Working Group on Bribery in
International Business Transactions

TYPOLOGIES ON THE ROLE OF INTERMEDIARIES IN INTERNATIONAL BUSINESS TRANSACTIONS

FINAL REPORT

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INTRODUCTION

1. This study[1] focuses on the use of intermediaries in cases of bribery of foreign public officials. Intermediaries fulfil a key role in international business transactions. Many of them perform lawful tasks, but many also engage in bribery of foreign public officials. The latter is supported by reported cases, prosecutions, press reports and anecdotal evidence. Since there is no established definition of intermediaries in the context of foreign bribery cases, this report uses a definition *sui generis*.

2. The OECD Working Group on Bribery in International Business Transactions (WGB) recognises that intermediaries play a key role in the bribery of foreign public officials. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) expressly covers the situation that foreign bribery is committed "directly or through intermediaries".[2] Crucial to the Convention's effective implementation is whether Parties have legislation that adequately covers foreign bribery through intermediaries (see Annex), and whether such offences are then readily detected, investigated and prosecuted.[3]

3. In December 2007, the WGB decided that a more profound knowledge about the role of intermediaries in cases of foreign (transnational) bribery was needed, especially since there are indications that intermediaries are involved in most foreign bribery cases. Accordingly, a meeting was held in December 2008 to discuss various types of foreign bribery committed through intermediaries. In the meeting's morning session, experts from Parties to the OECD Anti-Bribery Convention discussed their experience with the detection and investigation of such crimes. In the afternoon, these experts heard the business sector, trade unions and civil society present their views on the use of intermediaries and measures to prevent abuse.

4. This report presents and expands on the meeting's discussions. The report looks briefly at the definition of intermediaries and reasons for their use before examining several *modus operandi* of foreign bribery through intermediaries. It then examines some legal and practical issues that arise due to the use of intermediaries. Next, the report surveys the principal measures used by the private sector to prevent foreign bribery through intermediaries. The final Chapter contains case summaries supporting the identified trends and *modus operandi* of the crime.

5. It is important to note that this report is based on a retrospective analysis of closed cases. Hence, it aims to be descriptive rather than prescriptive. The purpose of this exercise is to identify factual and legal issues in relation to foreign bribery through intermediaries. It is clearly not intended to prescribe standards that must be met by Parties to the OECD Anti-Bribery Convention. Whether the report's findings should lead to such standards will be for the WGB to decide at a different time and in a different context, such as the Review of the Anti-Bribery Instruments or the future monitoring of the Convention.

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2 Article 1(1) of the Convention.

3 See the Working Group's Phase 2 Reports concerning awareness-raising, investigation and detection of foreign bribery through intermediaries.

CHAPTER 1: DEFINITION OF AN INTERMEDIARY AND RATIONALE FOR ITS USE

6. This Chapter first defines an "intermediary" since there is no generally accepted definition in the context of foreign bribery. It then examines some legitimate reasons why intermediaries are used. The Chapter will then end by considering the increasing role of intermediaries in foreign bribery cases.

A. Definition of an intermediary

7. In the absence of a (legal) definition, for the purposes of this report an intermediary is defined or described as a person who is put in contact with or in between two or more trading parties. In the business context, an intermediary usually is understood to be a conduit for goods or services offered by a supplier to a consumer. Hence, the intermediary can act as a conduit for legitimate economic activities, illegitimate bribery payments, or a combination of both.

8. This study therefore focuses on all parties who act as a conduit in international business transactions, *e.g.* agents, sales representatives, consultants or consulting firms, suppliers, distributors, resellers, subcontractors, franchisees, joint venture partners, subsidiaries and other business partners including lawyers and accountants. Both natural and legal persons, such as consulting firms and joint ventures are included. The study refers to all of these actors as "intermediaries".

B. Legitimate reasons for recruiting an intermediary

9. There may be legitimate reasons for using an intermediary. Over the last decades, companies of all sizes have been presented with opportunities for rapid growth in multiple jurisdictions. When exploring potential openings abroad, they often find themselves in unfamiliar environments with a wide variety of cultural, legal, financial and accounting complexities and obligations. Intermediaries with local knowledge can help companies navigate such - for them - uncharted territory. They can provide a wide range of services, such as legal advice, market research, sales and after-sales services, logistical arrangements etc. Intermediaries may also help corporations identifying business projects, or execute various other business-related activities.

10. In addition to the activities mentioned, intermediaries may act as local representatives. Even large multinationals may not be able to have direct representation in all countries or markets in which they operate, and may therefore need intermediaries to act on their behalf. And despite having an office in a foreign country, local laws may limit the number of expatriates that a company can employ, in which case intermediaries may be needed to address any consequent shortfalls in competencies. Finally, the use of intermediaries may be mandatory, because certain jurisdictions require the employment of a local agent for any business transaction in the local market.

C. The role of intermediaries in foreign bribery

11. Besides their legitimate function, intermediaries unfortunately can also be involved in illegitimate activities such as foreign bribery. In some cases, intermediaries may engage in bribery and corruption of their own volition and conceal their crimes from their principals. If the principal fails to adequately supervise its agent or to implement an adequate compliance programme, it could suffer negative consequences, including legal consequences in some countries.

12. In other cases, however, a principal may intentionally want to commit foreign bribery, and decide to do so through an intermediary so as to distance him/herself from the crime and increase his/her chances of evading justice. The same agent may be used for both legitimate and illegitimate reasons.

13. Intermediaries are frequently used to commit bribery in public procurement, as shown in the Working Group's first typologies exercise.[4] In the December 2008 meeting on the second typologies exercise, one participant commented that the OECD Anti-Bribery Convention contributed to the increased use of intermediaries, as companies try to distance themselves from bribery for fear of prosecution.

14. Raising awareness of and preventing bribery through intermediaries are important to the effective implementation of the OECD Anti-Bribery Convention. Parties to the Convention have taken various measures to this end, such as explicitly sanctioning bribery "through intermediaries", producing explanatory brochures, and encouraging the business sector to adopt codes of conduct, compliance programmes and due diligence policies. Many tax and export credit agencies also explicitly cover bribery through intermediaries in their guidelines or contracts.

CHAPTER 2: *MODUS OPERANDI* OF FOREIGN BRIBERY THROUGH INTERMEDIARIES

15. This Chapter first examines the three basic *modus operandi* of bribing through intermediaries. It then considers some variations to the three basic schemes that may be used on their own or in conjunction with one another. These variations add complexity to the overall bribery scheme, resulting in additional legal issues and obstacles to investigators and prosecutors which will be discussed in Chapter 3. The Chapter refers to cases that are summarised in Chapter 5.

A. *Modus operandi* of bribery through intermediaries – three basic schemes

1. An official's family, friends and other third persons act as intermediaries

16. In this first category, the principal company knows the identity of the foreign public official who receives the bribe. The company and the official agree on the amount of the bribe and the services that the official will provide, *e.g.* using his/her position or influence to ensure that the company obtains a contract. But instead of sending the bribe to the official directly, the parties agree that the company will transfer the bribe into the bank account of a third party intermediary who has no role in the transaction other than to pass on the bribe. There is thus no direct trace leading from the company to the bribed official. To justify the payments from the principal to the intermediary, false invoices are frequently used to pay for purported goods or services.

17. Several cases in this typologies exercise illustrate the use of family and friends. In the *Green Case*, the U.S. defendants negotiated the contracts to be awarded and the size of the bribe directly with a Thai official. The defendants then transferred the bribes into the offshore bank accounts of the official's friend and daughter. In the *Siemens Case*, bribes were paid to senior Nigerian officials to secure telecommunications contracts. The bribe payments were routed through the bank account of a U.S.-based intermediary who was the wife of a former Nigerian Vice President. In the *Lesotho Case*, bribe payments were channelled to the corrupt official through the official's friend and the friend's wife. In the *Truck Transport Case*, the limited information available based on reports by the company and the press indicate that bribes were sometimes deposited in the accounts of friends and relatives of foreign officials.

[4] OECD (2007), *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, Paris, ISBN 978-92-64-01394-0.

2. Intermediaries who do not provide any identifiable service

18. In the second category of cases, a company hires a business consultant as an intermediary. However, the consultant does not provide any identifiable or economically justifiable service. In fact, the consultant is controlled by a foreign public official who is bribed by the company. The consultant charges the company using feigned invoices for sham services. The company then pays the consultant who forwards the funds directly or through further layers of intermediaries and/or their companies to the official as a bribe. As with the previous scheme, there is no direct trace from the company to the official.

19. There are many examples of this scheme. In the *Titan Case*, the company allegedly paid an agent over USD 2 million in consultant fees. However, investigators found no evidence that the intermediary actually performed the services or incurred the expenses that were invoiced. The *Siemens Case* contains numerous examples also. For instance, a Hong Kong-based consultant was hired to work on a power plant contract. In fact, the consultant was a clothing company with no expertise in the power generation industry. Predictably, the consultant did not provide any actual services to the principal. In other instances, the consultants produced bogus work products, such as a sham traffic study in a case involving bribery of Russian officials. Another example is the *Vetco Case*, where a freight forwarder provided many legitimate services to the company, but also offered several "unadvertised" services such as an "express courier service", "interventions" and "evacuations". In fact, these unlisted services consisted only of negotiating with and bribing Nigerian officials so that goods would clear customs. The freight forwarder channelled portions of the fees paid by Vetco for these unlisted services to Nigerian officials as bribes.

20. Fake documentation is often used throughout the process to conceal the bribery. For example, the company and the consultant may sign a written consultancy agreement. The consultant may issue written, however feigned, invoices for his/her services. The company may also enter the expenditures in its books. These documents, however, generally use very general, non-descriptive language. Common examples include "supporting the company's business in country XYZ", "conducting (market) research", or "establishing necessary contacts". Invoices are likewise non-descriptive, *e.g.* "Consultancy fee for the period from XX to YY", or simply refer to "Fee as agreed for Project ABC, Phase 1" etc. Some simply state "Fee". The agreement and invoices may refer to a real or fictitious project. The services or work products to which they refer, however, are fake. Normally, the consultant will receive a fee or keep a certain percentage of the funds he/she transfers.

21. The Vetco Case mentioned above also illustrates the use of fake documentation. The freight company provided services entitled "interventions" and "evacuations", which were in fact euphemisms for bribing Nigerian officials. After Vetco ordered these services, the freight company issued invoices to Vetco in order to collect funds that were used as bribe payments.

22. Fake documentation using vague language was also found in the *Siemens Case*. At various times, Siemens entered into consultancy agreements even after it had won the contract, as was for example the case involving a Chinese train project. The agreements described the services to be performed by the consultant in a number of ways: "identify and define sales opportunities, provide market intelligence" and "support contract negotiations". In many instances, payments were supported by invoices with a similar description. In fact, the transactions were shams and the consultants performed no services beyond facilitating bribery.

