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DISSERTATION

„Debarment as an Anti-Corruption Tool in the Projects Funded by Multilateral Development Banks“

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List of Abbreviations

ADB	Asian Development Bank
ADF	Asian Development Fund
AfDB	African Development Bank
CCI	Centralized Case Intake Unit
CCO	Chief Compliance Officer
CMS	Compliance Management System
DMC	Developing Member Country
EO	Evaluation and Suspension Officer
EPPs	Enforcement Policy and Procedures
EU	European Union
EBRD	European Bank for Reconstruction and Development
FIR	Final Investigative Report
GAC	Governance and Anticorruption Strategy
GACAP	Governance and Anticorruption Action Plan
HLF	High Level Forum
IACD	Integrity and Anti-Corruption Division
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development
ICB	International Competitive Bidding
IDA	International Development Association
IED	Independent Evaluation Department
IEG	Independent Evaluation Group
IFI	International Financial Institution
INT	Integrity Vice-Presidency
IOC	Integrity Oversight Committee
IRR	Integrity Risks Reviews
ISO	International Organization for Standardization
LHWP	Lesotho Highlands Water Project
MDB	Multilateral Development Bank
NGO	Non-Governmental Organization

NoSP	Notice of Sanctions Proceedings
NTF	Nigeria Trust Fund
OAGI	Integrity Division of the Office of Auditor General
OAI	Office of Anticorruption and Integrity
OCCO	Office of the Chief Compliance Officer
OCFC	Oversight Committee on Fraud and Corruption
OECD	Organization on Economic Cooperation and Development
OED	Operations Evaluation Department
OII	Office of Institutional Integrity
PIR	Preliminary Inquiry Report
PP&Rs	Procurement Policies and Rules
PPRA	Project Procurement Related Audit
RA	Representation Agreement
RSA	Republic of South Africa
SAC	Sanction Appeals Committee
SOP	Standard Operating Procedures
TI	Transparency International
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Program
VDP	Voluntary Disclosure Program
WB	World Bank

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INTRODUCTION

“...[W]hile we breathe, we hope, and where we are met with cynicism and doubt, and those who tell us that we can't, we will respond with that timeless creed that sums up the spirit of a people: YES, WE CAN.”

BARACK OBAMA
*The 44th US President*¹

Inspired by *Barack Obama*'s historic election as the 44-th President of the United States, I wanted to use as an epigraph to my dissertation an excerpt from his victory speech, the gist of which was belief in CHANGE. His victory has demonstrated that everything is possible, if you go for it wholeheartedly and work hard to achieve what you want. When *Martin Luther King* was delivering his inspirational "I have a dream" speech at Washington's Lincoln Memorial in 1963, he was speaking of his dreams for the US - dreams to live in a world free of racism, where his children “will not be judged by the color of their skin but by their character.”² When *Thomas Mundy Peterson*³ voted in 1870, he thought that the world had changed, since no Afro-American had ever done it before. Barack Obama's victory can be considered not only as another huge step forward in realization of an American Dream, but also as a symbol of change in general.

Indeed, the world is changing. However, sometimes these changes can emerge in the form of a new look at the old things. For example, corruption is not a new phenomenon. It has been in place as long as there has been a willingness to accept different kinds of favors in exchange of conducting private affairs, business or carrying out government policy in the interests of certain individuals. The first documented cases of bribery date back to the year 3000 B.C.⁴ Two thousand years

¹ The first Afro-American President in the history of the US elected on 4 November 2008.

² King Jr. M.L., *I have a Dream*, <http://www.americanrhetoric.com/speeches/mlkihaveadream.htm> (accessed 5 November 2008).

³ The first Afro-American to vote in an election under the 15th Amendment to the United States Constitution ratified on 3 February 1870, which prohibited the states and the federal government prevent a citizen from voting based on race, color, or previous status as a slave.

⁴ Arnáiz, T.M. (2008): *The Exclusion of Tenderers in Public Procurement as an Anti-Corruption Mean*, 1, http://www.nispa.sk/portal/files/conferences/2008/papers/200804200047500.Medina_exclusion.pdf (accessed 8 February 2009).

ago, *Kautilya*, the prime minister of an Indian kingdom, wrote a book “Arthashastra” discussing bribery issues. Seven centuries ago, *Dante* placed bribers at the bottom of Hell, demonstrating thereby the negative attitude to corrupt behavior.⁵

Nevertheless, until early 1990s, the problem of corruption was barely addressed either at national or international level, although everyone knew about its existence. The Multilateral Development Banks (MDBs)⁶ had no incentive even to speak or write the word “corruption” regarding their own loans. No matter how much was stolen, they were confident that they would not have to “shoulder any financial burdens”.⁷ Institutions like the World Bank (WB)⁸ had a global “don’t ask, don’t tell” policy regarding corruption⁹ which was even a taboo subject there for a long time and used to be referred to discretely as the “c-word”.¹⁰

Since the speech of *James Wolfensohn*, the then President of the WB, at 1996 annual meeting of the Boards of Governors of the WB and the IMF¹¹, stressing out the need for the international development community to deal with the “cancer of corruption”, all that has changed dramatically - the taboo has been broken, the MDBs have started bringing to light the problem of corruption in the projects they fund and the fight against corruption has become global. Significant changes occurred in attitudes and understandings among international and regional development assistance organizations.

⁵ Tanzi, V. (1998): *Corruption around the World: Causes, Consequences, Scope and Cures*, IMF Staff Papers, Vol.45, No.4, 559-560.

⁶ The term “MDB” refers to the World Bank, the African Development Bank, the Asian Development Bank, the European Bank of Reconstruction and Development and the Inter-American Development Bank.

⁷ Winters J.A. (2004): *Combating Corruption in the Multilateral Development Banks*, 1, <http://foreign.senate.gov/testimony/2004/WintersTestimony040513.pdf> (accessed 7 November 2008).

⁸ The World Bank Group is a term covering five institutions - the International Bank for Reconstruction and Development (IBRD), the International Development Agency (IDA), the International Financial Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). In this dissertation, the term “World Bank” will refer only to IBRD and IDA, since procurement procedures for both institutions are the same.

⁹ Winters, *supra* note 7, at 2.

¹⁰ Tung, K.-Y. (2002): *The World Bank’s Institutional Framework for Combating Fraud and Corruption*, 1.

¹¹ Wolfensohn J.D. (1996): *Annual Meetings Address*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPRESIDENT2007/EXTPASTPRESIDENTS/PRESIDENTEXTERNAL/0,,contentMDK:20025269~menuPK:232083~pagePK:159837~piPK:159808~theSitePK:227585,00.html> (accessed 7 November 2008).

As a result, new anti-corruption policies have been formed to reduce levels of corruption addressing more carefully issues of selection and supervision of projects. One of the mechanisms introduced was debarment, also referred to as “blacklisting”. Although these two terms are considered to be synonyms in connection with an anti-corruption policy, the former is used more frequently. Personally, I also more incline to the term “debarment”, since there is a slight difference in their meaning. Black’s Law Dictionary defines blacklisting as “putting the name of (a person) on a list of those who are to be boycotted or punished.”¹² The consequences might be different depending on the purpose of blacklisting although they always result in exclusion. As for debarment, it is defined as “the act of precluding someone from having or doing something; exclusion or hindrance.”¹³ In realm of public procurement, it consists of two stages. First, the companies or individuals, the activities of which are in contradiction with the valid rules, are identified and, subsequently, put on a blacklist. At this stage blacklisting does not necessarily require a physical list or relevant written records. Second, these blacklisted companies or individuals are prevented from engaging in future contracts permanently or for a certain period of time (that is, debarred). This means that all debarred parties should be first blacklisted, while not all blacklisted companies will be debarred.¹⁴ From this point of view, “blacklisting” has a broader meaning. However, since various sources have been used for the purpose of this research, both terms hereinafter should be considered as equal.

As debarment is a relatively new mechanism, it is still a rather uninvestigated sphere. The initial research revealed that there was a limited amount of published material thereon, and, in particular, on debarment as a mechanism of preventing corruption applied by MDBs. Considering the importance of tackling corruption in the MDB-funded projects and the growing use of debarment by them, I decided to focus my research on corruption in the MDB-funded projects, its consequences and importance of combating it; debarment as one of the mechanisms to fight it, its features and

¹² Garner B.A. (Ed.-in-Chief) (8th ed. 2004): *Black’s Law Dictionary*.

¹³ *Ibid.*

¹⁴ Transparency International, recommending minimum standards for public procurement, also used these two terms separately. See: Transparency International, *Minimum Standards in Public Contracting* [hereinafter, TI Minimum Standards] http://www.transparency.org/global_priorities/public_contracting/tools_public_contracting/minimum_standards (accessed 5 December 2008).

requirements, conditions, criteria and the procedure of its usage, as well as its implementation by the MDBs. The research is based on the published literature, information available on the Internet and personal communication with MDB representatives at the time of writing this dissertation.

The following dissertation is divided into ten Chapters.

Chapter I explains the importance of tackling corruption in MDB-funded projects, illustrates its devastating consequences for development and gives a clear picture of the project cycle mapping out corruption risks at all its stages. Inclusion of this part is important due to necessity of having a good understanding of various techniques to misappropriate funds and disguise corrupt behavior throughout the project cycle. This helps to detect misdeeds when they occur and is a good illustration of practices which can serve as a ground for debarment. In the end, Chapter I suggests measures to be taken by MDBs to respond the challenge of corruption.

Chapter II gives an overview of debarment as an anti-corruption tool, including its historical background, general features of the procedure, its objectives, impact and requirements to ensure a fair and effective outcome.

Chapter III explains the common approach of the MDBs to tackle corruption and gives an overview of their preventive and remedial measures.

Chapters IV-VIII constitute the core of this dissertation. They examine anti-corruption policies of each MDB and give the detailed description of their debarment proceedings followed by an example of the case which led to debarment.

Chapter IX provides a synthesis and comparative analysis of the debarment procedures in all five MDBs.

The final Chapter X summarizes critical remarks found in literature regarding flaws in debarment procedures coupled with the author's comments thereto in light of the

latest changes. It also illustrates the challenges MDBs are facing during implementing debarment, followed by concluding remarks.

Annexes I-VII include a tabular synthesis of debarment procedures in the MDBs and respondents' due process rights, as well as flowcharts illustrating the process of dealing with allegations of fraud or corruption in each MDB.

CHAPTER I. CORRUPTION IN MDB-FUNDED PROJECTS

A. The Importance of Tackling Corruption in MDB-funded Projects

It took much time and efforts to make the world society understand, that fraud and corruption are the greatest obstacles to development in all its dimensions. In a survey of more than 150 high-ranking public officials and key members of civil society from more than 60 developing countries, public sector corruption was rated as the most severe obstruction to development and growth in their countries.¹⁵ Corruption in developing countries is not simply a domestic problem, but often involves a variety of actors within and outside of developing countries.¹⁶ Efforts of international organizations to reduce poverty in poor countries by providing development funds are in vain until these funds are being stolen, making poor people “even poorer, by denying them their rightful share of economic resources or life-saving aid”¹⁷. Cases like the United Nations Oil-for-Food scandal prove the necessity of more actions to be taken by international organizations to protect their financial interests and safeguard taxpayer funds.¹⁸

The Commission for Africa is convinced that “good governance is the key” to the economic growth of African states and its report of 2005 makes it clear, that unless there are positive changes in accountability and reducing corruption, other reforms and external support will have only “limited impact”.¹⁹ Similar statements were made by *Barack Obama* during his recent trip to Africa, pointing out that “development depends upon good governance” and “that is a responsibility that can only be met by Africans”.²⁰ However, *Kaufmann* argues that Obama's message was implicitly

¹⁵ Gray, C.W., Kaufmann, D. (1998): *Corruption and Development, Finance and Development*, 7.

¹⁶ Chanda, P. (2004): *The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal And Structural Obstacles And Uncertainties*, 32 Denv. J. Int'l L. & Pol'y, 315.

¹⁷ UNODC (2004): *Global Action against Corruption: The Merida Papers*, 1.

¹⁸ For the details of the Oil-for-Food scandal see <http://www.iic-offp.org/> (accessed 3 June 2009).

¹⁹ Commission for Africa (2005): *Report*, 37, http://www.commissionforafrica.org/english/report/thereport/english/11-03-05_cr_report.pdf (accessed 23 July 2009).

²⁰ BBC News (2009): *Obama speaks of hopes for Africa*, <http://news.bbc.co.uk/2/hi/africa/8145762.stm> (accessed 26 July 2009).

addressed also to aid donors, which have a tendency, especially within last years, to conceal the situation about poor governance and corruption in African countries.²¹

Since projects funded by MDBs are implemented by means of public procurement, a common example of corruption in these projects is when public officials award development project contracts to their friends, or accept bribes in exchange for contracts, which results in individual gain of these officials, and prevents development in much needed areas as the quality, and in some cases even presence, of a final product is lacking. “Funds desperately needed to combat poverty and disease and to build roads, hospitals and schools are spent instead on everything from palaces on the Riviera to the acres of shoes made of snakeskin, satin and ostrich”.²²

Each year the World Bank is spending several billions of dollars on loans, thereby exposing itself to significant operational risk for corruption and fraud. Northwestern University political economist *Jeffrey A. Winters* estimates, that since its founding, the World Bank lost about \$100 billion of its loan funds intended for development to corruption, and if we add corruption of loan funds from other MDBs, the figure would almost double to \$200 billion.²³

Winters refers to these stolen funds as a “criminal debt”. Most countries have a public debt that must be repaid to creditors by their citizens. Criminal debt refers to the share of total borrowed funds that has been stolen. Although the benefits from these resources were enjoyed privately, the fiscal burden of repaying this criminal debt is borne publicly.²⁴ *Winters* argues, that the debt is criminal in two ways: first, it was a crime to let the funds meant for the development be stolen, and second, it is an injustice to make poor people, who are denied the full development impact that the project could have achieved, bear the heavy burden of repayment. Indeed, corruption can sometimes place the burden of repayment of loans on some of the poorest people

²¹ Kaufmann, D. (2009): *Obama on Governance and Corruption in Africa: A message to aid donors as well?* <http://thekaufmannpost.net/obama-on-governance-and-corruption-in-africa-a-message-to-aid-donors-as-well/> (accessed 23 July 2009).

²² New York Times Editorial (2009): *Grand Larceny Africa*, 16 June 2009, http://www.nytimes.com/2009/06/17/opinion/17iht-edafrica.html?_r=1&hpw (accessed 26 July 2009).

²³ Winters, J.A. (2002): *Criminal Debt*, in: Pincus J.R., Winters, J. A. (Eds.), *Reinventing the World Bank*, 101.

²⁴ *Ibid.* at 107.

in the world, and if they have received just 70% of the loan funds from MDBs, they are nevertheless obliged to repay 100% of the loans they have never received plus interest.

It is worth mentioning, that the percentage of aid funds lost due to corruption represent not bribe *per se*, but the inflated contracting costs and the loss of equipment and other inputs that result from tolerating bribery.²⁵ The money paid as a bribe must come from some part of the project budget, which generally results in increased prices and decreased quality, and, consequently, less effective projects. When less-qualified bidders are awarded contracts through corrupt and fraudulent behavior, qualified bidders lose trust in government institutions and confidence in the system and stop bidding.

But there is also the second side of the coin. *Tina Søreide* argues that the major reason for bribery in public procurement is probably because everyone believes that everyone else is involved in such kind of “business”.²⁶ It must be frustrating to lose a contract because a competitor paid a bribe. Therefore, a lot of companies involved in the competition pay a bribe, even if they would be better without corruption. *Rose-Ackermann* refers to this problem as a “prisoner’s dilemma”, where even if all bidders agree not to offer bribes, each of them doubts that the rest will adhere to this agreement and continue offering bribes.²⁷ *Søreide* gives the following example to illustrate how this “chain” corruption can impact the economic environment:

Imagine that a highway is to be built, and the cost of the project is estimated at the amount of \$500 million. Ten companies take part in the tender. If five of them pay \$500 000 each to win the contract, while the winner also pays 10% of the contract value, \$50 million. The apparent effect is that \$50.250.000 is wasted (at least if the money is brought out of the country). Besides, the bribe paid by the contractor most probably inflates the highway price, or makes the company skimp on the quality. The other four bribing companies also have to

²⁵ Rose-Ackerman S. (1999): *Corruption and Government; Causes, Consequences, and Reform*, 179.

²⁶ Søreide, T. (2002): *Corruption in Public Procurement: Causes, Consequences and Cures*, 4.

²⁷ Rose-Ackerman, S. (2009): *Can Anti-Corruption Policies Do Without Corporate Ethics?*
http://www.forbes.com/2009/01/22/corporate-ethics-bribery-bix-corruption09-cx_sra_0122roseackerman.html+rose-ackerman+corruption+prisoner%27s+dilemma&cd=1&hl=de&ct=clnk&gl=at&client=firefox-a (accessed 16 October 2009).

regain their “sunk cost”, for instance by increasing prices on other products offered by the company, contributing to higher domestic inflation.²⁸

Eventually, the losers in this “high-level game” are ordinary people who are deprived of the possibility to enjoy the full development impact that the projects aiming at reducing poverty could have achieved.

The Articles of Agreement of the International Bank for Reconstruction and Development, which is the World Bank’s Charter, stipulate that “[t]he Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted”.²⁹ This is an explicit statement requiring the Bank not to allow its funds to be corrupted, and laying responsibility on it to fulfill this requirement. Similar provisions are contained in Charters of other MDBs.

Nevertheless, for years MDBs were doing nothing about thefts of the project funds and seemed to take care more of the outcome, rather than the process of the project implementation itself. For example, one senior official at the WB interviewed by *Winters*, claimed that, “[i]f you take the amount of 30 percent loss, it means 70 cents [on the dollar] got used for development after all. That’s a lot better than some places with only 10 cents on the dollar.”³⁰

Another WB task manager opposed the “glass is 70% full” perspective, arguing that “if they’re busy stealing 30 percent, they’re not paying any real attention to the other 70, even assuming 30 percent is all they’re taking. What you’re really doing is really ruining the whole effectiveness of the investment itself.”³¹

He gave the following example:

“You cut corners and nobody cares. If you let out a contract for \$2 million, and you get the few civil servants at the top sharing \$600,000 or 30 percent, do they care if the contractor puts in concrete that is just sand and water? Do

²⁸ Søreide, *supra* note 26, at 6.

²⁹ Articles of Agreement of the International Bank for Reconstruction and Development, 22 July 1944, Article III, Section 5(b) [hereinafter, IBRD Articles of Agreement].

³⁰ Winters, *supra* note 23, at 111.

³¹ *Ibid.*, at 120.

they care if the contractor doesn't put reinforcing steel in the structures? They don't care. So when Bank people say we're at least getting 70 cents of good development on the dollar, no you don't.... and the end result is you get very little development.”³²

Talking about the value a country or the poor really gets from projects, where “you get only one dollar out of ten that goes to the poor”, he claimed that it is not really worth it, since nothing has been done to strengthen the economy for the long term. “You've only nourished a corrupt government that has no intention of providing services.”³³

Therefore, when the funds of international organizations are at stake either as loans or grants, these organizations for the sake of efficiency of investment and development assistance should have an interest in the effective use of their resources.

Concurring with the idea that due to a lack of accountability from the government side, the development banks themselves should be held responsible, *Daene C. McKinney* sets forth the following accusations against them.³⁴

a) Provision of funds with no follow up on their use

The MDBs are more concerned about “pushing money out the door” and meanwhile look the other way.³⁵ In those rare cases when there is little supervision, evaluation procedures are result-oriented.

b) Selection of large-scale projects in nations prone to corruption

Countries with governments known to be opaque receive funding in the same manner as transparent ones. *Rose-Ackerman* is of the same opinion claiming, that kleptocratic states should not be helped to become more efficient at controlling and exploiting their own population, and the World Bank should not help autocrats collect taxes more efficiently.³⁶ At the same time, *Kaufmann* in his special report argues that the

³² *Ibid.*

³³ *Ibid.* at 121.

³⁴ McKinney, C. (2005): *Corruption in Multilateral Development Banks (MDBs)*, 1, [http://www.ce.utexas.edu/prof/mckinney/ce397/Topics/Ethics/Ethics\(2005\).doc](http://www.ce.utexas.edu/prof/mckinney/ce397/Topics/Ethics/Ethics(2005).doc) (accessed 10 February 2009).

³⁵ Bosshard, P., *Stealing from the World Bank – an Eyewitness Account*, <http://www.internationalrivers.org/en/node/4363/> (accessed 30 August 2009).

³⁶ Rose-Ackerman, *supra* note 25, at 179-180.

approach of the multilateral financial institutions has been changed lately and they would not fund now the governments with the “extreme misgovernance in financial aid”, as they would have done couple of decades ago – for example, they have lately refrained from providing funds to Mugabe's government in Zimbabwe.³⁷

c) Ignoring the possibility of corruption when drafting contracts

As an illustration of this accusation can serve, for example, leaving out clauses that could possibly prevent bribery or other corrupt acts.

d) Closing eyes to notifications of corruption

The Lesotho Highlands Water Project³⁸ is an example of a development project for which very few outside institutions offered help in prosecuting corrupt corporations whereas poor countries are unable to do it without external aid.

Besides, as argued by *Low*, because the MDBs often play a key role in major infrastructure projects, their posture can influence the course of key economic activities of governments and private parties around the world.³⁹ In addition, their policies and practices may also influence the practices of private lenders participating in these projects.⁴⁰

Thus, it is clear from the above mentioned, that good governance is a key to the effectiveness of development assistance, and that the impact of international aid can only be witnessed in corruption-free environment.

According to *Kaufmann*, compared to the mid-1990s, over the last decade the priority given to the governance in the aid effectiveness agenda has slowed down.⁴¹ While there are numerous projects and programs all over the world aimed at improvement of

³⁷ Kaufmann D. (2009): *Aid Effectiveness and Governance: The Good, The Bad, The Ugly*, 26, in: World Bank, *Development Outreach*, 26-29, <http://siteresources.worldbank.org/EXTWBIGOVANTCOR/Resources/kaufmann-corrected.pdf> (accessed 27 July 2009).

³⁸ For the details about Lesotho Highlands Water Project case see Chapter V, C (10) of this dissertation.

³⁹ Low, L.A. (1998): *Transnational Corruption: New Rules for Old Temptations, New Players to Combat a Perennial Evil*, American Society International Law Procurement, Vol.92, No.5, 151.

⁴⁰ *Ibid.*

⁴¹ Kaufmann, *supra* note 37, at 27.

governance, they mostly avoid addressing complicated governance and corruption problems, which are of great importance for development.⁴²

Before going into details on how the MDBs tackle the problem of corruption in the projects they fund, I would like to give a general overview of corruption and public procurement phenomena and point out the most common ways of disguising corruption throughout public procurement process.

B. Definition of Corruption

According to *Tanzi*, etymology of the word “corruption” originates from the Latin verb “rumpere”, which means “to break”.⁴³ Consequently, corruption occurs when something is broken. Being “a prism with many surfaces”, this “something” depends on which angle corruption is viewed from.⁴⁴ It might be a moral, social, political or economic code of conduct as well as criminal, civil or administrative law. However, to have the whole picture and not to see only one side of the prism presenting corruption, for instance, as a criminal behavior, it is necessary to view it broader.⁴⁵

Although corruption has been defined in many different ways, there is no generally accepted definition which applies to all forms, types and degrees of corruption. In most cases different observers would agree on whether a certain behavior constitutes corruption. Unfortunately, the behavior is often difficult to observe because acts of corruption do not typically take place in broad daylight.⁴⁶

Difficulties in working out a common definition for corruption are rooted in legal and political problems as well as different attitudes and customs in different cultures.⁴⁷ For example, gift giving in many village traditions is not considered corruption since

⁴² *Ibid.*

⁴³ *Tanzi*, V. (1995): *Corruption: Arm's Length Relationships and Markets*, 168, in: Fiorentini G. and Peltzman S. (Eds.), *The Economics of Organized Crime*.

⁴⁴ Council of Europe (1996): *Program of Action Against Corruption*, 15, <http://www.coe.int/t/dg1/greco/general/GMC96%20E95%20Actionprogr%20English.pdf> (accessed 15 February 2009).

⁴⁵ *Ibid.*

⁴⁶ *Tanzi*, *supra* note 5, at 564.

⁴⁷ *Søreide*, *supra* note 26, at 2.

the transaction is not made “under the table” - it is open and transparent; the scale is not life-changing; the benefits are usually shared with the community, and the public rights are not violated.⁴⁸ In fact, corruption is not about “putting one’s fingers in the till but more about the abuse of power or improbability in the decision-making process”.⁴⁹

Because of the discrepancy in notions of corruption in different societies, during the negotiations of the *United Nations Convention against Corruption* (UNCAC)⁵⁰ it was decided not to define corruption at all but to establish a wide range of acts constituting corruption. The Convention included not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence, concealment, and laundering of the proceeds of corruption, as well as offences committed in support of corruption such as money-laundering and obstruction of justice.⁵¹

United Nations Convention against Transnational Organized Crime,⁵² although focusing mainly on the fight against organized crime, includes few provisions regarding corruption. Article 8 of the Convention gives the following definitions of corruption:

- The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.
- The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another

⁴⁸ World Bank, “Youth for Good Governance” distance learning programme, Module III, *Introduction to Corruption*, 5, <http://info.worldbank.org/etools/docs/library/35970/mod03.pdf> (accessed 5 June 2009).

⁴⁹ *Ibid.*

⁵⁰ The text of UNCAC is available at <http://www.unodc.org/unodc/en/treaties/CAC/index.html> (accessed 5 January 2009). Signed in 2003, UNCAC entered into force on 14 December 2005 after having been ratified by 30 signatories.

⁵¹ UNCAC, Chapter III, Art.15-25.

⁵² Adopted by the General Assembly in its resolution 55/25 of 15 November 2000, entered into force on 25 December 2003.

person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Among other multilateral instruments to prevent and combat corruption, only the *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union* (the EU Convention), adopted by the Council of the European Union on 26 May 1997, and the *Civil Law Convention on Corruption*, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, contain general definition of corruption. The EU Convention defines corruption as follows:

- Passive corruption: the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties.⁵³
- Active corruption: the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties.⁵⁴

Under the Civil Law Convention on Corruption, "corruption" means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe, the undue advantage or the prospect thereof.⁵⁵

⁵³ Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, Art.2.

⁵⁴ *Ibid.*, Art.3.

⁵⁵ Civil Law Convention on Corruption, Art.3. The Convention entered into force on 1 November 2003.

The *Organization of American States Inter-American Convention against Corruption*, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, the *Council of Europe Criminal Law Convention on Corruption*, and the *African Union Convention on Preventing and Combating Corruption* only define different acts of corruption.

The most popular and simple, and at the same time, the most appropriate for the purpose of this dissertation definition of corruption is that of the World Bank. It identifies corruption as the “abuse of power for private benefit”.⁵⁶ Obviously, this definition implies public corruption which involves a government official benefiting at the expense of the taxpayer or at the expense of an ordinary person who comes into contact with the government.⁵⁷ *Tanzi* argues that public corruption can occur, when the following conditions are met:

- the act must be intentional, breaking the rule which is precise and transparent;
- the breach of the rule must be beneficial for the offender and/or people related to him;
- there must be a direct link between the specific act of “corruption” and the benefit derived.⁵⁸

C. Definition of Public Procurement and its Principles

The term “procurement” means all kinds of acquisition of goods and services by any individual or organization (public, private, international etc.). It can be anything from the purchase of pens to the construction work of a new international airport.

“Public procurement” refers to the acquisition of goods and services by a government and can take place at every government level: municipalities, provinces or states, and in national or federal governments. Contracts are signed with companies or

⁵⁶ Likewise, TI defines corruption as a “misuse of entrusted power for private gain”.

⁵⁷ Conversely, private corruption occurs between individuals in the private sector, such as the Mafia extorting money from a local business. This research is dealing only with public corruption.

⁵⁸ *Tanzi*, *supra* note 43, at 167-168.

individuals - local or foreign - and are supposed to meet the user's requirements with the best value for money. As such, public procurement must serve citizens' and taxpayers' interests.⁵⁹ Purchases of goods and services can benefit citizens directly, such as purchases of projects on the construction of roads, dams or a sewage system. Others benefit citizens indirectly, such as a purchase of consulting services to redesign the customs agency.

Robert Jourdain and *Nadia Balgobin* distinguish six different procurement types: International Competitive Bidding, Limited Competitive Bidding, National Competitive Bidding, Shopping, Direct Contracting and Force Account. The following table outlines the specific features of each of these procurement types:⁶⁰

Table 1. Procurement types and their features	
Procurement Type	Features
International Competitive Bidding (ICB)	<ul style="list-style-type: none"> • Widest range of choices • Gives adequate, fair and equal opportunities to bid
Limited Competitive Bidding	<ul style="list-style-type: none"> • ICB by direct invitation, no advertisement • Limited number of suppliers
National Competitive Bidding	<ul style="list-style-type: none"> • Unlikely to attract international competition
Shopping (National and International)	<ul style="list-style-type: none"> • At least three price quotations from known/ predetermined suppliers
Direct Contracting, Single Source	<ul style="list-style-type: none"> • Extension of existing contract for goods/services of similar nature • Standardization of equipment
Force Account	<ul style="list-style-type: none"> • Borrower's own personnel and equipment

⁵⁹ Jourdain, R., Balgobin, N. (2003): *Analyzing the Public Procurement Process to Identify and Eliminate Risks of Corruption*, in: *Controlling Corruption in Asia and Pacific*, 106 - papers presented at the 4th Regional Anti-Corruption Conference of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, Kuala-Lumpur, Malaysia, 3-5 December 2003.

⁶⁰ *Ibid.*, at 107.

Irrespective of the procurement method that is being used, it should be based on a good governance and integrity. In order to prevent mismanagement, fraud and corruption in public procurement, OECD countries in October 2008 approved *OECD Principles for Enhancing Integrity in Public Procurement* (OECD Principles). The OECD Principles, being in the form of OECD recommendation, serve as a policy framework with ten key principles to strengthen integrity and raise confidence in the management of public funds. These principles are divided into four groups, aimed at enhancing transparency, good management, prevention of misconduct as well as accountability and control, respectively.⁶¹

A. Transparency

1. Provide transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.
2. Maximize transparency in competitive tendering and take precautionary measures to enhance integrity.

B. Good management

1. Ensure that public funds are used in procurement according to the purpose intended.
2. Ensure that procurement officials meet high professional standards in knowledge, skills and integrity.

C. Prevention of misconduct, compliance and monitoring

1. Put mechanisms in place to prevent risks to integrity.
2. Encourage close cooperation between government and the private sector to maintain high standards of integrity.
3. Provide specific mechanisms to monitor public procurement as well as detect misconduct and apply sanctions accordingly.

D. Accountability and control

1. Establish responsibility along with control mechanisms.

⁶¹ Beth, E. (2009): *OECD Principles for Integrity in Public Procurement*, 18-19.

2. Handle complaints from potential suppliers in a fair and timely manner.
3. Empower civil society organizations, media and the wider public to scrutinize public procurement.

The primary target group of the OECD Principles is policy makers in governments at national level, but their implementation can also be essential for the MDBs. Although the responsibility for the execution of the MDB-funded projects, including the award and management of contracts, lies with the beneficiary countries, the MDBs have to ensure that their funds are being used for the purposes they are intended for. Therefore, they should encourage, and, if necessary, assist countries receiving their funds to enhance integrity and good governance in public procurement. This is particularly important, when the procurement of certain goods and services for the MDB-funded project is financed by the recipient country itself. In such cases the recipient countries can use their national procedures and not those of the MDBs. To duly implement the project, they should ensure compliance with good procurement practice, which according to *Jourdain*, promotes four key principles: transparency, economy, efficiency and fairness:

- *Transparency* defined as an objective (neutral) and public (visible) mastering of the whole process from call for tender to contract award and management.
- *Economy* expressed through i) contract prices that do not deviate much from original estimates; ii) unit rates that are comparable with similar conditions/price/indexes; and iii) a number of bids that is enough to reach the best possible price.
- *Efficiency and timeliness* to ensure that the actual procurement schedule conforms to the planned one and that there are no delays in public bid openings, evaluation and contract award.

- *Fairness and equity* to give all eligible bidders the same information and equal opportunity to compete for a contract.⁶²

Failure to comply with these principles can be an evidence of corrupt or fraudulent practices, respectively defined as “the misuse of an individual’s position for improper/unlawful enrichment”⁶³ or a “misrepresentation of facts”⁶⁴. As a result of these practices, the benefits of free and open competition are reduced.⁶⁵

D. Corruption in Public Procurement

Public procurement lies at the crossroad of the public and private sectors. A significant part of the government budget is spent on procurement of goods and services. Total government procurement worldwide is estimated to be roughly equivalent to 82.3% of world merchandise and commercial services exports in 1998.⁶⁶ Considering this, temptations for the transformation of the public funds into private gain are quite high, which makes public procurement more vulnerable to corruption than other sectors. In 2004, Transparency International estimated that the amount lost due to bribery in government procurement alone was at least \$400 billion per year worldwide,⁶⁷ while *Daniel Kaufmann* estimated it at \$1 trillion.⁶⁸

At the same time, lack of efficiency and waste of donors’ resources as a result of corruption can cause the largest damage to the public interest. Instead of focusing on the highest quality for the lowest price, the officials can purchase goods or services from the best briber. According to the Commission for Africa’s estimations, the false costs resulting in worse quality and unnecessary purchases can add at least 25% to the

⁶² Jourdain, *supra* note 59, at107.

⁶³ By offering/receiving anything of value to influence a procurement process or a contract execution.

⁶⁴ In order to influence a procurement process or a contract execution.

⁶⁵ Jourdain, *supra* note 59, at107.

⁶⁶ OECD (2002): *The Size of Government Procurement Markets*, 25, <http://www.oecd.org/dataoecd/34/14/1845927.pdf> (accessed 14 February 2009).

⁶⁷ Eigen P. (2004): *Transparency International Corruption Perception Index 2004*, 2, http://www.transparency.de/uploads/media/04-10-20_CPI_2004_DEU.pdf (accessed 14 February 2009).

⁶⁸ Kaufmann, D. (2005): *Myths and Realities of Governance and Corruption*, in: *Global Competitiveness Report 2005-06*, 83, http://mpira.ub.uni-muenchen.de/8089/1/MPRA_paper_8089.pdf (accessed 21 July 2009).

costs of the government procurement.⁶⁹ Consequently, too much can be paid for too little, or even nothing at all. Thus, preventing and sanctioning corruption in public procurement is one of the essential topics.

Tanzi distinguishes between political or high level and administrative or bureaucratic corruption.⁷⁰ He argues that political corruption can take place during the budget preparation phase, that is, when political decisions are made. Bureaucratic corruption occurs during the budget execution phase. In addition, the report of the Commission for Africa of 2005 considers not only politicians and public officials being responsible for existence of “signature bonuses” - the euphemism used for bribes - but also the bankers, lawyers, accountants, and engineers working on public contracts.⁷¹

In fact, there is a potential for and risk of corruption in public procurement in all countries and all sectors. Nonetheless, some sectors of public procurement are more exposed to corruption due to the complex nature of the works and the large amounts of the contracts that are involved (construction of highways, bridges, dams etc.).

Participants of the OECD Global Forum conference on “Fighting Corruption and Promoting integrity in Public Procurement”⁷² agreed that one of the fundamental obstacles in combating fraud and corruption in public procurement is the difficulty in detecting wrongdoings. This difficulty arises from the fact that there is often no clear offender nor victim, rather a group of individuals in collusion with common interests in keeping their corrupt acts unrevealed. Besides, corruption in the procurement process is far from being limited to direct bribery; there are many complicated ways of diverting funds and concealing these diversions. Therefore, efforts aimed at enhancing governance and integrity are indispensable for preventing corruption and, consequently, waste of public resources.

⁶⁹ Commission for Africa, *supra* note 19.

⁷⁰ *Ibid.*

⁷¹ Commission for Africa, *supra* note 19.

⁷² The OECD Global Forum conference took place on 29-30 November 2004 in Paris, papers of the Forum are available at http://www1.fidic.org/resources/integrity/corrupt_proc_OECD-rapport-2005-aase.pdf (accessed 14 February 2009).

OECD defines integrity as “the use of funds, resources, assets, and authority, according to the intended official purposes, to be used in line with public interest”.⁷³ In view of this definition, the following activities are pointed out by OECD as potential integrity violations:

- corruption, including bribery, “kickbacks”, nepotism, cronyism and clientelism;
- fraud and theft of resources;
- conflict of interest in the public service and in post-public employment;
- collusion;
- abuse and manipulation of information;
- discriminatory treatment in the public procurement process; and
- the waste and abuse of organizational resources.⁷⁴

These violations also served as a basis for the forms of corruption in the procurement context suggested by *Emmanuel L. Lomo* addressing Biennial Meeting of the International Lending Agencies and the Consulting Industry:

- A “corrupt practice” is offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence the selection process or the execution of a contract.
- A “fraudulent practice” is a misrepresentation or omission of facts in order to influence a selection process or the execution of a contract.
- A “collusive practices” is an arrangement between two or more competitors with or without the knowledge of each other, in order to establish prices at artificial, non-competitive levels.

