Chapter 6
Strengthening international cooperation to curb transnational bribery

Corruption has become increasingly international in nature. Corrupt officials seek safe havens abroad for themselves and the proceeds of corruption, while bribers take advantage of international financial services to facilitate their crimes. Economic globalization, however, has added a further international dimension to corruption. As international trade and investment have increased, so too have the opportunities for businesses to operate abroad and to bribe officials in a foreign country. Many states unfortunately do not criminalize the bribery of officials of another state. Alarmingly, some nations even condone or encourage such behavior, such as by allowing businesses to deduct these bribe payments from taxes. Many businesses have thus availed themselves of the opportunity to bribe foreign public officials to gain access to foreign markets. This trend not only raises serious moral and political concerns, but also undermines good governance and economic development, and distorts international competitive conditions.

Transnational bribery of this nature can touch on Asia-Pacific countries in several ways. Many countries in the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific are major players in international trade and/or receive significant amounts of foreign investment and development assistance. The officials of these countries are in regular contact with foreign businesses and are thus at risk of being bribed. At the same time, as many Asia-Pacific economies become more

developed, more businesses from these countries have begun to operate overseas and could therefore commit transnational bribery themselves. Furthermore, the region is home to several significant international financial centers, which could be used to launder the proceeds of, or to facilitate, transnational bribery. For these reasons, Asia-Pacific countries could well find themselves in need of seeking and providing extradition and MLA in transnational bribery cases.

Transnational bribery, because of its very nature and prevalence, calls for a multilateral, coordinated response, which led to the creation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The convention's 36 parties comprise some of the world's most internationally active economies, including three from Asia-Pacific (Australia, Japan, and Korea). Parties to the OECD Convention have agreed to outlaw the bribery of foreign public officials and to extradite perpetrators of such offenses. They have also agreed to provide prompt and effective MLA in such cases to the fullest extent possible under their laws and relevant treaties and arrangements. More recently, several Asia-Pacific countries have signed or ratified the UNCAC, which also requires States Parties to criminalize the bribery of foreign public officials. The UNCAC's provisions on extradition and MLA, described in earlier chapters, apply fully to this offense.

While legal frameworks for international cooperation in transnational bribery are beginning to fall into place, problems remain in the practice and enforcement of these rules. As Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland, observed, prosecutions of transnational bribery remain comparatively rare. Even when allegations of such crimes arise, a lack of political will and extraneous considerations (such as national economic interests) often hinder investigations and prosecutions. Practitioners can employ some practical measures to reduce these problems, but more effective remedies may well require the action of policy makers.

Particular challenges in providing mutual legal assistance in transnational bribery cases

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One of the main obsessions of international business is to lift trade barriers between countries, so that nationals and foreigners play by the same rules when buying and selling goods and services. The benefits expected are efficiency in transactions, cheaper goods, faster service, better quality, and happier consumers. So why does the judiciary not do the same? Why do countries refuse to open their national borders to foreign prosecutors who are investigating crime? What are the "particular challenges" we face in providing international cooperation to prosecute corrupt practices?

Legal problems do exist. It is not easy to coordinate two or more judicial systems and traditions. National legislation is not always up to date with the technicalities of active bribery of foreign public officials, and fighting corruption is only one priority among many others. Law enforcement authorities lack human and financial resources. Furthermore, MLA procedures are slow. It takes a few hours to move a million dollars from, say, New York to Jersey via Singapore, Dubai, Hong Kong, China, or Geneva, but a few years for a prosecutor to trace those funds, not to mention to forfeit them.

Nevertheless, prosecutors still achieve positive results because states are powerful entities. The international legal framework is being adapted to the actual necessities of prosecuting corrupt practices. International cooperation is developing quickly and becoming more efficient. The UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions can be considered major breakthroughs in that respect. They send a clear message that not only is corruption no longer acceptable, but the signatory states will take action to prosecute it.

So what are the next challenges? Practitioners continue to run into difficulties that cannot be solved by revising criminal codes or MLA treaties and conventions. How can law enforcement cooperate when it must take on powerful people and structures, politicians, and enormous wealth? How can it cooperate with a judiciary that is known to be corrupt? How readily will countries cooperate when it implies hurting the realities

of international business or restricting the ability of each country to secure important contracts for its economy?

Practitioners can take some tactical measures when faced with these difficulties. It is important to obtain as much information as possible concerning who in the foreign state may be trusted and what the sources of reliable information are. Embassies in the foreign state and FIUs can sometimes answer these questions. Practitioners can also consider making the investigation public—to the extent allowed under the law—since the press and publicity could force the foreign state to act. It may also be advantageous to involve multiple countries in a case, as is often possible when tracing funds. Countries are usually less inclined to refuse cooperation when more countries are involved. When investigating heads of state, in addition to all of these methods, practitioners should consider also prosecuting intermediaries, to increase pressure on those in power.

Another challenge faces practitioners when the judicial systems and practices of a requesting state do not guarantee basic human rights to an accused. For instance, cooperation will be granted only if the requesting state respects an accused's right to a fair, public hearing before an independent tribunal in which the accused knows the charge that he or she has to meet and has adequate time to prepare a defense. For a practitioner who is faced with requests from a country that does not seem to respect these basic rights, the best approach is probably to treat each case on its merits, rather than systematically reject every request from the country.

Practitioners also face difficulties because of the modus operandi of international corruption. Companies that bribe do so increasingly by outsourcing the payment of "commissions" and "success fees" to local agents, so as to sever all direct ties to local "decision makers." When the company is investigated for corruption, it will typically deny responsibility by claiming that the local agent has been cleared by its compliance department. In these situations, investigators should request MLA to find out the identity of the local agent, his or her operations and connections, etc. Such information is vital to the investigation.

To conclude, the investigation of transnational corruption raises many delicate questions. No single country can pretend to be immune from having to face at least some of them. It is hoped that policy makers will consider these questions as keys to a necessary upgrade of our prosecution techniques to address the roots of structural corruption.