23. A further example of the use of vague language can be found in the consultancy agreements in the *Baker Hughes Case*. After obtaining a contract from the Kazakh government, a Baker subsidiary allegedly entered into a sales representation agreement with a consultant. In exchange for a 2% commission, the consultant was required to "work diligently to protect and promote the interests of [the Baker Hughes] subcontractor", and "promote and procure sales and to negotiate and assist in the

conclusion of contracts". The agent ultimately received USD 20 000 in commissions without actually providing any services. Baker allegedly also hired a second agent to assist in obtaining a contract with a Kazakh state-owned oil company. A one-page agency agreement merely required the agent to carry out "laboratory and field experiments" and "marketing functions" on Baker Hughes products. There was no evidence that the agent performed any of these tasks. A third agent was hired to assist Baker in obtaining an oil-services contract from the Kazakh government. The agency agreement stated that Baker retained the consultant "in recognition of said work and assistance given by the [firm] towards Baker Hughes in pursuit of the [said] contract". Baker Hughes' books also referred to consultant fees as merely "commissions", "fees" or "legal services".

24. Another example of vague language is found in the *Lesotho Case*. A consortium of companies entered into a consultancy agreement under which the consultant would "provide information, advice and support" to the consortium, provide "further general assistance during contract negotiation", and assist the consortium "during the execution of the Works". The agreement also stated that the consultant would "try its best to supply [the consortium] with useful information and data for the award" of the contract. The consultant charged the consortium for hundreds of thousands of dollars, but the invoices for the payments referred merely to "customs regulations" and "new acquisitions in Africa". A member of the consortium hired a second consultant to perform services such as "keep [the company] informed of all developments", "collect appropriate documents and information", "assist [the company] in seeking, negotiating and securing a contract", providing administrative support, and "assist [the company] maintain good relationships with LHDA."

3. Intermediaries who provide a combination of legitimate and illegitimate goods and services

25. In a third category, a company again retains a business consultant as an intermediary but the consultant performs actual services, albeit of an improper nature. For example, the consultant may be asked to bribe an official to tailor the terms of reference of a public tender to favour the company, as illustrated by the *ABC Inc. Case*.

26. There are also instances in which a consultant bribes a foreign official to obtain confidential information related to a tender. In the *Statoil Case*, the company transferred funds via a business consultancy to an influential Iranian official. In return, the official obtained confidential information concerning oil and gas projects in Iran for the company and showed the company copies of bid documents by competitors. Likewise, the company in the *ABB Case* bribed Nigerian officials through an intermediary to secure confidential information about bids by the company's competitors. In the *Mastermind Intermediary Case*, the intermediary bribed foreign officials in order to obtain confidential information related to public procurement. The intermediary then offered to sell the information to potential participants in the procurement.

27. For cases in this category, the contract price includes the real value of the transaction, the bribe and a percentage fee for the agent. However, the company may or may not know how much of the contract value represents bribes. The payment scheme is similar to the previous category of cases, often with consultancy agreements and invoices that use similarly non-descriptive language. Whenever a payment is due, the consultant invoices the company while payment moves in the opposite direction. Sometimes the bribes are paid in instalments as in the Titan Case, where the bribe payments were falsely invoiced as consulting services paid in small increments and spread out over time. Payment could also be triggered by specific events, *e.g.* when the requested information is provided, when the contract is concluded, when contract milestones are reached, and/or when the entire project is completed.

28. Finally, there are also cases in which an intermediary performs legitimate services for the principal in addition to facilitating foreign bribery. For example, in the *Vetco Case*, the agent provided

freight forwarding and logistics services to customers worldwide, including to Vetco. In the *Ammunitions Case*, the intermediary procured ammunitions for the principal as requested (albeit at an inflated price in order to hide the bribe).

B. Variations to the basic schemes

29. The three basic schemes described above can be varied in a number of ways. Each of the variations described below can be used on its own or in conjunction with others.

1. Use of multiple intermediaries

30. The basic schemes described above are often modified so as to use a cascade of consultants to deliver the bribe from the company to the official through a "bottom-up" billing system. The consultancy firm at the lowest level is closest to or controlled by the bribed foreign public official. That consultancy firm sends a bill to another firm at the level above, which in turn bills another firm or consultant above. This chain of billing continues until the top-level consultant bills the company benefitting from the entire scheme. The official receives the bribe when all of these bills are paid. As with the cases in the basic scheme, there are no direct payments (and hence no direct trace) from the company to the bribed official. However, the multiple layers of consultants increases opacity and multiply the difficulty in gathering evidence.

31. The *Siemens Case* provides an example of such a cascade of intermediaries. In order to obtain a transmission line project in China, bribe money was funnelled through a Dubai consultant and then several entities associated with a Chinese business consultant (who was an American national and resident) before reaching the foreign officials. In other cases, Siemens retained a system of "payment intermediaries" whose sole task was to transfer money originating from Siemens to business consultants in order to pay bribes. In addition, some intermediaries provided company structures using bank accounts in different places. The intermediaries invoiced Siemens to trigger payments for certain projects, then kept a percentage of the funds for themselves and passed the rest through a cascade of consultants at various levels.

32. In addition, multiple intermediaries can also be used in parallel to simultaneously bribe different officials involved in the same project. For example, in the *TSKJ Case*, the company used a U.K. consultant to bribe senior Nigerian officials, and a Japanese consultant to bribe lower-level officials involved in the same project. In the *Siemens Case*, bribes to Venezuelan officials relating to a metro project were channelled through three consultants who were based in three different locations.

2. Location of intermediaries

33. As noted above, one legitimate rationale for using intermediaries is to tap their knowledge of and contacts in a foreign country. This predictably leads to the frequent use of agents based in that country, including in foreign bribery cases. For example, the company in the *Hioki Case* used local sales agents to bribe Latin American public officials. In the *Baker Hughes Case*, the company hired local intermediaries in Angola, Nigeria, Indonesia and Kazakhstan. In the *Hydropower Case*, a South American engineering company signed a contract for a hydropower project in Asia, but the local government blocked the contract's execution. The company then hired an influential local politician who offered bribes to senior government officials on the company's behalf.

34. However, it is also common to find intermediaries located in a third country. For example, in the *Siemens Case*, in addition to the local agents described above, third-country agents were also used: intermediaries in Dubai were used to bribe Italian and Venezuelan officials, while Hong Kong-based

intermediaries were involved in bribing officials in Israel, mainland China and Vietnam. In the *TSKJ Case*, Nigerian officials were bribed with the help of intermediaries in the U.K. and Japan.

3. Designated intermediaries and mandatory use of intermediaries

35. A company does not always have the choice of not using an intermediary. Government officials sometimes require foreign companies to retain a designated local agent, who in turn negotiates a fee with the company that in fact includes a bribe for foreign officials. For example, in the *Shipyard Case*, an engineering firm signed a contract to revamp a shipyard. Just before the actual work began, the government required the firm to hire a specified consultant. This government-designated agent charged the foreign company a 5% commission and also diverted part of the project's expenditures into a local political campaign. In the *Baker Hughes Case*, a Baker Hughes subsidiary submitted a bid for a project in Kazakhstan. Kazakh officials then requested that the company hire an agent who in turn charged 2% of revenues on the contract in question and 3% of revenues of all services subsequently performed by the company. Most of the fees eventually found their way to bank accounts controlled by Kazakh officials.

36. A less extreme situation is where foreign laws require companies to hire a local intermediary without identifying a specific agent. This could nevertheless be problematic since the pool of eligible agents is extremely limited in some countries (*e.g.* some states in the Middle East). In effect, the end result is similar to when a government designates one particular agent for a specific transaction. Even though the company in need of a local intermediary has a larger choice of candidates at its disposal, the scheme described seems the same.

4. Use of corporate structures such as subsidiaries

37. The cases in this typologies exercise show that subsidiaries are frequently involved in foreign bribery through intermediaries. This can arise in at least three ways. First, a subsidiary, rather than the parent company, may contract with the intermediary. In the *Baker Hughes Case*, the parent company hired a U.K. agent through its U.S.-incorporated but Kazakh-based subsidiary to secure a contract in Kazakhstan. In the *Hioki Case*, the U.S.-based subsidiary of a Japanese company hired local sales agents in Latin America to facilitate bribery. In the *Siemens Case*, senior officers of an Italian subsidiary hired a consultant to bribe Italian public officials. In the *Vetco Case*, several subsidiaries in a multinational conglomerate used an agent to bribe Nigerian customs officials.

38. Second, a subsidiary itself may be the intermediary that bribes. The officers or employees of a subsidiary may directly bribe foreign public officials for the benefit of the subsidiary, the parent and/or the multinational conglomerate as a whole. In the *ABB Case*, employees of the company's U.S. and UK subsidiaries allegedly bribed Angolan officials by sending the officials on all expenses paid trips to the U.S., Brazil, Norway and the UK. A third subsidiary in Kazakhstan bribed a local official to secure business from the government. In the *Truck Transport Case*, the company's low-level salespersons bribed foreign officials, according to the limited information available through press and company reports.

39. Third, a subsidiary could also be used to channel funds used for foreign bribery. In the *Blackbox Domestic Case*, the parent company instructed a consultant to send his invoices to an offshore subsidiary that provides auditing and compliance services to the parent. The subsidiary processed and forwarded the invoices to the parent. The parent then paid the invoice by sending funds (which included bribe payments) through the subsidiary to the consultant. This circuitous route for the invoices and payments through an offshore corporate entity merely adds another level of complexity for investigators.

40. The parent company's involvement in these scenarios may vary. A subsidiary may bribe foreign officials of its own volition and without the knowledge of the parent. In the *Golf Clubs Case*, the vice-

president and an engineer of a subsidiary in an Asian country bribed local officials with a trip and golf equipment. The parent company in the home country apparently had no knowledge of the crime. A subsidiary could also commit bribery with the knowledge or at the direction of the parent company. In the *Hioki Case*, the General Manager of a Japanese company oversaw the company's wholly-owned U.S. subsidiary and authorised the subsidiary to hire intermediaries to bribe officials in Latin America. Between these two extremes, the parent may deliberate avoid knowledge of the crime by refusing to inquire into the subsidiary's affairs, or it may have negligently failed to supervise the subsidiary, thus allowing the subsidiary to commit foreign bribery.

5. Beneficially-held accounts, slush funds and offshore financial centres

41. Criminals who engage in bribery are likely to hide their financial transactions. When intermediaries are used to commit the crime, the bribe is frequently routed through several bank accounts beneficially held by the intermediary, i.e. the account is in someone else's name. These accounts may be on- or offshore. Offshore financial centres were involved in several cases referred to in this typologies exercise, *e.g. Statoil*, *TSKJ*, *Siemens*, *Truck Transport*, *Lesotho* and *Ammunitions Cases*.