⁷³ Beth, *supra* note 61, at 19.

⁷⁴ *Ibid.*, at 20; see also: Huberts, L.W.J.C., Heuvel, J.H.J. van den (1999): *Ethics and Integrity and the Public-Private Interface*, in: Huberts, L.W.J.C., Heuvel, J.H.J. van den (eds.), *Integrity at the Public-Private Interface*, 165-184.

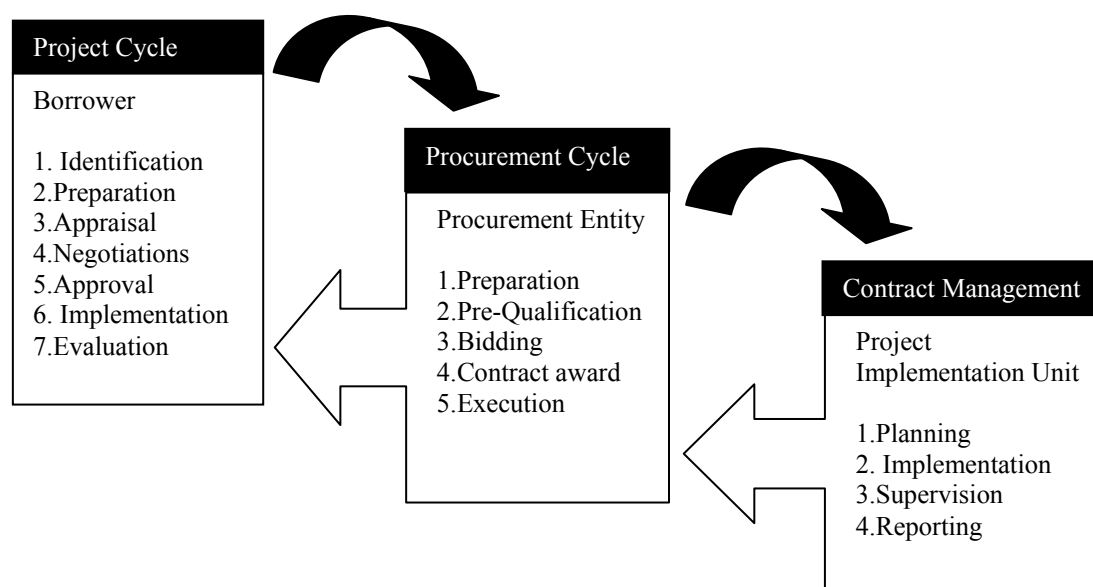
- A “coercive practices” is harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in a procurement process, or affect the execution of a contract.⁷⁵

E. Mechanisms Used to Disguise Corruption in Public Procurement

1. Introduction

To be able to tackle a problem, it is necessary, first of all, to clearly understand it. Therefore, in order to eliminate or reduce corruption in the MDB-funded projects, it is essential to explore the methods and techniques used to misappropriate funds and make a fraudulent transaction look legitimate to auditors. This knowledge contributes in developing adequate mechanisms and indicators to prevent fraud and corruption as well as helps detect misdeeds when they occur. In the context of this dissertation, it also helps better understand what kind of acts might constitute grounds for debarment. Schematically, the project cycle can be outlined as follows:⁷⁶

Figure 1. Project Cycle



⁷⁵ Lomo, E.L. (2007): *Tackling Demand Side Corruption*, presentation at the Biennial Meeting of the International Lending Agencies and the Consulting Industry (BIMILACI '07) at the Inter-American Development Bank held on 10-11 May 2007, http://www1.fidic.org/resources/bimilaci/2007/10_lomo_ethics_in_procurement.ppt (accessed 5 June 2009).

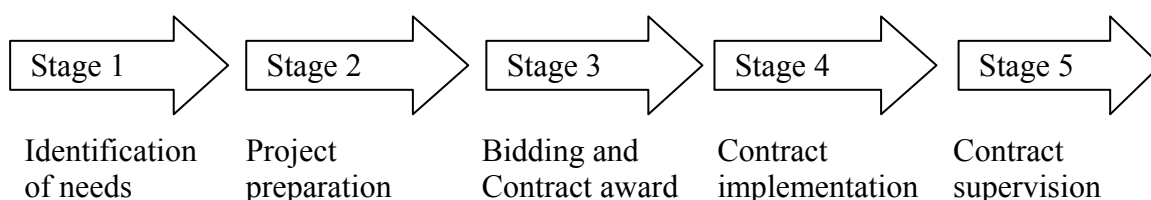
⁷⁶ Jourdain, *supra* note 59, at 108.

From this figure, we can conclude that the project cycle consists of three main phases, each containing few stages:

- pre-tendering phase: identification of needs, planning/budgeting and defining project specifications;
- tendering phase: invitation to tender, bidding process, bid evaluation and contract award;
- post-tendering phase: contract implementation, supervision and evaluation.

Since all these stages are procurement-related, the term “procurement cycle” often refers to the entire project cycle. Therefore, for the purpose of this dissertation, the term “public procurement” should be interpreted in its wider context, covering not only tendering, but also pre-tendering and post-tendering phases of the project cycle.

To outline the most common manifestations of corruption and fraud throughout a project cycle, the latter can be divided into the following stages:



Stages covering formation of contracts, that is, from definition of project specifications to contract implementation, are defined by OECD as a “tip of iceberg” since they are the most regulated and transparent stages of the entire procurement process, and, thus, are less exposed to the risk of corruption.⁷⁷ In contrast, the stage of identification of needs and contract implementation are less transparent and proved to have a higher risk of corruption as they are usually not reflected in the procurement regulations. According to *Arrowsmith et al.*, the most frequent forms of corruption in procurement financed by development institutions are the following:

⁷⁷ Beth, *supra* note 61, at 10.

- corruption in award procedures, usually involving bribes between government and contractor officials;
- fraud by contractors manifesting itself in the submission of false information to the procuring entity;
- the “siphoning off” of loan proceedings by government officials for unauthorized use.⁷⁸

However, as illustrated below, corruption can occur at any stage. Therefore, measures should be taken to prevent risks of corruption within the whole procurement cycle regardless of how high the risk is.

2. Mechanisms used during identification of needs

At this stage the government decides what to buy. Normally, the laws on procurement and on public works establish that in taking this decision the government must take into account the national development plan, technical programs, administrative support, the fiscal and financial calendar, maintenance requirements, and the short-, medium- and long-term goals and objectives, among other factors.⁷⁹

In the absence of adequate procurement planning, many agencies decide to acquire goods or services directly, through direct negotiation without opening the bid to competitors’ offers. The justifications can be urgent needs that arise very late in the planning process. Although direct purchases do not necessarily mean occurrence of corruption, they can lead to inefficiencies, such as inflated prices and unknown companies owned by direct relatives of the head of an agency and have no experience in the field of work they are being contracted for.⁸⁰

⁷⁸ Arrowsmith, S., Linarelli, J., Wallace, D. (2000): *Regulating Public Procurement: National and International Perspective*, 139.

⁷⁹ Haro G. (2005): *Mexico: Identifying Risks in the Bidding Process to Prevent Corruption*, in: OECD: *Fighting Corruption and Promoting Integrity in Public Procurement*, 191, http://www1.fidic.org/resources/integrity/corrupt_proc_OECD-rapport-2005-aase.pdf (accessed 14 February 2009).

⁸⁰ Raigorodsky, N. (2005): *Argentina: Identifying Risks of Corruption in Public Procurement*, in OECD: *Fighting Corruption and Promoting Integrity in Public Procurement*, 178, http://www1.fidic.org/resources/integrity/corrupt_proc_OECD-rapport-2005-aase.pdf (accessed 14 February 2009).

The following methods can be used at this stage:⁸¹

a) *Modified or falsified needs*

Changing or falsifying needs is a common way of justifying purchases, works or services that are often unnecessary or disproportionate to actual needs.⁸² The decision may not necessarily follow a policy rational or meet an existing need but rather follow the desire to bring benefits to an individual or an organization.⁸³ For example, demand is created for a good of little or no value to the society to favor particular suppliers.

b) *“Tagged” contract*

Sometimes decision-makers can include in the budget a contract with a “certain”, pre-arranged contractor, to pay back old political favors or kickbacks.⁸⁴

c) *Conflict of interest*

Conflict-of-interest situations might lead to bias and affect the decision-maker's decision on the need for contracts that impact their old employers (revolving doors).⁸⁵

d) *Unnecessary, falsified or subjective studies*

Studies are often indispensable in order to identify needs. But sometimes unnecessary studies are carried out by a favored firm but never delivered or claimed, even though advance payments have been made; or the results of the initial study commissioned from a competent organization are passed on to fictive firms that plagiarize them.⁸⁶ In other cases, studies performed by the companies that have a relationship with the

⁸¹ This list, as well as all further lists illustrating mechanisms of corruption and fraud during different stages of the project cycle are not exhaustive and reflect opinions of different authors based on their personal experience.

⁸² Bueb, J.-P., Ehlermann-Cache, N. (2005): *Inventory of Mechanisms to Disguise Corruption in the Bidding Process and Some Tools for Prevention and Detection*, in OECD: *Fighting Corruption and Promoting Integrity in Public Procurement*, 162, http://www1.fidic.org/resources/integrity/corrupt_proc_OECD-rapport-2005-aase.pdf (accessed 14 February 2009).

⁸³ U4 Anti-Corruption Research Centre, *Corruption in Public Procurement. General Overview*, part “How corruption operates in public contracting”, (hereinafter, U4, Corruption in Public Procurement) <http://www.u4.no/themes/procurement/procurementintro.cfm> (accessed 20 February 2009).

⁸⁴ Transparency International (2006): *Handbook for Curbing Corruption in Public Procurement*, 18 (hereinafter, TI Handbook), www.transparency.org/content/download/12496/120034 (accessed 20 February 2009).

⁸⁵ *Ibid.*

⁸⁶ Bueb, *supra* note 82.

company or companies that will participate in the bidding process can falsely conclude that particular services or goods are needed. As such, the studies not only generate the need they are intended to identify, but also create an illicit advantage for a firm or a group of firms.⁸⁷

3. Mechanisms used during project preparation

After having identified the needs, it is necessary to establish the precise cost of the project and draft project specifications and description of works. The purpose is to allow a thorough analysis of tenders and preparation of administrative and technical documentation required for issuing a call for tender.

3.1. Determining project budget

At this stage corrupt acts can be committed through deliberate misevaluation (under- or overvaluation) of project estimate.

a) Undervalued estimates

Underestimation is frequent and occurs, so that the proposal can easily be accepted. In such cases the expected benefits of the projects are maximized while the expenses to realize it are minimized. This raises the risk of being in need of supplementary funds at a later stage, which will subsequently inflate the initial cost. But since it is already too late to proceed otherwise, the additional costs are rarely negotiable and awarded to the winner of the initial contract, who, in its turn, favors the decision-maker.⁸⁸

b) Overvalued estimates

When it is high likely that a contract will be awarded due to importance of goods or services, the estimate can be overvalued. The awardee of the contract will thus have a comfortable margin, part of which may be returned to the decision-maker without

⁸⁷ Raigorodsky, *supra* note 80, at 178-179.

⁸⁸ Bueb, *supra* note 82, at 163.

increasing the initial cost.⁸⁹ At the same time there will be no suspicion of any “favours”, since the actual price ends up being quite close to the initial estimate.

3.2. Defining project specifications

After estimation of the project's costs it is necessary to set out the technical specifications of the project. During this stage, the corrupt acts committed by public officials and potential contractors are especially hard to detect, when the latter lack knowledge of the technical aspects of a certain project.

a) Preference for a single supplier

Bidding documents can include hand-tailored specifications that can only be met by that particular bidder, making thereby competition either impossible or restricted. Another variation on this technique is to transmit the specifications prepared by the technical staff of the decision-maker to the bribing company, which will then copy them to its bidding documents. Consequently, it will submit to the decision-maker exactly what the latter wants.

b) Inaccurate data

Quite often some information is being deliberately concealed or omitted from the specifications available to the potential bidders, while only one or more “favored” bidders are provided with the correct data. The informed firm may neglect incorporation of a particularly costly requirement in its estimate and win the contract thanks to a bid that is lower than those of the competitors but provides for a higher margin nevertheless.⁹⁰

c) Unnecessary complexity of bidding documents or terms of reference

This technique is used to create confusion to hide corrupt behavior and make monitoring difficult.⁹¹ In such cases it is reasonable to hire a private company to make these documents understandable. However, since the decision-maker's technical staff are usually capable to understand and explain these documents themselves, hiring a

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, at 164.

⁹¹ TI Handbook, *supra* note 84.

private company for this purpose can be used to “camouflage” commission payments to the decision-maker or his friends.⁹²

d) *Excessive technical requirements*

Sometimes technical specifications for a bid may be so specific, that it rules out all the competition giving advantages to a bribing company. For example, there might be requirements for specific certifications that are unnecessary for or irrelevant to the evaluation of the bid. However, failure to fulfill this requirement can result in disqualification of a bidder.

4. Mechanisms used during bidding and contract award

This stage begins when a bid is advertised and ends with the selection of the winner. Here as well, as at previous stages, different methods can be used to perform corruption.

4.1. Invitation to tender

a) *Reduced publicity*

One of the ways to make the bribing company win a contract is to reduce competition by limiting the call for bids and keeping the project secret as long as possible. It can be achieved by:

- non-publication of calls for bids, justifying it by a state secrecy, exclusive rights, research or experimental work or additional supplies;⁹³
- publication of calls for bids in sources with limited circulation;
- making the tender public during holiday time, when most administrative offices are closed;⁹⁴
- invitation to tender sent to a lot of companies to make the competition appear real, while these companies have a completely different area of

⁹² Beth, *supra* note 61, at 83.

⁹³ Bueb, *supra* note 82, at 165.

⁹⁴ Søreide, *supra* note 26, at 14.

specialization, or to a limited number of companies putting the blame on the mail system afterwards.⁹⁵

b) *Unrealistic deadlines*

Sometimes calls for bids may be disseminated with a close deadline for the presentation of applications, depriving bidders not notified in advance of the chance to submit a credible offer. As a result, only notified bidders can prepare the bidding documents. The shortened deadlines are often justified by false claims of urgency that requires a shorter tender period,⁹⁶ but in fact, their purpose is to exclude undesirable candidates. Time restrictions may also lead to the monopoly situation of a bribing company, resulting in monopoly prices.⁹⁷

4.2. Bidding process

a) *Difficult conditions for obtaining documents*

Sometimes conditions for obtaining the project specifications may allow only the limited number of bidders to do so. For example, they might have to be obtained exclusively on the spot without any possibility available for them to be posted to the potential bidders. Or, the costs for obtaining these documents might be too high.⁹⁸

b) *Confidentiality abuse*

A company may pay to obtain inside information about minimum and maximum price thresholds, average-offer prices, and project evaluation criteria,⁹⁹ and as a result, can obtain the contract formally without any irregularity.¹⁰⁰ Although corruption in the divulgence is difficult to prove in court, it is also difficult for a company to be sure that it is the only buyer¹⁰¹ - “the value of ‘confidential’ information is inversely proportional to the number of people who possesses

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Beth, *supra* note 61, at 92.

⁹⁹ Rose-Ackerman, *supra* note 25, at 27.

¹⁰⁰ Søreide, *supra* note 26, at 15; see also della Porta, D., Vanucci, A. (2001): *Corrupt Exchanges: Empirical Themes in the Politics and Political Economy of Corruption*, 9-10.

¹⁰¹ Rose-Ackerman, *supra* note 25.

it”.¹⁰² Besides, it has no judicial guarantee of obtaining what it has paid for (unless the courts are corrupt as well).¹⁰³

c) *Split contracts*

In some cases, large contracts can be split up into several smaller ones, so that they will be exempt from an open bidding process and avoid legal obligations regarding publicity. As a result, these contracts can be awarded to “ghost” companies.¹⁰⁴ Although the bills are submitted under different company names, in fact all the work is done by the same company.¹⁰⁵ For example, instead of purchasing a large quantity of personal computers in one process, the contract may be split in several direct purchases, avoiding an open tendering process.

d) *Collusive agreements*

Sometimes companies that are regularly selected may collude amongst themselves or with contracting authorities to secure contracts without having to compete. This practice enables them to share markets by dividing contracts among themselves according to their own criteria (work planning, difficulty of the work, deadlines etc.). As a result, those in collusion increase prices to be able to “compensate” their colleagues who have not been selected because of artificially losing bids, or not presenting offers (through subcontracting or various forms of compensation) and decision-maker (via commissions).¹⁰⁶

4.3. Bid evaluation and award

a) *Short-listing/ pre-qualification*

When short-listing/ pre-qualification are applicable in order to limit the number of competitors according to their previous experience, a company may pay a bribe to be included in the list of pre-qualified bidders.

¹⁰² *Ibid.*; see also della Porta, D. and Vanucci, A. (2001): *Democracy and Corruption in Europe*, 9.

¹⁰³ Søreide, *supra* note 26, at 5.

¹⁰⁴ Raigorodsky, *supra* note 80, at 162.

¹⁰⁵ Bueb, *supra* note 82, at 164.

¹⁰⁶ U4, Corruption in Public Procurement, *supra* note 83; see also Beth, *supra* note 61, at 94.

b) *Biased criteria*

Decision makers may be biased due to involvement of bribes or conflict of interest. This corrupt behavior may remain unnoticed, when selection criteria stated in tender documents are vague enabling the classification of bids to be changed and leaving room for subjective evaluation of bids and biased assessments.¹⁰⁷

5. Mechanisms used during contract implementation

Corruption can also take place once the contract has been awarded. There are following possible forms of misappropriation during the implementation of the contract:

a) *Lower quality*

Winning bidders/ contractors compensate bribes and other extra payments with poor quality, defective or different specifications than those contracted.¹⁰⁸ It can happen that contracts are awarded and prices are agreed on based on the reputation of international companies, and in fact the work is carried out by consultants from local companies who lack experience and qualifications.¹⁰⁹ Another example is delivery of goods of lower quality than that specified in the contract. Lower quality is difficult to detect, especially in works, since its consequences do not appear immediately.

b) *Modified orders*

Sometimes after the award, substantive changes may be introduced to the contract such as changes in specifications or cost increases. But it can also happen, that the supplier is asked to change the order for a less expensive product just before delivery. Since the product is already billed and the price is higher than that of the goods delivered, the supplier posts a credit voucher or cheque equal to the difference to an account in a name not identical, but so similar to that of the authority, that a “mistake”

¹⁰⁷ Bueb, *supra* note 82, at 165.

¹⁰⁸ TI Handbook, *supra* note 84, at 19.

¹⁰⁹ Sacerdoti, G. (2005): *Main findings of the Forum Workshop on “Identifying Risks in the Bidding Process to Prevent and Sanction Corruption in Public Procurement”*, in OECD: *Fighting Corruption and Promoting Integrity in Public Procurement*, 156, http://www1.fidic.org/resources/integrity/corrupt_proc_OECD-rapport-2005-aase.pdf (accessed 14 February 2009).

can easily be made.¹¹⁰ To make this process work, it is necessary that the purchaser be in collusion with the person in charge of verifying the goods supplied since they do not conform with those in the invoice.

c) *Sub-contracting*

The involvement of a large number of firms, either members of a consortium which has been awarded a contract or a group of sub-contractors, is an easy way to hide fraud and corruption. The risks for corruption are becoming higher when a cascade sub-contracting takes place, that is, sub-contractors themselves sub-contract work, since there is often little or no vigilance over the selection of the sub-contractor. These cascaded contracts can be used to produce amounts to be remitted afterwards to the decision-maker using methods of false invoices or undeclared work.¹¹¹

d) *False payment claims*

Contractor's claims are false, inexistent or inaccurate, and nonetheless they are filed and protected by those in charge of revising them.¹¹² A claim may be considered false in case of submission of the invoice for the services not rendered, goods not delivered or delivered of lower quality than that specified in the contract as well as false documents during the bid or in an effort to get the invoice paid.

e) *Double (or multiple) payments*

Another mechanism is paying for a study, which has already been received but under another title, and has been paid for. This practice, known as "recycling", is quite profitable, easy to use (even several times), and hard to detect without knowledge of the existence of the initial study issued under a different name.

f) *Late payments*

Late payments of invoices, postponement of payments to have prices reviewed in order to increase the economic value of the contract.¹¹³

¹¹⁰ Bueb, *supra* note 82, at 166.

¹¹¹ Beth, *supra* note 61, at 102.

¹¹² U4, Corruption in Public Procurement, *supra* note 83.

¹¹³ OECD (2007): *Integrity in Public Procurement: Good Practices from A to Z*, 25.

6. Mechanisms used during contract supervision

a) *Biased decisions*

Contract supervisors and auditors (where applicable) may be “bought” or biased due to the conflict of interest. As a result, they are closing their eyes to all the false claims, certificates, changes in quality, specifications etc.

b) *Inability or failure to apply penalties*

Sometimes it is impossible to apply sanctions for violations of the specifications due to the deliberate omission of the relevant clauses (for example, penalty clauses for the missed deadlines, modified orders, etc.) from the contract or unwillingness of the decision-maker to enforce them.¹¹⁴

F. What can be done by MDBs to tackle corruption?

At the 11th *International Anti-Corruption Conference* in May 2003, anticorruption activists stated that “[w]hen international agencies are found to have financed [. . .] corrupt transactions, they - not the consumers - must bear appropriate responsibility for outstanding loans and credits.”¹¹⁵

In fact, the role of the MDBs in public procurement is complex. On the one hand, they are funding projects and bearing the main responsibility for defining, planning and supervising them. But on the other hand, the mandates, powers and jurisdictions of the MDBs are in the most cases limited. For example, the MDBs, as administrative organizations, can exercise administrative sanctions. They do not, however, have the *subpoena* powers or the prosecutorial powers of governmental agencies. The success of these institutions’ efforts to fight corruption relies to a great extent on cooperation with law enforcement, other state agencies and with other organizations.¹¹⁶

¹¹⁴ Bueb, *supra* note 82, at 165-166.

¹¹⁵ Vallette, J. (2003): *World Bank Knew about Enron’s Payoffs in Guatemala*, citing *Final Communiqué of Anticorruption Activists, 11th International Anti-Corruption Conference*, Seoul, Korea (May 2003), <http://www.corpwatch.org/article.php?id=7828> (accessed 26 October 2009).

¹¹⁶ Sacerdoti, *supra* note 109, at 159-160. This can explain, for example, why in Lesotho case, the World Bank had to rely on Lesotho prosecutors and court proceedings, to provide the evidence of what took place in order to be able to debar the companies that had engaged in corrupt practice in the project funded by the World Bank. See case study in Chapter IV, C (10).

To improve aid effectiveness through better coordination mechanisms, the official donor aid community initiated in 2003 an *Aid Effectiveness High Level Forum* (HLF) in Rome.¹¹⁷ In Paris Declaration, adopted as an outcome of the Second HLF in 2005 the official donors undertook some commitments on governance, transparency and mutual accountability. During the Third HLF in Accra, in September 2008, an issue of the lack of transparency on how official donor monies were being spent was raised, which was later included in the final resolution “*The Accra Agenda for Action*”.¹¹⁸

Discussing the role of the MDBs at reducing corruption, *Winters* suggests distinguishing between efforts on a *micro level* - in projects and programs financed by the MDBs, at a *middle level* - within societies, and at a *macro level* - in relations and transactions among countries globally.¹¹⁹ According to him, the most efficient strategy for the MDBs to combat corruption would be to focus on micro level (Bank project supervision) and macro level (international coordination). Combating corruption within countries is not MDBs’ job, but that of each society, which is better equipped to put in place checks and balances. MDBs can and should help countries that request them to support their efforts in reducing corruption (for example, conducting reform of the civil service or of budgetary and financial management systems, and strengthen international cooperation and coordination in this regard), but it is not right to make reducing corruption across the country the centerpiece of their response to this problem.¹²⁰

The core of the MDBs response to corruption should be supervision and auditing of their own loans - that is where they can control through their internal procedures how these loans are used and take necessary steps in case of their misallocation. *Rose-Ackerman* argues that aid and lending organizations must review their own control mechanisms to remove their shortcomings, and either carry out the oversight function

¹¹⁷ Kaufmann, *supra* note 37, at 26.

¹¹⁸ *Ibid.*

¹¹⁹ Winters, *supra* note 23, at 104. Although Winters refers to the World Bank, this approach can apply to all MDBs.

¹²⁰ *Ibid.*, at 105. Winters regrettably argues that the World Bank has decided to focus exactly at the middle level of corruption problem. For example, about 20% of the Bank’s lending goes to governance and public sector reform, see World Bank website at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20040922~menuPK:34480~pagePK:34370~theSitePK:4607.00.html> (accessed 16 October 2009).

themselves, or involve outside observers to do it for them.¹²¹ They should realize that a problem exists and take the necessary steps to reduce the harm caused by corruption in aid and lending projects.¹²²

On 14 November 2005 the ex-US President George Bush signed into law legislation urging stricter anti-corruption controls in the MDBs.¹²³ The new law contains provisions requiring financial disclosure by development bank employees similar to that required for U.S. government officials and members of Congress; improvement of the quality and oversight of development bank loans; strengthening of whistleblower policies; and support of the independence and efficacy of the audit functions. Welcoming the legislation, *Patricia Adams* said that it “would help reduce the endemic corruption that has plagued MDB projects, but only if implemented fully and effectively by the boards of the MDBs”.¹²⁴

From my point of view, MDBs should keep funding projects even in countries with high level of corruption, since the poorest people in the world quite often live exactly in those countries where corruption is indeed a real problem for the whole society. But by doing so, they should at the same time launch country assistance programs focusing on governance and anti-corruption issues in order to ensure the recipients’ compliance to the anti-corruption measures. Besides, they should have a monitoring mechanism to make sure that these funds are being spent for the intended purpose with remedial measures in place in case of their misallocation. As the chief of the Zambian anti-corruption task force told diplomats from rich nations, “*Don’t sit silent. You don’t know how much influence you have.*”¹²⁵

¹²¹ Rose-Ackerman, *supra* note 25, at 182.

¹²² *Ibid.*

¹²³ Multilateral Development Bank Law, 14 November 2005, <http://www.odiousdebts.org/odiousdebts/publications/MultilateralDevelopmentBanklaw.pdf> (accessed 9 October 2009).

¹²⁴ Odious Debts Online (2009): *World Bank Reform Signed into Law*, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=15484> (accessed 9 October 2009).

¹²⁵ Dugger, C.W. (2009): *Battle to Halt Graft Scourge in Africa Ebbs*, <http://www.nytimes.com/2009/06/10/world/africa/10zambia.html?em> (accessed 26 July 2009).

CHAPTER II. DEBARMENT AS AN ANTI-CORRUPTION TOOL

A. Introduction

Despite existence of laws and regulations forbidding corruption, it still takes place on a broad scale. As it was mentioned before, in order to fight corruption there is an increasing tendency of developing and implementing debarment policies both at national and international level. One of the oldest debarment systems is the one in the US, which can apply based on the anti-trust violations, tax evasion and false statements as well as bribery in procurement-related activities. Currently, many other countries have or plan to introduce it.¹²⁶ At the international level the oldest debarment policy is that of the World Bank, which was made publicly available in 1998. By now, all other MDBs also have debarment systems in place.

1. Historical background of debarment

Blacklists have existed for centuries to identify undesirable individuals or organizations for the purpose of discrimination. History of blacklisting traces back to the Middle Ages, where there were the lists of the towns and population affected by the plague, later the lists of evangelic villages and persons in the period of recatolization or lists of the persons allegedly possessed by the Devil and suspected of sorcery.¹²⁷

Majority of blacklists nowadays are legal. For example, it can be a list of persons involved in the organized crime, a list of unreliable airlines or a list of unreliable clients who have not paid their bills and are denied credit privileges.

¹²⁶ In 2005 these countries included: Bangladesh, Brazil, China, the Czech Republic, France, Germany, India, Kenya, Nepal, Pakistan, the Philippines, Romania, Senegal, Singapore, South Africa, South Korea, Sweden, Tanzania, Turkey, Uganda, the United States and Zimbabwe. See Olaya, J. (2005): *Blacklisting Corrupt Companies*, in: Transparency International, *Global Corruption Report*, 60, http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2005#download (accessed 30 January 2009).

¹²⁷ Vymětal, P. (2007): *Blacklisting and Public Procurement*, in: Transparency International - Czech Republic, *Blacklisting in the Public Procurement System*, 25, http://www.transparency.cz/pdf/vz_cernelistiny2007_en.pdf (accessed 3 April 2009).

But since the purpose of blacklists is to exclude and discriminate, sometimes they can also result in unfair and illegal discrimination. The examples can include lists of dissenters in non-democratic regimes, list of individuals who will not be allowed entry into the country or who will be denied access to employment.¹²⁸

There can also be some variations of blacklisting. One of them is blackballing, the manner, in which some private (“gentlemen’s”) clubs allow any existing member to reject the application for the membership of the new candidate in such a manner that he throws at voting the black ball into the ballot box among the other (white) balls.¹²⁹ Another variation is blocklisting used in the past in the United States to exclude, reject and discriminate Afro-American population in different areas of life.¹³⁰

2. Blacklisting vs. white listing

Blacklists often apply, whether formally or informally, in combination with so-called white lists. As it appears from the name, white lists are the opposite of the blacklists, comprising the reliable and trustworthy entities, which fulfill certain preconditions for qualification, do not break the valid rules and act ethically. In principle, white listing is connected with the certification, the main purpose of which is to grant the mark of quality and trustworthiness to those products and entities, which fulfill the pre-established criteria. Examples of certification include declaration on conformity with EU standards, homologation certificates, hygienic and ISO standards etc.

In the field of public procurement white listing can be considered as an incentive instrument whereby companies eligible to participate in tendering are pre-selected because they have demonstrated the ability to perform in a responsible manner and the willingness to abide by applicable rules and regulations. Their reliability is judged upon the pre-established criteria. For example, in the EU-wide study on procurement and organized crime, the possibility of creation of an EU-wide White List was

¹²⁸ For example, during the cold war motion picture companies, radio and television broadcasters, and other firms in the entertainment industry in the US developed blacklists of individuals accused of being pro-Communists. Those companies then denied employment to those whose names were on those lists. See Vaughn, R. (1972): *Only Lies: A Study of Show Business Blacklisting*.

¹²⁹ Vymětal, *supra* note 127, at 29.

¹³⁰ *Ibid.*

suggested for discussion. To be put on the White List, the tenderer should demonstrate that within the EU territory he/she:

- has no past involvements in financial crimes or irregularities of any kind;
- has never been in breach of contract through the quality of work;
- has never failed to pay social security contributions;
- has no outstanding tax or duties debt;
- is not blacklisted;
- has never had a professional or other license withdrawn.¹³¹

Under the suggested criteria, the tenderer also volunteers to have checks being carried out by the national authorities in the Member States, which will be taken into account not only in this country but throughout the EU, and agrees to his details being kept by the EU coordinating body on procurement.¹³²

An EU White List would compliment blacklists existing in some Member States. The difference between these two lists is that not being on the white list would not automatically lead to exclusion from tenders.

The problem with white lists is that it is easier to buy a certificate than to be removed from the blacklist using unfair practices. For this reason, although blacklisting and white listing usually apply concurrently, on practice blacklists are applied more often than certification, at least in the case of the public procurement. *Vymětal* argues, that “if the entity is to be put on the grey¹³³ or blacklist in the consequence of suspicion of the corruption and misuse of public means, the costs for avoiding this (pay to avoid costs), and thus also the necessity to corrupt the debarment process are much higher than in the case of the white lists. In that case the costs for including in the white list

¹³¹ White, S. (Ed.) (2000), *Procurement and Organized Crime: An EU-Wide Study*, 34.

¹³² *Ibid.*

¹³³ *Grey lists* are the certain transitional type between the blacklists and white lists. They are the lists of the entities, the rights of which are suspended or limited temporarily for the reason of the suspicion of the breach of rules, possibility of continuing these activities and high probability of their including in the blacklist. The main purpose of their use is to prevent the serious failures arising from continuing of the unfair activities of the entity. However, the incurred losses (whether economic or non-economic) are usually not compensated in the case of not proving of the wrongdoing. See *Vymětal*, *supra* note 127, at 29.

and also the possibility to manipulate the certification process in its favor are lower (pay to get a benefit)”.¹³⁴

B. Debarment in the Realm of Public Procurement

Although debarment is also applicable to other resource allocation processes where there is a granting principal and a beneficiary responsible of performing services or delivering goods (for example, grants, fund allocation systems, etc.),¹³⁵ for the moment, one of the most discussed applications of blacklists is connected to the public procurement as one of the tools which might potentially help to prevent losses and costs related to corruption in the field of public procurement.

In 2005 Transparency International published a list of recommended minimum standards to be applied to all public contracts.¹³⁶ Blacklisting the companies and debarring them was listed as standard No.3.¹³⁷

Being a restrictive measure, debarment is based on the idea that only those companies and individuals who play fairly to win a competition for public funds can be awarded a contract. The aim is to protect these funds from those using unfair practices, in which case they are disqualified and forced to change their policy. The United States Federal Government links debarment to the concept of “responsibility”, requiring that contract awards be made only to “responsible” bidders, offerors, or sources.¹³⁸ *Sope Williams*, having the same approach in so far as the idea of responsibility is concerned, argues that exclusions which are directed towards maintaining the integrity of the procurement process protect the government since the latter only transacts with responsible contractors and is prevented from entering into business

¹³⁴ Vymětal, *supra* note 127, at 38-39.

¹³⁵ Transparency International (2006): *Publicity of Debarment and Current Debarment Systems in Place in International Organizations and Some Countries*, 1 (hereinafter, TI, Publicity of Debarment).

¹³⁶ TI Minimum Standards, *supra* note 14.

¹³⁷ “3. Maintain a blacklist of companies for which there is sufficient evidence of their involvement in corrupt activities; alternatively, adopt a blacklist prepared by an appropriate international institution. Debar blacklisted companies from tendering for the authority’s projects for a specified period of time.”

¹³⁸ Schooner, S.L. (2004): *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, Public Procurement Law Review, Vol.13, No.3, 212.

with an unreliable contractor, evidenced by that contractor's lack of business integrity.¹³⁹

Considering the above-mentioned and using the language of *Moran et al.*, debarment in relation to the public procurement can be defined as a process, whereby a company (and usually the companies with which its directors or principles are engaged) or an individual is formally prohibited from tendering for further projects that the donor is funding (or supporting the funding for) for a specified period of time if, after enquiry and examination by the donor, wherever in the world the projects may be, and whatever they may involve, that company or individual has been convicted of having been involved in the use of corruption to secure previous or ongoing projects.¹⁴⁰ In this context, corruption should be considered as the payment and receipt of some benefit, financial or in kind, between a public official and a company or an individual, that gives some advantage to the latter.

Thus, in principle, debarment process is a possibility to create lists of untrustworthy, unreliable and irresponsible companies and individuals, on the basis of which it would be possible to prevent participation in public contracting of those competitors, with whom it has been proven that they participated in acts of corruption in any of the phases of the public procurement cycle.¹⁴¹

All MDBs following the example of the World Bank, have introduced debarment to deter and – if detected – sanction those companies or individuals that have engaged in fraud or corrupt practices. The EBRD's decision of 8 February 2007¹⁴² on debarment of the German consulting engineer Lahmeyer International based on evidence of fraud in connection with a project financed by the World Bank, makes it increasingly likely

¹³⁹ Williams, S. (2006), *The Mandatory Exclusions for Corruption in the New EC Procurement Directives*, 9, http://www.nottingham.ac.uk/shared/shared_procurement/publications/Sope_Exclusions_in_proc.pdf (accessed 6 April 2009).

¹⁴⁰ Moran, J., Pope, J., Doig, A. (2004): *Debarment as an Anti-corruption Means: a Review Report*, 5, <http://www.u4.no/themes/debarment/debarmentreport.pdf> (accessed 6 April 2009).

¹⁴¹ Ondráčka, D., Cisařová, E. (2007): *Blacklisting in the Public Procurement System*, 25, in: Transparency International - Czech Republic, *Blacklisting in the Public Procurement System*, http://www.transparency.cz/pdf/vz_cernelistiny2007_en.pdf (accessed 3 April 2009).

¹⁴² EBRD, *Procurement – Fraud and Corruption*, <http://www.ebrd.com/oppo/procure/guide/fraud.htm> (accessed 30 January 2009).

that cross-debarment, that is, debarment by one MDB will lead to debarment by another, could become a new trend.

C. Debarment Procedure

1. Pre-debarment stage

Debarment may be preceded by so-called “pre-debarment stage”, whereby companies or individuals are warned of likely debarment should the conduct persist, the conduct be repeated, or occur under aggravated circumstances. This “notice” would be given on the grounds of proportionality and in order to leave debarment as a last resort in cases where, for example, the alleged behavior is real but negligible.¹⁴³

2. Grounds for debarment

The criteria by which the contracting authority can justify debarment may include a confession by someone involved in the corruptive activities, reliable information by third parties, circumstantial evidence as well as evidence and convictions emerging in courts.

