁶

In December 2006, however, the SFO suddenly, and surprisingly, closed its investigation with no prosecutions.⁴⁷ A court challenge to this failure to prosecute was immediately brought.⁴⁸ In April 2008, the challenge was upheld with the High Court concluding that the SFO had improperly terminated this

⁴⁴The Al Yamamah transaction, for example, extended over several decades and involved BAE supplying military aircraft, air defense, and other systems to the Kingdom of Saudi Arabia. The Financial Times referred to this transaction as the “biggest sale ever, of anything, to anyone.” See David White & Robert Mauthner, *Britain's Arms Sale of the Century: The 10 Billion Pounds UK-Saudi Deal*, FIN. TIMES, July 9, 1988, at 7.

⁴⁵See, for example, *The Story So Far . . . Background to the Legal Challenge, CONTROL BAE: REOPEN THE SAUDI CORRUPTION INQUIRY* (Feb. 13, 2008), <http://www.controlbae.org.uk/background/review.php> [hereinafter CONTROL BAE] (at “June 2007: New allegations”), which noted:

[S]eparate revelations came to light in June 2007, via the BBC's Panorama television programme and in The Guardian newspaper that the UK Government itself may be implicated in the corrupt activities that the Serious Fraud Office was investigating.

Panorama's principal allegation is that BAE, with approval of the UK's Ministry of Defence, made payments worth hundreds of millions of pounds over two decades to bank accounts under the personal control of Prince Bandar bin Sultan, the son of Prince Sultan bin Abdul Aziz who has been the Saudi Defence Minister since 1962. The documentary suggests that some of the payments were for the personal expenditure of Prince Bandar bin Sultan.

The allegations raise further concerns about the shelving of the SFO investigation. They suggest that, since 1985, successive British governments under Prime Ministers Margaret Thatcher, John Major and Tony Blair have used Ministry of Defence bank accounts to facilitate corrupt payments to a foreign official.

⁴⁶*Bandar Bin Sultan: Saudi Money Is Mine and I Do What I Want with It*, YOUTUBE (Jan. 10, 2009), <http://www.youtube.com/watch?v=FeXT3tuH6ls>.

⁴⁷Press Release, Serious Fraud Office, BAE Systems Plc/Saudi Arabia (Dec. 14, 2006), available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx>.

⁴⁸See CONTROL BAE, *supra* note 45 (“On 18 December 2006, four days after the SFO announcement, The Corner House and Campaign Against Arms Trade wrote to the UK Government arguing that the SFO's decision was unlawful and should be reversed. The legal challenge centered on the UK's obligations under the Organisation for Economic Co-operation and Development (OECD) Anti-bribery Convention, which Britain signed in 1997.”).

investigation to protect both BAE's contracts and U.K. government involvement.⁴⁹ This decision was overturned by the House of Lords within three months.⁵⁰

While there were no prosecutions of BAE officials, the Board of Directors of BAE did authorize a study of its business and ethical practices. The Woolf Committee Report, "Ethical business conduct in BAE Systems plc – the way forward," was issued in May 2008. As the title suggests, this was not an investigation into BAE's conduct in connection with its Saudi contracts. As part of "the way forward," however, the Woolf Committee recommended that the BAE Board should take an active role in preventing bribery.⁵¹ The BAE scandal and the Rotten Parliament affair made everyone look bad. It was only six months after the release of the Woolf Report that the final draft of the Bribery Act was introduced. It was enacted just four months later. Such is the "stuff" that moves governments.

IV. CONCLUSION

During Parliamentary hearings on the final version of the Act, Jeremy Carver, a prominent London lawyer active with the international anti-corruption organization, Transparency International, testified about the many years of delay, repeated public consultations, and redrafts of a bribery bill:

If any piece of legislation has been consulted on, it is this one. The difficulty, of course, has been that each body that has triggered a consultation, whether it is the Government, whether it is the Law Commission or previous parliamentary committees, has of course continued to receive the two points of view: one that says we must have legislation, it should be clear, it should be decisive and it should stop present malpractices, and the other says that, yes, we have legislation but basically we want to continue to do what we have always been doing and we do not want to risk losing British business.⁵²

Following implementation of the Act, Monty Raphael, a London criminal defense lawyer, who had also given testimony to Parliament as it considered the

⁴⁹ R (on the application of Corner House Research & Campaign Against Arms Trade) v. Director of the Serious Fraud Office, [2008] EWHC (Admin) 714, [171], *available at* <http://www.bailii.org/ew/cases/EWHC/Admin/2008/714.html>.

⁵⁰ R (on the application of Corner House Research and others) v. Director of the Serious Fraud Office, [2008] UKHL 60, [47]–[48].

⁵¹ All twenty-three of the Woolf Committee's recommendations are summarized at pp. 59–62 of the report. WOOLF COMMITTEE, BUSINESS ETHICS, GLOBAL COMPANIES AND THE DEFERENCE INDUSTRY: ETHICAL CONDUCT IN BAE SYSTEMS PLC—THE WAY FORWARD 59–62 (2008), *available at* http://ir.baesystems.com/investors/storage/woolf_report_2008.pdf.

⁵² JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL, UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE, 2009 (to be published as H.C. 430-I, Q520) (U.K.), *available at* <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/uc430-vi/uc43002.htm>.

Act, published a newspaper article which began: “If the UK really took corruption seriously, it would not have taken 104 years to introduce reform and then only after constant prodding from the OECD in the face of resistance from organised business interests.”⁵³

We have seen that the “organised business interests” Raphael refers to were fully supported by the government and Parliament for an exceedingly generous period. In addition to government tax policy affording the ability to deduct overseas bribes, in the more than 100 years of operation of the U.K. Corruption Acts there had not been a single prosecution for overseas bribery until 2008, immediately following the BAE and Rotten Parliament scandals, when such prosecutions began with companies already prosecuted by U.S. authorities.⁵⁴ Professor Alldridge notes that the U.K. government has been “very tolerant”⁵⁵ of British bribes overseas. In a wonderfully artful phrase, he refers to the U.K.’s “rather *belated keenness* to comply with international obligations [under the OECD Convention].”⁵⁶

“Belated keenness” it was, and this was finally overcome. Professor Alldridge notes that the OECD Convention “changed the landscape” with respect to overseas bribery to obtain or retain business.⁵⁷ I fully concur. The thirteen-year hiatus between signing and the effectiveness of the Bribery Act, however, tells us that a mere change in landscape was not sufficient to alter well-established U.K. policy from generous tolerance to aggressive legislation. The U.K.’s “belated keenness” was overcome, I submit, by the worldwide embarrassment of the U.K. arising out of Rumsfeld’s “stuff,” the BAE and Rotten Parliament scandals, not by a tardy awareness of the obligations undertaken by the U.K. when it signed the OECD Convention.

⁵³ Monty Raphael, *An Anti-Corruption Agency Would Offer Us International Leadership*, TELEGRAPH (Aug. 7, 2011), <http://www.telegraph.co.uk/finance/yourbusiness/8687359/An-Anti-Corruption-Agency-would-offer-us-international-leadership.html>.

⁵⁴ Alldridge, *supra* note 1, at 1197–99.

⁵⁵ *Id.* at 1186.

⁵⁶ *Id.* at 1201 (emphasis added).

⁵⁷ *Id.* at 1186.