42. Bribes may also come from a system of slush funds that had been created prior to the bribes. The advantage of slush funds is that bribes can be paid at any moment. Slush funds can be created using a cascade of consultancy firms and agreements described above. Inaccurate agreements and invoices referring to real or imaginary projects are used to divert funds from a company to secret accounts worldwide. When needed, the funds are withdrawn and distributed among various foreign public officials. A slush-fund scheme such as this one was used in the *Siemens Case* to support the company's systemic bribery of foreign public officials. Furthermore, Siemens created some of these slush fund accounts in offshore financial centres, which makes the scheme more difficult to detect and investigate, as noted above.

43. A subsidiary or the intermediary is also often incorporated in an (offshore) financial centre. For example, in the *Baker Hughes Case*, one agent who was hired to bribe Kazakh officials was the director of a consulting firm incorporated and registered in the Isle of Man. Another intermediary who specialised on Kazakhstan, Russia and Uzbekistan was a Panamanian-registered consultancy company. In the *TSKJ Case*, the company hired a UK-based intermediary to bribe Nigerian officials. To hide the bribes, the company entered into a consultancy agreement with a Gibraltar-incorporated firm that was controlled by the intermediary. As an additional complication, especially for investigators, these companies may have bank accounts in yet another set of jurisdictions.

6. A passive principal: active intermediaries and government-imposed intermediaries

44. This typologies exercise revealed that companies that initially have no intention of using intermediaries may eventually be confronted with the issue. In the *Mastermind Intermediary Case*, for example, an intermediary approached a company and offered confidential information that he had obtained through his connections with foreign officials. In other words, the intermediary (not the principal company) is the mastermind of the criminal enterprise and may accordingly be guilty of bribery as the main offender. The company, knowing that the intermediary had improperly obtained the information, may be a party to the offence (e.g. an accomplice, aider, abettor, co-conspirator or co-perpetrator).

45. A company can also (unexpectedly) be confronted with an intermediary at the request of a foreign government. In the *Baker Hughes Case*, the company was told that it would have to hire a particular agent in order to win the contract. The demand to hire an agent could be made even after the company had ostensibly won the contract, as the Baker Hughes Case demonstrates. Similarly, the foreign government in the *Shipyard Case* demanded that the company hire a specified agent only after the

company had signed the contract to revamp a shipyard and just before the actual work on the project was scheduled to begin.

C. Conclusion

46. This Chapter illustrates the three basic paradigms of foreign bribery through intermediaries. Although the basic schemes differ, the motivation for using any one of them is the same: to make the crime more difficult to detect and investigate. The several variations to the basic scheme, each of which can be used on its own or in combination with others, further increase this difficulty.

CHAPTER 3: ISSUES ARISING FROM THE USE OF INTERMEDIARIES TO COMMIT FOREIGN BRIBERY

47. As noted in the previous Chapter, the basic purpose of using intermediaries to commit foreign bribery is to evade detection, prosecution and conviction. This Chapter will examine why using intermediaries – including the variations to the basic *modus operandi* - makes foreign bribery cases more difficult to detect, investigate and prosecute. As will be seen below, foreign bribery through intermediaries creates practical difficulties in the investigation and evidence-gathering process. It also raises challenging legal issues that prosecutors and courts must tackle. Parties to the Convention take various approaches to implementing the Convention and this Chapter describes practical hurdles from a prosecution perspective rather than an interpretation of the Convention's requirements.

A. Mental state of the briber

48. An individual who has retained an intermediary often argues that he/she did not know that an intermediary would engage in bribery. Absent subjective intent to commit or knowledge of the crime, the principal would not be criminally liable.

49. This defence is untenable in some circumstances, however. For instance, a company may pay consultancy fees that are out of proportion with the services rendered, or goods at hugely inflated prices. In the *TSKJ Case*, the company paid a consultant USD 132 million over roughly seven years for vaguely described marketing and advisory services. In the *Cash-for-Signatures Case*, a company paid USD 2 million to a consultant with no relevant expertise in return for the signatures of eight senior foreign officials in two weeks. In the *Baker Hughes Case*, the company paid an Angolan agent USD 10.3 million in commissions over five years purportedly for seismic data. The company paid another agent USD 4 million but there was no evidence that the agent produced any work.[5]

50. The defence is also untenable where a principal pays large fees to an intermediary without making enquiries to ensure that the funds would not be used for bribes. This was the situation in the *Baker Hughes Case*. Similarly, the company in the *Oil-for-Food Case* paid an agent approximately USD 7 million for oil from Iraq without inquiring how the money would be spent. The company also argued that a no-corruption clause in the contract justified its refusal to inquire. In sum, when a principal unjustifiably

[5] See Chapter 4 for other "red flags" that could also be evidence of the principal's guilty state of mind.

refuses to make reasonable inquiries or pays unreasonable fees or prices, one should infer that the principal in fact knew that the intermediary would commit bribery.

51. To address this situation, the Parties to the OECD Convention have applied different concepts in accordance with their legal systems. Some jurisdictions rely on the principle of *dolus eventualis* or recklessness, i.e. an individual who is subjectively aware of a risk that bribery will be committed, and consciously takes the risk. Other jurisdictions employ the concept of wilful blindness, i.e. when an individual consciously and deliberately avoids knowing whether an act constitutes a bribe.[6] Regardless of the theoretical underpinnings, what is important is that principals who deliberately fail to make reasonable inquiries, or who pay consultant fees that are hugely disproportionate to the work product, cannot simply claim a lack of knowledge.

B. Prosecuting alternate crimes such as false accounting

52. Some noticeable differences in legal systems impact the ability to secure convictions for bribery of foreign public officials in international business transactions. The following examples may serve to illustrate this point.

53. The US foreign bribery legislation, the Foreign Corrupt Practices Act (FCPA), allows the prosecution to secure a conviction for false accounting in lieu of foreign bribery. In addition to foreign bribery, the FCPA contains accounting provisions that consist of books and records provisions as well as internal controls provisions. A conviction under the books and records provisions does not require the prosecution to prove that the accused engaged in a specific act of bribery; proving that false accounts or other false documents such as sham consulting agreements were maintained is sufficient to secure a conviction under the FCPA's books and records provisions.

54. The situation in many other jurisdictions differs significantly from the US example. In these jurisdictions, the prosecution needs to prove a chain of criminal offences ultimately leading to the bribery of a foreign public official. Staying with the example of false accounting, this means that the prosecution needs to first prove that false accounts, or for example sham consulting agreements, have been used to commit a specific crime (such as forgery of documents). The next step is to prove that those crimes subsequently lead to foreign bribery. In other words, the prosecution needs to identify and prove the full chain of crimes ultimately leading to the foreign bribery. Some jurisdictions further require that the prosecution identify and prove (each) individual beneficiary of such bribes before a conviction can be secured.

55. The use of intermediaries in cases of foreign bribery present the prosecution with an even more complicated task. The more intermediaries are used, the more complex it becomes to trace and prove the entire chain used to pass on the bribes and the fact that foreign bribery occurred. Many prosecutors and courts outside the US cannot overcome this problem by merely proving that the accused maintained false accounts or books and records, unlike under the FCPA.

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[6] However, recklessness, *dolus eventualis* and/or wilful blindness do not apply to foreign bribery offences in some Parties. Some Parties may also require proof that a principal knows the identity of the bribed official. See Section 1.1.2 of the Phase 1 Reports of Chile, France, Ireland, Luxembourg, Netherlands and Turkey. See also the Phase 1 Report of Switzerland (Section 1.1.5), and the Phase 2 Reports of Mexico (para. 40) and Portugal (para. 139).

C. Challenges posed by the use of subsidiaries

56. As noted above, subsidiaries can be involved with bribery through intermediaries in different ways. The subsidiary (instead of the parent company) may retain the intermediary or act as an intermediary itself. It could also be used to channel funds used for bribery. The principal's involvement may also vary, ranging from complete ignorance to negligent failure to supervise the subsidiary, or full knowledge or control of the subsidiary's actions.

57. The use of subsidiaries may create legal obstacles that could shield a parent company from liability. In many jurisdictions, the act of bribery committed by the intermediary may (at most) result in liability of the subsidiary but not the parent. This is caused by the fact that the parent and the subsidiary are separate legal persons acting in different jurisdictions. The parent, as merely a shareholder in the subsidiary, is generally protected by the so-called "corporate veil" and thus not liable for the acts of the subsidiary or its employees unless the veil is pierced.

58. The ease with which the corporate veil can be pierced varies significantly from one country to another. Some jurisdictions will hold the parent liable if there is direct involvement by the parent's employees and officers. Unfortunately, this may be difficult to prove because the parent company is often very remote from the crime. Other states may hold the parent liable if the parent dominated the affairs of the subsidiary, thereby rendering the subsidiary its "alter ego". There are also jurisdictions that may consider the subsidiary to be the parent company's agent; the parent is then vicariously liable for the subsidiary's acts. But despite these different theories, it may fairly be said that in many countries the principle of corporate personality will often prevail and shield a parent company from liability.[7]

59. Not surprisingly, companies may take advantage of these shortcomings and design corporate structures to specifically evade liability. For example, in the *TSKJ Case*, a joint venture was set up to seek contracts in a Nigerian gas project. The joint venture eventually contracted with consultants to facilitate the bribery of Nigerian officials. In an effort to evade U.S. foreign bribery laws, a U.S. company deliberately avoided direct ownership in the joint venture. Instead, it took an indirect ownership interest in the joint venture through a partially-owned U.K. company. It also ensured that the U.S. nationals were not on the joint venture's board. These efforts were ultimately unsuccessful because the company's senior executive, a U.S. citizen and resident, directly negotiated bribes with Nigerian officials.[8]

60. In addition to these legal obstacles, the use of subsidiaries can add opacity and complexity to the case, making the investigation or prosecution much more costly and time-consuming. Using subsidiaries increases the distance between a principal and the criminal act of bribery, making proof of a direct connection more difficult. Complex corporate structures can further obscure who was in control and made the decision to bribe. At a minimum, the use of subsidiaries increases the amount of evidence that investigators and prosecutors must gather.

61. The *Blackbox Domestic Case* is an example of a corporate structure designed to increase complexity and opacity. Although the parent retained the consultant, payments and invoices did not pass directly between the two parties. Instead, they were routed through a subsidiary that provided audit and compliance services to the company, thus adding an additional layer in the paper trail.