The grounds for debarment can range from failure to meet contract specifications to corruption and in case of administrative approach shall be determined and publicized in advance. *Sope Williams* distinguishes three kinds of behavior, which can result in debarment.¹⁴⁴ First, debarment could be directed at past violations of law, ethics, or anti-corruption norms that are unrelated to public procurement. Second, a supplier may be debarred from a particular procurement for a breach of the rules of that process without any consequential effect beyond the particular contract. Third, a supplier could be excluded from future contracts for past procurement violations.

¹⁴³ Transparency International (2006): *Recommendations for the Development and Implementation of an Effective Debarment System in the EU*, 7, (hereinafter, TI Recommendations), www.transparency.org/content/download/5661/32802/file/TI_EU_Debarment_Recommendations_06-03-28.pdf (accessed 30 May 2009).

¹⁴⁴ Williams, S. (2007): *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, Public Contract Law Journal, Vol.36, No.3, 284.

3. Judicial vs. administrative debarment

An investigation that could lead to debarment may be triggered by an existing judicial decision, or when there is a strong evidence of unethical or unlawful professional or business behavior.¹⁴⁵ The first form of debarment, considered as mandatory, requires a contracting body to exclude from tendering any company or an individual, which has been convicted of corruption.¹⁴⁶ This means, that debarment should be automatic in cases of a final criminal conviction ("*res judicata*") in any state with a functioning legal system based on the rule of law.¹⁴⁷ The second form of debarment is discretionary ("*non res judicata*") and based on "sufficient evidence", does not depend on a conviction and is used in cases of "grave professional misconduct".¹⁴⁸ In principle, it allows a much more timely and effective intervention.

In other words, debarment procedure can be either judicial (involving the courts) or administrative (part of the procurement procedure) in nature. *Moran et al.* point out that although the grounds for debarring a person or company may highlight evidence of criminal wrongdoing, the judicial procedure, unless the very material breach of the legal order is concerned, may lead to serious delays and is unnecessary.¹⁴⁹ Conversely, administrative process, with sufficient checks and balances, is faster, less costly and less complex, and thus is more effective.¹⁵⁰ Especially in the field of corruption it turns out that the best way to tackle corruption is not adopting new laws and legal procedures, but adopting flexible administrative and organizational approach.¹⁵¹

In practice, majority of debarment systems in place both nationally and internationally apply an administrative approach. The arguments brought against involving courts in debarment procedure are as follows:

¹⁴⁵ Olaya, *supra* note 126, at 59.

¹⁴⁶ For example, exclusion under the EU Procurement Directives.

¹⁴⁷ TI Recommendations, *supra* note 143, at 6.

¹⁴⁸ *Ibid.* For example, debarment by MDBs.

¹⁴⁹ Moran et al., *supra* note 140, at 17.

¹⁵⁰ Drew, K. (2005): *The Challenges Facing Debarment and the European Union Public Procurement Directive*, in: OECD: *Fighting Corruption and Promoting Integrity in Public Procurement*, 268-269, http://www1.fidic.org/resources/integrity/corrupt_proc_OECD-rapport-2005-aase.pdf (accessed 1 June 2009).

¹⁵¹ Moran et al., *supra* note 140, at 23.

a) *Limited number of criminal convictions*

In corruption cases there are often no direct victims to raise a case and no direct witnesses to the act. As a result, not every allegation of corruption can be investigated, and relatively high thresholds will be needed to screen out vexatious complaints¹⁵² though the problem of corruption in public procurement remains alarmingly high.¹⁵³ This makes a system based solely on criminal convictions limited in scope and effectiveness. If, for example, a prosecution fails to get a conviction against an individual suspected in corrupt practices, perhaps for technical reasons, the company this individual is employed by cannot be debarred. Besides, a court-based process will most likely have stricter procedural requirements but will be less efficient, since evidential requirements will be at their most demanding.¹⁵⁴

b) *Untimely outcome*

Debarment should protect the integrity of public funds by keeping corrupt companies and individuals away from public contracts. As it may take many years before a conviction is reached, the debarment of a tenderer often applies too late to have a deterring effect as more funds may have been misappropriated and the direct perpetrator may already have left the company. The time delay can also result in unfairness in the debarment, since the company may have introduced significant changes in its anti-corruption policies since the beginning of the trial. Administrative procedures allow for much quicker action, keeping the crucial deterring effects of the debarment system, while maintaining a due process similar to the courts.¹⁵⁵

c) *Non-compliance with court decisions*

There is the risk that donor agencies may not respect the court decisions debarring the company and will insist on its being entitled to tender for projects that they are

¹⁵² *Ibid.*, at 17.

¹⁵³ Only four countries of 36 signatories of the OECD convention on countering bribery (adopted in 1999) did judicial enforcement in 2005. This was despite the fact the 60% of the respondents to the World Business Environment Survey indicated that a bribe above 5% of the value of the contract is typically needed in doing business with the government (WBES 2000). See Transparency International (2007): *Policy and Guidelines on Fighting Corruption, Fraud, Money Laundering and the Financing of Terrorism*, a draft submitted to the European Investment Bank, 5, (hereinafter, TI Submission to the EIB), www.eib.europa.eu/attachments/strategies/comments_first_round_TI.pdf (accessed on 1 May 2009).

¹⁵⁴ Moran et al., *supra* note 140, at 17.

¹⁵⁵ TI Submission to the EIB, *supra* note 153.

financing (in the name of “international competitive bidding”) or the financing will not go ahead.

4. The objectives and impact of debarment

As argued by *Thornburgh*, the short-term goal of debarment is to protect the donor’s funds, while the broader goal is “to segregate out firms that engage in fraud and corruption so as to leave a pool of honest and capable firms to undertake projects”.¹⁵⁶ These goals can be achieved through the following impact of debarment:

a) *Incapacitation*

Debarment precludes a firm/individual from engaging in future corrupt and/or fraudulent practices at least for as long as it persists. This can be considered as an analog of imprisonment in the criminal justice context, when the defendant is unable to harm others at least for a period of time.¹⁵⁷ As *Giudo Penzhorn* claimed, because firms cannot be sent to prison, the only penalty that would match taking away a natural person’s liberty is “sanctions by the international donor/lending agencies”.¹⁵⁸

b) *Deterrence*

Only the fact of the existence of debarment procedures and their likely enforcement can have psychological influence on those bidding for public contracts since the consequences of being debarred can be quite serious. *Schooner* compares the threat of debarment with a Sword of Damocles.¹⁵⁹ Benefits derived from such a sword are due to fear which serves as a useful incentive. Being aware of all the risks arising from corruption (harm to their reputation, banning from participation in tenders for a certain period of time, increased possibility of being investigated criminally), the companies/ individuals can be discouraged from the idea of acting in a corrupt manner, for example, winning a contract through bribery. That is exactly the aim of

¹⁵⁶ Thornburgh, D., Gainer, R.L., Walker, C.H. (2002): *Report Concerning the Debarment Processes of the World Bank*, 60.

¹⁵⁷ *Ibid.*, at 59, 61.

¹⁵⁸ Penzhorn, G. (2004): *Comments on the Current Lesotho Bribery Prosecutions*, <http://www.odiousdebts.org/odiousdebts/publications/SenatePaperJuly04.pdf> (accessed 8 October 2009).

¹⁵⁹ *Schooner*, *supra* note 138, at 215.

debarment – to ensure a certain change in the acting of competitors finding themselves in this moral dilemma.

c) *Incentive*

While the individual wrongdoers within the corporation may be, and often are, debarred as individuals, their conduct can also be imputed to the entire corporation, if the actions are intended, at least in part, to benefit them. In this case not only the company's future is at stake, but also its affiliates, principals and employees, as well as its stockholders. And although the corporations themselves can be victims of the wrongdoings, they are held accountable if they do not eliminate conditions which might lead to wrongdoings. Any allegation of improper activity has the potential for a determination of non-responsibility.¹⁶⁰ Thus, when wrongdoing is committed on behalf of or for the benefit of the organization, corporations that ignore responsible governance¹⁶¹ or fail to demonstrate that the errors were inadvertent, and occurred despite the exercise of reasonable care¹⁶² run a higher risk of being debarred from public contracting. Therefore, companies are encouraged to set up effective anti-corruption programs and step forward if they discover irregularities. *Richard J. Bednar* suggests the following elements to be the minimum constituent part of an effective anti-corruption program:¹⁶³

- corporate standards of conduct and internal controls;
- support of the standards and controls from the governing authority of the corporation by words and actions;
- communication of the standards and controls to all level of the organization by training and otherwise;
- auditing and monitoring of the effectiveness of the policy;
- an internal system by which employees and agents may report or seek guidance regarding potential or actual violations of law;

¹⁶⁰ Pachter, J.S. (2004): *The New Era of Corporate Governance and Ethics: The Extreme Sport of Government Contracting*, Public Procurement Law Review, Vol.13, No.3, 248.

¹⁶¹ Bednar, R.J. (2004): *Emerging Issues in Suspension & Debarment: Some Observations from an Experienced Head*, Public Procurement Law Review, Vol.13, No.3, 225.

¹⁶² Pachter, *supra* note 160, at 250.

¹⁶³ Bednar, *supra* note 161, at 226.

- disciplinary action for misconduct;
- prompt correction of failures in internal controls.

Thus, debarment of the companies is intended, *inter alia*, to encourage them and others to raise their standards of conduct to a level where they can demonstrate their commitment to transparency and honesty during the public procurement procedure. Another way to demonstrate a responsible behavior by companies and individuals is a voluntary disclosure, whereby they communicate information concerning errors, omissions, irregularities or illegal acts committed by them or by others as well as results of an internal investigation into past corrupt acts in these projects to donor agencies or relevant public authorities. In return for their cooperation, the self-disclosers can expect some leniency to be exercised. They can avoid debarment in case they do not engage in further misconduct, their identities are being kept confidential, and they remain eligible to participate in tender procedure.¹⁶⁴

Clearly, the availability of debarment will strengthen transparent and open public contracting, but by itself it will not be able to create clean markets. As in anti-corruption strategies generally, there is no “silver bullet”,¹⁶⁵ debarment should only be seen as an effective complement to other preventive and remedial measures taken in order to tighten up public procurement procedures.

5. Elements of debarment procedures

To be efficient and achieve their objectives, debarment procedures tend to fulfill certain criteria. When debarment is carried out by state authorities, these criteria are set by law, constituting thereby legally binding requirements. On the other hand, in international organizations debarment is regulated by their internal rules and procedures. Therefore, the latter cannot be considered as requirements in a legal sense, but rather as voluntary criteria adopted from national laws, and in particular those of the US, to avoid a public criticism and be accepted by the parties involved. This could be compared with an issue of procedural guarantees in the alternative

¹⁶⁴ The Voluntary Disclosure Program exists in the WB, AfDB, European Commission, the United States, Japan, Brazil, and some other countries.

¹⁶⁵ Moran et al., *supra* note 140, at 16.

proceedings in lieu of the criminal prosecution (i.e. mediation, reconciliation etc.). This similarity makes the elements of debarment procedure be handled as “requirements”, which are set forth below.

a) *Fairness*

All rules and procedures relating to debarment should meet due process requirements. This means that companies and individuals facing debarment should be given an adequate opportunity to defend themselves, which is, first of all, the opportunity to be heard by presenting evidence before the decision-making body.¹⁶⁶ In its discussion paper, the UK Anti-Corruption Forum makes recommendations concerning fairness of debarment procedures, which varies depending on whether debarment is of mandatory or discretionary nature.

i) When a company or an individual has been convicted of corruption, and is facing *debarment under a mandatory procedure*, the UK Forum suggested the following recommendations:¹⁶⁷

- If the company or the individual facing debarment is appealing the conviction, the debarment should not take effect or be publicized unless and until the conviction is upheld by the appeal body.
- The company or the individual facing debarment should be permitted a reasonable time, prior to the debarment becoming effective, to present evidence to the debarring authority that the conviction was obtained in a jurisdiction which did not follow due judicial process. If the company or an individual can provide satisfactory evidence to this effect, debarment should not be implemented under the mandatory procedure.

¹⁶⁶ Friend, J. (2002): *Debarment, Blacklisting and Due Process*, http://www.ecaonline.net/March_2002x.html (accessed 29 May 2009).

¹⁶⁷ UK Anti-Corruption Forum (2007): *Fair and Efficient Debarment Procedures*, 2, http://www.anticorruptionforum.org.uk/acf/fs/groups/fair_efficient.pdf (accessed 30 January 2009). Although the discussion paper refers only to companies, it should be interpreted in a broader sense extending to individuals as well.

ii) When a company or an individual is accused of a corruption offence, and is facing *debarment under a discretionary procedure*, the UK Forum suggested the following recommendations:¹⁶⁸

- The company facing debarment should be notified about the initiation of the process, the grounds for it and provided with the evidence that it was involved in a corrupt act.¹⁶⁹
- The company facing debarment should be permitted a reasonable time to prepare its defense against the allegations.
- The company facing debarment should be permitted to deny, correct or clarify the facts that underlie the accusation and to provide the debarring authority with its documentary and witness evidence, and legal argument.¹⁷⁰
- The debarring authority should only debar when it is satisfied beyond all reasonable doubt that the company facing debarment was involved in a corrupt act.¹⁷¹
- The company facing debarment should be allowed a reasonable time to appeal the debarment decision to an independent appeal body.
- If the company facing debarment does appeal the decision, the debarment should not take effect or be publicized unless and until the debarment decision is upheld by the appeal body.
- Where a company has been convicted or debarred, and the company is appealing such conviction or debarment, a procuring entity shall be entitled to request the company facing debarment to provide reasonable

¹⁶⁸ *Ibid.*

¹⁶⁹ See also TI Recommendations, *supra* note 143, at 6.

¹⁷⁰ *Ibid.*

¹⁷¹ As it will be shown in the following Chapters, the MDBs took a different approach in this regard. |

proof that it has implemented an effective anti-corruption program as a condition of allowing it to tender during the period prior to the appeal being decided.

b) *Proportionality*

For some companies, being debarred might mean bankruptcy. But since the aim of this measure is rather to force companies to act correctly and change their policies, the penalties should be reasonable and the debarment period should be proportional to the type and severity of the conduct that led to the process in the first place.¹⁷² The following factors should be taken into account in determining the length of the debarment period:¹⁷³

- the severity of the offence;
- the magnitude of the loss caused by the offence;
- whether it is a first offence or a repeated offence;
- the seniority of the relevant individuals responsible for the offence;
- whether the board of the company had authorized or acquiesced in the offence;
- the steps taken by the company to prevent the offence occurring, that is, whether the company had effective standards of conduct and internal control systems in place at the time of the offence;¹⁷⁴
- whether the company/ individual reported the offence to the debarring authorities;
- whether the company has fully investigated the circumstances of the offence and, if so, made the result of the investigation available to the debarring authorities;¹⁷⁵
- the extent to which the company/ individual co-operated with the authorities after the offence had been discovered;

¹⁷² TI Recommendations, *supra* note 143, at 7.

¹⁷³ UK Anti-Corruption Forum, *supra* note 167, at 3.

¹⁷⁴ Zucker, J.S. (2004): *The Boeing Suspension: Has Consolidation Tied the Defense Department's Hands?* Public Procurement Law Review, Vol.13, No.3, 264.

¹⁷⁵ *Ibid.*, at 265.

- whether the relevant individuals responsible for the offence have been dismissed or appropriately disciplined by the company;
- the impact on the company and its non-offending employees of a debarment.

A tariff should be developed and published which lists the approximate length of the debarment taking into account the factors listed above. The intent should be that the debarment creates a result proportionate to the circumstances of the offence.¹⁷⁶ Besides, availability of the mitigating circumstances might promote behavioural change and encourage cases of corruption to be brought out into the open rather than be concealed.¹⁷⁷ Although the threat of debarment must be real and serious, which therefore acts as a deterrent, there should also be incentives for companies to implement anticorruption policies, and to deal openly and actively with respect to suspected acts of corruption.

For example, if a company knows that the same debarment sanction will be applied to it irrespective of whether or not it itself uncovers and reports the offence, it will have no incentive to undertake internal audits and co-operate with the authorities. On the contrary, it is more likely that it will try to hide the offence, since reporting will only alert the authorities and result in no benefit, but only punishment for the offending company. As a result, corruption will be driven underground, when preventing corruption is best achieved by bringing it out into the open.¹⁷⁸

Therefore, debarment procedures should allow for a sliding scale of penalties, that is, provide entry (listing) and exit (delisting) rules.¹⁷⁹ First of all, the length of debarment should take account of the circumstances listed above. Besides, if a company can provide satisfactory proof to the debarring authority that, after the offence, it has implemented an effective anti-corruption corporate program, for example, by enforcing codes of conduct, or changing policies and practices, it should be possible to reduce or lift the debarment.

¹⁷⁶ UK Anti-Corruption Forum, *supra* note 167, at 3.

¹⁷⁷ TI Recommendations, *supra* note 143, at 8.

¹⁷⁸ UK Anti-Corruption Forum, *supra* note 167, at 4.

¹⁷⁹ Olaya, *supra* note 126, at 60.

Many contracting authorities require disclosure by bidding companies of previous debarments. Criminal convictions are treated as “spent”, and do not require disclosure after a certain period. Similarly, after the debarment had been ceased, it should be deleted from the register and treated as “spent”.¹⁸⁰

c) *Transparency*

In order to prevent corruption, the debarment system should be transparent itself. Transparency and effectiveness go hand in hand with each other due to their mutual influence. A system that is not transparent cannot be effective, whereas transparent debarment system will produce the desired impact, that is, deterrence of corrupt behavior and promoting trust among users, managers and providers of funds that are subject to public trust.¹⁸¹

Transparency is rooted in the provision of access to information. The rules regarding debarment procedures, including grounds for debarment and possible penalties, should be made public. It must be quite clear how debarment should be determined; what the range of debarment periods is, and which procedures for appealing or lifting debarment are available.¹⁸² These rules should be part of all the documents in the public contract to be made known to all the parties involved in a public procurement process in advance.¹⁸³

According to Transparency International, the outcome of the debarment procedure should also be public and easily accessible. There should be a register containing details of all debarred companies and individuals, reasons for the debarment, length of the debarment, the name of the project, the country of origin of debarred companies or individuals, as well as the rules governing the process.

Transparency International pointed out several reasons why it is necessary that debarment lists are publicly available:¹⁸⁴

¹⁸⁰ UK Anti-Corruption Forum, *supra* note 167, at 4.

¹⁸¹ TI Recommendations, *supra* note 143, at 4.

¹⁸² UK Anti-Corruption Forum, *supra* note 167, at 3.

¹⁸³ Ondráčka, *supra* note 141, at 15.

¹⁸⁴ TI, Publicity of Debarment, *supra* note 135, at 2.

- The publication of debarment lists will have an important impact on legitimacy, credibility and accountability of debarment agencies. It will also give the possibility for independent parties to monitor the fairness of the debarment system.
- The publication of debarment lists will minimize the risk of the debarment system being subjected to manipulation, abuse and pressure.
- Contracting authorities and organizations, as part of their due diligence, need to know whether or not a company or an individual has been debarred. Therefore, procurement officers who do not have or have only limited access to this information (for example during a tender overseas regarding the debarment system in their home country) may end up evaluating contractors inappropriately.
- Since the main objective of debarment is prevention, it will be more effective if other companies and individuals are aware of debarment of their competitor or business partner engaged in corrupt practices.
- There is always a possibility that the owners of the debarred companies may start up a new company under a new name or simply founded elsewhere. Publicity of debarment lists can help procurement officers and due diligence analysts detect these cases.
- Publicly available debarment lists may facilitate information sharing internationally. Such networking may even reduce operating costs, and make systems more effective. Ideally, one international register should contain details of all debarments, so that information can be obtained from a single source.¹⁸⁵

¹⁸⁵ UK Anti-Corruption Forum, *supra* note 167, at 4.

d) *Timeliness*

Debarment systems should be timely to be able to protect the integrity of funds by keeping corrupt companies and individuals away from public contracts. Delays in beginning of the debarment procedures may result in further misappropriation of funds and lead to the increased costs, as it was discussed above.

CHAPTER III. ANTI-CORRUPTION MEASURES IN MDB-FUNDED PROJECTS

A. General Overview

Any organization sooner or later can become a victim of fraud or corruption. Irrespective of the nature of the organization, that is, whether it is a business corporation, national government agency or international organization, they can respond to these financial crimes in the following ways:¹⁸⁶

- Refer a matter for investigation and criminal prosecution in a nation with domestic jurisdiction over the acts.
- Institute a lawsuit for civil recovery, launched in such a nation against an offending company or individual, but such civil suits can be extraordinarily costly as well as problematic in their outcome, and even if a judgment is favorable, it can prove difficult to collect.
- Refer the matter to supervisory officials in professional or trade associations, or to consumer protection agencies, but such entities are often ineffective and even successful referrals are of limited utility.
- Take preventive actions within their own organizational structure (by means of employee education, regular audits, etc.) to lessen the likelihood of such problems in the future.
- Preclude an offender from future contracts.

National government agencies apply more often debarment in conjunction with a criminal proceeding in the national courts or a civil action for recovery of the loss.¹⁸⁷ To encourage a regular use of debarment, they set up simple procedures whereby the

¹⁸⁶ Thornburgh et al, *supra* note 156, at 2.

¹⁸⁷ *Ibid.*, at 3.

decision to debar is made by a lawyer in the general counsel's office or procurement office after reviewing the agency records of the matter.¹⁸⁸

International organizations can also bring suits to national courts, but because a fraud or corruption has resulted in a loss to an international organization and not to a national economy, there is less incentive for law-enforcement bodies to proceed with the case. As a result, such cases can be so lengthy and costly, that international organizations tend not to refer allegedly corrupt activity to national prosecutorial bodies. Nonetheless, in 2002 the United States District Court for the District of Colombia initiated two cases based on criminal referrals from the World Bank's Legal Department, where former World Bank employees pled guilty to corrupt activity they engaged in while employed at the World Bank.¹⁸⁹ For the first time, an international financial institution (even without a relevant mutual assistance treaty) assisted national prosecutors of a Member government.¹⁹⁰ But these kinds of cases are rare.

Hence, a likely recourse for international organizations is taking preventive measures against fraud and corruption as well as remedial measures of administrative nature as discussed below.

B. Preventive Measures

The projects funded by the MDBs are implemented by means of procurements in the borrowing countries. The actual contracts for their implementation are concluded between these countries and the private contractors. Thus, under contractual arrangements, it is the borrower, and not the MDB, which is responsible for the procurement process. *Meireles* points out the complexity of the relationship between the Bank, the Borrower and bidders. While the Bank and the borrower have a contractual relationship under the Loan Agreement, and the borrower and the bidders build their relationship according to the bidding documents, the relationship between the Bank and the bidders is unclear since they do not have any legal relationship with

¹⁸⁸ *Ibid.*, at 5.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, at 4.

each other.¹⁹¹ However, as it will be demonstrated below, the MDBs impose their own rules and procedures on the procurement process and supervise that the latter are observed.¹⁹²

Based on a “zero tolerance” policy against fraud and corruption in the project they fund, MDBs have to ensure that their funds are only disbursed to finance goods, works and services approved in the Loan Agreement. Therefore, they require borrowers as well as bidders, suppliers and contractors to observe the highest standards of ethic during the procurement procedure and the execution of contracts.

MDBs can prevent fraud and corruption in the projects they fund through effective supervision. This supervision takes place from project design through completion of the project to ensure that necessary management, procurement, and financial controls are in place.

1. Project design

To minimize the risk of fraud and corruption during implementation, MDBs, based on the country risk analysis, identify projects which are particularly prone to corruption, and pay careful attention to these risks when designing projects. Among tools for detecting risks of fraud or corruption during the project cycle are, for example, the Integrity Risks Reviews (IRR) program and the Red Flags Matrix launched by the IADB in 2008. An IRR is a risk analysis based on the collection and analysis of information from the investigated cases. Red Flags Matrix is an interactive checklist for detecting and managing risks of fraud and corruption in the procurement processes of IADB-financed projects which is based on indicators found in the investigations in IADB operations.¹⁹³

¹⁹¹ Meireles, M. C. (2006): *The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects*, 110, http://www.nottingham.ac.uk/shared/shared_procurement/theses/Marta_Meireles_master_FINAL.pdf (accessed 13 October 2009).

¹⁹² Shihata, I.F.I. (2000): *The World Bank's Inspection Panel: In Practice*, 12; see also Arrowsmith et al., *supra* note 78, at 137;

¹⁹³ IADB, *Office of Institutional Integrity: Annual Report 2008*, 15, 17, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1927592> (accessed 25 October 2009).

At this stage, the MDBs also review preparation work done by the borrower and others, including consultants and project cost estimates. As pointed out by *Aguilar*, the latter must be realistic, since excessively generous cost estimates, especially in projects involving only a few large contracts, present a big temptation for fraud and corruption by borrowers and contractors.¹⁹⁴

To ensure integrity in its projects, MDBs include anticorruption clauses and consequences thereof in the loan documents and project documentation and require that their policies and procedures to be applied for the procurement of goods, works, and services as well as for selecting, contracting, and monitoring consultants required for loan and technical assistance projects.

To make sure that even in countries with weak public administration, or lax or non-existent public procurement regulations the project procurement is conducted in an open, transparent, and competitive manner, without interfering in their internal administration, MDBs usually require the use of their own rules and procedures. They become binding on the borrower through their incorporation, with relevant amendments, if needed, in every loan agreement.

The only exception when the national laws can apply, is when MDBs permit a borrower to introduce an undertaking of the bidder to observe, in competing for and executing a contract, the country's laws against fraud and corruption, including bribery ("no-bribery pledge").

The objective of a "no-bribery pledge" is to discourage bribes by committing firms to bid on a bribe-free basis, while ensuring them that competitors are similarly binding themselves. The most basic form of the no-bribery pledge is a letter from the chief executive of each bidding company promising that the firm will obey the laws of the country and not bribe to obtain the contract. This could solve the "prisoner's dilemma" discussed above, but there is always risk that some bidders will sign and

¹⁹⁴ Aguilar M.A., Gill, J.B.S., Pino L. (2000): *Preventing Fraud and Corruption in World Bank Projects: A Guide for Staff*, 13.

bribe again. However, introduction of a “no-bribery pledge” provision might be possible when the laws are satisfactory to the MDBs and the contracts are large.¹⁹⁵

In addition, ADB takes measures to prevent "enclaving" - the creation of quasi-independent units, with their own accounting and reporting procedures, within a broader organization - in the financial management and administration of ADB-funded projects.¹⁹⁶

2. Supervision

During implementation stage, depending on the value of the contract, MDBs can conduct either prior or post review of the procurement arrangements for their conformity with the Loan Agreement and procurement rules and procedures.

Under a *prior review*, all procurement-related documents drafted by the borrower shall be approved by the MDBs before they are released to the public or to bidders.¹⁹⁷ Thus, a prior review is intended to ensure that the procurement process is in conformity with the MDBs’ requirements and prevents misconduct such as a particular bidder-tailored equipment specifications or too short deadlines to benefit the informed bidder. In 2009, the WB developed the Company Risk Profile Database (CRPD), which can alert the operational staff conducting a prior review of possible risks related to companies recommended for contract award.¹⁹⁸ However, prior reviews are applied only to the largest contracts. Thresholds for prior review vary

¹⁹⁵ The use of such pledges has been criticized, mostly by the World Bank Legal Department itself, due to the lack of the judicial and prosecutorial machinery to enforce laws in developing and transitional countries, even when they have in place laws prohibiting fraud and corruption. See Arrowsmith et al., *supra* note 78, at 142.

¹⁹⁶ ADB (1994): *Task Force on Improving Project Quality*, Executive Summary, para. 11, http://www.adb.org/Documents/Policies/Project_Quality/pq000.asp (accessed 26 October 2009).

¹⁹⁷ These document include, *inter alia*, the advertising procedure, prequalification documents when applicable, bidding document and any addenda, bid evaluation and proposal for award of contract, the contract documents and any significant modification agreed during execution.

¹⁹⁸ World Bank (2009): *Integrity Vice Presidency’s Annual Report*, 34 [hereinafter, INT Report 2009], http://siteresources.worldbank.org/INTDOII/Resources/WBG_INTAnnualReport2009_web.pdf (accessed 21 November 2009).

from loan to loan and from country to country and are specified in the procurement schedule of the project's loan agreements.¹⁹⁹

For contracts below prior review threshold MDBs conduct a *post review*, which means that within defined period of time after the closing date of the Loan Agreement, they can request the borrower to provide them with all the major documents referent to the procurement process.

One of the means by which MDBs monitor the progress of the projects they fund and ensure that loan resources are used for the intended purpose is by requiring borrowers and other beneficiaries to provide them with annual audited financial statements and other selective financial information. Audits must be carried out by a competent independent auditing firm, to certify the reliability of the information and data contained in the financial statements.

In addition to the annual financial audits, MDBs can conduct project procurement related audits to detect fraudulent and corrupt practices relating to procurement of goods and services. For this purpose, MDBs may require that a provision be included in bidding documents and in contracts allowing them to do so. Under procurement audit, MDBs review procurement documents, financial management system, contract price analysis and potential conflicts of interest. Besides, they are granted access to the project sites, in order to verify the compliance of the completed work, delivered goods or services provided with the requirements and specifications defined in the contract. However, procurement audits are conducted only in selected projects. Among criteria for their selection are consent of the borrowing country, size of the contract, project implementation phase etc.

Considering the above-mentioned, based on open, competitive tendering with pre-disclosed evaluation and selection criteria, as well as supervision, the procurement rules and procedures of the MDBs should on their own be sufficient deterrents to

¹⁹⁹ WB, *Summary and Detailed Borrower Procurement Reports*, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20251613~pagePK:84269~piPK:84286~theSitePK:84266,00.html> (accessed 21 November 2009).

corruption. But despite this, fraud and corruption still occur in MDB-funded projects. For example, *Winters* estimated the WB's loss to corruption since the beginning of its lending activity at about 30 percent of its funds.²⁰⁰ *Hobbs*, in a more recent research argued that many WB-financed projects were still subject to corruption and as a result were losing from 10 to 15 percent of contract value.²⁰¹

Among the causes which considerably contribute to the misprocurement in its projects, the World Bank pointed out institutional problems in the borrowing countries - such as low pay, lack of experience, lack of effective legislation, cultural practices together with the desire of firms to obtain financed contracts at any cost.²⁰²

The persistence of corruption in spite of the MDBs' efforts could also be explained by insufficient supervisory processes. If they were actually applied, they could detect and prevent many cases of corruption. However, the prior review although being one of the main procurement supervisory tools, is only used on a quarter of Bank contracts due to its applicability only to contracts above a certain value threshold, which varies from case to case.²⁰³ Procurement audits are not conducted that often. And even when these supervisory mechanisms are used, they are unable to detect and prevent corruption in the form of 'speed money'²⁰⁴ or corruption that helps being awarded a contract.²⁰⁵

Another factor explaining the insufficient supervision, as suggested by *Hobbs* in relation to the WB, is recognition by the Bank of the fact that in many countries where corruption is systematic, it is necessary to accept certain amount of corruption in order to ensure success and timely delivery of its projects. Project success is crucial for the Bank to maintain its credibility to creditor countries which make financial

²⁰⁰ Winters, *supra* note 23, at 102, 111.

²⁰¹ Hobbs, N. (2005): *Corruption in World Bank Financed Projects: Why Bribery is a Tolerated Anathema*, 24-29, <http://www.lse.ac.uk/collections/DESTIN/pdf/wp65.pdf> (accessed 16 October 2009).

²⁰² World Bank (1997): *Helping Countries Combat Corruption: The Role of the World Bank*, 2-9 [hereinafter, WB Helping Countries 1997]

²⁰³ Due to the fact that the cost of using prior review is more than 10-15% of contract value, smaller contracts "are not cost-effectively handled through prior review". *Ibid.*, at 15.

²⁰⁴ 'Speed money' is a term used by Hobbs meaning a corruption payment made to foster and facilitate different procedures during procurement in order to fulfil the contract in a timely manner.

²⁰⁵ Hobbs, *supra* note 201, at 22. According to the Bank officers interviewed by Hobbs, these forms of corruption are quite common in World Bank projects, but are rarely detected by the Bank.

contributions and to debtor countries which borrow its funds.²⁰⁶ Thus, it is more rational to continue anti-corruption efforts, but not to spend too many resources trying to bring the level of corruption in the Bank-funded projects to zero. As *Leff* argued, this may outweigh the benefits gained and be a detrimental distraction from policy and projects that could otherwise be much more developmentally beneficial.²⁰⁷

C. Remedial Measures

In pursuing their anti-corruption policies, the MDBs can take the following remedial measures:

- reject a proposal for an award if they determine that the bidder recommended for award has, directly or through an agent, engaged in sanctionable practices in competing for the contract in question;
- cancel the portion of the loan allocated to a contract if they determine at any time that representatives of the borrower or of a beneficiary of the loan engaged in sanctionable practices during the procurement or the execution of that contract, without the borrower having taken timely and appropriate action satisfactory to the Banks to address such practices when they occur;
- sanction a firm or individual, including issuing a letter of reprimand, debarment or imposing debarment-related sanctions, if they at any time determine that the firm/individual has, directly or through an agent, engaged in sanctionable practices in competing for, or in executing, a Bank-financed contract.²⁰⁸

²⁰⁶ *Ibid.*, at 29.

²⁰⁷ Leff, N. (1964): *Economic Development through Bureaucratic Corruption*, in: 8 American Behavioural Scientist, 8-14.

²⁰⁸ Guidelines on Procurement under IBRD Loans and IDA Credits, Art. 1.14(b)-(d), Guidelines on Selection and Employment of Consultants by WB Borrowers, Section 1.22(b)-(d); ADB Procurement Guidelines, Art. 1.14(b)-(d), ADB Guidelines on the Use of Consultants, Art. 1.23(b)-(d); Policies for the Procurement of Goods and Works financed by the IBRD, Art. 1.14(b), Policies for the Selection and Contracting of Consultants financed by the IADB, Art. 1.21(b); AfDB Rules and Procedures for

Thus, not only borrowers are subjected to the remedial decisions, but also bidders despite the non-existence of any contractual connection between them.²⁰⁹

1. Rejection of a proposal for award

Rejection of a proposal for award appears to be part of the procedures for prior review of the procurement process. As argued by *Sope Williams* in the context of the WB, it is not clear how during the review process it is determined that the tender is tainted with corrupt activity, which investigative tools are used, if any, but in any case this procedure is less rigorous than the one leading to a debarment.²¹⁰ Usually, the prior review is only limited to ensuring that the procurement documents comply with the conditions of the Loan Agreement, without verifying the accuracy of those documents²¹¹ and checking whether a bidder is on the list of the debarred firms or individuals.²¹² However, the latter can only show the past practice of the bidder but is not enough to determine occurrence of fraud or corruption in competing for a contract in question. This, coupled with the fact that the prior reviews are conducted only in limited number of contracts, could explain why allegations of fraud and corruption arise mainly after the contract had been awarded. Moreover, if the Bank has sufficient evidence to make such determination during the prior review, it is unclear, why it serves only as a ground for rejection and, thus, affects only bidder's inability to be awarded the contract in question. From my point of view, the language of this provision contradicts the requirement to sanction a firm or an individual, if the Bank *at any time* (emphasis added) determines that the firm or the individual has engaged in sanctionable practices *in competing for* (emphasis added), or in executing, a Bank-financed contract. In addition, it contradicts the MDBs' aim to eliminate corrupt bidders from the projects they fund and to prevent misappropriation of their funds in the future.

Procurement of Goods and Works, Art. 1.14(b)-(d), AfDB Rules and Procedures for Recruitment of Consultants, Art. 1.22(b)-(d); EBRD Enforcement Policy and Procedures, Art. 7.2.

²⁰⁹ Meireles considers it as "creating requirements for third parties". See Meireles, *supra* note 191, at 115.

²¹⁰ Williams, *supra* note 144, at 292.

²¹¹ *Ibid.*

²¹² Personal communication with a WB representative.

Therefore, the provision on rejection set forth in the procurement rules of all MDBs except for the EBRD, should be interpreted in a way that it only applies to cases where a firm or an individual competing for an MDB-funded contract, is debarred by the MDB and has not been reinstated by the time of the bidding.

At the same time, if the prior review reveals information on fraud and corruption allegedly occurred in competing for the MDB-funded contract, it would make more sense to reject the proposal and initiate an investigation. This is the case in the EBRD. After revision in 2009, EBRD's Procurement Policies and Rules do not provide for any remedial actions like Procurement Guidelines in all other MDBs but refer directly to the Bank's Enforcement Policy and Procedures (EPPs) to deal with the sanctionable practices. As a result of the investigations and enforcement proceedings, EBRD can impose one or more sanctions available. Rejection is one of those. Thus, in the EBRD the decision to reject a proposal is taken as a result of the same procedure which can also lead to debarment. The choice of the sanction depends on the mitigating and aggravating factors.