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7 For a further discussion of these issues, see a paper prepared by Professor Ugo Draetta for the Working Group "Role of foreign subsidiaries in the application of the OECD Convention on Bribery of Foreign Public Officials and its implementing national legislations", DAFFE/IME/BR/WD(2003)11.

8 This also appeared to have been the basis of liability against the parent company in the Baker Hughes and Hioki Cases in the U.S.

62. In sum, the use of subsidiaries can pose difficult legal and practical obstacles to investigators and prosecutors. The Working Group has long recognised the challenges posed by subsidiaries in foreign bribery cases, listing the issue in 1998 as one of five for further study.[9] It could be beneficial to conduct this study specifically in the context of foreign bribery through intermediaries.

D. Challenges posed by offshore financial centres

63. As noted in the previous Chapter, financial crimes frequently involve offshore financial centres (OFCs). Foreign bribery is no exception. Bribe payments are often routed through OFCs. Intermediaries and subsidiaries involved in the bribery scheme are also often incorporated in OFCs.

64. The result is that investigation and prosecution of these crimes are made much more difficult if not impossible. Investigators need additional time and resources to obtain evidence from OFCs through mutual legal assistance. In certain cases, the evidence is simply unavailable because some OFCs do not require companies to keep relevant records such as a register of shareholders and proper accounts. Information may also be unavailable because of opaque corporate laws or stringent bank secrecy laws.

E. Jurisdiction to prosecute

65. Foreign bribery committed through an intermediary can pose jurisdictional difficulties in prosecutions. In these cases, the actual act of offering, giving or promising a bribe is committed by the intermediary, not the principal. This act is often committed outside the territory in which the principal is located. The agreement between the principal and the intermediary (e.g. a contract for services, or an agreement to bribe) may also be concluded outside the principal's jurisdiction. Consequently, some would argue that the case has a tenuous link with the principal's jurisdiction, and that the authorities in that jurisdiction do not have territorial jurisdiction to prosecute the principal.

66. A low threshold for invoking territorial jurisdiction could help overcome this problem. Ideally, territorial jurisdiction should arise even if the principal commits relatively peripheral acts in the jurisdiction, e.g. communicating with the intermediary while in the jurisdiction, sending funds from an account in the jurisdiction directly or indirectly to the intermediary, or if the benefits of the bribery accrue in the jurisdiction.

67. Nationality jurisdiction reduces this problem as well, as it can be invoked to prosecute a principal who is a national. The concept should also be extended to legal persons and allow the prosecution of companies which are incorporated or just active in that jurisdiction, even if the natural person who bribed is a foreigner. Another option is to prosecute the principal for related offences, such as false accounting (such as in the ABB Case) or money laundering.

68. The jurisdictional difficulties are magnified when prosecuting an intermediary who is located abroad (as is often the case). There are usually even fewer territorial links between the intermediary and the principal's jurisdiction. The intermediary is also often a foreign national, and hence nationality jurisdiction cannot be invoked. He/she also may not operate in the principal's jurisdiction, and is thus less likely to have committed other offences such as false accounting and money laundering in that jurisdiction. Even when there is jurisdiction, the intermediary would have to be extradited. Not surprisingly, of the cases considered in this typologies exercise, only the *TSKJ Case* concerned the prosecution of a foreign intermediary in the principal's jurisdiction.

[9] "Five Issues Relating to Corruption" DAFFE/IME/BR(98)13.

F. Additional issues

69. The Phase 2 reports indicate some additional legal issues that could arise in intermediary cases. The foreign bribery offences in some Parties require proof of a "corruption pact" between the briber and the foreign official. For instance, one may have to prove that the public official knew that the briber intended to obtain an act or omission in return for an unlawful advantage. This could pose difficulties in cases involving intermediaries, since the principal may not know the identity of the official, let alone the amount of the bribe or the act performed by the official as *quid pro quo*.[10]

70. The Phase 2 reports also considered the issue of failed intermediation. This arises when a principal seeks to bribe a foreign public official through an intermediary, but the intermediary decides not to bribe the official despite the principal's wishes. Intermediation may also fail if a foreign official rejects an offer of a bribe by an intermediary. At least some Parties to the OECD Anti-Bribery Convention do not consider cases of failed intermediation a crime.[11]

71. Some Phase 2 reports have also considered whether a foreign bribery offence covers intermediaries who are not aware that they are giving, offering or promising a bribe. Many jurisdictions have asserted that the situation is covered, usually without supporting case law.[12]

72. Finally, the use of intermediaries can hamper investigation by requiring additional evidence concerning the intermediary to be gathered. If the intermediary is located abroad, there could be difficulties in obtaining mutual legal assistance and exchanging information among law enforcement agencies.

G. Conclusion

73. Foreign bribery through intermediaries thus pose a number of challenges to legislators, policy-makers, law enforcement and prosecutors, such as ineffective and inefficient mutual legal assistance, particularly but not only from offshore financial centres; the abuse of corporate vehicles to commit crimes; and beneficial ownership of assets. The same obstacles exist for investigating foreign bribery without the use of intermediaries, but they are greatly amplified when intermediaries are involved.

74. The Chapter also shows that the use of intermediaries gives rise to some technical legal issues, such as the mental state of the briber; the use of subsidiaries and the corporate veil; and jurisdiction to prosecute the principal and the intermediary. Some of these issues may merit further examination by the Working Group, whether through its monitoring work under the OECD Anti-Bribery Convention, a cross-country horizontal study, or an experts' meeting such as the current one on intermediaries.

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10 See the Phase 2 Reports of France (paras. 109-110), Italy (para. 121-123), Luxembourg (paras. 97-98) and Turkey (paras. 164-5), and the Mid-Term Study of Phase 2 Reports (paras. 102-7).

11 See Phase 1 Reports of Bulgaria (section 1.1.5), Hungary (section 1.1.5), and Slovenia (para. 22). See also Phase 2 Reports of Austria (para. 108), Brazil (para. 141), France, (paras. 109-10), Japan (paras. 152-4) and Turkey (paras. 96-7 and 164-5).

12 The Working Group has decided to follow up this issue in three Parties: see Phase 2 Reports of Austria (para. 108), Chile (para. 145), and Slovenia (para. 143). See also Section 1.1.5 of the Phase 1 Reports of Belgium, Brazil, Ireland, Japan, and Poland; and the Phase 2 Reports of Norway (para. 76) and Sweden (para. 176).

CHAPTER 4: PRIVATE SECTOR ACTIONS TO REDUCE THE RISKS OF BRIBERY BY INTERMEDIARIES

75. As the previous Chapters show, a company could be embroiled in foreign bribery if its employees decide to commit the crime by using an intermediary. It could also be implicated if an intermediary commits bribery of its own volition, without the direction of the company or its employees. In either case, a company could face legal liability as well as financial and reputational damage.

76. Many large corporations have accordingly devised compliance programmes to manage these risks. The same applies to other bodies that use agents, such as international development banks and international organisations that offer public tenders. Some companies reported that enhanced due diligence has led to a decrease in commissions paid, the number of hiring requests, and the use of offshore accounts, shell companies and accounts not in the name of an intermediary.

77. The compliance programmes used by companies vary greatly from one to another because of differences in context, *e.g.* where the company operates and in what sector. Nevertheless, many programmes share common features aimed at identifying and mitigating the risks of foreign bribery through intermediaries. The purpose of this Chapter is to provide a survey of some of the salient features found in the compliance programmes of many companies, as well as suggestions by the International Chamber of Commerce, Transparency International, BIAC, TUAC, and national governments.

78. However, to be successful, designing a compliance programme with the right components is not enough. The best-designed compliance programmes would do little to prevent foreign bribery through intermediaries unless they are fully implemented with proper resources and top-level commitment. This Chapter will end by looking at some companies' efforts at implementation.

A. Codes of conduct

79. The compliance programmes of many companies centre on a corporate code of conduct. These codes generally articulate a company's commitment to ethical standards and practices. Codes of conduct are increasingly popular in large corporations. Some now specifically address foreign bribery through intermediaries, though the definition of intermediaries can vary, ranging from only agents and consultants, to all business partners such as joint venture partners, distributors, and resellers. Some codes specify that the company can only work with reputable and qualified individuals or firms. Certain companies have also prepared additional guidelines that supplement the codes of conduct and provide more detailed, situation-specific guidance. Finally, there are companies which require intermediaries to observe their codes of conduct.

B. The decision to hire an intermediary

80. Intermediaries can be useful, as noted in Chapter 1, but they may not be absolutely necessary. The foreign bribery risks associated with intermediaries have resulted in a small number of cases in which the use of agents is abandoned altogether. For instance, India has prohibited the use of agents in armament contracts since the 1980s in order to prevent foreign bribery. Also, one company that recently settled foreign bribery charges with the U.S. authorities claimed that it had decided to reduce its reliance on outside consultants and agents.[13] In the *Aon Case*, the company similarly decided to prohibit the use of

[13] Businessweek (7 January 2009), "Alcatel-Lucent Says 'No Thanks' to Middlemen"; Le Point (5 January 2009), "*Par crainte de corruption, Alcatel-Lucent se sépare de centaines d'agents commerciaux*".

agents whose only service was to provide client introductions in countries with a significant risk of corruption.

81. At the other extreme, companies may have no choice but to hire an intermediary. As noted in Chapter 2, some states require foreign companies to engage local agents in its business dealings, sometimes from a pool with a very limited choice of candidates. There are also instances in which a foreign official will designate a specific intermediary for a transaction.

82. Most cases will fall between these two ends of the spectrum, leaving companies with the choice of whether to hire an intermediary. The impetus for employing an intermediary generally comes from the company's commercial department, which may have identified a commercial need as well as a potential intermediary. As the preceding Chapters show, one of the dangers in these cases is that a company's employee or officer may cite this commercial need as a pretext for hiring an agent to bribe foreign officials.

83. To ensure that the commercial need for an intermediary is legitimate, many companies have added checks and balances to the decision-making process. For example, a commercial department may not be allowed to take the final hiring decision. Instead, the department manager is required to submit a written recommendation on suitable candidates to the company's senior management, along with all information about the candidates that has been collected. The senior management then takes the final decision, in some cases after a compliance officer has reviewed the manager's recommendation. To enhance accountability, the selection process is documented and subject to controls, with means to audit the final decision. An external review may also form part of the procedure, such as hiring specialised companies to certify that an agent meets anti-bribery standards.

C. Due diligence when hiring intermediaries

84. As noted in the preceding Chapters, risks of foreign bribery arise once a company engages an intermediary, whether by choice or by the compulsion of a foreign government. To mitigate this risk, companies have developed due diligence procedures for hiring intermediaries. The most thorough procedures cover the entire engagement of intermediaries, from initial selection, appointment and remuneration to monitoring during the execution of the contract.

1. Criteria for selecting intermediaries

85. The first step of the due diligence process is the collection of information about a prospective intermediary. Companies may require a wide range of information covering a candidate's qualifications, reputation, business relationships and resources, including:

- Corporate information, *e.g.* corporate constituent documents such as the memorandum of association, and the names of owners, partners, principal officers, shareholders; names under which the intermediary conducts business; and affiliated companies;
- Financial references and data;
- Qualifications, and experience of the intermediary, its officers and personnel: intermediaries in third countries might have difficulties justifying their value-added compared to the principal's own employees;
- Relationship between the intermediary's owner or employees and any government official;
- Description of organisations and people who will work on behalf of the company;
- Reputation checks from references and other sources, including litigation history; and

- The intermediary's own anti-corruption policy (especially for sub-contractors and suppliers) and its implementation, as well as the intermediary's commitment to the company's anti-corruption policy and the necessity of complying with it.

86. When assessing the collected information, companies will look for "red flags" that may call for more thorough investigations or the rejection of a candidate altogether. Depending on the assessment, a contract may be signed, more thorough investigations may be necessary, or the candidate may be rejected altogether. Red flags include intermediaries who:

- Submit inadequate or incomplete information;
- Can "guarantee" sales, for instance because he/she knows the right persons;
- Have family or business ties with the host country political officials, government or public officials either in regulatory institutions or client institutions;
- Are recommended by an official of the potential government customer;
- Have insufficient experience in the principal's industry, or are under-resourced or ill-equipped to perform the services offered;
- Hide the ownership of their company through trusts or shell companies, or use shell companies;
- Lack transparency in expenses and accounting records;
- Request unusually high commissions or particularly high fees prior to giving the customer a business contract (up-front commission), or unusual payment patterns, including payments in cash, into offshore accounts or accounts in different names or countries;
- Operate in a country where corruption is widespread (or has a history of corruption);
- Refuse to certify anti-bribery compliance;
- Have violated local bribery laws or are indifferent to them; or
- Face allegations of lack of integrity.

87. As for who will assess a potential intermediary and make the decision to hire, there are three different models. Some companies use a strictly centralised system: the chief compliance officer assesses the candidates and makes the final hiring decision, though a business unit may make a recommendation. Other companies use a decentralised system in which business units have the final say. Lastly, some companies use a hybrid model. Intermediaries that *prima facie* have higher risk may be subject to closer scrutiny and approval by the company's compliance department or even the chief compliance officer.

2. Appointment and Contract

88. To ensure accountability and transparency, many companies require that intermediaries be engaged through a written contract for a fixed term with the following elements:

- A detailed description of the work/services to be provided, and a stipulation that remuneration will be for legitimate services performed and invoiced, and paid to an account in the intermediary's name in the intermediary's country of residence. It may state that no cash payments will be made to an intermediary;
- A clear statement that the hiring company requires the intermediary to be familiar with and to abide by its anti-corruption policies;

- An explicit prohibition of bribery of (domestic and foreign) public officials, as well as requiring the intermediary to abide by the laws, particularly those on bribery, in the jurisdictions of the company and the intermediary, and where the intermediary operates;
- A provision stating that, if the intermediary commits bribery, then the company may terminate the contract without compensation and claim back fees already paid;
- A duty to cooperate in any investigation into whether the intermediary committed bribery, even after the contract has terminated;
- A requirement that the intermediary maintain accurate, complete and transparent accounting records, and provide invoices for its expenditures; and a clause that the intermediary's performance might be audited and reviewed periodically.

89. Some companies use a standard contract and require the approval of appropriate senior management or the legal department for any modifications to it. Any proposed variation to the terms of the contract requires additional due diligence.

3. Tasks and remuneration

90. As noted in Chapter 2, agents often receive excessive compensation that in turn is used to fund bribery. The appropriate level of remuneration is therefore a key issue.

91. The private sector has developed some general principles on remuneration. Fee levels are justified as far as possible by referencing objective criteria, such as the prevailing market rate; past performance; the agent's reputation and expertise; complexity of the work; the agent's resources and expenses necessary to perform the contract; the risks borne by the intermediary; proportionality between the agent's contract and the value of the overall project or contract.

92. In terms of payment method, some companies pay an intermediary for specific work or services over an agreed period of time. Regular reviews of the intermediary's performance and contract renewal are preferred to evergreen contracts. A lump sum may be used if the scope of the work can be clearly defined from the outset. If there is a degree of uncertainty, a fixed fee may be calculated based on a cost/time estimate augmented by verifiable expenses and disbursements.

93. An intermediary is also sometimes remunerated through a success fee, frequently expressed as a percentage of the value of the contract obtained. Companies and intermediaries believe that these arrangements add incentives and flexibility to contracts. However, success fees are more risky in terms of foreign bribery. For instance, the bribe payments were disguised as success fees in the *Baker Hughes Case* and in the *Siemens Case*, the latter to obtain contracts for a metro project in China.

94. In order to minimise the risks of bribery, some companies determine success fees based on explicit, relevant and objective criteria. This could include factors affecting the likelihood of winning the contract, *e.g.* the quality of the intermediary's product, and whether the intermediary already has existing relations with the potential customer. If the chances of winning are low, the percentage payable could be higher. Some companies limit success fees to 5% of the contract, but such a ceiling could be excessive or irrelevant for very large contracts.

95. Companies have also established specific compensation guidelines that set out commission rates as well as procedures relating to the method, currency and place of payment. The guidelines may specify that payments follow a sliding scale, with the commission percentage declining as the contract value increases. Payments may also be made as a series of sums staggered over time, with reference to commonly agreed milestones that are reflected in the contract and can be verified by the company.

96. As for the mode of payment, some companies require that all payments be made to a bank account in the intermediary's name in his/her country of residence. Some companies avoid cash payments, transfers to offshore accounts or accounts not in the intermediary's name, and payments in third countries. Some companies also avoid large payments to intermediaries before or immediately after a contract is obtained. Others adopt an internal approval system in relation to any payments made to intermediaries.

4. Monitoring intermediaries during the contract

97. Many companies continue to apply the compliance process even after an agent has been hired. A company may monitor an intermediary's activities during the contract, including regular performance reviews and audits of the intermediary's books and records. Some companies further require regular activity reports detailing the intermediaries' work and financial outlays which can be helpful monitoring tools and may serve as a basis for later controls. These reports may also prevent "sleeping" intermediaries who are only activated in case of need.

98. Some companies also subject intermediaries to due diligence on a regular basis, *e.g.* every two years. Any red flags that arise or suspected breach of the company's anti-corruption policies are investigated. The intermediary may be suspended during the investigation to prevent interference. If the intermediary has committed foreign bribery, some companies have a policy of terminating the contract and invoking its contractual right to recoup fees paid.

D. The importance of implementation

99. Codes of conduct and compliance programmes are useful tools for reducing the risks of foreign bribery through intermediaries. In the end, the best designed codes of conduct, compliance programme and due diligence measures would do little to prevent foreign bribery through intermediaries unless they are fully implemented in a company's daily business.

100. The importance of effective implementation was strongly shown in the *Siemens Case*. The company reminded its employees to abide by local laws, introduced anti-corruption clauses in its contracts with agent, and issued company-wide guidelines, principles, recommendations and codes of ethics prohibiting bribery. Unfortunately, these measures lacked detail and were non-binding. More critically, the company's top management were not committed to compliance, which in turn led to a compliance office that was under-resourced and lacking in independence. As a result, the company's numerous circulars, principles and recommendations on corruption amounted only to a "paper programme" that was ineffective in curbing a systemic corporate culture of bribe-paying. In sum, effective implementation may be the most crucial aspect of corporate compliance.

101. The results of inadequate implementation were also demonstrated in the *Aon Case*. The company had a code of conduct that specifically required employees to refrain from using a third party to perform any act that the employee could not engage in directly. Employees were required to make annual written declarations that they had read and understood the code. However, the company made no other significant efforts at implementing a compliance programme, such as providing adequate training and guidance to employees, or requiring stringent due diligence and payment procedures. As a result, the company made EUR 3.4 million in suspicious payments to third party agents in a span of roughly 33 months.

102. Successfully and effectively implemented compliance programmes share a number of common features. There is generally strong commitment from senior management (the "tone from the top") to implement the programme. The programme covers all relevant persons (including external agents and contractors), all of whom receive guidance and training on how to implement the programme. Additional training and focus may be given to employees working in corruption-prone areas and activities. Some large

companies have also established means to report alleged violations of the law or company policy to a specific body. The body is in turn subject to clear instructions on how to handle such allegations. In addition there may be clear sanctions policies in case of non-compliance. To ensure ongoing implementation, compliance programmes may be subject to regular self-assessments, reviews and adjustments.

103. Finally, implementation of compliance programmes is generally less common in small and medium-sized enterprises (SMEs). Governments have sought to raise awareness within this sector through web sites, brochures and activities in association with SME business organisations. However, the extent to which SMEs have adopted appropriate risk-mitigating measures is unclear. According to the Working Group's Phase 2 Reports, many SMEs lack proper due diligence measures and continue to have low awareness of the dangers of using intermediaries.

CHAPTER 5: CASE SUMMARIES

104. The purpose of this Chapter is to provide case studies that are representative of trends and *modus operandi* of foreign bribery through intermediaries. It is not meant to provide an exhaustive catalogue of cases involving intermediaries; it would not be practical to do so, given the large number of such cases. The case studies draw mainly on information available from an official, public source (*e.g.* court documents). Where this is not the case, or where the information is confidential, the case study is "anonymised", i.e. the names of firms and individuals described in the case are fictitious. Anonymised cases may also contain features drawn from one or more actual cases.

Siemens Case
Source: Complaint by SEC (1:08-cv-02167) and Criminal Information (1:08-Czech Republic-00367-RJL) (U.S. District Court of the District of Columbia) (12 December 2008)

The Complaint and Information allege that Siemens, a German engineering company with worldwide operations, engaged in a widespread and systematic practice of foreign bribery between 2001 and 2007. The scheme involved officials in at least ten countries, several subsidiaries, different lines of business and thousands of payments, many through intermediaries. Its extensive nature provides interesting insights into the *modus operandi* of foreign bribery through intermediaries.

As with many other cases, the intermediary is sometimes located in the bribed official's jurisdiction (i.e. local agents). For example, in relation to a Venezuelan metro project, Siemens hired a long-time business consultant who had been an advisor to former Venezuelan presidents and was thus known as a political "fixer". In Bangladesh, relatives of local officials were recruited as consultants to secure a mobile telephone services contract. Payments related to the Oil-for-Food programme involved local agents in Iraq.