2. Cancellation of the portion of the loan

If as a result of the prior review of procurement decisions, an MDB concludes that the borrower had strictly followed its rules, it issues a "no objection" notice, which is a notification to the procuring entity in the borrowing country, stating that based on the information received from the procuring entity the Bank has no objection to its decisions. In case those decisions are inconsistent with the rules imposed by an MDB, the latter declines to issue its "no objection" and declares "misprocurement". As a consequence thereof, the Bank will cancel that portion of the loan, which had been misprocured. Even once the contract is awarded after obtaining a "no objection" from the Bank, the latter may still declare misprocurement if it concludes that the "no objection" was issued on the basis of incomplete, inaccurate, or misleading information furnished by the borrower or the terms and conditions of the contract had been modified without Bank's approval.

3. Debarment

Debarment constitutes the core of the MDBs' remedial measures. On 17 September 2006, at the World Bank's annual meeting in Singapore, the heads of the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the European Investment Bank, the European Bank for Reconstruction and Development, the International Monetary Fund and the World Bank announced a Joint International Financial Institutions (IFI) Anti-Corruption Task Force Framework in order to have a harmonized strategy to combat corruption in the activities and operations of the member institutions.²¹³

Since a common understanding of the prohibited practices was considered to be crucial to the success of a harmonized approach, the IFIs agreed on the standardized definitions of fraudulent corrupt, coercive and collusive practices, which have been implemented by all MDBs by now. These definitions followed by explanations are given below:

a) *Corrupt practice*

A “corrupt practice” is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.

This definition can be interpreted as either active or passive bribery, which can occur both during the procurement process and the execution of the contract. For example, a company/individual can be awarded a contract in exchange for a bribe or kickbacks. Kickback can occur when a company/individual in exchange of the awarded contract “kicks back” money – usually a percentage of the value of the contract - to the government official who made a selection. Bribery may occur where the contractor bribes to “close” borrower's eyes to undue fulfillment of the contractual obligations.

²¹³ International Financial Institutions Anti – Corruption Task Force Uniform Framework for Preventing and Combating Fraud and corruption, signed on 17 September 2006, <http://siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf> (accessed 5 September 2009).

b) *Fraudulent practice*

A “fraudulent practice” is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.

In other words, fraudulent practice is an intentional documentation-based change made to influence the procurement process or contract execution. Hence, negligent misrepresentations or omissions are not covered by this definition. It can be misrepresentation of the supplier’s qualifications, financial misrepresentations, the falsification of accounting records and invoices, overbilling etc.²¹⁴ For example, the poor performance of the key consulting firm during the execution of the project can be a result of the misrepresentation of its experience, qualifications and certifications during bidding procedure in order to meet the selection criteria.

c) *Collusive practice*

A “collusive practice” is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party.

Collusion was described by *Klitgaard* as an “agreement among possible suppliers before submitting their bids”, wherein they form a kind of cartel to agree on a bid price, which is over competitive minimum, and choose one supplier with the winning bid – although it is still artificially high, it is much lower than those of other suppliers, which have no chance of winning.²¹⁵ The profits from the winning bid may be divided among the “defeated” suppliers, or they may choose on a rotation basis the next “winner” to make sure that each participant in the arrangement is awarded a contract at certain point regardless that participant’s competitiveness.²¹⁶ The impact of the collusion is that winning bid prices are significantly higher than they would have

²¹⁴ Aguilar et al., *supra* note 194, at 2.

²¹⁵ Klitgaard, R. (1988): *Controlling Corruption*, 136.

²¹⁶ Williams, *supra* note 144, at 288.

through a fair competitive bidding, which undermines the project's development value and confidence in the Bank's procurement system.²¹⁷

d) *Coercive practice*

A “coercive practice” is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.

The term “coercion” means the use of force or personal violence to cause something to occur. In public procurement it usually goes hand in hand with collusion and expresses the intention of the actor that is pre-determined to win, to use the violence in order to prevent outsiders from participation in the procurement process or force the “victims” to submit inflated bids.²¹⁸

Apart from the harmonized definitions, IFIs also elaborated common principles and guidelines for the conduct of investigations and agreed on enhancing exchange of information among themselves. As for the sanctions procedures, they still vary from one MDB to another. It is currently under discussion among MDBs whether to harmonize them or keep them different while mutually recognizing them.

However, irrespective of the sanctions procedure, none of the MDBs can sanction public officials involved in corruption or fraud in Bank-financed projects, since it has no authority or the capacity to take any actions against them. Therefore, in order to ensure effective and comprehensive fight against corruption, the MDBs should make referrals to, cooperate with, and provide evidence to the relevant authorities of the countries involved. In case of lack of willingness to cooperate from the side of the government, the MDBs can take action under the legal agreement with the country,

²¹⁷ World Bank (2007): *The World Bank's Anti-Corruption Guidelines and Sanctions Reform: Benefiting the Poor by Helping to Prevent and Combat Fraud and Corruption in World Bank Projects: A User's Guide*, 8, <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/RevisedPMNDFinaluserGuideline031607.pdf> [hereinafter, WB' User's Guide].

²¹⁸ Williams, *supra* note 144, at 288; *see also* WB Anti-Corruption Guidelines, *supra* note 216, at 7.

namely suspend disbursement of the loan and/or cancel undisbursed loan amounts and, may even require early repayment of the loan.²¹⁹

²¹⁹ World Bank (1999): *Toward a Comprehensive Development Strategy*, Independent Evaluation Group's Annual Review of Development Effectiveness, 6 [hereinafter, WB Development Effectiveness], http://www.wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2000/04/07/000094946_99122006064936/Rendered/PDF/multi_page.pdf (accessed 13 October 2009)

CHAPTER IV. THE WORLD BANK

A. Introduction

The World Bank was founded in 1946 to assist countries devastated by the Second World War in reconstructing their economies.²²⁰ Within the following years, the World Bank expanded its operations and today it is a leading multilateral organization with the main purpose to reduce poverty. The major institutions within the World Bank providing financial aid to developing countries in the form of low-interest loans, interest-free credit, and grants to specific predefined projects are the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

Over the past five decades, the World Bank has loaned more than half a trillion dollars for economic development with an average of \$20 billion per year.²²¹ Consequently, it should impose good-governance and anti-corruption requirements in the bank-financed projects. Bank's former legal counsel argues, that "as the world's major development finance institution and the coordinator of foreign aid to many of its members, the Bank cannot realistically ignore issues which significantly influence the effective flow and appropriate use of external resources in its borrowing countries".²²² Besides, if the Bank advises countries on the control of corruption, it should first of all ensure that its own loans are, to the maximum extent possible, free of corruption.²²³

During the last few years, the Bank had been criticized for the high number of failures of projects that it had funded.²²⁴ The Bank's own analysis in 1999 showed the importance of the Bank's supervision and the borrower's implementation

²²⁰ IBRD Articles of Agreement, *supra* note 29, Article I.

²²¹ Berkman, S. (2008): *The World Bank and the Gods of Lending*, 3.

²²² Shihata, I.F.I. (1997): *Corruption: a General Overview with an Emphasis on the Role of the World Bank*, Dickenson Journal of International Law, Vol.15, 476.

²²³ WB Helping Countries 1997, *supra* note 202, at 29.

²²⁴ Head, J. W. (2004): *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, University of Kansas Law Review, Vol.52, 241.

performance in the outcome of the projects.²²⁵ Therefore, to increase the credibility of its projects, it was essential for the World Bank to adopt efficient procurement procedures and introduce enforcement mechanisms that guarantee the observance of the rules.²²⁶

B. Tackling Corruption in the WB-funded Projects

1. The WB's fiduciary responsibility

Under Article III, Section 5(b) of the IBRD Articles of Agreement, the Bank is required to make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other noneconomic influences or considerations. Similar requirements are specified in Article V, Section 1(g) of the IDA Articles of Agreement. Since fraud and corruption can divert loans and credits to purposes other than those for which they were granted and affect the efficiency and effectiveness of the concerned projects, the WB has a fiduciary responsibility to prevent fraud and corruption in projects it funds. This legal obligation means that the Bank's failure to take effective measures against losses of its loans to corruption violates the requirements of the Articles of Agreement and makes the Bank legally responsible for a share of the corrupted funds.²²⁷

Besides, as a development institution, the WB shall ensure that projects achieve their development objectives, and in particular, help borrowing countries in identifying and solving the problems emerging during their implementation. No matter how well the project is prepared, it will lose its value, if it is not properly executed.²²⁸

²²⁵ WB Development Effectiveness, *supra* note 219, at 8, Box 2.1. As it can be seen from the Box, while borrower compliance increases the project's chances to success by about 20%, improved Bank supervision increases it by 51 % and borrower performance by 43 %.

²²⁶ Meireles, *supra* note 191, at 72.

²²⁷ Winters, *supra* note 23, at 102.

²²⁸ Shihata, *supra* note 192, at 8-9.

2. The WB anti-corruption policy

2.1. General overview

As it was mentioned before, till the beginning of 1990s, the World Bank's approach to the issues of fraud and corruption affecting Bank-funded projects could have been described as the "three-monkey policy": "see nothing, hear nothing, say nothing". The lack of an explicit requirement in the IBRD's Articles of Agreement to take measures against corruption in the Bank-financed projects and of any official policy to do so, as well as the provisions prohibiting the Bank from interfering in the internal affairs of a borrower country²²⁹ were for many years given as the reasons of the Bank's silence with regard to the allegations of corruption in borrower countries and in Bank projects.²³⁰

The Bank's initial approach to the corruption problem can be found in internal memoranda²³¹ which pointed out the issue of corruption and concluded that the Bank can take some aspects of national governance into consideration. Since then corruption has been incorporated into the Bank's development agenda.

Upon taking office in September 1991, *Lewis T. Preston*, the then new President of the World Bank, being aware of the Bank's questioned performance decided to review the overall efficiency of its operations, and in particular, of its loan portfolio. For this purpose, a Task Force was convened in February 1992 headed by an experienced senior manager *Willi A. Wapenhause*. One of the main findings of the Task Force's report known as "*Wapenhause Report*"²³² was that the Bank's staff was often more concerned about "pushing" as many projects as possible, while paying less attention to the commitments of the borrowing countries or their contractors.

²²⁹ IBRD Articles of Agreement, *supra* note 29, Article IV, Section 10.

²³⁰ Thornburgh, D. (2000), *Report to Shengman Zhang, Managing Director and Chairman of the Oversight Committee on Fraud and Corruption, the World Bank, Concerning Mechanisms to Address Problems of Fraud and Corruption*, 8-9.

²³¹ Legal Memorandum of the General Counsel, SecM91-131, Issues of Governance in Borrowing Members – The Extent of Their Relevance Under the Bank's Articles of Agreement, 21 December 1990 (5 February 1991); Legal Opinion of the General Counsel, SecM95-707, Prohibition of Political Activities in the Bank's Work 11 July 1995 (12 July 1995).

²³² The findings of the Task Force were submitted to the Bank's Board of Executive Directors in November 1992 as *Effective Implementation: Key to Development Impact (R92-125)* (November 3, 1992).

Therefore, it concluded that the Bank should, *inter alia*, improve the performance of its portfolio through changes in its own policies and practices.²³³

First active steps to address the problems of corruption began when *James Wolfensohn* came to the presidency in 1995. In July 1996 a paper formulating the Bank's sanctions process was presented to the Executive Directors.²³⁴ But the turning point in breaking the ice, as it was already stated earlier, was the address of *Wolfensohn* to the Boards of Governors in October 1996²³⁵ where he stressed out that the "cancer of corruption" was a major problem for the Bank and those countries it was trying to assist. Following this, the Bank took steps to ensure transparency in its procurement procedures and revised its procurement guidelines to identify actions to be considered as violations and introduce procedures for their investigation and sanctions.

In August 1997, the Poverty Reduction and Economic Management Network of the Bank issued a major report called "*Helping Countries Combat Corruption: The Role of the World Bank*".²³⁶ One of the main reasons for the Bank's anti-corruption policy pointed out in the Report was that corruption diverts public services from those who need them most,²³⁷ and undermines public support for development assistance by creating an erroneous perception that all assistance is affected by corruption. This report for the first time set out a general framework for addressing corruption as a development issue and announced the Bank's anti-corruption strategy consisting of four main dimensions:

- preventing fraud and corruption in Bank-financed projects;

²³³ Shihata, *supra* note 192, at 2-3.

²³⁴ Fraud and Corruption – Proposed Amendments in the Bank's Loan Documents for the Purpose of Making Them More Effective in the Fight against Fraud and Corruption, dated 11 July 1996 [Board Paper R96-112/1]. This paper was implemented in a January 1998 Operational Memorandum.

²³⁵ Wolfensohn, *supra* note 11.

²³⁶ The paper was approved by the Executive Directors and published in September 1997 together with the paper *The World Bank's Role in Helping Countries Combat Corruption: Guidelines to Staff*.

²³⁷ As Steve Berkman correctly pointed out, inefficient projects undermine development and break the promises of progress and alleviation of poverty given to the poor, *see* Berkman, *supra* note 221, 2; *see* also Winters, *supra* note 23, 120.

- helping countries that request Bank assistance in their efforts to reduce corruption;
- mainstreaming a concern for corruption in Bank's work, that is, including the corruption issue in country assistance strategies, country lending considerations, the choice and design of projects etc.;
- Adding support to international efforts to reduce corruption.

Following the adoption of this strategy, concrete steps were taken to prevent fraud and corruption in Bank projects, including but not limited to: the introduction of a confidential hotline, tightening of procurement guidelines, intensive audits of projects, and support for improving procurement systems in client countries.²³⁸

Paul Wolfowitz, who replaced *James Wolfensohn* in 2005, picked up the anticorruption torch and since first days of his presidency made the fight against corruption a major priority. Identifying it as the single largest obstacle to development, he gave a pledge to "move from talking about corruption to dealing with corruption" in Bank-funded projects. For this purpose he suspended or delayed loans to India, Bangladesh, Kenya and Chad due to corruption concerns and increased the budget of the Bank's anti-corruption unit.²³⁹ "This is about making sure that the bank's resources go to the poor and don't end up in the wrong pockets. It is about fighting poverty", *Wolfowitz* said in an interview to *US News & World Report*.²⁴⁰

On 15 October 2006 the Bank adopted a new framework document entitled "*Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants*" (the Anti-Corruption

²³⁸ Huther, J., Shah, A. (2000): *Anti-Corruption Policies and Programs: A framework for Evaluation*, 5, http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/01/06/000094946_00121906063771/Rendered/PDF/multi_page.pdf (accessed 4 September 2009).

²³⁹ Bosshard, P., Lawrence, S. (2006): *The World Bank's Conflicted Corruption Fight*, <http://www.internationalrivers.org/en/node/1256> (accessed 31 August 2009).

²⁴⁰ Pound, E.T., Knight, D. (2006): *Cleaning Up The World Bank*, <http://www.usnews.com/usnews/biztech/articles/060403/3worldbank.htm> (accessed 1 September 2009).

Guidelines).²⁴¹ These Guidelines included the expanded definitions of the practices constituting fraud and corruption and set out the basic actions that borrowers and other recipients of loan proceeds are required to undertake to prevent and combat fraud and corruption in Bank-financed projects. They also set forth sanctions and related actions that the Bank may take in cases of fraud and corruption. These Guidelines should be incorporated into the legal agreements for each project, and the Borrower should distribute them to all project participants to make sure that they are aware of their content.²⁴²

In March 2007, the World Bank's Board of Directors approved the *Governance and Anticorruption Strategy* (GAS) which has three main pillars:

- Helping countries build capable, transparent, and accountable institutions.
- Expanding partnerships with multilateral and bilateral development institutions, civil society, the private sector, and other actors in joint initiatives to address corruption.
- Minimizing corruption in World Bank-funded projects by assessing corruption risk in projects upstream, actively investigating allegations of fraud and corruption, and strengthening project oversight and supervision.²⁴³

For the purpose of my research, I will only focus on the third pillar.

²⁴¹ World Bank (2006): *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants* [hereinafter, WB Anti-Corruption Guidelines] http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB_Anti_Corruption_Guidelines_10_2006.pdf (accessed 5 September 2009).

²⁴² World Bank (2009): *Sanctions System: Tackling Corruption through a Two-Tier Administrative Sanctions Process*, 4 [hereinafter, WB Sanctions System], <http://siteresources.worldbank.org/INTOFFEVASUS/Resources/OESFactSheet09.pdf?resourceurlname=OESFactSheet09.pdf> (accessed 5 September 2009).

²⁴³ World Bank (2004): *Reform of the World Bank's Sanction Process*, 2-3 [hereinafter, WB Sanctions Reform], http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2004/06/29/000160016_20040629112806/Rendered/PDF/295270rev.pdf (accessed 29 August 2009)

2.2. Procurement reforms

In light of changes in the Bank's anticorruption policy, relevant amendments were made to the *Guidelines on Procurement under IBRD Loans and IDA Credits* (WB Procurement Guidelines) in 1996 and to the *Guidelines on Selection and Employment of Consultants by World Bank Borrowers* (WB Consultants Guidelines) in 1997. In terms of corruption control, the review of the Bank's procurement policies in 1996 and 1997 was the most significant one since 1964, when the first formal direction on Bank procurement was issued. The Bank introduced new sections regarding fraud and corruption in its Procurement and Consultants Guidelines. The watershed of these sections was providing the Bank with the right to debar companies or individuals which had engaged in fraudulent or corrupt practices in competing for, or in executing, a Bank-financed project and permitting borrowers to include a "no-bribery" pledge in bid documentation.²⁴⁴

In 2004 provisions on corruption in the Procurement and Consultant Guidelines were revised again²⁴⁵ and, as a result, the list of sanctionable activities was completed by collusive and coercive practices²⁴⁶ and the Bank was granted contractual access to bid and contract documentation and the power to audit the accounts of suppliers.²⁴⁷

On 1 August 2006, the Executive Directors of the Bank approved a series of reforms,²⁴⁸ which came into force in July 2007. The most significant changes with regard to procurement were as follows:

- Adoption of new definitions of corrupt, fraudulent, collusive, and coercive practices, which inter alia expanded coverage of the sanctions beyond procurement. If prior to the reforms the Bank imposed sanctions

²⁴⁴ "With the specific agreement of the Bank, a Borrower may introduce into bid forms for large contracts an undertaking of the bidder to observe, in competing for and executing a contract, the country's law against fraud and corruption (including bribery)[...]. See WB Procurement Guidelines, Section 1.15.

²⁴⁵ WB Sanction Reform, *supra* note 243, at 2-3.

²⁴⁶ WB Procurement Guidelines, Section 1.14(a)(iii)-(iv).

²⁴⁷ *Ibid.*, Section 1.14(e).

²⁴⁸ World Bank's Sanctions Procedures (2006) [hereinafter, WB Sanctions Procedures], Section 1, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0..contentMDK:21299248~menuPK:3726884~pagePK:64168445~piPK:64168309~theSitePK:3601046.00.html> (accessed 5 September 2009).

for those sanctionable practices, as defined under the Bank's Procurement and Consultants Guidelines only in the context of procurement of works, goods, and services, the selection and employment of consultants, and the execution of contracts resulting from such procurement or selection, after the reforms they can also be sanctioned when occurred during the preparation or implementation of a Bank-financed project outside the procurement or selection or contract execution²⁴⁹ (for example, fraud and corruption committed by NGOs or financial intermediaries that were not selected through procurement).²⁵⁰

- Adoption of a new sanctionable offense of “obstructive practice”, defined as both non-compliance with the Bank's third-party audit rights and deliberate obstruction of Bank investigations into fraud and corruption.²⁵¹

C. The WB's Debarment Policy

1. Introduction

In the beginning of 1990s, three cases of fraud and corruption were referred by several Bank officials to the Legal Adviser for Procurement and Consultant Services and to the Chief of the Bank's Central Procurement Office. Investigation in each case was conducted by these two officials in consultation with others. After having examined the evidence, they gave the suspected companies a chance to defend themselves. Eventually, all these companies were found to be involved in fraud and corruption and deprived of the eligibility to get Bank contracts for a period of two years.²⁵²

Lack of any guidelines on Bank's responses to this kind of irregularities raised certain difficulties in assessment of the cases. Therefore, likelihood of similar cases in the

²⁴⁹ World Bank, *Sanctions Reform: Expansion of Sanctions Regime beyond Procurement and Sanctioning of Obstructive Practices*, <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/SanctionsReformNoteBorrowers.pdf> (accessed 5 September 2009).

²⁵⁰ *Ibid.*; see also WB User's Guide, *supra* note 217, at 4-5.

²⁵¹ *Ibid.*

²⁵² For more information about the case see Thornburgh et al., *supra* note 156, at 10-11.

future was an incentive for the Bank to undergo significant changes in order to recognize fraud and corruption as problems to be tackled with and, consequently, to find relevant solutions.

As it was discussed above, in order to prevent fraud and corruption in Bank-financed projects and fulfill the mandate of the Bank's Articles of Agreement, the first thing the Bank did was revision of its procurement guidelines and related provisions.²⁵³ One of the key changes was enabling the Bank to debar firms and individuals involved in corruption in the Bank-funded projects.

In order to implement the new provisions in the Procurement and Consultants Guidelines regarding fraud and corruption, on 5 January 1998, the Bank approved the Operational Memorandum called "*Fraud and Corruption under World Bank Contracts: Procedures for Dealing with Allegations against Bidders, Suppliers, Contractors, or Consultants*". Under this Memorandum, an Investigation Unit was established within the Internal Auditing Department to investigate allegations of fraud and corruption, which was transferred a year after under the supervision of the then newly set up Oversight Committee on Fraud and Corruption, and later on became an essential part of the new Department of Institutional Integrity.²⁵⁴ Assessment of the allegations and evidence gathered during the investigations was entrusted with the Sanctions Committee, established in November 1998, which was also responsible for making recommendations to the President regarding appropriate sanctions to be imposed on those companies or individuals found to have engaged in fraudulent or corrupt activities.²⁵⁵

On 2 August 2001, the Bank issued written procedures for the Sanctions Committee which had three main objectives:

- To reflect certain institutional changes, including clarification of the particular steps the Bank was taking to implement the general provisions

²⁵³ WB Procurement Guidelines, WB Consultants Guidelines, General Conditions Applicable to Loan and Guarantee Agreements, General Conditions Applicable to Development Credit Agreements.

²⁵⁴ Thornburgh et al., *supra* note 156, at 10-11.

²⁵⁵ The Committee itself is not involved in sanctioning those accused of such activities.

of the Operational Memorandum, and the creation of the Department of Institutional Integrity (INT) responsible for conducting fraud and corruption investigations and preparing the notices of debarment proceedings;

- To formalize practices of the Sanctions Committee in the context of the earlier work by the Bank's investigators; and
- To provide an improved process to the companies and individuals alleged to have engaged in fraudulent or corrupt activities, including a more uniform conduct of the Committee's hearings and stricter division of responsibilities between INT, the Sanctions Committee and its Secretariat.²⁵⁶

The Sanctions Committee composed of senior Bank managers was making recommendations to the President for decision.

As a result of the reforms of 2006, mentioned above, the President has been removed from the sanctions process and, instead, a new staff position of "Evaluation and Suspension Officer" (EO) has been established. The Sanctions Committee which was composed only from the Bank staff was replaced by Sanctions Board including three Bank staff appointed by the President, and four non-Bank staff appointed by the Executive Directors. The Sanctions Board may also form a Panel comprising two non-Bank staff and one Bank staff. Both the EOs and the Sanctions Board are independent of INT.²⁵⁷

²⁵⁶ World Bank (2001): *Sanctions Committee Procedures*, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84271~piPK:84287~theSitePK:84266,00.html> (accessed 8 September 2009).

²⁵⁷ WB Sanctions Reform, *supra* note 243, at 4-5; *see also* Statute of the World Bank Group Sanctions Board with amendments dated 17 February 2009 [hereinafter, WB Sanctions Board Statute], http://siteresources.worldbank.org/INTOFFEVASUS/Resources/Sanctions_Board_Statute_FINAL_Amended_February_17_2009%29.pdf (accessed 6 September 2009).

2. Grounds for debarment

For the purpose of the anti-corruption policy, the Bank defines corruption as the “abuse of the public office for private gain”.²⁵⁸ This definition is quite broad, which can cover acts like bribery, theft of state assets, fraud, nepotism, the misallocation of government benefits and other forms of bureaucratic corruption.²⁵⁹ With regard to the Bank-financed projects, the WB Procurement and Consultants Guidelines differentiate the following five kinds of sanctionable offences which constitute grounds for debarment: corrupt, fraudulent, coercive and collusive practices as defined in the *IFI’s Uniform Framework for Preventing and Combating Fraud and Corruption*,²⁶⁰ and an additional offence of obstructive practice which definition is as follows:

An “obstructive practice” is deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or acts intended to materially impede the exercise of the Bank’s inspection and audit rights.²⁶¹

Before introduction of this offence, the destruction of the evidence could only be considered as an aggravating circumstance while determining sanctions in case the fact of corruption has been proved. A firm could also get away with preventing the Bank from gathering sufficient evidence to prove the allegation of corruption.²⁶² Currently, even the refusal to allow access to the Bank investigators to the financial records of the Bank-financed project by the company implementing it is considered an offence and can lead to the debarment of the company.²⁶³

²⁵⁸ WB Sanctions Reform, *supra* note 243, at 8.

²⁵⁹ *Ibid.*, at 8-12.

²⁶⁰ WB Procurement Guidelines, Section 1.14(a)(i)-(iv).

²⁶¹ *Ibid.*, Section 1.14(a)(v).

²⁶² WB Sanctions Reform, *supra* note 243, at 5.

²⁶³ WB User’s Guide, *supra* note 217, at 9.

There is no requirement in the WB Procurement Guidelines that the above-mentioned acts be completed or successful for them to constitute a sanctionable offence. For example, offering a bribe to another party constitutes a corrupt practice and may be resulted in debarment even if the offer is not accepted or the purpose of the payment is not achieved.²⁶⁴

Besides, debarment can apply against sanctionable offences committed both in pre- and post-contract stages of procurement. Nonetheless, the Bank will not take any measures against a firm or an individual involved in corruption occurring outside the Bank projects.²⁶⁵

3. Initial sources of allegations

The Bank can receive allegations of suspicions of the sanctionable offences from different sources, such as procurement auditors, personnel involved in procurement matters in countries where projects are being funded, government officials in those countries, employees of companies alleged to be involved in fraud or corruption or those of competitor companies, NGOs, media, witnesses, anonymous sources, etc.²⁶⁶ This information can be communicated directly with Bank's auditors or investigators, or indirectly using the Fraud and Corruption Hotline operated by an independent third party.²⁶⁷ In case the informant wants his/her identity to be kept confidential, the Bank will not reveal any information that may disclose it to anyone outside the investigative team and its managers and attorneys unless the Bank determines that this person made an intentional misrepresentation or omission, or the Bank is required to do so by law.²⁶⁸ Information from anonymous sources is also accepted and assessed in the same manner as information originated from the identifiable person.

²⁶⁴ *Ibid.*

²⁶⁵ Williams, *supra* note 144, at 284.

²⁶⁶ According to the World Bank Integrity Vice Presidency Annual Report 2009, in 2009 38% of total allegations were received from the WB staff which is the main source of allegations of sanctionable offences, 33% were received from contractors, government officials and employees of NGOs, and 28% of the allegations were reported to INT anonymously, http://siteresources.worldbank.org/INTDOII/Resources/WBG_INTAnnualReport2009_web.pdf (accessed 16 October 2009), 11.

²⁶⁷ Thornburgh et al., *supra* note 156, at 16.

²⁶⁸ World Bank, *Report Suspected Fraud and Corruption*, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EX>

4. Investigation process

4.1. Preliminary assessment of allegations

All received allegations of fraud and corruption are referred to the Bank's Integrity Vice-Presidency (INT).²⁶⁹ But not all allegations lead to investigations. When an allegation is received, a Centralized Case Intake Unit (CCI) established in 2007, conducts an initial screening and assessment of all received complaints concerning fraud and corruption in Bank-financed projects. As a result, it determines whether the allegation is *prima facie* credible and related to the WB-funded activities. The initial assessment is recorded in a Preliminary Inquiry Report (PIR), which provides a summary of the allegation and evaluates the impact that the alleged corrupt practices could have on the Bank's reputation, finances, and development goals which is used to determine the ranking of cases.²⁷⁰ Preparation of PIRs by CCI and not by investigators, which used to be the case before, allows INT's investigators to focus purely on their investigative activities.

If based on the PIR, INT determines that the allegations are outside of INT's jurisdiction, it redirects them as appropriate. Those allegations that fall under INT's jurisdiction are investigated if they are determined to be of a higher priority.

4.2. Full investigations

Under the current triage system, all cases are ranked as High, Medium and Low Priority according to a number of criteria including: impact on development outcomes; impact on the Bank's reputation and finances; impact on present and future Bank engagements; ability to deter future corrupt practices; estimated cost of resolution; likelihood of resolution; and safety of Bank staff and witnesses. Depending on the availability of resources, INT focuses first on the High Priority

TDOII/0..contentMDK:20659616~menuPK:1702202~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html (accessed 6 September 2009).

²⁶⁹ The Bank's Integrity Vice-Presidency was previously known as Department of Institutional Integrity established in 2001 as the investigative arm of the WB, which was elevated to a Vice Presidency in 2008.

²⁷⁰ World Bank (2007): *Integrity Vice Presidency's Annual Report*, 15 [hereinafter, INT Report 2007], <http://siteresources.worldbank.org/INTDOII/Resources/fy07report-complete.pdf> (accessed 7 September 2009).

cases in order to ensure that those cases are investigated more rapidly. Medium Priority cases are reviewed monthly to determine whether their priority should be adjusted up or downwards, where relevant in relation to new incoming cases. These cases may be upgraded to High Priority if new information is received and/or additional resources become available. This allows for more realistic and effective management of major investigations. Low Priority cases are closed automatically after 30 days if no other information becomes available that justifies a change in the priority rating.²⁷¹

Following Volker's recommendation, INT is striving to complete normal external investigations within 12 months and complex ones within 18 months. For this purpose INT designed tracking systems to meet standards and is recruiting staff to achieve required resource-to-case ratio.²⁷²

If, as a result of investigation, the Director of INT believes that an offence that may lead to debarment has occurred and there is sufficient evidence to substantiate the allegations, it should refer the evidence and a recommendation of appropriate sanction in the form of a document entitled the Proposed Notice of Sanctions Proceedings (NoSP) to the Evaluation and Suspension Officer (Evaluation Officer).²⁷³ To speed up the transition from closing an investigation to imposing sanctions, INT created a specialized litigation unit, which is dealing with drafting and preparing proposed NoSPs.²⁷⁴

5. Sanctions Process

5.1. Submissions to the Evaluation and Suspension Officer

The decision whether a firm or individual has engaged in a sanctionable practice and, if so, what sanction should be imposed, is determined through a revised two-tiered sanctions process involving the EOs and the Sanctions Board (for a flowchart

²⁷¹ *Ibid.*

²⁷² INT Report 2009, *supra* note 198, at 4, 8-9.

²⁷³ WB Sanctions Procedures, *supra* note 248, Sections 2-3.

²⁷⁴ INT Report 2009, *supra* note 198, at 20.

illustrating the sanctions process in the WB see Annex III). Both the EOs and the Sanctions Board are independent of INT.²⁷⁵

Submission of the NoSP by INT to the EO is the first tier. The EO shall examine the received evidence within forty-five (45) days²⁷⁶ and decide whether it leads to a finding that Respondent²⁷⁷ is engaged in a sanctionable practice.²⁷⁸ If it does, the EO issues the NoSP to the Respondent stating the allegations and the recommended sanction, attaching the evidence, and explaining the Respondent's right to contest the allegations and/or recommended sanction.²⁷⁹ Within forty-five (45) days after the date of issuance of the NoSP the Respondent has the right to explain in writing why it should remain eligible to be awarded future Bank contracts pending the final outcome of the proceedings.²⁸⁰

Except for cases regarding allegations on violation of a Material Term of Voluntary Disclosure Program's Terms and Conditions, and unless the EO, based on the explanation submitted by the Respondent under Section 5(5) of the Sanction Procedures, determines, that temporary suspension shall not be imposed, "the Respondent shall, seventy-five (75) days after the date of issuance of the NoSP, automatically be temporally suspended, pending a final outcome of the sanctions proceeding".²⁸¹ To this end, in May 2009, the Bank adopted a procedure for Early Temporary Suspension, which will be put into practice in 2010. This new procedure

²⁷⁵ Before the Reform of the World Bank's Sanctions Process of 2006, the sanctions process was also two-tiered, with a Sanctions Committee composed of senior Bank managers making recommendations to the President for decision. The Reform removed the President from this process. Instead, a new staff position of "Evaluation and Suspension Officer" was established, and a Sanctions Board including three Bank staff appointed by the President, and four non-Bank staff appointed by the Executive Directors, unlike the former Sanctions Committee which was composed only from Bank staff. The Sanctions Board may also form a Panel comprising two non-Bank staff and one Bank staff. *See* Sanctions Reform, *supra* note 243, at 4-5; *see also* WB Sanctions Board Statute, *supra* note 257.

²⁷⁶ WB Sanctions Procedures, *supra* note 248, Section 5(1).

²⁷⁷ "Respondent" in the context of the WB sanctions process means "a firm or individual alleged to have engaged in a Sanctionable Practice and who has been designated as such in a Notice". *See* WB Sanctions Procedures, *supra* note 248, Introduction.

²⁷⁸ "Sanctionable Practice" in the context of the WB's sanctions process means "any corrupt, fraudulent, coercive, collusive or obstructive practice in a Bank Project [...], or any violation of a Material Term of the Voluntary Disclosure Program Terms and Conditions". *See* WB Sanctions Procedures, *supra* note 248, Introduction (J). Information about the WB Voluntary Disclosure Program (VDP) will be given further.

²⁷⁹ WB Sanctions Procedures, *supra* note 248, Section 5(3).

²⁸⁰ *Ibid.*, Section 5(5).

²⁸¹ *Ibid.*, Section 5(6).

allows for the temporary suspension of a company's eligibility to receive Bank-financed contracts when the EO has determined that there is sufficient evidence that the company has engaged in some misconduct, but INT continues to investigate other related allegations. It aims to prevent the risk of additional corrupt activities by a firm while INT completes an investigation (for example, see below the case of Acres). The Bank will not make public the identity of firms until the final decision is taken.²⁸²

5.2. Submissions to the Sanctions Board

If the Respondent does not contest the allegations and/or the sanction recommended by the EO in the NoSP within ninety (90) days after the date of its issuance, the matter is referred to the Sanctions Board, which automatically, without a review and a hearing, issues a decision imposing the sanction recommended by the EO in the NoSP.²⁸³

If the Respondent decides to contest the allegations and/or the sanction recommended, the matter is referred to the Sanctions Board for its review and decision pursuant to its Statute.²⁸⁴ In this case, the Respondent within ninety (90) days after issuance of the NoSP may submit a written response to the allegations and recommended sanction ("Response").²⁸⁵ After this, within thirty (30) days INT may submit a written reply to the arguments and evidence contained in the Response.²⁸⁶

The Respondent and INT have an opportunity to present their case by requesting the Sanctions Board to hold a hearing.²⁸⁷ At the hearing the Respondent may be self-represented or represented by an attorney or any other individual authorized by the Respondent, at his own expenses.²⁸⁸ Hearings are limited to arguments and evidence contained in the written submissions to the Sanctions Board. Witnesses may be called

²⁸² INT Report 2009, *supra* note 198, at 22.

²⁸³ WB Sanctions Procedures, *supra* note 248, Section 5(8).

²⁸⁴ *Ibid.*, Section 5(7).

²⁸⁵ *Ibid.*, Section 6(2).

²⁸⁶ *Ibid.*, Section 6(3).

²⁸⁷ *Ibid.*, Section 10.

²⁸⁸ *Ibid.*, Section 11(2).

and questioned only by the Sanctions Board. Cross-examination is not allowed, while it is possible to present rebuttal evidence during the hearing.²⁸⁹

5.3. *Standard of proof*

The standard of proof requires, that on the basis of preponderance of evidence, the Sanctions Board or the Sanctions Board Panel shall decide whether it is “*more likely than not*” that the Respondent had engaged in the sanctionable practice.²⁹⁰

5.4. *Imposition of sanctions*

a) *Range of sanctions*

If the Sanctions Board or the Sanctions Board Panel determines that it is more likely than not that the Respondent engaged in a sanctionable practice, it shall impose an appropriate sanction from the following range of five possible administrative sanctions irrespective of the recommendation of the EO.²⁹¹

- Formal *letter of reprimand* of the Respondent’s conduct;²⁹²
- *Debarment*, which means that the Respondent is declared ineligible, either indefinitely or for a stated period of time, to be awarded a contract in Bank projects²⁹³.
- *Conditional non-debarment*, which means that the Respondent is required to comply with certain remedial, preventive or other measures to reduce the likelihood of the fraud and corruption in the future. A failure to carry out the required acts would result in the Respondent’s debarment.²⁹⁴ The measures to be taken may include firing employees involved in fraud or

²⁸⁹ *Ibid.*, Section 12(2)(c)-(d).