But very frequently, the intermediary and his/her financial dealings are located in a third jurisdiction. For example, bribes for two Italian officials were channelled through a Dubai-based intermediary. Intermediaries in Dubai and Cyprus were used to bribe Venezuelan officials. Hong Kong-based consultants were used to bribe officials in Israel, mainland China and Vietnam. In Nigeria, the consultant was the wife of a former Nigerian Vice President who was living in the U.S.

In some cases, multiple intermediaries were used in parallel to supply bribes relating to the same project. For example, bribes to Venezuelan officials relating to the metro project described above were paid through business consultants based in Cyprus and Dubai, in addition to the local political "fixer". To bribe Chinese officials in a transmission line project, Siemens used one consultancy in Dubai and another owned by U.S. nationals. Bribes to Russian officials to win a medical devices contract were channelled through consultants based in Dubai and the U.S.

Multiple intermediaries were also used in cascade. For the transmission line project in China described above, the bribe money was funnelled through the Dubai consultant and then paid to several entities associated with a Chinese business consultant who held a U.S. passport and maintained a U.S. residence. In other instances, intermediaries provided company structures using bank accounts in different places. Siemens also retained fewer than a dozen "payment intermediaries" whose sole task was to transfer money from Siemens to business consultants. The payment intermediaries invoiced Siemens to trigger payments for certain projects, kept a percentage of the funds for themselves and passed the rest to the consultants.

Siemens often entered into business consultant agreements with the intermediaries. In some cases, this was done after Siemens had won the contract, as was the case for bribes to Chinese officials involved in a train project. The agreements describe the services to be performed by the consultant vaguely as to "identify and define sales opportunities, provide market intelligence" and support contract negotiations. In many instances, payments were supported by invoices with a similar description. The transactions were in fact shams, with the consultants performing no services beyond facilitating bribery. In one case, a Hong Kong-based consultant was retained to "identify and define sales opportunities, provide market intelligence," and support contract negotiations for a power plant project. In fact, the consultant was a clothing company with no expertise in the power generation industry. Some consultants produced bogus work products, such as a sham traffic study in a case involving the bribery of Russian officials.

The bribe money is provided to the intermediary (and concealed) through different means. In the Venezuelan metro case, one consultancy agreement concerned other Siemens projects but was actually designed to transfer money to the Venezuelan officials. Another consultancy agreement stated that the consultant would supply certain equipment to the Venezuelan authorities, when in fact the equipment was supplied by another company. In another case, a contract with an engineering firm was artificially inflated and the excess amount was transferred to an intermediary for use as bribes. The funds may also be hidden in a slush fund and used as needed. For example, bribes for two Italian officials were drawn from slush funds in Liechtenstein.

As one would expect, the transfer of funds used for bribery is often convoluted so as to stymie investigators and to distance Siemens and the intermediary from the corrupt official. Bribes for Bangladeshi officials were routed through accounts in the U.S. and Hong Kong, while those for Chinese officials in a train project went through U.S. correspondent banks and then multiple Swiss accounts. For an identity card project in Argentina, bribes were channelled through the books of an unrelated project to conceal the payments from internal auditors. Bribes for Vietnam officials were sent from the U.S. to a Singapore account controlled by the Hong Kong-based consultant.

The Siemens case also illustrates vividly the dangers of an unimplemented corporate compliance programme. During the currency of this bribery scheme, Siemens reminded its employees to respect local laws, introduced anti-corruption clauses in its contracts with agent, and issued company-wide guidelines, principles, recommendations and codes of ethics prohibiting bribery. However, these measures were non-binding and lacking in detail. Coupled with a compliance department that lacked funding and independence, Siemens' compliance policies were but a "paper programme" that was "largely ineffective" at changing its practices.

Titan Corporation Case
Source: Civ. Action No. 05-0411(JR) (U.S. District Court for the District of Columbia) (1 March 2005)

The Complaint filed by the SEC alleged that Titan Corporation, a military intelligence and communications company, signed a contract in 1999 to build and manage a telecommunications project in Benin. Later that year, Titan retained a business advisor to the President of Benin as a consultant. When introduced to the agent, Titan was told that the agent had access to the President.

In 2000, Titan paid approximately USD 2 million to the agent at his request. The payments were falsely invoiced as consulting services. They were also broken into smaller increments and spread out over time. Almost all of the payments were funnelled into the President's re-election campaign. At about the same time, Benin's Postal and Telecommunications Office agreed to quadruple Titan's fee for managing the telecommunications project. Titan expected this increase to generate roughly USD 6 million in revenues.

ABB Case
Source: SEC Complaint Case No. 1:04CV01141 (U.S. District Court for the District of Columbia) (2 July 2004)

The SEC's complaint alleged that three sets of corrupt transactions implicated ABB, a global provider of power and automation technologies headquartered in Switzerland. From 1998 to 2001, employees of ABB's U.S. and U.K. subsidiaries provided cash and gifts to Nigerian officials. The payments were to secure confidential information about bids by ABB's competitors and to secure favourable consideration of ABB's own bids. Some of the payments were made through an intermediary under cover of false invoices characterising them as payments for consulting services. After receiving the payments, the intermediary passed the funds to the officials.

In the second set of transactions, ABB's U.S. and U.K. subsidiaries sponsored "training trips" by Angolan government engineers to the U.S., Brazil, Norway and the U.K. For each trip, ABB covered all expenses and provided spending money. The engineers were responsible for evaluating submitted tenders. In one instance, an Angolan company whose principals were social friends of ABB's Angola manager fronted the money for the illicit payments. The manager was then reimbursed by a Florida company which, in turn, was reimbursed by ABB's subsidiaries through the use of misleading invoices.

In the third set of transactions, ABB's Kazakh subsidiary transferred payments to companies controlled by a Kazakh public official to secure business from the government. The payments were made pursuant to sham contracts for consulting services and fake invoices. No legitimate services were in fact performed. ABB's U.S. subsidiary refused to reimburse the Kazak subsidiary for the payments because of concerns over their legality. However, the U.S. subsidiary did nothing to recover payments already made or to stop subsequent payments.

Baker Hughes Case
Source: Deferred Prosecution Agreement and SEC Complaint H-07-1408 (U.S. District Court for the Southern District of Texas (26 April 2007)

Baker Hughes is a U.S.-based oil services company. The Deferred Prosecution Agreement alleges that Baker Hughes wholly owned BHSI, a subsidiary that was incorporated in the U.S. but operated in Kazakhstan. BHSI bid for a contract to provide a range of oil-field drilling and production services for a project in Kazakhstan.

After the bid was submitted, Kazakh officials requested that BHSI hire an agent who was a U.K. national. The agent was also the director of a consulting firm incorporated and registered in the Isle of Man but

which had an office and bank account in the U.K. Under the agency contract, BHSI agreed to pay the agent 2% of revenues on the contract in question and 3% of revenues of all subsequent services performed by Baker Hughes in Kazakhstan. The agreement also specified that Baker Hughes retained the consulting firm "in recognition of said work and assistance given by [the consulting firm] towards Baker Hughes in pursuit of the [said] contract". No meaningful due diligence was conducted before the agent was retained. Baker Hughes was then awarded the contract.

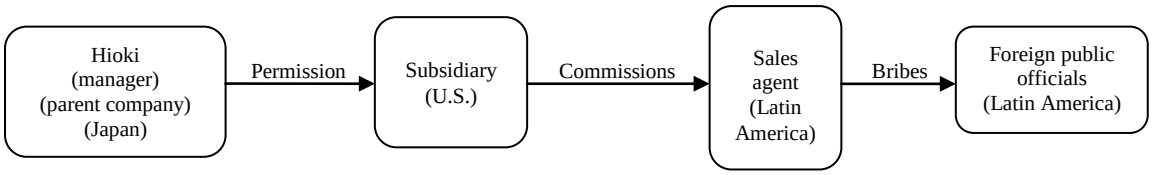
Baker Hughes ultimately paid over USD 4 million to the agent via wire transfers to the consulting firm's U.K. bank account. The payments were recorded in the internal accounts of Baker Hughes and BHSI as "commissions", "fees" or "legal services". In fact, the consulting firm had no office or presence in Kazakhstan, and rendered no goods or ancillary agency services to Baker Hughes or BHSI. Baker Hughes eventually reaped almost USD 190 million in revenues and USD 20 million in profits on the contract.

The SEC Complaint alleged a second transaction between Baker Hughes and this agent. Sometime after the first contract, a Baker Hughes subsidiary successfully obtained a contract as a subcontractor in an unrelated project. Baker Hughes and the agent then entered into a sales representation agreement. In exchange for a 2% commission, the agent would, among other things, "work diligently to protect and promote the interests of [the Baker Hughes subcontractor]", "promote and procure sales and negotiate and assist in the conclusion of contracts", and "assist [the subcontractor] in obtaining and expediting for [its] employees or its affiliates … all such visas, work or residence permits, quotas and permissions as may be required". The agent ultimately received USD 20 000 in commissions without performing any services for the subcontractor.

The SEC Complaint further alleged that Baker Hughes hired a second agent for another Kazakh contract. A Baker Hughes subsidiary hired an agent to assist in obtaining a large contract with the Kazakh state-owned oil company. A one-page agency agreement required the agent to carry out "laboratory and field experiments" and "marketing functions" on Baker Hughes products, among other things. There was no evidence that the agent did so. After the contract was awarded to Baker Hughes, the agent did no other work. Baker Hughes later learned that the agent was a senior officer in the Kazakh state-owned oil company. Despite this discovery, Baker Hughes continued to pay commissions to the agent.

Finally, the SEC Complaint alleged that Baker Hughes employed several other agents without implementing sufficient internal controls to determine whether the payments were for legitimate services, whether the payments would be shared with government officials, and whether the payments would be accurately recorded in its accounts. Examples included an agent in Angola, who received USD 10.3 million in commissions over five years purportedly for seismic data; a Nigerian tax consultant for resolving a tax dispute; "finder's fees" to a Panamanian-registered company that was its agent for Kazakhstan, Russia and Uzbekistan; freight forwarders in Indonesia who used a special method to by-pass the regular customs process; customs brokers in Nigeria to resolve alleged underpayments of customs duties; and a Kazakh individual for procuring licences.