²⁹⁰ *Ibid.*, Section 15(2)(a). As a result of sanctions reform, the standard of proof was changed from “reasonably sufficient” to “more likely than not” in order to increase the clarity and achieve more uniformity in application. *See* Thornburgh et al, *supra* note 156, at 50.

²⁹¹ *Ibid.*, Section 15(2)(d).

²⁹² *Ibid.*, Section 15(3)(a).

²⁹³ *Ibid.*, Section 15(3)(b); *see also* WB Procurement Guidelines, Section 1.14(d).

²⁹⁴ *Ibid.*, Section 15(3)(c).

corruption, introducing and/or implementing ethics programs, adopting a compliance program incorporating audits, correcting corporate deficiencies that could affect the honesty of the Respondent's dealings etc.²⁹⁵

- *Debarment with conditional release*, which operates as a normal temporary debarment, but the Respondent's period of debarment would be reduced or terminated if the specified conditions similar to those for a conditional non-debarment have been complied with.²⁹⁶
- *Restitution*, which means that the Respondent would be required to pay back the diverted funds to the affected government or any other party.²⁹⁷

b) Length of debarment

Debarment can be imposed either indefinitely or for a stated period of time. At the inception of the sanction process the most frequently employed sanction was debarment for an indefinite period, which was treated in fact as a permanent debarment.²⁹⁸ However, length of debarment of the currently debarred parties varies from three (3) to fifteen (15) years.²⁹⁹ For cases involving the violation of a Material Term of the VDP Terms and Conditions the only applicable sanction is a ten (10)-year debarment.³⁰⁰

c) Mitigating and aggravating factors

In determining an appropriate sanction as well as the length of a debarment, various mitigating or aggravating factors can be taken into account:

- severity of the Respondent's actions;
- degree of involvement of the Respondent in the Sanctionable Practice;

²⁹⁵ Thornburgh et al., *supra* note 156, at 62.

²⁹⁶ WB Sanctions Procedures, *supra* note 248, Section 15(3)(d).

²⁹⁷ *Ibid.*, Section 15(3)(e).

²⁹⁸ Thornburgh et al., *supra* note 156, at 58.

²⁹⁹ WB, *Listing of Ineligible Firms*, <http://web.worldbank.org/external/default/main?theSitePK=84266&content-MDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984> (accessed 8 September 2009).

³⁰⁰ WB Sanctions Procedures, *supra* note 248, Section 15(3)(b)(iii).

- the losses and damage caused by the Respondent to the procurement process;
- the Respondent's past conduct involving the Sanctionable Practice;
- the Respondent's cooperation in the investigation;
- period of temporary suspension already served etc.³⁰¹

The Decision of the Sanctions Board enters into force immediately.³⁰²

6. Parties subject to sanctions

Under the WB Procurement Guidelines, both natural and legal persons can be subject to debarment.³⁰³ In order to “circumvent the consequences of a debarment decision”,³⁰⁴ a debarred firm can create a new firm and bid under different corporate identity or have access to Bank contracts through its subsidiaries, affiliates, and other related companies that have a common ownership with it.³⁰⁵ In recognizing this risk, the Bank extends the debarment to “any individual or organization that, directly or indirectly, controls or is controlled by the Respondent”.³⁰⁶ This can be achieved through in-depth investigations into the business history of the liable company and the networks of its ownership, which might be quite challenging and costly for the Bank.³⁰⁷

In establishing a relationship between the respondent firm and its affiliates, the Bank focuses on control and not ownership,³⁰⁸ since it is possible to control the activities of

³⁰¹ *Ibid.*, Section 15(5).

³⁰² *Ibid.*, Section 16(1).

³⁰³ WB Procurement Guidelines, Section 1.14(d).

³⁰⁴ WB Sanctions Reform, *supra* note 243, at 13.

³⁰⁵ Williams, *supra* note 144, at 295.

³⁰⁶ WB Sanctions Procedures, *supra* note 248, Section 15(4).

³⁰⁷ Williams, *supra* note 144, at 295; *see also* Anechiarico, F., Jacobs, J.G. (1995): *Purging Corruption from Public Contracting: The “Solutions” Are Now Part of the Problem*, in: New York Law School Law Review, Vol.40, 172.

³⁰⁸ Under the Operational Memorandum, debarment automatically extends to “any firm that owns the majority of the accused firm’s capital, or of which the accused firm owns the majority of the capital”, Memorandum on Fraud and Corruption under Bank-Financed Contracts: Procedures for Dealing with Allegations Against Bidders, Suppliers, Contractors, or Consultants (Operational Memorandum), 5 January 1998, §5.

a separate firm without owning a majority interest in that firm.³⁰⁹ Considering this, the sanctions can mainly be extended to the firms that have a common ownership with the respondent (for example, sister companies) and firms that bear some degree of responsibility for the sanctionable offences, even if they do not have a direct connection with the latter (for example, parent/holding companies).³¹⁰

7. Appeals

The World Bank does not provide the debarred parties with any possibility to appeal decisions of the Sanction Board.

Back in 2002, in his report concerning debarment in the WB, Thornburgh criticized its sanctions process claiming that the Bank personnel were serving as investigators, prosecutors, judge and jury whose decision was final and there was no opportunity to appeal it.³¹¹

In order to eliminate this conflict of interest, the reforms of the Sanctions Process introduced position of the Evaluation Officer and changed the composition of the Sanctions Board, which consists now from both internal and external members, enhancing thereby the independence of this body and lessening the rationale for subjecting their decisions to additional review by the outside panel. Following Volker's Recommendations, external member was appointed as Chair of the Sanctions Board in February 2009.

8. Disclosure and information sharing

Information about the identity of each sanctioned party and the sanctions imposed are published on the Bank's website.³¹²

³⁰⁹ Thornburgh et al., *supra* note 156, at 76. Talking about control, Thornburgh clarifies, that it has not necessarily be a complete control, but can also be limited to an influence exerted by a debarred individual to another firm's activities where he moved to a managerial position.

³¹⁰ Williams, *supra* note 144, at 296.

³¹¹ Thornburgh et al., *supra* note 156, at 79.

³¹² WB Listing of Ineligible Firms, *supra* note 299. The information about debarred firms appears also in the Bank's Press Releases.

Until December 2008, the Bank was disclosing only the names of companies it debarred from contract work on loans and projects in borrowing countries as well as those of their affiliates, while the identities of companies debarred from working directly for the Bank itself were secret. It has changed after the Bank had been criticized for the lack of transparency with respect to the Indian IT Company Satyam. Although the Bank suspended it from consideration for future direct contracts on the grounds of fraud and corruption in February 2008 and debarred it in September 2008, the information became public only in December. In the meantime, UNDP awarded a six-million dollar contract to the company. Therefore, in January 2009, “in the interest of fairness and transparency”, the World Bank decided to make public the names of all companies it debar, including those debarred from its corporate procurement.³¹³

Besides, INT publishes annual reports with statistics on trends in allegations, reporting, and investigative outcomes, and following Volker’s Recommendations, it has started disclosing redacted investigative reports on its website since 13 September 2007.³¹⁴

The WB may at any time make materials submitted to the Sanctions Board available to other organizations, including another MDB, if they have an agreement on reciprocal sharing of this kind of information.³¹⁵ Moreover, if the WB determines that there is evidence of a sanctionable practice in connection with a project funded by another international organization, including another MDB, it may at any time share this information with this organization.³¹⁶ Likewise, the WB may at any time share information with national authorities of a member state, if it determines that the sanctionable practice has violated the law of that country.³¹⁷

³¹³ World Bank (2009): *Statement: World Bank Group Discloses Debarments under Corporate Procurement Program*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22030864~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (accessed 11 October 2009).

³¹⁴ World Bank, *Status of Recommendations from Volcker Independent Review of INT*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21924818~menuPK:34480~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (accessed 16 October 2009).

³¹⁵ WB Sanctions Procedures, *supra* note 248, Section 18(3).

³¹⁶ *Ibid.*, Section 18(2).

³¹⁷ *Ibid.*, Section 18(1).

9. Avoiding debarment: the Voluntary Disclosure Program

In August 2006 the World Bank introduced a new anti-corruption tool called “Voluntary Disclosure Program” (VDP), to “uncover corrupt and fraudulent schemes and patterns in Bank-financed projects through the voluntary cooperation of participating firms and individuals”.³¹⁸ The VDP allows the World Bank contractors to “self-police”, meaning to identify, investigate and rectify privately, and thereby avoid debarment.³¹⁹

All companies and individuals involved in Bank-financed projects are eligible to participate in the VDP unless they are Bank staff or under active investigation by the Bank³²⁰ or any relevant jurisdiction.³²¹ For this purpose, program participants commit themselves to standardized, non-negotiable Terms and Conditions³²² requiring them to:

- cease corrupt practices and commit to not engage in misconduct in the future;
- disclose to the Bank the results of an internal investigation into all their Bank-project-related contracts for the last five years including fraudulent, corrupt, collusive or coercive acts in Bank-financed projects or contracts; and
- implement a robust “best practices” internal compliance program monitored by a Bank-approved third party for three years.

³¹⁸ World Bank (2006): *World Bank Launches Voluntary Disclosure Program*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21011609~menuPK:34464~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (accessed 10 September 2009).

³¹⁹ Dubois P., Matechak, J. (2006): *World Bank Battles Corruption through New Voluntary Disclosure Program*, International Government Contractor, Vol.3, No.9 ¶ 73, 4. http://www.reedsmith.com/db/documents/World_Bank_Battles_Articles.pdf (accessed 10 September 2009).

³²⁰ WB Voluntary Disclosure Program, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/EXTVOLDISPRO/0,,contentMDK:20996886~menuPK:2720524~pagePK:64168445~piPK:64168309~theSitePK:2720459,00.html> (accessed 11 September 2009).

³²¹ Dubois, *supra* note 319, at 1.

³²² Terms and Conditions of the WB VDP, <http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPTermsandConditions.pdf> (accessed 11 September 2009).

In exchange for these commitments and full cooperation, VDP participants avoid debarment for disclosed past misconduct, they may continue to compete for and participate in Bank-financed projects,³²³ and their identities are kept confidential.³²⁴

However, if the participant of the VDP breaches the conditions of the VDP Terms and Conditions by, *inter alia*, continuing to engage in misconduct, withholding the information relating to past or current misconduct, or failing to implement a compliance program or cooperate with a compliance monitor, the Bank will impose a mandatory ten-year debarment on that participant.³²⁵ This debarment will be conducted through the Bank's regular debarment process³²⁶ and will be publicized.

The importance of the VDP for the Bank's anti-corruption efforts stems from several factors. First, it gives the Bank an alternative source of information which might help fight corruption.³²⁷ Second, it gives the Bank the ability to establish the nature, forms, and patterns of corruption in Bank projects and increases the range of tools that the Bank may use in its anti-corruption policies and operations.³²⁸ In addition, the VDP helps ensure proper use of Bank and donor funds as well as provides incentives to the contractors with "less-than-perfect pasts" stop corrupt behavior and become compliant with Bank rules and guidelines.³²⁹ As it was argued by *Dubois and Matechak*, "[t]he VDP is a win for the private sector, a win for the World Bank and a win for international development".³³⁰

³²³ However, participation in the VDP does not provide immunity from prosecution in any jurisdiction. The World Bank may promise not to impose debarment, but it cannot prevent the national authorities from enforcing their national anticorruption (bribery, fraud, kickback, etc.) laws if they independently investigate the participant's activities. See Dubois, *supra* note 319, at 3.

³²⁴ WB VDP, *supra* note 320.

³²⁵ Terms and Conditions of the WB VDP, *supra* note 322, §5.8.

³²⁶ WB Sanctions Procedures, *supra* note 248, Section 15(3)(b)(iii).

³²⁷ While the VDP's informational value must, by nature of the program, remain confidential, a properly structured VDP can identify corrupt actors in specific instances.

³²⁸ Williams, *supra* note 144, at 300; see also WB VDP, *supra* note 320.

³²⁹ *Ibid.*

³³⁰ Dubois, *supra* note 319, at 4. However, not everyone shares this opinion. For example, Patricia Adams of the Canadian-based foreign aid watchdog, Probe International, argues that the VDP is "bad for developing country citizens and taxpayers, and the rule of law," since it "allows 'confessors' confidentiality and thus allows the Bank to cover-up its own negligence or complicity, which undermines the administration of justice in countries where it is a criminal offense to bribe a foreign official." Odious Debts Online (2006): *German Firm Barred by World Bank for Bribery in Lesotho Project*, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=16566> (accessed 14 September 2009).

10. Case study: Lesotho Highlights Water Project

10.1. General overview of Lesotho Highlands Water Project (LHWP)

The bi-national *Lesotho Highlands Water Project* (LHWP) between the Kingdom of Lesotho (Lesotho) and the Republic of South Africa (RSA), is one of the most comprehensive engineering projects of its kind in the world designed principally to transfer water from the Senqu/Orange river in eastern and central Lesotho to the Gauteng Province, RSA's industrial heartland.³³¹ Comprising several large dams and tunnels throughout Lesotho and South Africa and involving five rivers, LHWP is Africa's largest water transfer scheme. If carried out as originally planned, it will by 2027 divert about 40% of the Senqu/Orange River's water which will be piped into 200 Km of tunnels to be delivered to the South African Guateng River.

The purpose of the project was to meet the growing demand for water in the RSA, generate Muela hydroelectric power for Lesotho (currently almost 100% of Lesotho's requirements), as well as provide an annual income for the impoverished country. Because the apartheid regime of South Africa was under international sanctions at that time, the money was officially lent to Lesotho, and Pretoria was in charge of servicing and repaying the debt and \$ 40 million a year as royalties on imported water while Lesotho was going to pay only for the hydroelectric plant. Much of the funding by Lesotho was received in the form of international aid from a wide range of international and private commercial banks, particularly the World Bank. The signing of the Lesotho Highlands Water Project Treaty by the Government of Lesotho and of the Republic of South Africa on the 24th October 1986 officially launched the project.³³²

³³¹ LHWP website, *Project Overview*, <http://www.lhwp.org.ls/overview/overview.htm> (accessed 14 September 2009).

³³² Phase IA and IB of the project have been completed by 2004. Phases II-IV due to the changes in the projection of water demand in South Africa, along with concerns over negative social and environmental impacts of the project are under negotiation between RSA and Lesotho.

10.2. Actions by Lesotho authorities

10.2.1. Investigations

At the outset of the project, in November 1986, *Masupha Ephraim Sole* was appointed to the post of Chief Executive - a position of great power and responsibility. Step by step, he started abusing his powers of the office increasing the control and influence he had over the award of the contracts in the project.³³³ In 1993, serious concerns about his management style, and in particular, staff appointments and finance made the Minister for Water and Energy hire *Ernst and Young* to audit LHWP's account. The audit identified some irregularities, such as abusing the hosing scheme, charging personal expenses to work accounts, nepotism etc.³³⁴ These "irregularities" prompted the Minister to order a full-scale disciplinary enquiry at the end of 1994, which concluded with the dismissal of Sole from the LHDA in 1996.³³⁵

In 1996, LHDA started civil proceedings against Sole to recover the money he misappropriated during his employment. Further investigation showed that Sole had received large transfers to his Johannesburg bank accounts from accounts in his name at three Swiss banks – Union Bancaire Prive and Banque MultiCommercial in Geneva, and UBS in Zurich.³³⁶ In 1997, thanks to some changes in the Swiss banking secrecy laws in the mid-1990s, the Lesotho prosecutors were able to request access to Sole's banking records, which they gained in early 1999.³³⁷

The received data from the Swiss banks allowed the prosecution to conclude successfully the civil case as it had proved Sole had large funds at his disposal, outside the country, he had not declared. In October 1999, the court awarded damages

³³³ Darroch, F. (2004): *Lesotho Highlands Water Project – Corruption and Debarment*, in: Moran et al, see *supra* note 140, 62-63. Fiona Darroch, Barrister-At-Law, UK had been following the trials closely and is in regular contact with members of the prosecution team.

³³⁴ Earle, A., Turton, A. (2005): *Corruption on the Lesotho Highlands Water Project – a case study*, 10, http://www.swedishwaterhouse.se/swh/resources/20051010164821Earle_Turton_Presentation_Corr_case_study.pdf (accessed 23 September 2009).

³³⁵ Darroch, F. (2004): *At Goliaths Feet: the Lesotho Highlands Water Scheme Corruption and Bribery Trials*, 4, <http://www.odiousdebts.org/odiousdebts/publications/Gauteng.pdf> (accessed 17 September 2009).

³³⁶ Henry, J.S. (2003): *High Crimes in Lesotho: Transnational Criminals – Part 3*, 7, http://bloodbankers.typepad.com/submerging_markets/first_world_criminals_part_3_lesotho_112003jsh.pdf (accessed 22 September 2009).

³³⁷ Earle, *supra* note 334, at 12-13.

of M8.900.000³³⁸ to LHDA against Sole.³³⁹ The LHDA concluded that bribery had been taking place on a massive scale and froze payments to contractors.

In July 1999, Lesotho authorities opened a criminal proceeding against Sole, accusing him of the offence of bribery – an offence of common law. The same fate was awaiting a number of contractors, consultants and intermediaries through whose accounts the money had passed. With the assistance of lawyers and auditors, Lesotho authorities managed to establish who had allegedly paid bribes and how the money had flowed. In July 1999, the Maseru Magistrate's Court charged nine companies, three international consortiums and three officials with bribery and fraud and provided initial estimates of the amounts they had allegedly paid.³⁴⁰

Realizing the complex issues of the trials, a former Chief Justice of Lesotho, Acting Judge *Brendan Cullinan* of Ireland, was appointed to conduct the trials due to his long experience. Besides, being expatriate he could not be accused of biased judgment.³⁴¹

10.2.2. Major Trials by Lesotho Authorities

a) Sole

Sole was the first to be tried in Lesotho case. His trial started on 11 June 2001. Sole was charged with sixteen counts of bribery, and two of fraud.

In the indictment, in the charge for each bribery count, it was alleged that within certain periods, but on unknown dates and at unknown places, the contractors/consultants offered payments to Sole, which he “unlawfully, intentionally and corruptly” accepted, and in return he had to exercise his influence and power, in his official capacity, to further their private interests.

The results of a forensic analysis of Sole’s banking records set out what payments had been made, when, by whom, and to whom. A total amount paid to Sole over a period

³³⁸ The loti (*pl. moloti*) is the currency in Lesotho. 1 LSL = 0.13USD (as of 2 October 2009).

³³⁹ Darroch, *supra* note 335, at 6; *see also* Earle, *supra* note 334, at 13.

³⁴⁰ Greybe, D. (1999): *Official Faces Charge over R12m Bribes*, 3, <http://www.odiousdebts.org/odiousdebts/publications/DamsOnTrial.pdf> (accessed 6 October 2009).

³⁴¹ Darroch, *supra* note 335, at 6.

of nine years was established in the amount of M8.058.877. Most of the payments he was receiving from contractors on the project through the intermediaries, namely Mr. Jacobus Michiel Du Plooy, Mr. Zalisiwonga Bam and Mr. Max Cohen. Within few days after having received the money, the intermediaries were making payments to Sole's Swiss bank accounts. The analysis showed that there was a stable ratio in case of Du Plooy (60%) and Bam (50%), while Cohen was paying to Sole less plus various percentages.³⁴²

In May 2002, after a year-long trial, *Sole* was found guilty on 11 counts of bribery and 2 counts of fraud (concerning fabricated expense claims while on an overseas trip) in Lesotho High Court and sentenced to 18 years of imprisonment.³⁴³ The Court of Appeal reduced the term of imprisonment to 15 years.³⁴⁴

His conviction was a kickoff of the long-running series of corruption trials against leading international construction companies in Lesotho.

b) *Acres*

Acres, a Canadian consultancy company, got involved in LHWP in February 1991, with a signature of a "sole source contract" with LHDA. The Contract 65 funded by the World Bank included the provision of services relating to the establishment and implementation of the construction contract of the Katse dam, the transfer tunnel and delivery tunnels. Acres continued to render services under this contract until November 1999.

In the Indictment, Acres was charged with two counts of bribery. The company was alleged to have made payments into a Swiss bank account held by Zalisiwonga Mini Bam (deceased by the time of a trial) and into a Swiss bank account held by Margaret Bam - the wife of Zalisiwonga Mini Bam - who transferred the said amounts to a Swiss account held by her husband, who in turn thereafter paid/transferred or was

³⁴² Earle, A. (2007): *The Role of Governance in Countering Corruption: an African Case Study*, <http://www.iwaponline.com/wp/009S2/0069/009S20069.pdf> (accessed 23 September 2009), 8; see also Earle, *supra* note 334, at 18.

³⁴³ Case *Rex vs. Sole* (2002): *Sentence by Hon. Mr Acting Justice B. P. Cullinan*, <http://www.odiousdebts.org/odiousdebts/publications/SoleSentence.pdf> (accessed 23 September 2009).

³⁴⁴ Darroch, *supra* note 335, at 17.

supposed to pay/transfer the said sum, or part thereof, to Mr. Sole.³⁴⁵ The core of the prosecution case was that both payments amounted to bribes.

Acres' trial began in February 2002, which made it the first corporate defendant to be tried in Lesotho. Acres' defense was claiming that Bam had been the company's representative in Lesotho and had been paid for his services under the terms of the representation agreement (RA). It was denying the company's knowledge that the money would be passed on to Sole.³⁴⁶

The prosecution claimed that the RA was a sham intended to conceal the true nature of the relationship agreement between the company and Sole. *Darroch* pointed out several corruption red flags in this RA, such as a lack of need for the services provided under RA and no evidence of their performance by the agent, non-proportionality between the value of services and the payments for them, making payments to secret Swiss accounts, etc.³⁴⁷ *Penzhorn* argues, that since the RA contains a "no duck – no dinner" clause, that is, unless the contract is obtained the agent will not be paid, it "has bribery written all over it", particularly where the agent seeks to secure the contract outside the formal bidding process.³⁴⁸

The Court found that RA was just a sham. It rejected Acres' theory that it did not know that Bam was paying Sole with the money obtained from Acres. It also determined that the money which Bam paid in the ratio of 60% to Sole while leaving 40% for himself were bribe money to ensure that Acres' interests in the LHDA were secured.³⁴⁹

³⁴⁵ Case *Crown vs. Acres International Limited* (2001): *Court indictment and charges of bribery against Canadian company, Acres International Limited, in the Lesotho Highlands Water Project*, <http://www.odiousdebts.org/odiousdebts/publications/AcresIndictment.pdf> (accessed 4 October 2009).

³⁴⁶ *Darroch*, *supra* note 335, at 18.

³⁴⁷ *Ibid.*, at 20.

³⁴⁸ *Penzhorn*, G. (2004): *Three strikes against graft: assessing the impact of high-profile corruption*, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=10173> (accessed 7 October 2009).

³⁴⁹ Case *Rex vs. Acres International Limited* (2002): *Judgment*, 254, <http://www.odiousdebts.org/odiousdebts/publications/JudgmentAcres.pdf> (accessed 4 October 2009).

Acres was found guilty on two accounts of bribery and fined an amount of M22.058.091, which was reduced to M15.000.000 by the appeal court.³⁵⁰

c) *Lahmeyer*

Next defendant to be tried was Lahmeyer, a German construction company. Lahmeyer was involved in the construction of the delivery tunnel from Muela storage dam to the outflow in South Africa. This contract was also funded by the World Bank. The charges were similar to those against Acres, namely paying, with intent to bribe, varying sums of money into Swiss bank accounts held by Bam who afterwards, acting as intermediary, was transferring the amounts in question, or part thereof, to Sole. The alleged amount of the bribes paid by the company to Sole via Bam was M2.300.000 over a six-year period.³⁵¹

Lahmeyer was found guilty on seven counts of bribery and fined M10.650.000. This was appealed by the prosecution, with the final judgment being against Lahmeyer on nine counts of bribery and sentencing it to a fine of M12.000.000.

d) *Spie Batignolles*

Next in line for Lesotho prosecution was a French company Spie Batignolles. The case was complicated because in 1995 it was merged with another French company, one of the world's leading electrical companies, Schneider Electric. The latter claimed that it was not brought properly before the Lesotho court and could not be tried.

According to *Darroch*, on 19 May, 1995, Spie Batignolles had entered into a 'contribution and divestment agreement', with a French company called Gesilec. With this, all Spie's assets and liabilities, including those in LHWP contracts, were transferred to Gesilec, which renamed itself Spie Batignolles, on 27 June 1995. On the same date, the original Spie Batignolles merged with Schneider Electric.³⁵²

³⁵⁰ Case *Rex vs. Acres* (2003): *Appeal Judgment*, <http://www.odiousdebts.org/odiousdebts/publications/AcresAppealJudgementAug2003.pdf> (accessed 4 October 2009).

³⁵¹ International Rivers (2003): *Lesotho Judge Convicts German Engineering Firm of Bribery Charges*, <http://www.internationalrivers.org/en/africa/lesotho-water-project/lesotho-judge-convicts-german-engineering-firm-bribery-charges-0> (accessed 22 September 2009).

³⁵² Darroch, *supra* note 333, at 65.

Although being legal, acts of merger and the name change seemed more as a different line of defence to avoid being brought to trial on corruption charges. The EU, being involved in this project since the early 80s via its specialist anticorruption unit OLAF, assisted the Lesotho prosecution in tracing the corporate relationships of the aforesaid companies.³⁵³ Confronted with the findings, Schneider/ Spie pleaded guilty on 16 counts of bribery involving the payment of M16.000.000 to Sole via Max Cohen as an intermediary. It was fined M10.000.000 in February 2004.

Impregilo was also tried, having been charged with five counts of bribery. The company was fined an amount of M15.000.000.

Other companies are either being tried or still awaiting their trials.

10.3. The World Bank actions

The World Bank financed the design of the project and lent a \$110 million loan under phase 1A in 1989 and another loan in the amount of \$ 45 million in 1998 under phase 1B. In both phases the Bank was responsible for promoting the project, increasing the overall financing package, supervising design and construction, transferring engineering and other technical skills to local staff, and monitoring social and environmental impacts.

According to the World Bank, it first learned about possible cases of corruption in LHWP with the public disclosure of the criminal summons served on Sole in July 1999.³⁵⁴ Following this, the matter was referred to the Bank's Oversight Committee for Fraud and Corruption (current INT) which initiated its own investigation on possible cases of corruption which may have occurred in the contracts it has financed.

³⁵³ OLAF (2006): *Three European Companies Guilty in African Aid Fraud Case*, http://ec.europa.eu/anti_fraud/press_room/pr/2006/13_en.html (accessed 6 October 2009).

³⁵⁴ World Bank (2001): *Notice to Acres on Debarment Proceedings*, 15 [hereinafter, WB Notice], <http://www.odiousdebts.org/odiousdebts/publications/DebarmentProceedings.pdf> (accessed 6 October 2009).

a) *Acres*

Following public disclosure of the allegations of corruption in LHWP, Acres wrote to the Bank denying its involvement in any improper conduct in connection with its contract on the project.³⁵⁵ Upon request of the Bank, although with a delay, Acres provided it with the documentation on its work on the project and its relationship with Bam, including copies of the documents served on Acres by the prosecuting authorities handling the criminal case in Lesotho.³⁵⁶ To coordinate its investigation, in fall 1999, the World Bank hired an American law firm *Arnold and Porter*.

Based on the evidence collected during investigation, the Bank stated in its proposed Notice of Debarment Proceedings to Acres that “[t]he evidence is reasonably sufficient to conclude that Respondent Acres engaged in corrupt practice by paying monies to Mr. Sole through Mr. Z.M. Bam so that Acres could influence Mr. Sole and the LHDA in connection with work being performed by Acres on the LHWP.”³⁵⁷

However, at the end of the investigation, the Sanctions Committee of the Bank concluded that the evidence was not reasonably sufficient to show that the firm had engaged in corrupt practices and as a result postponed the debarment of Acres. But the Bank reserved the right to reopen the investigation in case any additional information surfaces, including from the public proceedings in Lesotho.³⁵⁸

The investigation was reopened following the conviction of Acres in the High Court of Lesotho in September 2002. Having failed to keep its promise given back in 1999 at a closed-door meeting that it would provide financial support to the Lesotho prosecutors³⁵⁹ on the grounds that the country would recoup its costs on gaining

³⁵⁵ Letter from Oskar T. Sigvaldason to Shengman Zhang, Callisto Madavo and Alfonso Sanchez, 20 August 1999, 2.

³⁵⁶ WB Notice, *supra* note 354, at 43.

³⁵⁷ *Ibid.*, at 48.

³⁵⁸ World Bank Press Release (2004): *World Bank Sanctions Acres International Limited*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0..contentMDK:20229958~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607.00.html> (accessed 6 October 2009).

³⁵⁹ van Vuuren, H. (2006): *Time to Listen to Lesotho! – The World Bank and its New Anti-Corruption Agenda*, <http://www.brettonwoodsproject.org/art-542425> (accessed 8 October 2009).

convictions,³⁶⁰ the Bank benefited from the investigative work which had been done by the Lesotho authorities.³⁶¹

Seven months after, the Court of Appeal had upheld on one of the two counts in August 2003, the Bank's Sanctions Committee having studied the court records, found that Acres had been engaged in corrupt activities for the purpose of influencing the decision-making of the then Chief Executive of the LHDA, the implementing agency for the LHWP.³⁶² Since this activity violated the Bank's procurement standards, it issued a notice that the debarment case had been reopened.³⁶³ As a result, Acres was debarred for three years. The period of debarment which was shorter than it might have been was justified by the mitigating factors: the fact that Acres had already been ordered to pay a criminal fine by the Lesotho courts³⁶⁴ and that the persons involved "are no longer in positions of responsibility in the company".³⁶⁵

One month before the Sanctions Committee gave its ruling, Acres was bought by a larger Canadian firm Hatch Ltd. To the question of *Probe International*, whether the change in ownership would affect Acres' debarment, the Bank first replied that both companies would be ineligible to receive any Bank contracts. But then, referring to confusion based on conflicting interpretations by its own lawyers, it said that "Hatch, not being a party to the Lesotho case, can bid."³⁶⁶

While some anti-corruption campaigners were applauding the World Bank's decision to debar Acres, others were expressing their dissatisfaction by the fact that it took it five years to do so. According to Patricia Adams, Executive Director of Probe

³⁶⁰ Darroch, *supra* note 333, at 69.

³⁶¹ It should also be mentioned, that upon announcement of the indictments in mid-1999, the World Bank provided extensive evidentiary support to the Lesotho prosecutors, made Bank staff available for interviews, and later assisted the Government by bringing together the Lesotho prosecutors with the various project funding agencies and EU anti-fraud officials.

³⁶² Darroch, *supra* note 333, at 69.

³⁶³ Bretton Woods Project (2004): *Acres Debarment: Litmus Test for Bank on Corruption*, <http://www.brettonwoodsproject.org/art-42230> (accessed 7 October 2009).

³⁶⁴ Using fine as a "mitigating factor" by the Sanctions Committee, when the fine has not yet been paid, was questioned by Fiona Darroch, see Bretton Woods Project (2004): *Landmark Decision: Canadian Company Debarred*, <http://www.brettonwoodsproject.org/art-62691> (accessed 8 October 2009).

³⁶⁵ World Bank Press Release, *supra* note 358.

³⁶⁶ Peryman, L. (2004): *Fighting Corruption Alone*, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11703> (accessed 8 October 2009).

International, the World Bank debarred Acres “more in name than in fact”.³⁶⁷ After Acres was charged, it continued to receive World Bank contracts, winning over \$2.3 million in new contracts - last one signed just a week before its debarment – none of which was supposed to be affected by the debarment decision.³⁶⁸

Another concern after Acres had been debarred by the World Bank, was due to the absence of uniformity amongst development agencies in recognizing each other’s sanctions rules. According to *Peryman*, a company "can be debarred by one financial institution for corrupt behaviour one day and be awarded a contract with another the next."³⁶⁹

b) *Lahmeyer*

The World Bank’s actions towards Lahmeyer were similar to those towards Acres. Likewise, due to insufficiency of evidence, the World Bank decided not to sanction the company in October 2001 reserving the right of re-examining its findings in light of any additional relevant information. Following the convictions of Sole and Lahmeyer by the High Court of Lesotho in 2002 and 2003, respectively, upheld by the Court of Appeal of Lesotho in April 2003 and in April 2004,³⁷⁰ respectively, the World Bank re-opened debarment proceedings against Lahmeyer in August 2005.³⁷¹

Having established that Lahmeyer had paid bribes in connection with the LHWP, the WB debarred Lahmeyer for a period of seven years, from 3 November 2006 to 3 November 2013. The period of ineligibility could have been reduced by four years (till 3 November 2009), if the company had introduced a “satisfactory corporate compliance and ethics program” and fully cooperated with the Bank in disclosing any

³⁶⁷ Adams, P. (2004): *Statement to the US Senate Committee on Foreign Relations*, http://old.probeinternational.org/catalog/content_fullstory.php?contentId=1680&cat_id=15 (accessed 8 October 2009).

³⁶⁸ Bretton Woods Project, *supra* note 363.

³⁶⁹ Peryman, L. (2004): *Fighting Corruption Alone*, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11703> (accessed 8 October 2009).

³⁷⁰ Lahmeyer's conviction was upheld on six of seven counts.

³⁷¹ World Bank (2006): *World Bank Sanctions Lahmeyer International for Corrupt Activities in Bank-Financed Projects*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21116129~pagePK:64257043~piPK:437376~theSitePK:4607.00.html> (accessed 8 October 2009).

other past sanctionable misconduct, presumably under the Bank's Voluntary Disclosure Program (VDP).³⁷² But it is still on the WB list of ineligible firms.³⁷³

Again, as in case with Acres, the World Bank was accused of a slow reaction. "It sends the wrong signal to other corporate bribers," argued *Patricia Adams*.³⁷⁴ "In those seven years since the original indictment, Lahmeyer was able to carry on business as usual. Rather, the Bank should have taken swift action and suspended the company's right to do business with the Bank when they were originally indicted – as is allowed for under the U.S. Foreign Corrupt Practices Act – pending a decision by the Lesotho courts."³⁷⁵ *International Rivers* commented that "the World Bank's kid-glove treatment of companies convicted of bribery in Lesotho thus far is an insult to the Lesotho government's courageous efforts to hold both bribe-takers and bribe-payers to account".³⁷⁶ *Patricia Adams* claimed that the Bank should have debarred the companies immediately after the decision of the Court of Appeal had been taken. "I don't think there could be any better test than what they've gone through and the due process they received in Lesotho. They were convicted, they appealed, they lost, and they should be debarred".³⁷⁷

Decision by the EBRD to debar Lahmeyer in February 2007,³⁷⁸ following a debarment by the World Bank, a so-called "cross-debarment", was considered as an important step towards consistency among the MDBs. It was the first time when any of the development banks made a company ineligible for fraud or corruption committed in a project financed by another bank.³⁷⁹

³⁷² *Ibid.*

³⁷³ WB Listing of Ineligible Firms, *supra* note 299..

³⁷⁴ Adams, P. (2006): *German Firm Barred by World Bank for Bribery in Lesotho project*, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=16566> (accessed 8 October 2009).

³⁷⁵ *Ibid.*

³⁷⁶ International Rivers Network (2003): *Lesotho Judge Convicts German Engineering Firm of Bribery Charges*, <http://www.internationalrivers.org/en/africa/lesotho-water-project/lesotho-judge-convicts-german-engineering-firm-bribery-charges-0> (accessed 10 October 2009).

³⁷⁷ Hearne, B. (2004): *The World Bank and Action on Corporate Corruption*, <http://www.ethicalcorp.com/content.asp?ContentID=2079> (accessed 10 October 2009).

³⁷⁸ Transparency International (2007): *Transparency International Urges Debarment Consistency among Development Banks*, http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_02_26_ti_urges_debarment_consistency (accessed 9 October 2009).

³⁷⁹ For more details about EBRD debarment, see Chapter VIII, C (8).

CHAPTER V. THE ASIAN DEVELOPMENT BANK

A. Introduction

The idea of a financial institution that would be Asian and foster economic growth and cooperation in the region was born during postwar rehabilitation and reconstruction of the early 1960s.³⁸⁰ Established in 1966, with the headquarter in Manila, ADB is an international development finance institution which mission is to help its developing member countries reduce poverty and improve the quality of life of their people. From 31 members at the time of its establishment in 1966, ADB has grown to 67 members - of which 48 are regional members and 19 are non-regional members.³⁸¹

To pursue its mission, ADB lends loans to prepare and implement technical assistance projects and programs in development member states and, if necessary, consults people from all sections of society to ensure that its projects and programs address their needs. Countries with limited debt repayment capacity in the region receive additional help through the Asian Development Fund (ADF), set up in 1973 to provide grants and low-interest loans.³⁸²

Given the high level of corruption in most of the ADB borrowing countries,³⁸³ dozens of billions are lost due to corruption in procurement of goods and services.³⁸⁴ Therefore, adequate measures are required from the ADB to respond the challenge of corruption in its lending operations.