Hioki Case
Source: Plea Agreement, Criminal Case No. H-08-795 (U.S. District Court, Southern District of Texas) (10 December 2008)



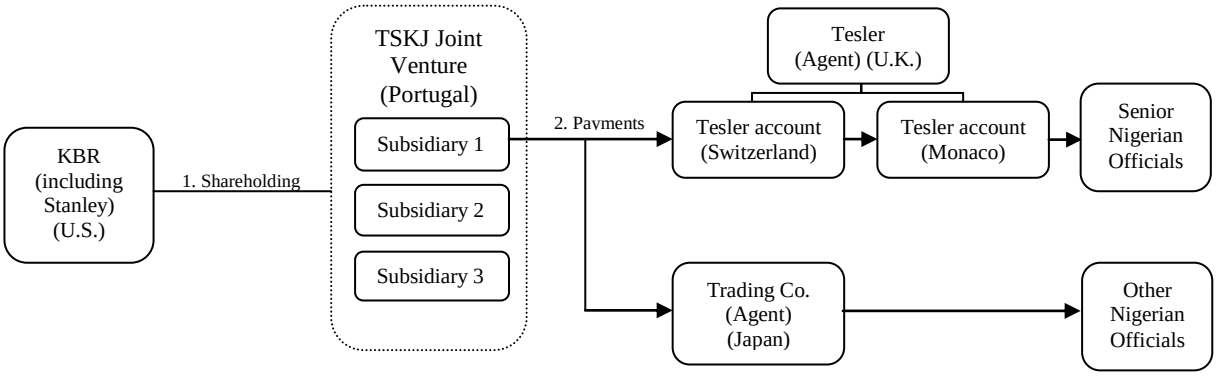
Hioki was the General Manager of a Japanese company that manufactured marine hose and other products. Based in Tokyo, he oversaw the company's wholly-owned U.S. subsidiary, which included sales of the company's products in Latin America. The subsidiary generated the business by hiring local sales agents. The agents were responsible for developing relationships with customers and keeping the subsidiary apprised of business opportunities. Many of the agents had relationships with officials in state-owned entities that were often the company's customers.

When a business opportunity arose, an agent often agreed to pay the employees of the state-owned entity a percentage of the total value of the proposed deal. The agent then conveyed to the U.S. subsidiary the amount of the bribe and sometimes the identity of the official. The subsidiary in turn relayed the information to the parent company in Japan for permission to pay the bribe. If the payment was approved and the company won the contract, then the company paid the local agent a "commission" which included the agent's commission and the bribe payment. The agent then passed the bribe on to the employees of the customer. At least USD 1 million in bribes were paid from 2004 to 2007.

Green Case
Source: Grand Jury Indictment, Criminal Case No. CR08-59(A)GW (U.S. District Court, Central District of California) (1 October 2008)

The Indictment alleged that the defendants bribed a Thai government official to obtain contracts to run the Bangkok International Film Festival. The official and the defendants agreed on the value of the contract, which was inflated by the amount of the bribe. When the defendants received payments from the Thai authorities under the contract, they transferred the portion of the payment representing the bribe to bank accounts held by the official's daughter or friend in the U.K., Singapore and Jersey.

TSKJ Case
Source: Indictment (Tesler) H-09-098 (17 February 2009); Plea Agreement (Stanley) H-09-597 (3 September 2008); Plea Agreement H-09-071 (KBR) (11 February 2009) (U.S. District Court for the Southern District of Texas Houston Division)



The Indictment alleged that TSKJ was a joint venture that was created in 1991 to bid for and perform contracts in a Nigerian natural gas project. TSKJ was formed by four companies, including KBR, an American engineering and construction company. The joint venture operated through three companies in Portugal.

The senior executives of TSKJ's constituent companies decided to bribe Nigerian officials in order to win contracts for the project. Among these was Stanley, an American officer and director of KBR. On three occasions, Stanley and several top executives of other companies in the joint venture met top-level Nigerian officials to discuss the bribe. In each of these instances, the top-level Nigerian official nominated a lower level official as his representative to negotiate amount of the bribe. An agreement was later reached with the representative.

To bribe these three and also additional officials, TSKJ retained two agents. First, TSKJ used Tesler, a U.K. national and resident, to facilitate bribery of high-level Nigerian officials. To this end, TSKJ entered consultancy agreements with a Gibraltar company operated by Tesler for vaguely described marketing and advisory services. TSKJ transferred some USD 132 million from its account in the Netherlands through a New York bank and ultimately to Tesler's accounts in Switzerland and Monaco. Second, TSKJ retained a global trading company headquartered in Japan to bribe lower level Nigerian officials. TSKJ sent over USD 50 million to this company's account in Japan. The funds paid by TSKJ to the consultants were intended to be used, at least in part, to bribe Nigerian officials.

As of June 2009, Stanley has pleaded guilty to foreign bribery, while Tesler has been indicted in the U.S. and was awaiting extradition from the U.K. Also indicted and pending extradition was a U.K. national and resident who worked for TSKJ and was involved in the bribery scheme.

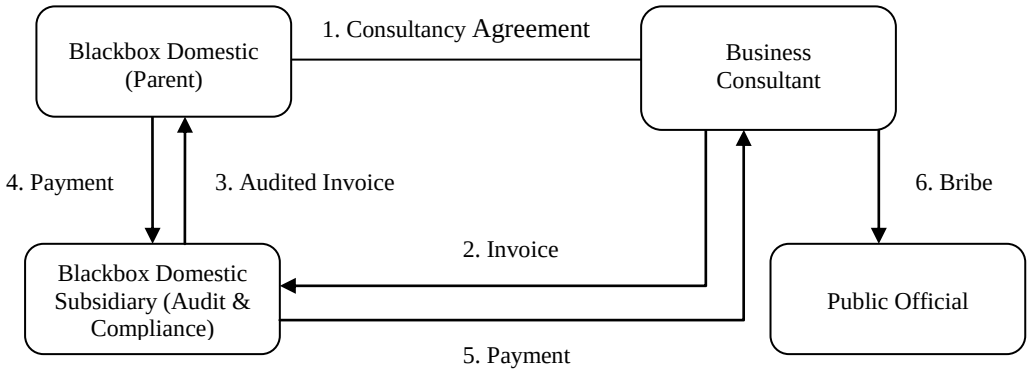
It is also of interest to note that KBR designed its involvement in the TSKJ corporate structure to limit its liability under U.S. foreign bribery laws. TSKJ consisted of three sub-companies, only one of which was used to engage the consultants to commit bribery. KBR did not own this sub-company directly but only indirectly through a U.K. company. KBR also avoided placing U.S. citizens on this sub-company's board of directors. Despite these efforts, KBR was indicted for foreign bribery in the U.S. and pleaded guilty in February 2009.

Statoil Case
Source: Information 06-CRIM-960 (U.S. District Court, Southern District of New York) (13 October 2006)

The Information alleged that Statoil, a Norwegian oil and gas company, entered into a vaguely-defined consulting services contract with an offshore company located in the U.K. The real purpose of the contract was to channel funds payable under the contract to an Iranian official who wielded enormous influence in

the Iranian oil and gas industry. Under the agreement, Statoil was to pay over USD 15 million in bribes over 11 years. The payments were routed through a U.S. bank into a Swiss bank account. In return, the Iranian official provided Statoil with non-public information concerning oil and gas projects in Iran, and showed Statoil copies of bid documents. This informational advantage allowed Statoil to obtain a number of contracts in Iran.

Blackbox Domestic Case
Anonymised Case



The Blackbox Domestic case varies from the basic paradigm by adding an offshore subsidiary to conceal the bribe payments. As in the basic scenario, Blackbox Domestic hires a consultant for sham services. However, the consultant sends its invoice to an offshore subsidiary of Blackbox Domestic that provides audit and compliance services to Blackbox Domestic. The subsidiary audits the consultant's invoice and forwards it to Blackbox Domestic, which pays the invoice through the subsidiary. Upon receiving the funds, the consultant forward them to an official as a bribe, less a portion for his/her services. In some instances, the consultant may hire other consultants to funnel the bribe to the official, so as to add more layers of opacity.

Cash-for-Signatures Case
Anonymised Case

A construction company had spent several hundreds of millions of dollars for the construction of a new airport terminal in Asia. In order to activate certain bank loans, the company urgently needed eight signatures of high-ranking local public officials. To do so, the company hired a retired pharmaceutical salesman for USD 2 million under a milestone contract, i.e. the contract stipulates certain fees for each signature obtained. The consultant duly obtained all signatures within two weeks.

Oil-for-Food Case
Anonymised Case

An oil company acquired oil from Iraq during the UN Oil-for-Food Programme. This was accomplished by hiring an intermediary under a contract that included a no-corruption clause. The company paid the intermediary approximately USD 7 million without asking the intermediary for details of how the money would be spent. Shortly thereafter, the intermediary transferred USD 6 million into an account in the State Bank of Jordan that was controlled by the Central Bank of Iraq and retained the balance. The oil company claimed that it did not have the requisite mens rea for committing the crime since it had no knowledge of how the intermediary would spend the money, and because of the no-corruption clause in the contract.

Mastermind Intermediary Case
Anonymised case

This case concerned a bribery transaction initiated by an intermediary, not a principal or corrupt official. The intermediary bribed foreign public officials to obtain confidential information such as specifications of future public procurements. The intermediary then approached potential bidders in the procurement and sold this information to his/her preferred bidder. The company knew that the intermediary had obtained the information improperly. The intermediary and the company also signed a consulting contract.

The intermediary participated in several cases of bribery at the same time, using four different legal entities. He/she operated in different countries. In one of these cases, the intermediary, foreign public official and three principals were located in five different countries.

Shipyard Case
Anonymised Case

An engineering firm obtained a contract in a foreign country to revamp a shipyard. After the contract had been signed and the project was due to begin, the government required the firm to hire a specified consultant. The consultant imposes additional requirements on the project that effectively diverted part of the project's expenditures into a political campaign in the foreign country.

ABC Inc. Case
Anonymised case

The country of Narnia was planning for the construction of New Hospital financed through loans from a multilateral development bank (MDB). The MDB received a complaint alleging that Company ABC hired business consultants to act as intermediaries with Narnia government officials. The consultants paid more than USD 1 500 000 in bribes to certain officials through the intermediaries. The purpose was to convince the officials to narrow the Terms of Reference and manipulate the bidding process so that portions of the construction contract would be awarded to ABC.

An investigation revealed that ABC hired Joe Smith and three other local consulting companies as business consultants. ABC claimed that the business consultants carried out legitimate negotiations with the government officials. The contracts between ABC and the consultants, including Smith, indicated that the services to be provided were allegedly to support ABC's businesses in the country, conduct market research and serve as liaison with local customers. However, ABC has no evidence of the products or services delivered by the consultants. The fees paid to the consultants appeared to be in excess of the likely services provided.

Smith admitted to investigators that pursuant to instructions by ABC's Commercial Manager, he overbilled ABC by artificially increasing his fees and deposited the excess monies in an offshore bank account identified by the Commercial Manager for ABC. He stated that he believed it was a favour to the company in order to "release" funds. However, he denied knowledge of payment of any bribes. Records for the account identified could not be obtained.