³⁸⁰ ADB, *Responding to Challenges of a Changing Region*, <http://www.adb.org/About/history.asp> (accessed 22 October 2009).

³⁸¹ For more information on ADB member states see <http://www.adb.org/About/membership.asp> (accessed 22 October 2009).

³⁸² ADB Operations, <http://www.adb.org/About/operations.asp> (accessed 22 October 2009).

³⁸³ Transparency International Perception Index, http://www.transparency.org/policy_research/surveys_indices/cpi (accessed 24 October 2009).

³⁸⁴ ADB Anticorruption Policy (1998), paras.21-31, <http://www.adb.org/Documents/Policies/Anticorruption/anticorruption.pdf> (accessed 24 October 2009).

B. Tackling Corruption in the ADB-funded Projects

1. The ADB's fiduciary responsibility

ADB's response to the threat of corruption in its projects and programs derives from the Article 14(xi) of the Agreement Establishing the Asian Development Bank, which imposes on the Bank the obligation to "take the necessary measures to ensure that the proceeds of any loan made, guaranteed or participated in are used only for the purposes for which the loan was granted and with due attention to considerations of economy and efficiency."

This provision clearly states that Bank management and staff should take any measures that are necessary to eradicate corruption from ADB-financed projects and programs.

2. The ADB's anti-corruption policy

2.1. General overview

Following a fundamental change in the approach to anticorruption issues in the mid-90s, ADB affirmed that like in any other region corruption had a negative impact on development also in Asia and recognized the importance of governance. In 1995, ADB became the first MDB to adopt a special policy on governance in its paper approved by the Board - *Governance: Sound Development Management*.³⁸⁵ This document, known as a *Government Policy*, did not address corruption directly. But it officially recognized, for the first time, the importance of accountability for public officials, and transparency and predictability in government operations in fight against corruption and achieving positive development outcomes.

To broaden and strengthen the ADB's work on governance, which had started under its Governance Policy and addressed, in particular, corruption issues, the Bank's Board of Directors unanimously approved an Anticorruption Policy on 2 July 1998.

³⁸⁵ ADB (1995): *Governance: Sound Development Management*, <http://www.adb.org/Documents/Policies/Governance/default.asp> (accessed 24 October 2009).

The policy is focused on three objectives:

- supporting competitive markets, and efficient, effective, accountable, and transparent public administration;
- supporting promising anticorruption efforts on a case-by-case basis and improving the quality of the ADB's dialogue with its developing member countries (DMCs) on a range of governance issues, including corruption; and
- ensuring that the ADB's projects and staff adhere to the highest ethical standards.³⁸⁶

The third objective of the Bank's Anticorruption Policy calls for more firm internal measures to enhance the integrity of Bank operations through establishing priorities for fighting corruption. Highest priority was given to maintaining the integrity of the Bank's lending and technical assistance operations. It means that the ADB could either change its lending policy between sectors, or lower its lending to a country if corruption threatens the development impact of Bank projects or that country's broader development prospects. A second priority is strengthening the Bank's procurement policy by enabling the Bank to cancel a contract or loan if there is evidence of corruption, debar firms and audit companies working on Bank-financed projects. Other priorities include, *inter alia*, improving the quality of oversight and management of ADB loans and technical assistance grants; and ensuring that all ADB staff and Bank counterparts within the DMCs are familiar with the Anticorruption Policy.³⁸⁷

In 2000, ADB developed a Medium Term Agenda and Action Plan,³⁸⁸ to assess progress and lessons learned to improve its approach to governance for the next five years (2000-2004). One of the major areas of the Action Plan was fighting corruption by setting an example of zero tolerance by, *inter alia*, strengthening the control systems of executing agencies and identifying fraud and corruption through project procurement related audits.

³⁸⁶ ADB Anticorruption Policy, *supra* note 384, para.14.

³⁸⁷ ADB (2000): *Anticorruption Policy, Description and Answers to Frequently Asked Questions*, 4, <http://www.adb.org/Documents/Manuals/Anticorruption/anti.pdf> (accessed 24 October 2009).

³⁸⁸ ADB (2000): *Promoting Good Governance: ADB's Medium-Term Agenda and Action Plan*, http://www.adb.org/Documents/Policies/Good_Governance/default.asp (accessed 24 October 2009).

In 2005, ADB conducted a joint review of implementation of its governance and anticorruption policies to assess and refocus its efforts. As a result of its findings, ADB decided to improve its performance by launching its Second Governance and Anticorruption Action Plan (GACAP II) in 2006.³⁸⁹ Among the aims of GACAP II are strengthening of governance and anti-corruption components in program and project design as well as strengthening of program and project administration and portfolio management.

2.2. Procurement reforms

In 1994, ADB's Task Force on Improving Project Quality found that ADB did not pay adequate attention to the project design and processing, while putting emphasis on "achieving annual levels of programmed lending".³⁹⁰ This so-called "approval culture" was aimed at approving new projects without ensuring that existing ones achieve their objectives.³⁹¹ As a result, the Task Force urged the ADB to increase its accountability for project quality.³⁹²

Shortly before promulgation of the ADB's Anti-Corruption Policy, an Anti-Corruption Task Force was convened to examine the ADB's procurement policy. Based on its conclusions, the ADB decided to introduce anticorruption provisions identical to those adopted by the WB in 1996 and 1997 for the rejection of proposals, loan cancellation, debarment, inspection rights and "no bribery pledge". These modifications have been incorporated into its Procurement Guidelines and Guidelines on the Use of Consultants by the ADB and its Borrowers (Consultants Guidelines) following the adoption of the Anti-Corruption Policy and their approval by the Board.³⁹³

³⁸⁹ ADB (2006): *Second Governance and Anticorruption Action Plan (GACAP II)*, <http://www.adb.org/Governance/gacap.asp> (accessed 24 October 2009).

³⁹⁰ ADB (1994): *Task Force on Improving Project Quality: Executive Summary* [hereinafter, ADB Task Force], http://www.adb.org/Documents/Policies/Project_Quality/pq000.asp (accessed 26 October 2009).

³⁹¹ One former Board member interviewed by Steve Herz said that the focus of project staff "is on getting a paper to the Board. After that, it's not [their] problem, even if the project flops." See Herz, S. (1994): "Zero Tolerance?" *Assessing the Asian Development Bank's Efforts to Limit Corruption in its Lending Operations*, 17, http://www.bicusa.org/Legacy/Zero_Tolerance_Report.pdf (accessed 26 October 2009).

³⁹² ADB Task Force, *supra* note 390, Executive Summary, http://www.adb.org/Documents/Policies/Project_Quality/pq000.asp (accessed 26 October 2009).

³⁹³ ADB Anti-Corruption Policy, *supra* note 384, paras.58-60.

C. The ADB's Debarment Policy

1. Introduction

To implement the debarment provisions introduced in 1998 in the ADB's procurement policies, the Anti-Corruption Policy designated the Office of Auditor General (OAG) as the initial point of contact for allegations of fraud and corruption in ADB-financed projects. In September 1999, ADB established an Anticorruption Unit (OAGA) within OAG to deal with such allegations. Effective 1 January 2005, the OAGA became the Integrity Division (OAGI). And as of 1 October 2009, the OAGI became the Office of Anticorruption and Integrity (OAI).³⁹⁴

To determine, whether the respondent failed to comply with the Anticorruption Policy or procedures and, if so, impose the appropriate sanction, the ADB established an Integrity Oversight Committee (formerly Oversight Committee on Anti-Corruption).

2. Grounds for debarment

Due to absence of universal definition of corruption, the ADB Anticorruption Policy defined it as “the abuse of public or private office for personal gain”.³⁹⁵

Corrupt, fraudulent, coercive and collusive practices which may constitute grounds for debarment are set forth in the ADB Procurement Guidelines³⁹⁶ and Consultants Guidelines³⁹⁷ and reflect the language of the IFI's “Uniform Framework for Preventing and Combating Fraud and Corruption”.³⁹⁸ These practices comprise corruption, which involves behavior on the part of officials in the public and private sectors, in which they improperly and/or unlawfully enrich themselves and/or those

³⁹⁴ Due to all these changes, titles “OAGA”, “OAGI” and “OAI” are interchangeable in this dissertation and should be considered as equal.

³⁹⁵ ADB Anticorruption Policy, *supra* note 384, para.17.

³⁹⁶ ADB Procurement Guidelines (2007), <http://www.adb.org/documents/guidelines/procurement/default.asp?p=prcrmnt> (accessed 26 October 2009).

³⁹⁷ ADB Guidelines on the Use of Consultants (2007), <http://www.adb.org/Documents/Guidelines/Consulting/Guidelines-Consultants.pdf> (accessed 26 October 2009) [hereinafter, ADB Consultants Guidelines].

³⁹⁸ ADB Procurement Guidelines, Art. 1.14(a) and ADB Consultants Guidelines, Art. 1.23(a).

close to them, or induce others to do so, by misusing the position in which they are placed.³⁹⁹

3. Initial sources of allegations

Initial concerns, allegations, or evidence recognized in the ADB as “complaints” can be received by the OAI from ADB staff, contractors, consultants, third parties by email, fax, mail, in person, or by telephone. Information concerning the identity of a complainant is strictly confidential and will not be released to other ADB staff or to anyone outside ADB without prior authorization of the complainant. Allegations may also be reported anonymously.⁴⁰⁰ According to the OAGI Annual Report 2007, within period of 1998-2007, 54% of the allegations were received from the ADB staff members, while 34% were received from the outside sources and 12% from the audit reports.⁴⁰¹

4. Investigation process

4.1. Preliminary assessment

Each complaint received by the OAI shall be registered and scanned to determine whether it is:

- relevant to OAI's mandate;
- credible (depends on the source of the complaint and the credibility of the evidence presented);
- verifiable (depends on the age of the issues, the availability of information, and the specificity, sufficiency, and reliability of the information received); and

³⁹⁹ ADB Anticorruption Policy, *supra* note 413, para.17.

⁴⁰⁰ ADB, *How to Report Fraud and Corruption*, <http://www.adb.org/Integrity/howto.asp> (accessed 19 October 2009).

⁴⁰¹ ADB (2008): *OAGI Annual Report*, 11, <http://www.adb.org/Documents/Reports/Anticorruption/OAGI-Annual-Report-2008.pdf> (accessed 19 October 2009).

- material (depends on the seriousness and implications to ADB operations).⁴⁰²

As a result of a screening, OAI will decide either to:

- close the case due to insufficient evidence; or
- warrant investigation; or
- refer the allegation to the relevant department/ office, when it is beyond OAI's jurisdiction (even if the case is closed).⁴⁰³

To be warranted an investigation, the allegation should be within OAI's jurisdiction, credible, verifiable, and material (for a flowchart illustrating the process of dealing with allegations of fraud or corruption in the ADB see Annex IV).

4.2. Full investigations

Investigations are conducted by OAI, which may also, with the concurrence of the Auditor General, engage external auditors, investigators, or other experts to assist in the investigation of specific allegations of fraud and corruption. OAI shall coordinate all investigative work performed by such experts.⁴⁰⁴

During the course of investigation, OAI may gather documentary, video, photographic, computer forensic, or tape-recorded evidence, as well as interview witnesses.⁴⁰⁵

In certain cases, the Integrity Oversight Committee, with the concurrence of the President, also may refer matters for investigation to appropriate authorities of a concerned member government. This may include the borrowing country, the country of which the subject of investigation is a national, or the country where the alleged incident occurred.⁴⁰⁶

⁴⁰² ADB Integrity Guidelines and Procedures, para.53, <http://www.adb.org/Documents/Guidelines/Integrity-Guidelines-Procedures/chap3.asp?p=antipubs> (accessed 21 October 2009).

⁴⁰³ *Ibid.*, para. 54.

⁴⁰⁴ *Ibid.*, para. 61.

⁴⁰⁵ *Ibid.*, para. 57.

⁴⁰⁶ ADB, *OAI's Investigative Process*, <http://www.adb.org/Integrity/investigative-process.asp> (accessed 19 October 2009).

If as a result of investigation, there is no sufficient evidence to support the matter of investigation or any other sanctionable offence, OAI will document its findings, and both the Director of OAI and Auditor General must endorse closing the case.⁴⁰⁷

If OAI has sufficient evidence to believe that the Respondent (bidder, consultant, contractor, or other party involved in an ADB-funded project) is engaged in a corrupt or fraudulent practice, it will present its findings to the Respondent, explain the basis for such findings and give the latter an opportunity to comment in writing upon the allegation(s) and submit any other relevant information before OAI presents its case to the Integrity Oversight Committee.⁴⁰⁸ When the Respondent is a firm, OAI will also notify it that debarment might be imposed on its officers, directors and associated firms, and at OAI's discretion, it may present investigative findings to those associated parties.⁴⁰⁹

5. Sanctions Process

5.1. Submissions to the Integrity Oversight Committee

Upon completion of the investigation, OAI shall present a report together with all investigative findings and the explanation from the Respondent (if available), as well as recommendations of a sanction to the Integrity Oversight Committee (formerly Oversight Committee on Anticorruption).⁴¹⁰ The Integrity Oversight Committee (IOC) consists of three members appointed by the President at the Auditor General's recommendation among ADB's senior staff, including one as Chair, to serve normally for 12 months.⁴¹¹

The IOC has a sole power to decide whether bidders, consultants, contractors, or other party involved in an ADB-funded project (other than ADB staff) had engaged in a sanctionable practice and if so, which sanction to impose.⁴¹²

⁴⁰⁷ ADB Integrity Guidelines and Procedures, *supra* note 402, para.63.

⁴⁰⁸ *Ibid.*, para.25,

⁴⁰⁹ ADB Integrity Principles and Guidelines (2006), para.57, <http://www.adb.org/Documents/Guidelines/Integrity-Principles-Guidelines/integrity-guidelines-procedures-2006.pdf> (accessed 19 October 2009).

⁴¹⁰ ADB Integrity Guidelines and Procedures, *supra* note 402, para.68.

⁴¹¹ *Ibid.*, para. 29. The Auditor General and/or President may determine a different term.

⁴¹² OAI's Investigative Process, *supra* note 406.

5.2. *Standard of proof*

The standard of proof for OAI investigations shall be preponderance of evidence, showing that it is *more probable than not* that the Respondent had engaged in a sanctionable practice.⁴¹³

5.3. *Imposition of sanctions*

a) *Range of sanctions*

Sanctions that ADB may impose include *reprimands* and *debarment* of a company or an individual proved to have been engaged in a sanctionable practice. When debarred, an individual or a company is ineligible to participate in ADB-financed activity. Although usually debarment affects only future contracts, the IOC may also recommend the cancellation of existing obligations.⁴¹⁴

b) *Length of debarment*

In determining debarment period, the IOC usually first debars the Respondent for a minimum period from 1 to 7 years. Upon completion of the minimum period, the IOC may "reassess" the sanction period in order to extend (for example, if the entity is known to have engaged in other sanctionable practices during its debarment period) or end (for example, the entity demonstrates rehabilitation) the debarment period. Maximum debarment period for the first violation is "indefinitely" for individuals and 7 years for companies. Debarment period for the subsequent violation (after being reinstated) is "indefinitely" for individuals and up to 10 years for companies. Only under extraordinary circumstances (for example, repeated violations of ADB's Anticorruption Policy or procedures) can the companies be debarred indefinitely.⁴¹⁵

c) *Mitigating and aggravating circumstances*

When determining a sanction, the IOC shall consider all mitigating and aggravating circumstances relevant to the case, such as:

⁴¹³ Integrity Guidelines and Procedures, *supra* note 402, paras.7 and 18.

⁴¹⁴ ADB Integrity Principles and Guidelines, *supra* note 409, para.64.

⁴¹⁵ *Ibid.*, paras.33-35.

- whether the individual or a company continued the sanctionable practice after becoming aware of OAI's investigation;
- the degree of cooperation with OAI or any attempt to conceal the sanctionable practice;
- evidence of restitution and steps taken to address the concerns;
- the nature of the fraud and/or corruption and the circumstances and manner under which the fraud and/or corruption was committed (that is, attempted fraud or corruption versus committed fraud or corruption);
- arguments provided by the individual or the company under investigation against allegations;
- the background of the individual or the company's management; and
- if another multilateral development bank or international organization debarred the individual or other entity.⁴¹⁶

d) *Reinstatement*

At the end of the minimum sanction period debarred individuals and firms may request reinstatement.⁴¹⁷ Requests for reinstatement shall contain the reason for the sanction and provide a basis for which ADB should consider the reinstatement.⁴¹⁸

In determining whether to reinstate an individual or a firm OAI may consider the following factors:

- the reason a sanction was imposed;
- restitution;
- changes in management or ownership;
- verifiable mechanisms to improve business governance;
- effective administrative, civil or criminal action initiated by the debarred individual or firm as a result of debarment imposed by ADB;

⁴¹⁶ Integrity Guidelines and Procedures, *supra* note 402, para.37.

⁴¹⁷ OAI may remind them of this opportunity approximately 45 days before the end of the minimum sanction period.

⁴¹⁸ ADB Integrity Guidelines and Procedures, *supra* note 402, para.75.

- information indicating that the debarred individual or firm engaged in a sanctionable practice after being debarred by ADB, including sanctions imposed by other international organizations; and
- results of administrative or criminal investigations.⁴¹⁹

At the conclusion of its review or investigation, OAI will prepare a report to the IOC with a recommendation regarding reinstatement. The IOC may decide to either reinstate eligibility or extend the debarment for another year (after which the individual or other entity may again apply for reinstatement).⁴²⁰

In cases where ADB extended debarment to the respondent firm's principals or related parties, the decision of the IOC may also address ADB's sanction of those entities.⁴²¹

If the IOC decides to extend debarment, the individual or a firm may appeal the decision to the Sanction Appeals Committee within 90 days of the date of OAGI's notice of the decision.⁴²²

6. Parties subject to sanction

The IOC can debar both individuals and firms. When the IOC debars a firm that is proved to have engaged in sanctionable practice, it may also extend the sanction to the principals (owners, directors, officers, or major shareholders) of a firm, as well as related parties, if it determines that there is a legitimate basis to do so.⁴²³ A “related party” is one that has:

- the ability, directly or indirectly, to control or significantly influence the respondent party;
- a familial relationship;

⁴¹⁹ *Ibid.*, para.76.

⁴²⁰ *Ibid.*, para.77.

⁴²¹ *Ibid.*, para.78.

⁴²² *Ibid.*, para.79.

⁴²³ *Ibid.*, para.39.

- common or related ownership, management, or control (for example, affiliated or associated firms); or
- an agreement or dependency for a specific or limited purpose, such as a joint venture, with the respondent party.⁴²⁴

In determining relationship and deciding whether circumstances warrant sanctioning the related parties as well, the IOC considers, in particular, management and organizational structure, and if the related party was involved in or influenced the sanctionable practice which was the subject of investigation, or it influenced such practice itself. In this context, the IOC focuses on major shareholding, control of or influence over a firm, and not on ownership.⁴²⁵

While debarred individuals and firms may not participate in ADB-financed projects during the debarment period, related parties remain eligible to do so if the IOC decides not to extend the debarment to them. Conversely, firms in which a sanctioned individual holds a principal interest will be ineligible to participate.⁴²⁶

7. Appeals

A Respondent may appeal the IOC's decision to a Sanction Appeals Committee (formerly Review Committee on Anticorruption) within ninety (90) days from the date of OAI's notice of the IOC's decision. An appeal must be in writing, stating the reason(s) for the requested review of the IOC's decision. The Sanction Appeals Committee (SAC) will consider only appeals that include new information that was not known, or could not reasonably have been known, to the Respondent party at the time that explanations were sought by OAI, and such information would have been relevant to the decision of the IOC.⁴²⁷

⁴²⁴ ADB Integrity Principles and Guidelines, *supra* note 409, para.71.

⁴²⁵ *Ibid.*, paras.72-73.

⁴²⁶ ADB (2008): *Frequently Asked Questions on Anticorruption and Integrity*, 36, <http://www.adb.org/Documents/Brochures/FAQs-Anticorruption-Integrity/default.asp> (accessed 22 October 2009).

⁴²⁷ Integrity Guidelines and Procedures, *supra* note 402, para.72.

After having considered the appeals, the SAC may reduce or lift the imposed sanctions, or require the IOC to reconsider a case.⁴²⁸

The SAC consists of three vice presidents, out of which the one with the longest ADB vice presidential tenure will chair it. The SAC renders its decision only on the basis of a consensus of all members.⁴²⁹ In case of failure to reach consensus the Chair requests the President's involvement.⁴³⁰ The decision of the SAC on any appeal is final and binding and not subject to further appeal.⁴³¹

8. Disclosure and information sharing

In accordance with ADB's Public Communications Policy, ADB discloses statistical information concerning results of its investigations into fraud and corruption, as well as incorporates significant recommendations and issues from audits into its Annual Report.⁴³² However, ADB does not disclose the names of debarred individuals and firms except for two cases when it makes a Notice of Sanctions on its website:

- if a debarred individual or firm attempts to participate in ADB-funded project while ineligible (it will also result in an extension of the sanction period);
- if OAI cannot reach a debarred individual or firm.⁴³³

However, in the interest of cooperation, harmonization, and transparency, ADB shares the Anticorruption Sanctions List, on a confidential basis, with other MDBs and international organizations on a need-to-know basis. On the same basis, it can extract and share certain information on the list with any of ADB's member countries.⁴³⁴

⁴²⁸ *Ibid.*, para.40.

⁴²⁹ *Ibid.*, para.41.

⁴³⁰ *Ibid.*, para.42.

⁴³¹ *Ibid.*, para.41.

⁴³² ADB (2005): *The Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information*, para.100.

<http://www.adb.org/Documents/Policies/PCP/PCP-R-Paper.pdf> (accessed 20 October 2009).

⁴³³ ADB Integrity Guidelines and Procedures, *supra* note 402, paras.81-82; *see also* ADB Integrity Principles and Guidelines, *supra* note 409, para.86.

⁴³⁴ ADB Integrity Principles and Guidelines, *supra* note 409, para.87.

ADB believes that the practice of not publicizing the Anticorruption Sanctions List best supports fair and consistent implementation of its anticorruption policy justifying it by the following reasons:

- the ADB's debarment procedure is an administrative tool, not a legal or judicial assessment of fraud or corruption - terms that have different definitions and carry significant legal implications in ADB's member countries;
- firms, in particular those with significant resources, are more likely to present challenges to decisions that publicly classify them as corrupt or fraudulent, requiring ADB's time and expenses to address rebuttals;
- the deterrent effect believed to be the benefit of publicizing the list does not outweigh the benefits of the current practice;
- publicizing the Anticorruption Sanctions List could lead to incorrect conclusions regarding the focus of ADB's anticorruption efforts or levels of corruption within a particular region or country.⁴³⁵

9. Case study: Joint Attack on Fraud in Kyrgyz Republic⁴³⁶

In August 2004 ADB debarred 21 credit unions and 41 individuals in the Kyrgyz Republic for fraud committed in a sub-project of the ADB-financed Rural Financial Institution Project.

The anticorruption case began when in October 2002 the National Bank of the Kyrgyz Republic (NBKR) advised ADB that the Financial Company for the Support and Development of Credit Unions (FCCU), created with ADB's support as a source of financing for businesses in rural areas, found fraud involving fictitious membership and financial data in some credit unions. Through surveys, audits, and inspections, FCCU identified fraudulent data that formed the basis of credit unions' borrowing

⁴³⁵ ADB, *Confidentiality of Anticorruption Sanctions List*, <http://www.adb.org/Anticorruption/issues.asp> (accessed 20 October 2009).

⁴³⁶ ADB, *Joint Attack on Fraud*, <http://www.adb.org/Anticorruption/fraud.asp> (accessed 24 November 2009).

from FCCU, which was then used to pay members and finance high-risk ventures not reported to FCCU.

ADB's East and Central Asia Department staff and the then Anticorruption Unit of the Office of the Auditor General, and NBKR and FCCU worked together to effectively address the fraud. With ADB's support through technical assistance, FCCU was able to increase scrutiny of credit union assets. FCCU also tightened procedures for increasing capital of any credit union, and strengthened licensing procedures. FCCU ultimately identified fraud in 21 credit unions, and has appropriately classified the debt and undertaken efforts to recover fraudulently obtained funds. NBKR referred FCCU's findings to prosecutors. FCCU shared its findings with ADB's Anticorruption Unit, which resulted in a debarment of these 21 credit unions and 41 individuals involved in fraud.

CHAPTER VI. THE INTER-AMERICAN DEVELOPMENT BANK

A. Introduction

The Inter-American Development Bank (IADB) was established half a century ago, in 1959, when 18 countries ratified the Agreement establishing the Inter-American Development Bank (IADB Charter).⁴³⁷ Its defined purpose was “to contribute to the acceleration of the process of economic and social development of the regional developing member countries, individually and collectively”.⁴³⁸ To achieve it, the IADB provides loans, grants, guarantees and investments as well as technical assistance for planning and implementing development projects and sector reform programs for Latin American and Caribbean countries.

One of the features of the IADB is that over fifty percent of the Bank’s shares are held by borrowing members, while in other MDBs control rests in their lenders. It provides more financing to the region than any other government-owned regional financial institution.⁴³⁹ Since 1959, the IADB has approved \$168 billion for projects, mobilizing more than \$375 billion in investments.

In view of these figures, any diversion of the funds from their intended purpose causes national interests to suffer and questions the reputation of the IADB itself. However, like in all other MDBs, the problems of fraud and corruption for many years were almost ignored in the IADB’s operations. Any losses in its projects the Bank was considering to be insignificant compared to the overall benefits derived.

⁴³⁷ Agreement Establishing the Inter-American Development Bank [hereinafter, IADB Charter], effective on 30 December 1959, <http://www.iadb.org/leg/documents/pdf/convenio-eng.pdf> (accessed 20 October 2009).

⁴³⁸ *Ibid.*, Section 1.

⁴³⁹ The value of the loans approved by the IADB in 2007 was about \$10 billion, significantly exceeding that of any other regional development bank.

B. Tackling Corruption in the IADB-funded Projects

1. The IADB's fiduciary responsibility

The Bank's fiduciary responsibility to address fraud and corruption derives from its Charter which demands that the resources and facilities of the Bank be used exclusively to implement the purpose and functions set forth in Article I of the Charter.⁴⁴⁰

2. The IADB's anti-corruption policy

2.1. General overview

Echoed by the increase of concerns about the negative impact of fraud and corruption on development at a world-wide scope, the Bank assigned a working group to conduct a review of the consequences of corruption and possible means of combating it. As a result, on 28 February 2001 it adopted a document titled "*Strengthening the Systematic Framework against Corruption for the IADB*" (Systematic Framework) calling for reforms that would:

- ensure that Bank staff act in accordance with the highest levels of integrity and that the institution's internal policies and procedures are committed to this goal;
- ensure that activities financed by the Bank are free of fraud and corruption and executed in a proper control environment; and
- support programs that will help borrowing member countries of the Bank strengthen good governance, enforce the rule of law, and combat corruption.⁴⁴¹

Following submission of the Systematic Framework, the IADB reviewed preventive and remedial measures to address problems of fraud and corruption.

⁴⁴⁰ IADB Charter, *supra* note 437, Article III, Section 1.

⁴⁴¹ IADB (2001): *Strengthening a Systematic Framework against Corruption* [hereinafter, IADB Systematic Framework], <http://www.iadb.org/leg/Documents/Pdf/Corruption-EN.pdf> (accessed 20 October 2009).

2.2. Procurement reforms

In recognition of the problem posed by fraud and corruption, the IADB undertook an overhaul of its procurement policies. As a result, in 1995, the IADB introduced the anti-corruption provisions and the notion of debarment for acts of corruption in its *Basic Procurement Policies and Procedures of the IADB*, which were incorporated into the Bank's standard procurement bidding documents in 1999. The Bank significantly expanded the notion of fraud and corruption in its procurement activities in 2005 adopting *Policies for the Procurement of Goods and Works Financed by the Inter-American Development Bank* (Procurement Policies)⁴⁴² and *Policies for the Selection and Contracting of Consultants Financed by the Inter-American Development Bank* (Consultants Policies).⁴⁴³ These Policies were edited in February of 2006 and have been modified according to the Sanctions Procedures Document in July 2006.

C. The IADB's Debarment Policy

1. Introduction

Although the IADB introduced “debarment” clause in its procurement policies in 1995, that is, even earlier than the WB, it started implementing it only in 2001. Following the submission of the Systematic Framework in 2001, the Procurement Committee was designated to investigate allegations of fraud and corruption in the IADB-funded project procurement process. All other allegations of fraud and corruption in any Bank activity were investigated by the Office of the Auditor General.⁴⁴⁴

⁴⁴² Policies for the Procurement of Goods and Works Financed by the Inter-American Development Bank (2006) [hereinafter, IADB Procurement Policies], <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=774392> (accessed 2 November 2009).

⁴⁴³ Policies for the Selection and Contracting of Consultants Financed by the Inter-American Development Bank (2006) [hereinafter, IADB Consultants Policies], <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=774394> (accessed 2 November 2009).

⁴⁴⁴ Thornburgh, D., de Noriega, J.S., Gainer, R.L., Walker, C.H. (2008): *Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank*, 6, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1824265> (accessed 2 November 2009).

In April 2001, the Oversight Committee on Fraud and Corruption (OCFC) was created with the initial function of receiving and classifying all allegations of fraud and corruption and then referring them to the appropriate office for investigation (usually the Office of the Auditor General, the Procurement Committee, the Ethics Committee, or the Legal Department). After this, OCFC would monitor investigations and implementation of recommendations (including sanctions) arising from these investigations. It was also responsible for recommending cases to the President of IADB that should have been forwarded to national authorities.⁴⁴⁵

In October 2003, responsibilities to investigate allegations of fraud and corruption in Bank-financed activities were reassigned to a newly established Office of Institutional Integrity (OII), which started its operation in 2004. Apart from investigations, OII performs prevention work by preparing lessons learned from the investigations to improve the Bank's integrity policies and mechanisms.

In September 2004, the IADB created the Sanctions Committee. It is comprised of five Bank staff members appointed by the President and is responsible for reviewing the evidence discovered in the course of investigations into allegations of fraud and corruption. The Sanctions Committee determines whether allegations are well founded and if sanctions are appropriate on the basis of the information provided by OII and parties subject to the investigation.

In December 2009, the IADB has revised its anti-corruption framework based on the recommendations of an external group headed by *Richard Thornburgh* presented in the report in late 2008. Among main changes in the IADB's procedures are:

- Creation of a new Case Officer position. The Case Officer reviews OII investigative findings and has the authority to sanction parties for wrongdoing, including a suspension from participating in Bank-funded programs.

⁴⁴⁵ *Ibid.*, at 8-9.

- The Case Officer's recommendations can be appealed to the new Sanctions Committee, which for the first time will include external members (four), as well as Bank staff (three). All seven members will be appointed by the President.
- The OCFC has been replaced by the Anti-corruption Policy Committee, which will focus on policy development and oversight of the Bank's anti-corruption initiatives. The cases previously considered by the OCFC will be dealt with by the Sanctions Committee.⁴⁴⁶

These changes will be implemented over the course of 2010. Therefore, the procedures below do not reflect any of them.

2. Grounds for debarment

A Systematic Framework defined corruption as “acts performed by officials who use their positions wrongfully, or are requested to do so by others, to obtain some benefit for themselves or for others”.⁴⁴⁷

In the context of the Bank-funded projects, the Bank's Procurement and Consultants Policies provide for of acts which may be committed by bidders, suppliers, contractors or consultants in violation of the requirement to adhere to the highest ethical standards and lead to sanctions, including debarment. These acts which definitions are harmonized with those of the Uniform Framework are as follows: corrupt, fraudulent, coercive and collusive practices.⁴⁴⁸

The Procurement and Consultants Policies clearly stipulate that this list of sanctionable practices is not exhaustive since it covers only the most common types of corruption. Therefore, the Bank reserves the right to take action in case of any

⁴⁴⁶ IADB News Release (2009): *IDB Moves to Strengthen Anti-Corruption Framework*, <http://www.iadb.org/news-releases/2009-12/english/idb-moves-to-strengthen-anticorruption-framework-6079.html> (accessed 5 January 2010).

⁴⁴⁷ IADB Systematic Framework, *supra* note 441, at 1.

⁴⁴⁸ IADB Procurement Policies, Art. 1.14(a), IADB Consultants Policies, Art. 1.21(a). The Bank applies the definitions of fraud and corruption as adopted by the International Financial Institutions (IFI) Anti-Corruption Task Force.

similar act or allegations involving alleged acts of corruption, even when they are not specifically stipulated in the list.

3. Initial sources of allegations

Allegations of fraud or corruption can be made to the OII, the President, Vice Presidents, managers, or the Bank's Country Office Representative in each of its borrowing member countries, as well as in France and Japan. This can be done confidentially by telephone, e-mail, fax, regular mail, in person, or through the allegations form given on the IADB website, either anonymously or by identifying yourself.

All allegations shall be referred to the OII. According to the OII annual report 2008, in the period of 2004-2008, 19% of the allegations were made anonymously, 66% were made by Non-Bank staff, while 15% came from Bank staff.⁴⁴⁹

4. Investigative process

4.1. Preliminary assessment of allegations

Upon receipt of an allegation involving bidders, contractors or consultants in IADB-financed projects, OII undertakes a preliminary assessment to determine whether the allegation (i) concern a Bank-financed activity, (ii) constitute a violation of the Bank's anti-corruption policies, and (iii) provide enough information to warrant an investigation by OII.

If the answer to all of the above questions is affirmative, then OII will conduct a full investigation. Contrariwise, if, at the end of the preliminary review or at any other stage of the investigation, OII concludes that there is not a sufficient basis to warrant continued investigation, OII advises the Oversight Committee on Fraud and Corruption (OCFC) of that determination, and the OCFC has the final authority to

⁴⁴⁹ IADB (2008): *OII Annual Report*, 4 [hereinafter, OII Report 2008].
<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1927592> (accessed 28 October 2009).

decide whether the matter has to be closed (for a flowchart illustrating the process of dealing with allegations of fraud or corruption in the IADB see Annex V).

4.2. Full investigations

Investigations are conducted by OII's investigators known as "integrity officers" pursuant to the *Principles and Guidelines for Investigations* endorsed by the IFI's Anti-Corruption Task Force. They rely on evidence that is obtained by OII from Bank staff members, country officials and third parties, as well as from project documents. In case of necessity, OII might undertake missions to conduct interviews.

OII presents the results of its investigations to the OCFC and makes recommendations on further actions. OCFC is responsible for deciding whether a sanctions proceeding should be commenced. Where the results of an investigation support a finding of fraud or corruption, OII can recommend to the OCFC either to (a) submit the matter to the Sanctions Committee of the Bank if it involves bidders, contractors or consultants in Bank-financed projects using public sector loans, or (b) consider sanctions if the matter involves contracts between the Bank and third-parties, or in projects funded by Bank loans to the private sector. If as a result of OII investigations, evidence is lacking, to either confirm or deny an allegation, OII will accompany its report with a recommendation to close the matter.

5. Sanctions Process

5.1. Submissions to the Sanctions Committee

Sanctions proceedings are regulated by the *Sanctions Procedures*.⁴⁵⁰ If, based on the findings and recommendations of OII, the OCFC determines that there is sufficient evidence to support a finding that an act of fraud or corruption may have occurred by a party subject to the jurisdiction of the Sanctions Committee, the OCFC may request OII to prepare and deliver a Notice of Administrative Action⁴⁵¹ (Notice) to the

⁴⁵⁰ IADB Sanction Procedures, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=841305> (accessed 25 October 2009).

⁴⁵¹ Prior to the end of 2007, "Notice of Administrative Action" was called "Notice of Charges".

Sanctions Committee.⁴⁵² The OCFC may, in its discretion, decline to authorize the preparation of a Notice in relation to an incident that occurred more than 5 (five) years earlier.⁴⁵³

The Notice must identify the potential subject to sanctions (Respondent), state the allegations of fraud or corruption, and summarize the facts relevant to the basis for the allegations. Apart from that, OII should attach to the Notice all evidence relevant to the determination of a sanction, including all exculpatory or mitigating evidence, explain that the Respondent has an opportunity to respond to the allegations, and list the sanctions that the Bank may impose. After having received this Notice, the Sanctions Committee sends it with all attachments to each Respondent.

The Respondent is given sixty (60) days to present arguments and evidence in response to the allegations set forth in the Notice.⁴⁵⁴ After this, both OII and the Respondent have one more chance to reply to each other's responses (so called "OII's Reply" and "Respondent's Surreply"). Based on all materials submitted, the Sanctions Committee determines whether the Respondent engaged in an act of fraud or corruption in connection with a Bank-financed project.