Tom Jones, the former construction manager of the New Hospital project, stated that the hospital was significantly oversized for the area population but was completed on time. Moreover, the Terms of Reference required the provision of certain emergency electric generators that could only be provided by ABC because of an agreement of exclusivity between the primary construction contractor for the project and ABC. Investigation revealed that ABC had originally produced these generators for a different project

that ultimately did not go forward. At the time of the construction of New Hospital, ABC had the generators in storage and was looking for a buyer for them.

The staff of the primary construction contractor confirmed that the generators were purchased from ABC as required by the Terms of Reference.

The government officials interviewed denied receipt of any bribe payments but admitted having had numerous business and social contacts with ABC's business consultants.

The brother of a senior official in the Ministry of Health was determined to have a controlling ownership interest in one firm retained as a sub-contractor for the New Hospital project.

Aon Case
Source: Final Notice, UK Financial Services Authority, 6 January 2009

Aon is a major insurance and insurance company in the UK. From 2005 to September 2007, Aon had a code of conduct that specifically prohibited employees from using a third party to perform any act that the employee could not engage in directly. Employees were required to make annual written declarations that they had read and understood the code. However, the company made no other significant efforts at implementing a compliance programme.

As a result, the company paid EUR 3.4 million to third party agents in Bahrain, Bangladesh, Bulgaria, Burma, Indonesia and Vietnam. Aon did not question the purpose and nature of these suspicious payments, even though it was reasonably obvious that there was a significant risk that the agent may use the funds to bribe a foreign official, and there was no genuine commercial purpose to paying the agent.

Vetco Case
Source: (Aibel Group Limited) Deferred Prosecution Agreement CR H0705 (US District Court for the Southern District of Texas) (5 January 2007); DOJ Press Release, 6 February 2007

Vetco International Ltd. is the parent company of a multinational conglomerate. One of its subsidiaries, Vecto Gray UK, won a contract to provide engineering and procurement services and subsea construction equipment for Nigeria's first deepwater oil drilling project. Vecto Gray UK in turn relied upon other subsidiaries of Vetco International Ltd. to perform the contract. These subsidiaries included Vecto Gray Controls Inc., which managed the contract, and Aibel Group Ltd., which supplied employees and equipment for the project.

Agent A is a large, global provider of freight forwarding and logistics services. It provided such services to the Vecto International Ltd. subsidiaries described in several countries, including Nigeria. It published a tariff rate sheet that listed its services in Nigeria, but it also provided other unadvertised services such as an "express courier service", "interventions" and "evacuations". In fact, these unlisted services means for channelling bribes from the shipper to Nigerian customs officials. Agent A generated two invoices when unlisted services are rendered: one purporting to be based on the weight of the shipment, another for a "local processing fee" or a similar term. Invoices for customs duties were not be provided.

Vecto International Ltd. subsidiaries resorted to these unlisted services when it wished to import goods into Nigeria illegally, or when their goods encountered delays or difficulties in clearing Nigerian customs. Employees of the subsidiaries knew that fees paid to Agent A would be used to bribe Nigerian customs officials. Agent A typically invoiced Vecto Gray Controls Inc., which would in turn request payment from the other subsidiaries. In approximately 2.5 years, Vecto International Ltd. subsidiaries made at least 378 corrupt payments totalling approximately USD 2.1 million.

Truck Transport Case
Anonymised Case

Company X is a major European manufacturer of trucks and other heavy vehicles. In order to boost sales, some employees of Company X paid bribes to foreign officials. Low-level salespersons sometimes deposited money in the accounts of friends and relatives of the purchasing personnel. Bribes were also paid through letterbox firms in Malta, Bahamas, British Virgin Islands, Cyprus, London and New York.

Ammunitions Case
Anonymised Case

Company A, a U.S. company, arranged to purchase ammunitions from Government X through a middleman M who was located in Cyprus. Under the arrangement, Company A would pay M who would forward the funds to Government X. M then took delivery of the ammunitions and delivered them to Company A. Company A and M knew that the purchase price had been artificially inflated and greatly exceeded the actual value of the ammunitions. The excess value was used to bribe officials of Government X to falsify the documents that specified the ammunitions' country of origin.

Hydropower Case
Anonymised Case

Company X, a South American engineering company, signed a long-term contract with a local power company concerning a hydroelectric power project in Asia. The local government then blocked the execution of the contract. After years of negotiations, Company X retained an influential local politician as an intermediary to approach senior government officials and offer bribes. Bribes were channelled through the local politician's accounts in Hong Kong and the Cayman Islands to the Swiss accounts in the name of relatives of the senior government officials.

Golf Club Case
Anonymised Case

An Asian engineering company established a foreign subsidiary in another Asian country. To secure business, the vice-president and an engineer of the subsidiary bribed officials in the foreign country with a trip and golf equipment totalling over EUR 6 000. The parent company in the home country apparently had no knowledge of the crime.

Lesotho Case
Source: Judgments in *R. v. Acres International Ltd.* (2002), CRI/T/144/02 (Appeal Court of Lesotho); affirming (2002), CRI/T/2/2002 (High Court of Lesotho); and *R. v. Sole* (2002), CRI/T/111/91 (Appeal Court of Lesotho), affirming (2002), CRI/T/111/99 (High Court of Lesotho)

In 1986, Lesotho and South Africa agreed to build the Lesotho Highlands Water Project, a series of dams and tunnels that would provide water and electricity. The Lesotho Highlands Development Authority (LHDA) oversaw the project in Lesotho, with MS as its Chief Executive. Several companies from Europe and Canada formed a consortium to bid for contracts in the project. Over a nine-year period, payments totalling SAR 8 million were channelled from various members of the consortium through intermediaries to MS.

One of the intermediaries was DP, a South African citizen and resident. The consortium entered into a consultancy agreement with DP under which DP would "provide information, advice and support" to the

consortium, provide "further general assistance during contract negotiation", and assist the consortium "during the execution of the Works". The agreement also stated that DP would "try its best to supply [the consortium] with useful information and data for the award" of the contract. DP would be paid USD 1 million if the contract was awarded to the consortium. The consortium indeed won the contract and duly transferred the funds to DP's Swiss bank account. The invoices issued by DP for the payments referred to "customs regulations" and "new acquisitions in Africa". DP then forwarded part of these funds to MS.

Another intermediary B was a Lesotho national and a close friend of MS. B also entered into consultancy agreements with several members of the consortium. In one instance, AI, a Canadian company, entered into an agreement with an entity controlled by B that had an address of a banker in Switzerland. The contract required B to perform services such as "keep [AI] informed of all developments", "collect appropriate documents and information", "assist [AI] in seeking, negotiating and securing a contract", providing administrative support, and "assist [AI] maintain good relationships with LHDA." The Court found that AI had no reason to retain B and received little or no benefit from the agreement. Nevertheless, AI transferred almost CAD 700 million over six years to Swiss bank accounts controlled by B and his wife. B in turn forwarded a portion of the funds to MS.

ANNEX
TREATMENT OF BRIBERY THROUGH INTERMEDIARIES IN THE OECD ANTI-BRIBERY CONVENTION AND OTHER INTERNATIONAL LEGAL INSTRUMENTS

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

105. Article 1 of the OECD Anti-Bribery Convention expressly requires Parties to establish that it is a criminal offence for any person to intentionally "offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official". However, the Convention and its Commentaries do not elaborate on the meaning of "directly or through intermediaries".

106. The offences of roughly half of the Parties to the Convention expressly cover bribery through intermediaries, either with language similar to Article 1 or the words "directly or indirectly" (Argentina, Australia, Belgium, Brazil, Canada, France, Greece, Hungary, Ireland, Luxembourg, Mexico, New Zealand,[14] Portugal, Slovak Republic, South Africa, Spain, Turkey, United States).

107. Of the Parties that do not expressly cover bribery through an intermediary in the offence, six rely on their Penal Code provisions on instigation and complicity (Austria, Bulgaria, Chile, Denmark, Germany, Poland, and Slovenia). The remaining Parties rely on its implicit coverage in the offence. Eleven submitted some supporting authority for their contention that it is indeed covered, be it domestic case law (Estonia, Germany, Italy, Japan, Korea, Netherlands, Sweden, and Switzerland), preparatory works and parliamentary discussions (Estonia, Netherlands, Norway) or legal literature (Czech Republic, United Kingdom). Two countries so far have not been able to provide supporting evidence of their contention that their offences cover foreign bribery through intermediaries (Finland and Iceland).

2. Other international legal instruments

108. Other international legal instruments expressly deal with foreign bribery through intermediaries with language similar to the OECD Convention, *e.g.* the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

109. Some instruments, however, use the words "directly or indirectly", *e.g.* Article 16 of the United Nations Convention against Corruption, Articles 2 and 5 of the Council of Europe Criminal Law Convention against Corruption.[15] Some instruments also use the "directly or indirectly" language *viz.* domestic bribery, *e.g.* the Inter-American Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.

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[14] The New Zealand legislation covers the giving of a bribe "to a person with intent to influence a foreign public official". The Working Group accepted in the provision covered foreign bribery through intermediaries (Phase 1 Report, section 1.1.5).

[15] However, the Explanatory Report states "the transaction may be performed through intermediaries".

SUGGESTED FURTHER READING

Business Anti-Corruption Portal for small and medium-sized companies (SMEs) operating in emerging markets and developing countries. The Portal is developed and maintained by a subcontractor of ministries and agencies of Denmark, Germany, the Netherlands, Norway, Sweden and the United Kingdom.

Common Industry Standards (CIS) of the Aerospace and Defence Industries Association of Europe (ASD), section 6 on "Agents, consultants and intermediaries" (www.defenceagainstcorruption.org/common-industry-standards)

International Chamber of Commerce, Anti-Corruption Commission (www.iccwbo.org/policy/anticorruption):

- "Fighting Corruption, International Corporate Integrity Handbook", Chapter 6, December 2008, written by Michael N. Davies Q.C.
- ICC Model Occasional Intermediary Contract
- ICC Model Commercial Agency Contract
- ICC Model Distributorship Contract, which is a contract with a buyer-reseller responsible for marketing the supplier's goods within a certain territory.
- ICC Model International Franchising Contract, which is a contract with an independent buyer-reseller who obtains the right to exploit a package of industrial or intellectual property rights and continuing commercial or technical assistance.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (www.oecd.org/daf/nocorruption)

OECD: Phase 1 and Phase 2 Country reports on the implementation of the OECD Anti-Bribery Convention (www.oecd.org/daf/nocorruption)

Mark Pieth, Lucinda Low, Peter Cullen (2007), *The OECD Convention on Bribery, a Commentary*, Cambridge University Press

Transparency International (2003), *Business Principles for Countering Bribery*, and its SME edition (2008)