5.2. Standard of proof

The required standard of proof shall show that "*the evidence is sufficient*" to support the findings of the investigation. This standard slightly differs from the "*more probable than not*" that had been agreed upon among the MDBs.⁴⁵⁵

⁴⁵² IADB, *Operating Guidelines and Regulations for the Oversight Committee on Fraud and Corruption*, Art. 109 [OCFC Guidelines and Regulations], <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1156281> (accessed 30 October 2009).

⁴⁵³ IADB Sanction Procedures, *supra* note 450, para.4.2.

⁴⁵⁴ If it fails to do so within determined period of time, the allegations will be deemed to be admitted.

⁴⁵⁵ International Financial Institutions Principles and Guidelines for Investigations (2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=832313> (accessed 28 October 2009).

5.3. *Imposition of sanctions*

Under the Sanctions Procedures, the Sanctions Committee renders its decision without a hearing. However, it may, in its discretion, hold such hearings as it deems necessary.

The Committee's decision takes effect immediately.

a) *Range of sanctions*

The possible sanctions that may be imposed by the Sanctions Committee are as follows:

- *Reprimand* in the form of a formal letter of censure of the Respondent's behavior;
- *Conditions on Contracting* – a declaration that an individual, entity or firm bidding for or participating in a Bank-financed project is ineligible to be awarded contracts under Bank-financed projects except under such conditions as the Committee deems to be appropriate.
- *Debarment* - a declaration that an individual, entity or firm is ineligible, either permanently or for a stated period of time, to be awarded and/or participate in contracts under Bank-financed projects.
- Other sanctions that the Sanctions Committee deems to be appropriate under the circumstances, including the imposition of fines representing reimbursement of the Bank for costs associated with investigations and proceedings. Such other sanctions may be imposed in addition to or in lieu of other sanctions.⁴⁵⁶

In exceptional cases, to protect the public and the Bank's interest, "for good cause shown" the OCFC may order, upon issuance of the Notice or at a later stage of the sanctions proceedings, that the Respondent be suspended from consideration for award of contracts until the decision of the Sanctions Committee.

⁴⁵⁶ IADB Sanctions Procedures, *supra* note 450, para.11.2.

b) *Length of debarment*

Debarment may be imposed permanently or for a stated period of time. From the list of the sanctioned firms and individuals on the Bank's website, we can see that the length of debarment varies from one to ten years.

c) *Mitigating or aggravating factors*

In determining the length of debarment, the Sanctions Committee may consider various mitigating or aggravating factors. These factors include:

- severity of the Respondent's actions;
- the past conduct of the Respondent involving fraud or corruption;
- the magnitude of any losses caused by the Respondent;
- the quality of the evidence against the Respondent;
- any mitigating circumstances, including the intervening implementation of programs to prevent and detect fraud or corruption or other remedial measures by the Respondent;
- the savings of Bank resources or facilitation of an investigation being conducted by the OII occasioned by the Respondent's admission of culpability or cooperation in the investigation process; sanctions imposed by other parties, including another MDB.

6. Parties subject to debarment

Debarment can apply to both individuals and firms. It might be extended to any individual or firm that, directly or indirectly, owns or controls⁴⁵⁷ a Respondent, is owned or controlled by a Respondent, or is under common ownership or control with a Respondent. Debarment can be extended both to firms in existence at the time the debarment is imposed and those formed during the debarment period.

⁴⁵⁷ Indicia of control include, but are not limited to, the possession, direct or indirect, of the power to direct the management and policies of a business concern, organization or individual, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees.

Any firm or individual which can be subject to debarment due to its relationship with the Respondent shall also be listed as Respondent in a Notice and given an opportunity to respond to it.⁴⁵⁸

7. Appeals

The Sanctions Committee's decisions are final and not subject to appeal. Nevertheless, within one year from the issuance of its decision on debarment the Respondent may request reopening of the matter for reconsideration on the basis of newly discovered facts (no later than thirty days following such discovery) which by due diligence could not have been discovered prior to the Sanction Committee's Decision. The Committee will decide on its own discretion.

8. Disclosure and information sharing

As of 2007, the Bank publishes the names of debarred individuals and firms on its website.⁴⁵⁹ This public disclosure is in line with the Bank's policy of "zero tolerance" for fraud and corruption and shows that there will be serious consequences will result if the Bank finds evidence of the sanctionable practices. Thus, it has a deterrent effect and gives credibility to the Bank's efforts in this area.

If at any time the OCFC determines that there is any evidence of fraud or corruption in connection with an activity financed by another MDB, it may make or request OII to make available any related information to such organization or government, as the OCFC, in consultation with OII, deems appropriate, taking into account the need to protect confidential information.⁴⁶⁰

⁴⁵⁸ IADB Sanctions Procedures, *supra* note 450, Art. 11.3.

⁴⁵⁹ IADB, *Sanctioned Firms and Individuals*, <http://www.iadb.org/topics/transparency/IAD/sanctionedfirms.cfm?lang=en> (accessed 30 October 2009).

⁴⁶⁰ OCFC Guidelines and Regulations, *supra* note 452, para.110(b).

When investigations lead to a conclusion that internal laws of a country may have been violated, the OCFC may recommend to the President of the IADB, that the matter be referred to the appropriate national authorities. In this case, the OCFC may make or request OII to make available to these national authorities such information relating to the suspected violation as the OCFC, in consultation with OII, deems appropriate, taking into account the need to protect confidential information.⁴⁶¹

9. Case study: Fraudulent Curriculum Vitae

A company “X” submitted a bid for a consulting contract that contained three Curricula Vitae (CVs) for consultants who would be performing work under the contract. The consultants later filed complaints to the effect that the information in their CVs had been modified by the company, exaggerating their experience to obtain additional points in the evaluation. The company had indeed won the contract based on the higher score generated by the altered CVs.

OII interviewed the consultants who confirmed that the information in their CVs was false. As a result, a Notice of Administrative Action was issued against the company and its legal representative, who had submitted the false information. The Sanctions Committee has debarred both for three years. The value of the contract awarded to the company was US\$ 116,389.⁴⁶²

⁴⁶¹ *Ibid.*, para.110(a).

⁴⁶² OII Report 2008, *supra* note 449, at 13.

CHAPTER VII. THE AFRICAN DEVELOPMENT BANK

A. Introduction

Established as the regional MDB for Africa, African Development Bank (AfDB) is a leading financial development institution on the continent. It was created on 4 August 1963 in Khartoum, Sudan, where 23 newly independent African countries signed the agreement establishing the institution (AfDB Charter). As of December 2007, AfDB includes 53 independent African countries and 24 non-African countries.⁴⁶³ AfDB is the parental organization of the African Development Bank Group comprising two more entities: the African Development Fund (ADF), established on 29 November 1972, by the African Development Bank and 13 non-African countries, and the Nigeria Trust Fund (NTF), set up in 1976 by the Federal Government of Nigeria.⁴⁶⁴

Under its Charter, the purpose of the AfDB is to promote the economic development and social progress of its regional member countries (RMCs).⁴⁶⁵ It contributes to improving the living conditions of the populations, as well as creating, expanding and rehabilitating productive and social investments. It finances development and structural adjustment projects and programmes, provides advisory services and stimulates investments from other sources of finance.⁴⁶⁶

The AfDB's development assistance, available both for private and public sectors in regional member states, is mainly channeled through project loans/grants, including lines of credit, and technical assistance. During the period of 1967–2008, the AfDB has approved 3,276 loans and grants totaling USD 44.75.

⁴⁶³ Following the amendment of the Agreement in May 1982, the membership of the AfDB was opened up to non-regional countries.

⁴⁶⁴ Although the ADF and NTF are legally and financially distinct from the ADB, they share the same staff, and their projects are subject to the same high standards as those of the ADB. Therefore, within the context of this thesis, unless otherwise indicated, "African Development Bank" (or AfDB) means the African Development Bank, the African Development Fund, and the Nigerian Trust Fund.

⁴⁶⁵ Agreement Establishing the African Development Bank, 14 August 1963, Chapter 1, Article 1, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/30718627-EN-AGREEMENT-ESTABLISHING-THE-AFRICAN-DEVELOPMENT-BANK-6TH-EDITION.PDF> (accessed 3 November 2009) [hereinafter, AfDB Charter].

⁴⁶⁶ AfDB (2007): *Disbursement Handbook*, Chapter 1, Article 1.1, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Financial-Information/30715194-EN-DISBURSEMENT-HANDBOOK.PDF> (accessed 3 November 2009).

B. Tackling Corruption in the AfDB-funded Projects

1. The AfDB's fiduciary responsibility

Article 17.1(h) of the AfDB Charter requires that AfDB “shall make arrangements to ensure that the proceeds of any loan made or guaranteed by it are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency”.⁴⁶⁷

2. The AfDB's anti-corruption policy

2.1. General overview

Various surveys show that the majority of African countries have a high level of corruption.⁴⁶⁸ *Michelle Celarier* claims that in 1996, up to 30bn dollars in aid for Africa ended up in foreign bank accounts.⁴⁶⁹

However, although known even by the AfDB, the problems of corruption became a central component of its good governance agenda only in the late 90s. This was due mostly to increase in the incidence of corrupt practices with impunity, mounting evidence about its negative impact on economic growth and investment, and impediment of the efficient use of development assistance.⁴⁷⁰

In December 1999, the Bank issued its Bank Group Policy on Good Governance. Based on this Policy, the AfDB has been actively supporting governance in RMCs through institutional strengthening projects and non-lending activities. While strengthening transparency and accountability in the management of public resources at the country, sector and regional levels can be crucial for economic development and elimination of poverty in fragile states and the region as a whole, it does not ensure accountability and transparency in the use of the resources provided by AfDB.

⁴⁶⁷ AfDB Charter, *supra* note 465, Article 17.1(h).

⁴⁶⁸ For example, WB Governance Indicators, TI's Corruption Perceptions Index (CPI).

⁴⁶⁹ Celarier, M. (1996): *The Search for the Smoking Gun*, in: *Euromoney Online Magazine*, 49.

⁴⁷⁰ AfDB Proceedings of the Regional Learning Workshop on Combating Corruption in Africa (2003), 8.

Therefore, to prevent and mitigate the harmful impact of corruption on the economic development of its member countries, the AfDB has adopted an Anti-Corruption Strategy aimed at:

- Preventing corruption in AfDB activities;
- Mainstreaming corruption issues in AfDB activities;
- Helping Regional Member Countries (RMCs) that request assistance; and
- Participation in regional and global anti-corruption initiatives.

2.2. Procurement reforms

Based on its Anti-Corruption Strategy, AfDB adopted a zero tolerance policy against fraud and corruption in the projects it funds. Borrowers (including beneficiaries of Bank loans) as well as bidders/suppliers/contractors under Bank-financed contracts are required to observe the highest ethical standards during the procurement and execution of contracts.

Procurement financed by the AfDB is governed by the *Rules and Procedures for Procurement of Goods and Works* (AfDB Procurement Rules)⁴⁷¹ as well as *Rules and Procedures for Recruitment of Consultants* (AfDB Consultants Rules)⁴⁷² both developed in 1999 and revised in 2008 for the purpose of harmonization with other MDBs.

Besides, AfDB approved new guidelines for policy-based loans aimed specifically at governance policy changes and reforms. Specifically, the guidelines provide information for consideration at each stage of the project cycle, and serve as a check list of actions required to assess governance risk and impact, required policy changes and recommended actions, and relevant indicators to measure progress.

⁴⁷¹ AfDB (2008): *Rules and Procedures for Procurement of Goods and Works*, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/Revised%20RULES%20AND%20PROCEDURES%20FOR%20PROCUREMENT%20OF%20GOODS%20%26%20WORKS%20FINAL%20SEPTEMBER%202009%20ENGLISH.pdf> (accessed 30 October 2009) [hereinafter, AfDB Procurement Rules].

⁴⁷² AfDB (2008): *Rules and Procedures for the use of Consultants*, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/Revised%20PROCEDURES%20FOR%20THE%20USE%20OF%20CONSULTANTS%20FINAL%20ENGLISH%20SEPTEMBER%202009.pdf> (accessed 30 October 2009) [hereinafter, AfDB Consultants Rules].

C. The AfDB's Debarment Policy

1. Introduction

Provisions on debarment in the AfDB were first introduced when it adopted its formal Procurement Rules and Consultant Rules in 1999. Apart from these Rules, debarment procedure is based on the *Guidelines on Preventing and Combating Fraud and Corruption in Bank Operations*, *IACD's Standard Operating Procedures* and *AfDB Sanctions*. Currently AfDB is in the process of developing comprehensive Sanctions Guidelines.

Before establishment of the Integrity and Anti-Corruption Division (formerly known as an Anti-Corruption and Fraud Investigation Division), allegations were investigated by the Internal Audit Department (IAD) or by an ad-hoc team, including the general counsel. The Bank's Procurement Review Committee (PRC) based on the findings and conclusions of investigations used to decide on sanctions, such as cancellation of loans to the borrowers or debarment of the contractor/consultants.⁴⁷³

In November 2005, the Board of Directors of the AfDB created the Integrity and Anti-Corruption Division (IACD), which began its operations in June 2006. Being under the Office of the Auditor General, IACD is the only investigative body for fraud and corruption within the AfDB and reports directly to the Auditor General. The Division's mandate is to promote integrity in the use of Bank resources and investigate corruption in Bank-financed activities.⁴⁷⁴ IACD works collaboratively with the Internal Audit Division, which also reports to the Auditor General. While the Internal Audit Division deals mainly with programmed verifications of financial statements and the functioning of business processes, the IACD conducts investigations to verify specific allegations of misconduct, fraud or corruption.

⁴⁷³ Langton, D. (2004): *Anti-Corruption Standards of the International Financial Institutions*, 7, <http://web.mit.edu/kolya/f/root/net.mit.edu/sipb.mit.edu/contrib/wikileaks-crs/wikileaks-crs-reports/RL32374.pdf> (accessed 1 November 2009).

⁴⁷⁴ "Bank-financed activities" refers to all operations and internal administrative matters financed by the AfDB.

2. Grounds for debarment

Grounds for debarment listed in the Revised Procurement Guidelines of 2008 are as follows: corrupt, fraudulent, coercive and collusive practices.⁴⁷⁵ Their definitions are harmonized with those of the Uniform Framework mentioned above.

3. Initial sources of allegations

Initial allegations can be received from any person who has knowledge of alleged corruption and/or fraudulent activities within the Bank's operations: employees, contractors, consultants and the general public. The principal receiving point for the Bank is the IACD. Allegations can be reported through secured telephone, email and facsimile hotlines 24 hours a day, seven days a week. Online forms for receiving complaints are also available.

The IACD accepts all information either anonymously or with identification of the person making the report, if he/she so wishes. The identity and the information provided are held in the strictest confidence.

Apart from IACD, allegations may be provided to any AfDB office or an employee of the Bank. In this case, there is a mandatory obligation for this information to be reported to the IACD within a period of 7 days from the time of first receipt.

4. Investigation process

4.1. Preliminary assessment of allegations

All complaints are registered and reviewed by IACD to determine whether they fall under its jurisdiction. Complaints that fall outside the authority of IACD are referred to the appropriate organs within the Bank. Those complaints that fall under its mandate are evaluated for their credibility, materiality, and verifiability. Depending on the outcome of the evaluation, IACD will either:

⁴⁷⁵ AfDB Procurement Rules, *supra* note 471, Art.1.14 (a); AfDB Consultant Rules, *supra* note 472, Art. 1.22.

- discard them if they are obviously false or frivolous; or
- warrant the opening of an investigation if there is sufficient evidence to move forward; or
- determines to carry out additional screening via a preliminary inquiry.⁴⁷⁶

4.2. Full investigations

Once screening of the allegations reveals that they have a merit, the IACD opens a full investigation based on its Standard Operating Procedures (SOP) being consistent with the Uniform Framework for Preventing and Combating Fraud and Corruption (for a flowchart illustrating the process of dealing with allegations of fraud or corruption in the AfDB see Annex VI).

For the purpose of corroboration of the information in IACD's possession, investigative activity shall include, *inter alia*, collection and analysis of documentary, video, audio, photographic, and electronic information or other material, interviews of witnesses, observations of investigators, conducting of interviews, etc. If needed, the IACD may also involve external parties for investigations.⁴⁷⁷

If the IACD believes that an audit is required, it may make a recommendation to the Auditor General who will then refer the case to the Internal Audit Division to conduct such an audit, if deems it necessary.⁴⁷⁸

During investigations, at an appropriate time determined by IACD, a Respondent is sent a formal Notice on Investigation Findings (Notice). This Notice states the allegations, summarizes the facts and evidence, sets forth the possible sanctions, and explains the Respondent's right to present exculpatory evidence. The Bank does not provide for any time limitation for contesting the allegations by the Respondent as long as the evidence is credible and relevant to Investigations. Likewise, there is no

⁴⁷⁶ AfDB, *Integrity and Anti-Corruption: 2007-2008 Report*, 13, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Integrity%20and%20Anti-%20Corruption%202007-2008%20Report.pdf> (accessed 2 November 2009).

⁴⁷⁷ AfDB, *Investigative Process*, <http://www.afdb.org/en/about-us/structure/auditor-generals-office/integrity-and-anti-corruption/investigative-process/> (accessed 2 November 2009).

⁴⁷⁸ *Ibid.*

such limitation for the Bank to respond to the Respondent's arguments and evidence - it does so as required on case by case basis.⁴⁷⁹

If upon completion of the investigation, the findings are not sufficient to substantiate the complaint, the IACD will close the investigation and notify the relevant parties about it.

5. Sanctions process

A sanctions proceeding is regulated by the *AfDB Sanctions* pending adoption of comprehensive *Sanctions Guidelines*.

5.1. Submissions to the President

If the IACD finds sufficient information to substantiate the complaint, the Auditor General presents the Sanction Report to the President of the Bank.⁴⁸⁰

5.2. The standard of proof

The standard of proof shall show that it is *more probable than not* that the Respondent had engaged in a sanctionable practice.⁴⁸¹

5.3. Imposition of sanctions

Based on the investigation information furnished, the President makes sanction determination with the advice of the Advisory Committee on Corruption and Fraud.⁴⁸²

a) Range of sanctions

The Bank's range of sanctions for external Subjects include letter of reprimand and debarment.⁴⁸³

⁴⁷⁹ Personal communication with AfDB representatives.

⁴⁸⁰ AfDB Investigative Process, *supra* note 477; see also AfDB Integrity and Anti-Corruption Report 2007-2008, *supra* note 476.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

b) Length of debarment

Debarment may be imposed either indefinitely or for a stated period of time, determined on case-by-case-basis depending on aggravated and/or mitigating factors. By now the average length of debarment imposed has been three (3) years.

c) Aggravating and mitigating factors

Choice of the sanction and length of debarment depend on the following factors:

- severity of the Respondent's conduct;
- degree of the Respondent's involvement in the sanctionable practice;
- the Respondent's past conduct involving a sanctionable practice;
- voluntary disclosure of the information on the involvement in sanctionable practice;
- other factors which might be deemed relevant on a case-by-case basis.

6. Parties subject to debarment

When the debarred party is a company, debarment extends to its directors and staff, as well as its affiliates.

7. Appeals

Debarred firms/ individuals may within ninety (90) days appeal to the President for re-consideration. However, Respondent does not have an automatic right to reconsideration. Appeal to Request a Review must reflect information that was not known, or could not reasonably have been known to the subject at the time the AfDB sought explanations, and would have been relevant to the President's decision. In determining whether to reconsider the case and which decision to take, the President may seek the advice of the Advisory Committee on Corruption and Fraud.⁴⁸⁴

⁴⁸⁴ *Ibid.*

8. Disclosure and information sharing

At the time being, the Bank does not publish the reports/documents concerning investigations and the names of debarred persons/entities on its website.

However, in line with collaboration and cooperation being forged amongst MDBs, the Bank is open to share information, on a need-to-know basis. Where a case has to be referred to a National Authority, this would be decided by the President with the advice of the Advisory Committee on Corruption and Fraud on a case-by-case-basis.⁴⁸⁵

9. Voluntary Disclosure Programme (VDP)

The AfDB encourages firms or individuals involved in its projects to volunteer information on fraud or corruption of which they have knowledge or in which they are involved in. The voluntary disclosure of malpractices can be a mitigating factor in the application of sanctions against the firm or individual making the disclosure.⁴⁸⁶

10. Case study: Financial Irregularities in Project C⁴⁸⁷

AfDB received an allegation from Government of A related to financial irregularities perpetrated by a company B on Project C. Based on its own investigations and the sworn affidavits and signed statements obtained by the national anti-corruption office of A, AfDB concluded that, under its rules and procedures, standards and definitions, there was evidence of fraudulent practices in the award of contract to the company B - the procurement process for the selection of B was not competitive and there was manipulation in the procurement process that facilitated B to win the bid. The contract price was exaggerated and inexplicably high and some local staff received kickbacks from the award of this contract. Additionally, company B submitted ineligible and

⁴⁸⁵ *Ibid.*

⁴⁸⁶ AfDB, *Voluntary Disclosure Program (VDP)*, <http://www.afdb.org/en/about-us/structure/auditor-generals-office/integrity-and-anti-corruption/voluntary-disclosure-program/> (accessed 5 November 2009).

⁴⁸⁷ Due to confidentiality reasons all the names in this case study have been redacted.

fictitious invoices to support its claims for reimbursement of expenses under the contract it signed with the government of A.

Based on the afore-mentioned findings and pursuant to the AfDB's Procurement and Consultants Rules, the AfDB debarred company B, its two directors and three subsidiaries for five years each. Three individual project staff, which had accepted bribes and kickbacks and colluded with company B to violate the AfDB rules, were sanctioned from working on any AfDB-financed activities for a period of three years each. Another individual project staff was recommended for official reprimand for gross negligence in exercising due diligence in the supervision of the invoices to be enforced by the Government of A under its civil service rules.

AfDB's findings were referred to the Anti-Corruption office of Government A to be used to further investigation.

CHAPTER VIII. THE EUROPEAN BANK ON RECONSTRUCTION AND DEVELOPMENT

A. Introduction

The idea of establishment of the European Bank of Reconstruction and Development (EBRD) emerged in 1989 after the fall of the Berlin Wall and the end of the Cold War. The foundation agreement was signed on 29 May 1990 by 40 countries, the Commission of the European Communities and the European Investment Bank to “foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative”⁴⁸⁸ in the countries of Central and Eastern Europe and the Commonwealth of Independent States. With headquarters in London, the EBRD began operations in April 1991. Since its establishment, the number of the member countries has grown to 61, and the number of recipient countries reached 30.⁴⁸⁹

EBRD fulfills its mission through project financing for banks, industries and businesses, both new ventures and investments in existing companies. Besides, it supports publicly owned companies in privatization and restructuring. It also assists in building institutions necessary for development of the market economy, and promotes market-oriented skills and sound business practices.

B. Tackling Corruption in the EBRD-funded Projects

1. The EBRD’s fiduciary responsibility

Article 8.1. of EBRD’s constituent agreement (EBRD Charter) requires it to “take the necessary measures to ensure that the proceeds of any loan made, guaranteed or participated in by the Bank, or any equity investment, are used only for the purposes for which the loan or the equity investment was granted.”⁴⁹⁰ Bound by this provision, EBRD has to prevent its funds from being diverted from their intended purposes.

⁴⁸⁸ Agreement Establishing the European Bank for Reconstruction and Development (signed in Paris on 29 May 1990 and entered into force on 28 March 1991), Chapter 1, Article 1 [hereinafter, EBRD Charter].

⁴⁸⁹ Turkey became the EBRD’s 30th recipient country as of 1 November 2008.

⁴⁹⁰ EBRD Charter, *supra* note 489, Chapter III, Art.8.1.

2. The EBRD's anti-corruption policy

2.1. General overview

The rapidity of economic transformations in the transition countries has also created a lot of opportunities for fraud and corruption which exposed EBRD's funds to risks. This urged EBRD to develop an anti-corruption strategy which would encompass prevention, detection, investigation and sanction of corruption, fraud and similar practices in both the Bank's operations and more generally.

Preventive measures include assisting EBRD's countries of operations in their efforts to tackle corruption (external assistance); taking steps within the EBRD to ensure its integrity (internal prevention), and harmonizing its approach to dealing with corruption through global collaboration (international co-operation).

Internal prevention plays a key role in ensuring that the highest levels of ethical standards are maintained in all of the Bank's activities. For this purpose the Bank has developed integrity due diligence procedures and guidelines which help the Bank to assess the potential risks. The EBRD ensures that integrity concerns are seized on at all levels of the investment cycle. Following "know your customer" principle, banking teams should check prospective deals and clients for matters that might pose risks to the Bank's interests and reputation.

The due diligence undertaken by the banking teams is routinely reviewed by Risk Management to provide independent judgment of its adequacy and conclusions. The higher risks are subject to control by the Office of the Chief Compliance Officer (OCCO). The OCCO, comprised of seven staff members, regularly monitors compliance by the banking teams with the integrity procedures which rely on "red-flags" serving as early warnings of potential integrity risks. These risks must be thoroughly addressed prior to any investment decision by the Bank.

Recently, the EBRD created a position of Business Group Director for Portfolio Monitoring whose role is to ensure that the EBRD monitors efficiently and effectively the risks in the Bank's portfolio of existing projects, and to provide early warnings and solutions to identified problems, including events of corruption and fraud.

2.2. Procurement reforms

30% of EBRD's business portfolio in the public sector, therefore it is essential that clients observe the "highest standards of ethics" during the procurement and execution of contracts financed by it.

Considering that particular risks are associated with procurement, the Bank's Board of Directors approved Procurement Policies and Rules (PP&Rs) in 1991⁴⁹¹ which have been revised several times since then.

In February 1998, the EBRD's Board of Directors approved revisions to the PP&Rs, which covered definitions of corrupt and fraudulent practices in the procurement process and the way the EBRD would deal with any proven allegations of these practices.⁴⁹² Amendments of 2007 extended the sanctionable offences to corrupt, fraudulent, coercive and collusive practices and introduced a provision on a "no bribe pledge".

C. The EBRD's Debarment Policy

1. Introduction

Debarment was first mentioned in the Bank's revised PP&Rs of 1998. Along with debarment, PP&R set forth a basis for a cross-debarment of a firm or an individual which has been found to have engaged in corrupt or fraudulent practices in a project not financed by the Bank by either a judicial process in a member country of the Bank or a finding by the enforcement (or similar) mechanism of another international organization (a third-party finding).

Before 2009, all received allegations of fraud and corruption would be investigated by the OCCO. The results of its investigations would be reviewed by the EBRD's Procurement and Contracting Committee, which could make, if appropriate, a

⁴⁹¹ EBRD, *Procurement Policies and Rules*, <http://www.ebrd.com/about/policies/procure/ppr.pdf> (accessed 24 November 2009).

⁴⁹² EBRD, *Annual Report 1999*, 54, <http://www.ebrd.com/pubs/general/ar99.htm> (accessed 25 November 2009).

sanction recommendation to the Bank's Executive Committee. The latter would decide whether, and what kind of sanction to apply.

In late 2008, as part of its commitments under the Uniform Framework, the EBRD adopted the Enforcement Policy and Procedures (EPPs), which set forth provisions on how the Bank should proceed with the received allegations of fraud and corruption. The EPPs became effective as from 27 March 2009, when the Enforcement Committee was established. The EPPs designated OCCO to investigate allegations of corruption or fraud in the EBRD's activities.⁴⁹³

2. Grounds for debarment

Grounds for debarment are: corrupt, fraudulent, coercive and collusive practices. In May 2007 EBRD adopted harmonized definitions of fraudulent and corrupt practices as set out in the *Uniform Framework for Preventing and Combating Fraud and Corruption* and has incorporated them into the revised PP&Rs.⁴⁹⁴

As EBRD's Anti-corruption report of 2008 makes it clear, it is not necessary for the prohibited practice to occur in connection with procurement - it may also occur during the execution of the Bank project, such as by misappropriation of funds or bribery of officials.

3. Sources of initial allegations

Anyone, within or outside the Bank, who has information regarding alleged fraud or corruption in EBRD-financed projects shall report it to the Bank's Office of the Chief Compliance Officer (OCCO).⁴⁹⁵ It can be done in person, by calling the toll-free

⁴⁹³ The manner in which OCCO helps EBRD protect its integrity and reputation and manage integrity risks is set forth in *The Bank's Integrity Risks Policy* which also includes the OCCO's Terms of Reference (approved by the Board of Directors on 7 April 2009), <http://www.ebrd.com/about/integrity/integrityriskpol.pdf> (accessed 21 November 2009).

⁴⁹⁴ EBRD PP&Rs (approved 6 May 2009), para.2.9., <http://www.ebrd.com/about/policies/procure/ppr09e.pdf> (accessed 24 November 2009).

⁴⁹⁵ On 7 April 2009, EBRD's Board of Directors approved "The Bank's Integrity Risks Policy and Terms of Reference for the Office of the Chief Compliance Officer".

hotline or via e-mail. EBRD can also accept anonymous complaints and keep confidentiality of those who disclosed their identity but do not want it to be revealed. OCCO can also receive information about judicial judgment in an EBRD member country or a decision by another international organization that an individual or entity has engaged in fraud or corruption (Third Party Finding).

4. Investigation process

4.1. Preliminary assessment of allegations

Upon receipt of an allegation of a suspected Prohibited Practice or information concerning a Third Party Finding, the Chief Compliance Officer (CCO) shall carry out a preliminary assessment to determine whether the allegation falls under OCCO's jurisdiction and whether the information received is reliable (for a flowchart illustrating the process of dealing with allegations of fraud or corruption in the EBRD see Annex VII).

The matter shall be closed if based on the preliminary assessment the CCO determines that it does not warrant further investigation as well as if the prohibited practice being object of the allegation or a Third Party Finding took place (or would have taken place) more than ten years prior to the date of receipt of such information by CCO.⁴⁹⁶

4.2. Full investigations

If as a result of the preliminary assessment of the allegations the CCO determines, that the matter falls under OCCO's jurisdiction and that the allegations are reliable, the CCO shall undertake a more detailed and comprehensive investigation. Investigations are carried out in accordance with the International Financial Institutions Principles and Guidelines for Investigations.

⁴⁹⁶ EBRD Enforcement Policy and Procedures, para.3.3(ii)-(iv) [hereinafter, EBRD EPPs] <http://www.ebrd.com/about/integrity/epp.pdf> (accessed 24 November 2009).

In case of a receipt of a Third Party Finding, the CCO does not carry out an investigation but verifies its authenticity, establishes the connection, if any, between the individual or the firm subject to that Finding and the Bank, and determines its relevance and seriousness to the Bank. In determining the seriousness of the Third Party Finding, CCO shall consider whether the Third Party Finding was rendered in a jurisdiction which afforded appropriate due process rights to the Respondent and the gravity of Respondent's conduct having regard to international conventions and standards.⁴⁹⁷

If, as a result of investigation, the CCO determines that there is sufficient evidence to support a finding of a Prohibited Practice or that a Third Party Finding may warrant imposition of sanctions, he/she shall send a draft Notice of Prohibited Practice or a Notice of Third Party Finding and proposed sanction to the Enforcement Committee.⁴⁹⁸

5. Sanctions process

A sanctions process in the EBRD is two-tiered involving the Enforcement Committee and the President.

5.1. Submissions to the Enforcement Committee

Upon receipt of the CCO report, the Enforcement Committee which consists of at least five senior Bank staff members appointed by the President shall determine whether the matter warrants further consideration.⁴⁹⁹ But prior to that, if the Enforcement Committee deems it necessary for protection of the Bank's interests or reputation as well as for maintenance of integrity of the Bank's procurement process, it may order suspension of the eligibility of the Respondent (and affiliates, if any), to

⁴⁹⁷ *Ibid.*, para.3.4(ii).

⁴⁹⁸ *Ibid.*, para.3.5(i).

⁴⁹⁹ Prior to adoption of EPPs, this role belonged to the EBRD's Procurement and Contracting Committee ("PCC"), which was reviewing the results of any OCCO investigation and if appropriate, was making a recommendation to the EBRD's Executive Committee to cancel any portion of the EBRD's financing, together with a recommendation as to whether the entity in question should be excluded, either indefinitely or for a limited period of time, from bidding on future EBRD projects.

participate in any Bank-financed project or to receive payment in respect of an ongoing project. Suspension may be either for a defined period of time or for so long as the enforcement proceedings are ongoing.⁵⁰⁰ A suspension decision will be made public unless the Respondent has informed the Enforcement Committee in writing that he/she will voluntarily refrain from attempts to participate in the Bank-financed projects pending a final outcome of the Enforcement Proceedings.⁵⁰¹ Breach of such an undertaking might affect the sanction decision.⁵⁰²

If there is no sufficient ground to warrant further consideration, the Enforcement Committee directs the CCO to close the case. If, on the contrary, the Enforcement Committee determines that the evidence is sufficient to support a finding that the Respondent did commit the alleged prohibited practice or that the Third Party Finding warrants imposition of sanction, it shall send the Notice of Prohibited Practice or the Notice of Third Party Finding, respectively, to the Respondent.⁵⁰³ The Notices identify the Respondent, states the allegation and attach all evidence (the Notice of Prohibited Practice) or a copy of the Third Party Finding (the Notice of Third Party Finding), state proposed sanction(s) and explains the possibility of contesting the allegation(s) and/or the proposed sanction(s) (the Notice of Prohibited Practice) or proposed actions (the Notice of Third Party Finding) within prescribed period of time which should not be less than 30 days.

If, within the period of time set out in either the Notice of Prohibited Practice or the Notice of Third Party Finding, the Respondent does not express its/his/her intention to contest the allegations or the proposed sanctions, the Enforcement Committee shall automatically instruct the CCO to implement the proposed sanctions without need for further submission to the President.⁵⁰⁴

When the Respondent opts for the contested enforcement proceeding, it/he/she should submit either (i) arguments and/or written evidence in response to the material

⁵⁰⁰ EBRD EPPs, *supra* note 496, para.5.2.

⁵⁰¹ *Ibid.*, para.7.3.

⁵⁰² *Ibid.*, para.6.8(v).

⁵⁰³ *Ibid.*, para.5.1(iii)-(iv).

⁵⁰⁴ *Ibid.*, para.5.7(i).

provided in the Notice of Prohibited Practice and/or include arguments and evidence of mitigating circumstances, such as the intervening implementation of programs to detect or prevent prohibited practices; or (ii) mitigating circumstances subsequent to the date of the Third Party Finding or other circumstances and arguments regarding relevance or seriousness of the Third Party Finding to EBRD.⁵⁰⁵

The CCO, which receives a copy of the Respondent's submission, can within prescribed period of time rebut the arguments and evidence presented.⁵⁰⁶

The Respondent is also entitled to make oral representations if it/he/she wishes so, which can be rebutted by the CCO or his/her representative. All oral representations are limited to arguments and evidence contained in the written submissions.⁵⁰⁷

5.2. Standard of proof

Reviewing the evidence submitted, the Enforcement Committee shall determine their relevance, materiality, weight, and sufficiency. In relation to a prohibited practice, the Enforcement Committee shall determine whether based on the evidence *it is more likely than not* that Respondent engaged in the alleged prohibited practice. In relation to a Third Party Finding, the Enforcement Committee shall determine whether *it is more likely than not* that the Bank's operations or reputation would be harmed or impaired if the Bank did not sanction the Respondent.⁵⁰⁸ In case of positive determination, the Enforcement Committee submits a report to the President together with recommended sanctions.

⁵⁰⁵ *Ibid.*, para.6.2(ii)-(iii). Due to the nature of the enforcement proceedings by EBRD, the Respondent in its/his/her response may not challenge any element of the Third Party Finding.

⁵⁰⁶ *Ibid.*, para.6.3. The Enforcement Committee may, at its discretion, accept additional material evidence from either the OCC or the Respondent after the deadlines providing the other party with the opportunity to respond.

⁵⁰⁷ *Ibid.*, para.6.5

⁵⁰⁸ *Ibid.*, para.6.6. 'More likely than not' means that upon consideration of all of the relevant evidence and materials, a preponderance of the evidence and materials supports the finding.

5.3. *Imposition of sanctions*

Upon receipt of the report and recommendations of the Enforcement Committee, the President, in consultation with the Executive Committee⁵⁰⁹ can: (i) accept the recommendation in whole; (ii) accept the recommendation in part and make his/her own determination; (iii) reject the recommendation and refer the matter back to the Enforcement Committee for further consideration; (iv) or reject the recommendation and order the Enforcement Committee to close the matter.⁵¹⁰

a) *Range of sanctions*

The President can impose one or more of the following sanctions:

- *Rejection* of a proposal for award of contract to a Respondent in respect of a procurement of goods, works or services.
- *Cancellation* of a portion of Bank finance allocated to a Respondent but not yet disbursed in respect of a contract for the procurement of goods, works or services.
- A formal *Letter of Reprimand*.
- *Debarment*: the Respondent is declared ineligible, either indefinitely or for a defined period of time, to participate in any new Bank-financed Project.
- *Conditional Non-Debarment*: the Respondent is required to comply, within defined period of time, with certain remedial, preventative or other measures as a condition to avoid debarment. If the Respondent fails to do so, it will be debarred automatically.
- *Debarment with Conditional Release*: the Respondent is declared ineligible for a defined period of time subject to conditional reinstatement pursuant to which the period of debarment is reduced or terminated if the Respondent demonstrates compliance with specified conditions such as

⁵⁰⁹ Prior to adoption of EPPs, the President was not participating in decision-making process and the Executive Committee would decide alone, without whether, and what kind of sanction to impose.

⁵¹⁰ EBRD EPPs, *supra* note 496, para.6.9.

the introduction and/or implementation of corporate compliance or ethics programs.

- *Restitution*: Respondent is ordered to make restitution of diverted funds to any other party.⁵¹¹

b) *Length of debarment*

The Respondent can be debarred either indefinitely or for a defined period of time.

c) *Aggravating and mitigating factors*

Recommendations and decisions on sanctions are affected, *inter alia*, by the following factors:

- severity of the Respondent's conduct;
- degree of the Respondent's involvement in the prohibited practice;
- damage caused by the Respondent to EBRD;
- past conduct of the Respondent involving a prohibited practice;
- mitigating circumstances, including the extent to which the Respondent cooperated in the investigation.⁵¹²

6. Parties subject to debarment

Both individuals and firms can be subject to debarment. In relation to a firm, debarment can be extended to its affiliates, meaning any firm controlled, directly or indirectly, by the Respondent, any firm that controls, directly or indirectly, the Respondent or any firm directly or indirectly under common control with the Respondent.⁵¹³

⁵¹¹ *Ibid.*, para.7.2.

⁵¹² *Ibid.*, para.6.8.

⁵¹³ *Ibid.*, para.2.1.

7. Appeals

EPP does not provide any right of appeal to Respondent and its affiliates. The President's decision is final and takes effect immediately.

8. Disclosure and information sharing

Names of the Respondents subject to debarment or debarment with conditional release will be posted on the EBRD's website and remain there for as long as debarment is in force.

The materials submitted in the context of enforcement proceedings can with the authorization of the Enforcement Committee be disclosed to any international organization at any time given this organization has agreed to make similar information available from its own files to EBRD.

9. Case study: Cross-debarment of Lahmeyer

Effective 8 February 2007, EBRD determined that Lahmeyer International GmbH ("Lahmeyer") would be ineligible to be awarded EBRD-financed contracts until such time as Lahmeyer had implemented an anti-corruption programme satisfactory to the EBRD.⁵¹⁴ Lahmeyer, as mentioned above, was originally debarred by the World Bank in 2006 for bribery in connection with the WB-financed Lesotho Highlands Water Project. Cross-debarment of Lahmeyer by EBRD on the basis of paragraph 2.9 (d) of the PP&R was the first case where any of the MDBs has debarred a company for an offence committed in a project financed by another MDB. Therefore, it was widely celebrated as an important step towards harmonization of the MDB'S anti-corruption efforts.

One might ask why they cross-debarred Lahmeyer, and not Acres, for example, which was found guilty on more charges than Lahmeyer. The then Chief Compliance Officer

⁵¹⁴ EBRD News Release: *Anti-Corruption Ruling*, 25 March 2008, <http://www.ebrd.com/oppo/procure/guide/fraud.htm> (accessed 24 November 2009).

of EBRD in an interview to *Transparency International* explained that Acres had never worked with EBRD on projects, therefore its debarment would have made no sense. On the other hand, Lahmeher had done a lot of business with EBRD over the years and was actually being considered for an award of a contract that was to be financed by the EBRD.⁵¹⁵

Prior to its debarment, Lahmeyer was offered a chance to explain why it should not be debarred. Its representatives informed EBRD about a compliance programme and a code of conduct introduced since being convicted in Lesotho. But this was not enough for EBRD and Lahmeyer was debarred until “it improved its anti-corruption policies”, which meant, *inter alia*, introduction of a compliance monitor to advise on and assist in developing an overall effective anti-corruption/ corporate governance structure; a viable reporting mechanism and a policy that protects employees that report corruption in good faith.⁵¹⁶

By 2008, Lahmeyer had introduced an enhanced Compliance Management System (CMS), which was a comprehensive anti-corruption programme satisfactory to the EBRD. In view of Lahmeyer's efforts, the EBRD had decided to re-instate Lahmeyer's eligibility to be awarded EBRD financed contracts effective 3 March 2008.⁵¹⁷

However, in order to ensure that full implementation of the CMS is achieved, Lahmeyer's Compliance Monitor was required to provide the EBRD with two monitoring reports, demonstrating Lahmeyer's implementation of its anti-corruption program to the satisfaction of the EBRD. In case of Lahmeyer's failure to do so or a new finding of fraud or corrupt practices in the company by a judicial process or other official enquiry at any time prior to 1 March 2009, the Bank would have had the right to re-instate Lahmeyer's debarment and declare Lahmeyer ineligible to be awarded a future EBRD financed contract for an indefinite period of time.⁵¹⁸

⁵¹⁵ Transparency International, *Interview with Enery Quinones, Chief Compliance Officer of EBRD* (April 2007), http://www.transparency.org/publications/newsletter/2007/april_2007/interview (accessed 24 November 2009) [hereinafter, TI Interview].

⁵¹⁶ *Ibid.*

⁵¹⁷ EBRD News Release, *supra* note 515.

⁵¹⁸ *Ibid.*

CHAPTER IX. SYNTHESIS AND COMPARATIVE ANALYSIS

This research on debarment by the MDBs demonstrates that all MDBs have debarment systems in place and all of them are of an administrative nature.⁵¹⁹ Their debarment policies have a lot in common due to harmonization steps under the Uniform Framework for Preventing and Combating Fraud and Corruption signed on 17 September 2006 by the heads of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, Inter-American Development Bank, International Monetary Fund and the World Bank in Singapore. However, the Uniform Framework is focused only on definitions of sanctionable practices, investigative principles and guidelines, as well as the promotion of information sharing among IFIs, leaving out the sanction procedures (for a tabular synthesis of debarment procedure in the MDBs see Annex I).

A. Grounds for debarment

As claimed by *Thornburgh*, to ensure fairness of the debarment proceedings, it is essential to forewarn the potential subjects thereof of the kinds of conduct which will give rise to their liability under such proceedings. Therefore, the range of the particular activities which may lead to debarment should be clearly defined.⁵²⁰

The current definitions of the sanctionable practices set forth in the procurement rules and procedures of the MDBs have been harmonized with those provided for in the Uniform Framework. They are as follows:

- *A corrupt practice* is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.

⁵¹⁹ Despite being administrative in nature, *Moran et al.* argued that the WB's debarment process can be considered as a quasi-judicial, where companies are allowed to be represented by lawyers, written submissions are accompanied by a signed statement that they are "trustful to the best of the signer's knowledge",⁵¹⁹ as well as witnesses can be called. See *Moran et al.*, *supra* note 140, at 16.

⁵²⁰ *Thornburgh et al.*, *supra* note 156, at 30.

- A *fraudulent practice* is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.
- A *collusive practice* is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party.
- A *coercive practice* is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.

The only MDB which list of sanctionable practices differs from those of the others is the WB. In addition to the harmonized definitions listed above, it also includes an “obstructive practice” which means (i) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or (ii) acts intended to materially impede the exercise of the Bank’s inspection and audit rights.⁵²¹ Other MDBs use an “obstructive practice” only as an aggravating factor while determining sanctions in case the fact of corruption has been proved. There is even a reference to it in the ADB’s Integrity Principles and Guidelines. Although these Guidelines do not include it in the list of sanctionable practices, they consider it as “a failure to maintain the highest ethical standards”, which may form the basis for remedial actions.

B. Cross-debarment

Only the ADB and the EBRD refer to the cross-debarment in their policies. Thus, the ADB under its Integrity Principles “may determine that other international financial

⁵²¹ WB Procurement Guidelines, Section 1.14(a)(v).

institutions' or legal or regulatory bodies' decisions that a party has failed to adhere to appropriate ethical standards (any established system of principles, rules, or duties, including the laws or regulations of a state), constitutes that party's failure to maintain the highest ethical standards required by ADB's Anticorruption Policy".⁵²² Likewise, the EBRD, under its Enforcement Policy and Procedures, may impose debarment based on the third-party finding, which is "a final judgment of a judicial process in a member country of the Bank or a finding by the enforcement (or similar) mechanism of another international organization that an individual or entity has engaged in a Prohibited Practice".⁵²³

However, in practice, there is only one case of cross-debarment by now – that of Lahmeyer by the EBRD, which had initially been debarred by the WB. Debarment of only firms and individuals that had engaged in corrupt practice within the projects funded by a certain MDB has been often criticised for significantly undermining the essence of debarment, since firms or individuals debarred by one MDB are still eligible to obtain a contract funded by another MDB. Therefore, to ensure a deterrent effect of debarment and prevent corrupt practice, all MDBs should apply cross-debarment. It makes no sense for any MDB to do business with a company that another MDB has debarred because of corruption.

Over the last few years there has been an active discussion about the possibility of implementation of cross-debarment among the MDBs. The complexity of this issue was due to different sanctions procedures they apply, and the need to ensure due process to the Respondent. An MDB has to be sure that when it takes a decision based on a decision made by someone else, it is comfortable with that decision-making process. In some cases, it can rely on the processes and procedures of another institution, while in other cases, it may doubt their transparency or fairness. As an EBRD Chief Compliance Officer pointed out in her interview with TI, "cross-debarment is saying 'yes, we trust that the decision was made in a way we can rely on'".⁵²⁴ Therefore, according to some points of view, before establishing a practice of

⁵²² ADB Integrity Principles and Guidelines, *supra* note 409, para.52.

⁵²³ EBRD EPPs, *supra* note 496, para.2.19.

⁵²⁴ TI Interview, *supra* note 515.

cross-debarment, MDBs should have adopted uniform sanction policies. However, it seemed hardly achievable because of some institutions' long-established practices.

Finally, on 9 April 2010, after two years of meetings to discuss a WB proposal the heads of the MDBs signed an *Agreement for Mutual Enforcement of Debarment Decisions*.⁵²⁵ Under the Agreement, a company or individual debarred by one MDB may be sanctioned for the same misconduct by all other MDBs. However, the Agreement sets criteria, subject to which cross-debarment can take place, including that the debarment exceeds one year, was made public by the sanctioning MDB and was made within 10 years of the date of commission of the sanctionable practice.

The Agreement will only apply to debarment decisions made after the Agreement has entered into force, which is set to be by mid 2010, according to a statement by the banks.

As cross-debarment is limited to sanctions which are made public, MDBs will recognize and cross-debar only sanctions published on the website of a sanctioning MDB. In case of ADB, these will only be firms and individuals (i) who have been sanctioned for having breached any earlier sanction imposed by ADB, or (ii) whom ADB could not notify of sanction after reasonable efforts. As for AfDB, it is not clear yet how this Agreement will impact its debarment policy.

It should be pointed out, that the Agreement does not preclude an MDB from pursuing independent debarment proceedings for separate sanctionable practices. It also allows an MDB to decide not to enforce a debarment by the sanctioning bank, if that would be "inconsistent with its legal or other institutional considerations." In this case the former must "promptly notify" all other MDBs of that decision.

However, despite its restrictions, the agreement on cross-debarment is an unprecedented step in the global fight against fraud and corruption. As the President of the WB, R. Zoellick said after the signature of the Agreement, "[w]ith today's

⁵²⁵ The Agreement is available at <http://www.ebrd.com/about/integrity/Debar.pdf> (accessed 15 April 2010).

cross-debarment agreement among development banks, a clear message on anticorruption is being delivered: Steal and cheat from one, get punished by all”.⁵²⁶

C. Actors involved in a debarment procedure

Debarment procedure in the MDBs involves at least two actors: the one investigating allegations, and the one taking sanctions decisions on the basis of the results of those investigations. However, some MDBs involve additional actors to filter cases submitted for sanctions.

In the WB, the allegations that a firm or individual has engaged in the sanctionable practices are investigated by its Integrity Vice Presidency (INT). Sanctions decisions are taken through a two-tiered process conducted by the Evaluation and Suspension Officer (EO) and the Sanctions Board. If INT believes there is sufficient evidence to substantiate the allegations, the case is referred to the EO - the first tier of the sanctions process. If the EO determines that the evidence supports a finding that the alleged offence has occurred or a material term of the Voluntary Disclosure Program Terms and Conditions has been violated, he/she submits the case to the Sanctions Board with a recommended sanction. The Sanctions Board - the second tier of the Bank’s sanctions process – automatically imposes the sanction recommended by the EO, or, if the case has been contested by the respondent, reviews the case itself and takes the final decision. It may also hold a hearing as part of its deliberations.

Advantage of the two-tiered process, is that less cases are submitted to the Sanctions Board, because not all EO’s decisions are contested. Some respondents realize that in view of the evidence possessed by the Bank it would be senseless to do so. As a result, the Bank is able to conclude such cases at the EO level, without going through

⁵²⁶ WB Press Release (2010), *Cross-Debarment Accord Steps Up Fight Against Corruption*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0..contentMDK:22535805~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (accessed 15 April 2010).

the time-consuming and expensive process associated with a full review and hearing by the Sanctions Board.

In the ADB, all allegations are investigated by the Office of Anticorruption and Integrity (OAI). Sanctions decisions are taken by the Integrity Oversight Committee (OIC).

In the IADB, investigations of all allegations are carried out by the Office of the Institutional Integrity (OII). The results of the investigations, together with the recommendations on further actions are referred to the Oversight Committee on Fraud and Corruption (OCFC). If the OCFC decides that there is sufficient evidence to commence the sanctions proceeding, the case is forwarded to the Sanctions Committee, which takes sanctions decisions.

In his report concerning the anti-corruption framework of the IADB, *Thornburgh* questioned the necessity of the OCFC's continued existence in the current form,⁵²⁷ claiming that it acts "largely as a document forwarding facility" and delays the work of the OII and the Sanctions Committee and should, therefore, "be freed of the functions of filtering documents travelling between the two".⁵²⁸ Based on *Thornburgh's* recommendations, in 2009, the IADB introduced some changes in its anti-corruption framework to be implemented in the course of 2010. As a result of these reforms, the OCFC has been replaced by the Anti-Corruption Policy Committee, which will focus on policy development and oversight of the Bank's anti-corruption initiatives, while the cases previously considered by the OCFC will be dealt with by the Sanctions Committee.

In the AfDB, the allegations of corruption and fraud are investigated by the Integrity and Anti-Corruption Division (IACD). The sanction decision is taken by the President on the advice of the Advisory Committee on Corruption and Fraud (ACCF).

⁵²⁷ As it was mentioned earlier, the initial responsibilities of the OCFC were responding to allegations of fraud and corruption, conducting investigations and taking appropriate actions based on the results thereof. However, majority of its responsibilities have been assumed by subsequently created OII and the Sanctions Committee.

⁵²⁸ *Thornburgh et al.*, *supra* note 444, at 24, 67.

In the EBRD, investigations of all received allegations of suspected prohibited practices and information about a third-party finding are conducted by the Office of the Chief Compliance Officer (OCCO). Like in the WB, the sanctions process in the EBRD is two-tiered. If the CCO believes there is sufficient evidence to substantiate the allegations, the case is referred to the Enforcement Committee - the first tier of the sanctions process. If the Enforcement Committee, in its turn, determines that there is sufficient evidence to conclude that the alleged offence has occurred, it issues a Notice to the Respondent giving the latter an opportunity to contest the allegations and/or proposed sanctions. If the Respondent fails to do so within a prescribed period of time, the Enforcement Committee instructs the CCO to implement the proposed sanction without submission of the case to the second tier – the President. This procedure is different from that of the WB, where the EO submits the case to the Sanctions Board even when the latter imposes sanctions automatically, in the absence of the Respondent’s willingness to contest the allegations and/or recommended sanctions.

However, if the Respondent opts for a contested enforcement proceeding, the Enforcement Committee based on the evidence received from both CCO and the Respondent, as well as arguments presented during hearings, if any, submits a report of its determination to the President, including a recommended sanction. The President, in consultation with the Executive Committee, takes a final decision.

Involving the President in taking the final decision was criticized by *Thornburgh* in his report concerning debarment in the WB, which also used to have the President in this role. *Thornburgh* claimed that involving the President in the sanctions process imposed burdens on his time and subjected him to “lobbying” by advocates of respondents, including in some cases the Executive Director representing the country of the respondent. This may be considered as subjecting the President to undue influence which can erode the Bank’s reputation. Therefore, *Thornburgh* recommended that the President should have been taken out of the decision-making

process.⁵²⁹ This recommendation was implemented as a result of the WB's sanctions reforms of 2006.

Obviously, the same approach can be taken regarding the role of the President in the AfDB and the EBRD. It would be advisable to remove the President's responsibility for taking sanctions decisions. In the EBRD, it can be achieved by vesting this authority with the Enforcement Committee. In the AfDB, it would be better to create a unit designated for taking sanctions decisions, and limit the role of the ACCF to matters concerning the Bank's anti-corruption policies and oversight of its activities in this direction.

D. Statute of limitations

In the report on debarment by the WB, *Thornburgh* argues that the Bank should not adopt any statutes of limitations. If the evidence met the standard of proof, establishing that the Respondent engaged in fraud or corruption, it should not matter, how long ago the alleged incident occurred, since the primary purpose of the Bank's debarment process is to protect its funds from future harm. He further claims, that in fraud and corruption matters, the delayed discovery of evidence is rather a rule than an exception and that the imposition of time limitations in debarment proceedings would serve those who could hide their acts for the duration of the limitations period.⁵³⁰

However, during its sanctions reforms, the World Bank decided to introduce a ten-year time limitation.

The EBRD has also a ten-year time limitation, while the IADB has just a five-year one.

As for the ADB and the AfDB, they do not have any time limitations to pursue allegations, no matter how long ago the alleged wrongdoing occurred. However, as mentioned by an ADB representative, if the alleged wrongdoing occurred too long

⁵²⁹ Thornburgh et al., *supra* note 156, at 78-80.

⁵³⁰ *Ibid.*, at 35.

ago, there is not always the possibility to verify the allegations. In such cases, there is no other recourse but to close the complaint.

E. Standard of proof and burden of proof

Since debarment procedures by MDBs are administrative, the standard of proof must be lower than the one applied in criminal cases - “*beyond a reasonable doubt*”. Therefore, the standard of proof, required during sanctioning process in the MDBs, is similar to the one required in the most civil cases – “*preponderance of evidence*”, also known as “*balance of probabilities*”. The standard is met, when on the basis of preponderance of evidence, the sanctioning body can decide that it is “*more likely than not*” (WB, EBRD) or “*more probable than not*” (ADB, AfDB) that the Respondent committed the sanctionable practice.

Only the IADB has a bit different wording, requiring the determination that “*the evidence is sufficient*” to believe that the Respondent has engaged in fraud or corruption. The WB used to have a similar standard – “*reasonably sufficient*”. This standard was criticized for being ambiguous and causing misinterpretation or misapplication. For this reason, to increase the clarity and achieve more uniformity in application, *Thornburgh* suggested to replace it with a more descriptive standard, such as “*more likely than not*”,⁵³¹ which the WB did as a part of its Sanctions Reform of 2006.

The burden of proof to present sufficient evidence to meet the standard of proof is born by the MDBs, since they initiate the proceedings. Once the case is initiated, the burden of proof shifts to the Respondent, to overcome the evidence against him/her and demonstrate that it is *more likely than not* that the Respondent’s behavior did not constitute a sanctionable practice.

⁵³¹ *Thornburgh et al, supra* note 156, at 50.

Obligation of a subject under investigation to prove it is “not guilty” is being considered by some critics as contradicting to the presumption of innocence.⁵³² However, the presumption of innocence and the burden of proving guilt beyond a reasonable doubt are limited to criminal cases. The International Covenant on Civil and Political Rights and other international and regional human rights instruments apply only to cases, where a person is “...charged with a criminal offence”.⁵³³ On the other hand, civil actions initiated on the basis of suspected criminal activities, do not require proof of illicit origin “beyond reasonable doubt” and accept proofs on a balance of probabilities. Therefore, in view of the administrative nature of debarment and the fact that it does not have a degree of severity as that of a criminal sanction, it should be considered as compatible with the principle of the presumption of innocence,

F. Range of sanctions

To ensure compliance with their conditions and requirements, MDBs can impose a range of sanctions, individually or in combination, that would best serve their interests and the sanctioning purposes appropriate thereto. Existence of sanctions of different levels is explained by the fact that sanctions should be “tailored to the individual cases”.⁵³⁴ Among those which can possibly be employed by all MDBs are *debarment*, *a letter of reprimand* and *restitution*, debarment being the mostly used one.

Debarment can be permanent, indefinite or for a limited period depending on the aggravating and/or mitigating factors. These factors include, *inter alia*, egregiousness and severity of the respondent’s actions; past conduct of the respondent involving fraudulent or corrupt practices; magnitude of any losses caused by the respondent; quality of the evidence against the Respondent; mitigating circumstances, including respondent’s admission of culpability, voluntary disclosure of information on the involvement in the sanctionable practice, cooperation in the MDBs’ investigation, the

⁵³² Oberdorfer, J. Kim H., Martinez, V. (2002): *Contractors Beware: The Pitfalls of a World Bank Debarment Proceeding*, 2, http://www.pattonboggs.com/files/News/89db43d8-b1bc-48fb-919e-b91e61e665f8/Presentation/NewsAttachment/47c98bf1-620a-44fd-94ee-04213b703ebf/2002_09_24_WorldBankArticle.pdf (accessed 10 October 2009).

⁵³³ Moran et al., *supra* note 140, at 23.

⁵³⁴ Thornburgh et al, *supra* note 156, at 61.

intervening implementation of programs to prevent and detect fraud or corruption or other remedial measures by the Respondent.

In addition to the mentioned sanctions, IADB may impose a sanction called “*conditions on contracting*”, which deprives the debarred party of the right to be awarded contracts, except under certain conditions as deemed necessary. The WB and the EBRD additionally provide for the debarment-related sanctions, such as *conditional non-debarment* and *debarment with conditional release*.

Conditional non-debarment is a sanction, where the debarred party is required to comply, within a defined period of time, with certain measures as a condition to avoid debarment. It can be considered as a probationary period, during which the party should change in a way that would reduce the likelihood of its engagement in future wrongdoing. As argued by *Thornburgh*, it is easier for firms to exchange personnel, than for people to change.⁵³⁵ Therefore, this sanction applies mostly to firms which would be compelled, during the determined period of time, *inter alia*, to terminate the employees involved in fraud or corruption; to initiate an effective business ethics training program; to adopt a compliance program incorporating systematic audits, anonymous reporting systems, and internal investigations; and to correct its other corporate deficiencies that could affect the honesty of its dealings.⁵³⁶

Debarment with conditional release is a sanction, where the debarred party is debarred for a defined period of time subject to conditional reinstatement if the debarred party demonstrates compliance with specified conditions. The conditions would be basically the same as those for the conditional non-debarment with the only difference that in debarment with conditional release these conditions are the requirements to be met before the firm can be reinstated. That is exactly how the ADB determines the duration of the debarment, although it does not call it “debarment with conditional release”. First, it imposes debarment for a minimum period, from 1 to 7 years, after which this period is being reassessed and might be either extended or ended. Maximum debarment period for the first violation is “indefinitely” for

⁵³⁵ *Ibid.*, 62.

⁵³⁶ *Ibid.*

individuals⁵³⁷ and 7 years for companies. Debarment period for the subsequent violation (after being reinstated) is “indefinitely” for individuals and up to 10 years for companies. Only under extraordinary circumstances (for example, repeated violations of ADB's Anticorruption Policy or procedures) can companies be debarred indefinitely.

As for the length of debarment for a limited period in other MDBs, that of the currently debarred parties varies from three to fifteen years in the WB, from one to ten years in the IADB, and from three to five years in the AfDB. The average length of debarment in the MDBs can be estimated as three years.

G. Due process

During debarment procedure, all MDBs ensure due process to Respondents. However, since this procedure is administrative, the Banks are not bound by the rules applied in traditional judicial proceedings. Therefore, in view of the absence of the harmonized sanctions proceedings among the MDBs, the due process rights provided to Respondents vary from one Bank to another (for a synthesis table on due process rights during debarment procedure in the MDBs see Annex II).

1. Right to contest allegations and recommended sanctions

Prior to the imposition of any sanction, all MDBs send a notice to the Respondent, informing that the latter may be sanctioned for the allegation indicated therein, provides a description of the evidence gathered, and gives the Respondent an opportunity to contest allegations and/or recommended sanction by submitting any relevant information within a designated period of time. The period of time given to respondents to contest allegations is different in each MDB. Likewise, the timeframe in which the MDBs can reply to the Respondents' responses to the allegations also varies.

⁵³⁷ ADB, like *Thornburgh*, believes that a change in character for individuals is less likely, and, for this reason, may consider not engaging further any individual who has committed any corrupt or fraudulent practices.

In the WB, a Respondent has ninety (90) days after issuance of the notice to respond to the allegations and recommended sanction, while INT may reply to the Respondent's arguments and evidence within thirty (30) days.

In the ADB, although there is a provision in the Integrity Principles and Guidelines giving a Respondent an opportunity to respond to the OAI's findings, there is no prescribed period of time within which it can do so. Lack of the precise delay is explained by the fact, that OAI does not control administrative actions which may result from its findings.⁵³⁸ Therefore, it may not determine the timing of ADB presenting its findings to a Respondent or its opportunity to respond to those findings.

In the IADB, the Respondent has an opportunity to respond to the allegations and recommended sanction that the Bank may impose within sixty (60) days. If the Respondent submits a reply, OII may contest it within twenty (20) days giving the Respondent the second chance to reply to the OII's arguments and evidence within twenty (20) days.

In the AfDB, there is no time limitation for presenting exculpatory evidence - the debarred party is entitled to do so as long as evidence is credible and relevant to investigations. AfDB can reply to the brought arguments in order to verify facts and analyze evidence within period of time as required on a case-by-case basis.

In the EBRD, respondent should be given not less than 30 days to contest the allegation(s) and/or the proposed sanction(s) when the ground for proceeding is a prohibited practice, or only proposed actions, when the ground is the third party finding.

As we can see, Respondents are informed in advance of the allegations brought against them and sanctions that might be imposed based on the recommendations presented in the notice, and have sufficient time to contest them. This can be achieved by submitting written arguments and evidence to the MDB, taken into account during

⁵³⁸ ADB Integrity Principles and Guidelines, *supra* note 409, para.57.

review of the case for rendering a sanction decision. However, it is up to the Respondents to decide whether to contest the allegations and/or recommended sanction. Sometimes they might opt for not doing so, considering it meaningless in light of the evidence possessed by the MDB. In this case, the allegations will be deemed admitted by the Respondent, and the sanctions decision will only be based on the arguments and evidence presented by the MDBs' investigative actors. As it was mentioned above, in case of the WB, it would result in imposing a sanction recommended by the EO, without submitting it for a full review and hearing to the Sanctions Board.

2. Right to hearing

Right to hearing gives Respondents a chance to explain their understanding of the matter, view of the evidence against them and to present arguments of mitigating circumstances face-to-face. Only the WB and the EBRD provide a Respondent with this right. The IADB may also hold a hearing, but only at its own discretion, when it deems it necessary, without providing either party with a right to request a hearing.

In the WB, a hearing can be held upon request of either INT or the Respondent. At the hearing, the Respondent may be self-represented or represented by an attorney or any other individual authorized by the Respondent, at the Respondent's own expenses. Hearings are limited to arguments and evidence contained in the written submissions to the Sanctions Board. Witnesses may be called and questioned only by the Sanctions Board. Cross-examination is not allowed, while it is possible to present rebuttal evidence during the hearing.

In the EBRD, hearing or how it is called in its EPPs, "oral representations" are possible only upon request of the Respondent. Compared to the WB, the Respondent cannot have any representatives and has to be present in person. All oral representations are limited to arguments and evidence contained in the written submissions, which can be rebutted by the CCO or his/her representative.

There was a concern regarding the WB's hearing process, that it is inappropriate for the INT investigator to present the evidence to the Sanctions Board since it serves at the same time as investigator and "prosecutor". However, as *Thornburgh* explains in his report, this complaint does not have any grounds, since INT's role is only to summarize and explain the evidence.⁵³⁹ This could also apply in the context of the EBRD, where CCO plays the same role as INT.

3. Right to appeal

None of the MDBs provide the debarred parties with legal remedies (through national courts) and only ADB provides them with an administrative remedy (through the Bank's outside panel) against sanctions decisions.

Impossibility, by the debarred parties to turn to national courts, is explained by several reasons:

- MDBs and their staff have immunity from domestic jurisdiction for anything done in connection with their employment.⁵⁴⁰
- The procurement guidelines being integral part of the Loan Agreement constitute international law and thus prevail over domestic law. For this reason, a bidder cannot claim that the MDB's actions contradict due process as determined by national law, as the MDB is "insulated from accountability within domestic legal systems."⁵⁴¹
- There is no legal relationship between MDBs and contractors. Therefore, the latter do not have any rights of recourse against Banks.⁵⁴²

⁵³⁹ Thornburgh et al, *supra* note 156, at 44.

⁵⁴⁰ Sands, P., Bowett, P.K. (2001): *The Law of International Institutions*, 490–91; Jenks, C.W. (1961): *International Immunities*, 41; Articles of Agreement, art. VII, § 8.

⁵⁴¹ Arrowsmith et al., *supra* note 78, at 149.

⁵⁴² However, *Meireles* argues that as the Bank has the right to interfere with the decisions during the procurement process, it should have the correspondent obligation of recognizing the rights of the other party to be heard. See *Meireles*, *supra* note 191, at 110.

- Although MDBs have to ensure that, contractors facing debarment are treated fairly, as much as it is possible and reasonable, they do not have resources to ensure that the aggrieved contractors always have a right of recourse.⁵⁴³ As *Thornburgh et al.* argued, the Bank’s goal “must be fairness, not placation”.⁵⁴⁴

As for administrative remedies, only the ADB provides the Respondent with a right to appeal a sanctions decision. For this purpose, there is a special Sanction Appeals Committee (SAC) where the Respondent may appeal within 90 days from the date of the decision of the Integrity Oversight Committee (IOC). However, the SAC considers only appeals that include new information that had not been known to the Respondent before. After having considered the appeals, the SAC may reduce or lift the imposed sanctions, or require the IOC to reconsider the case.

The IADB and the AfDB have similar procedures, whereby a debarred party may request re-opening of the case only on the basis of new information that was not known, or could not reasonably have been known during consideration of the case, and would have been relevant to the sanction decision. Hence, they do not provide an automatic right to reconsideration – it is always at the discretion of the body, which is meant to reconsider the case. The difference between the two is that, in the IADB, the sanctioned party is given one (1) year from the issuance of the decision on debarment to do so, while in the AfDB this period is limited to ninety (90) days.

However, these procedures are different from that of the ADB and, in my opinion, cannot be considered as an appeal, even though AfDB uses the term “appeal”. The reason is, that the body reconsidering the case is the same one which took a sanction decision, and not an independent unit or panel designated specifically for this purpose (the Sanctions Committee in IADB and the President in AfDB with the advice of the Advisory Committee on Corruption and Fraud).

⁵⁴³ Williams, *supra* note 144, at 303.

⁵⁴⁴ Thornburgh et al, *supra* note 156, at 9.

The World Bank formally does not provide the debarred parties with any right of appeal. However, introduction of a two-tiered sanctions process and involvement of external members to the Sanctions Board eliminated conflict of interest and removed the need for an additional review of sanctions cases by an outside panel. If to analyze the WB's sanctions process, one might see that Respondents' right to contest the allegations and sanctions recommended by the EO, and as a result, receive a full review and hearing (upon request) before the Sanctions Board can be considered as an equivalent of a right to appeal. The standard of the review by the Sanctions Board, as pointed out by *Thornburgh*, would be *de novo*, meaning that it would take a fresh look at the matter and would not be bound by the findings or recommendations of the EO.⁵⁴⁵ On the other hand, if the Respondent waives the right to contest the case, the sanction proposed by the EO would become final. Thus, the EO can be considered as a sanctioning body, and the Sanctions Board as an appeal body.

What is also important in the contested proceeding of the WB is that there are no preconditions for the case to be reviewed by the Sanctions Board, except for being submitted within ninety (90) days from the issuance of the notice to the respondent. The same timeframe is given to the respondents in the ADB to appeal the IOC's decisions. However, unlike the procedure in the WB, the SAC will only accept and consider appeals that include new information, which had not been known to the respondent before. Thus, in the absence of new facts, the respondent is not eligible to appeal on the ground of an error during debarment procedure, too harsh sanction or the violation of the Bank's due process requirements. Besides, the Sanctions Board consists both of internal and external experts, while SAC is composed only of the ADB's senior staff members.

In the EBRD, the debarred party does not have any right of recourse - the President's decision is final. Moreover, the Enforcement Committee that makes recommendations to the President is made up only of the Bank officers. Hence, its procedure is similar to that of the WB prior to its sanctions reform, which was criticized by *Thornburg* due to the Bank's personnel serving as investigators, prosecutors, judge and jury.⁵⁴⁶

⁵⁴⁵ *Thornburgh et al, supra* note 156, at 37.

⁵⁴⁶ *Ibid.*, at 79.

Although the EBRD also has a two-tiered sanctions process, the latter cannot be considered as an equivalent of an appeal procedure, like in the WB. The difference is that in the EBRD, it is the Enforcement Committee - the first tier - that fully reviews the case and holds hearings, if any, while the President - the second tier - takes decision based on the submissions received by the Enforcement Committee not including the arguments and explanations presented during hearings. Upon necessity, the President can also refer the case back to the Enforcement Committee for further consideration.

H. Disclosure and information sharing

As noted by a WB employee with field experience involving procurement matters, “fear must be placed in the hearts of those willing to give or take a bribe. One of the few things that can provoke such fear is the prospect of a public announcement of debarment”.⁵⁴⁷ Besides, in the experience of some WB investigators, the disclosure of the names of the debarment parties also encourages representatives of concurring firms to volunteer information to the Bank concerning wrongdoing that they have observed.⁵⁴⁸

At the moment, only the WB, the IADB and the EBRD provide for disclosure of the information on the debarred firms and individuals by uploading the names, grounds and lengths of debarment on their websites and constantly updating this information.

The ADB and the AfDB do not publish this information. The ADB believes that the practice of not publicizing the Anti-Corruption Sanctions List best supports fair and consistent implementation of its anticorruption policy justifying it by the following reasons:

- the ADB’s debarment procedure is an administrative tool, not a legal or judicial assessment of fraud or corruption - terms that have different definitions and carry significant legal implications in ADB’s member countries;

⁵⁴⁷ *Ibid.*, at 82-83.

⁵⁴⁸ *Ibid.*

- firms, in particular those with significant resources, are more likely to present challenges to decisions that publicly classify them as corrupt or fraudulent, requiring ADB's time and expenses to address rebuttals;
- the deterrent effect believed to be the benefit of publicizing the list does not outweigh the benefits of the current practice;
- publicizing the Anti-Corruption Sanctions List could lead to incorrect conclusions regarding the focus of ADB's anti-corruption efforts or levels of corruption within a particular region or country.⁵⁴⁹

However, the ADB would disclose the names of the debarred parties when they attempt to participate in the ADB-funded project while being ineligible and when the ADB cannot reach them. In these cases, it makes a Notice of Sanctions on its website. Resistance to disclose the names of the debarred parties, grounds for their debarment, length of debarment etc. was considered by Transparency International as one of the main obstacles debarment was facing.⁵⁵⁰ However, in my opinion, disclosing the identities of the debarred parties is not consistent with the MDBs' intended purpose to protect their funds and makes debarment similar to a criminal conviction. Given the value of reputation for honesty and quality of service in the business world, publicly labeling parties for engagement in fraud or corrupt practices minimizes their chances to survive in the marketplace, in particular, when it concerns small companies ending up in bankruptcy. It can happen even in jurisdictions, where the practices the companies are debarred for, are not sanctionable due to the difference in definitions. This would place MDBs, as claimed by the ADB, "above the law".

However, in the interest of cooperation, harmonization and transparency, MDBs should exchange the information on debarred parties and share it with international organizations and member countries on a need-to-know basis, which they all do.

Besides, if any of the MDBs happens to know about an alleged fraud and corruption within activities funded by another MDB, it may share this information with the latter. Likewise, if

⁵⁴⁹ ADB, *Confidentiality of Anticorruption Sanctions List*, <http://www.adb.org/Anticorruption/issues.asp> (accessed 20 October 2009).

⁵⁵⁰ Jennett, V. (2006): *Using Blacklisting Against Corrupt Companies*, 2, <http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query119.pdf> (accessed 3 June 2009).

the MDBs determine that internal laws of a country may have been violated, they may at any time disclose relevant information to the corresponding national authorities.

I. Voluntary Disclosure Program (VDP)

Only the WB and the AfDB have a VDP in place. However, the two are quite different. The VDP of the WB is a program, which gives firms and individuals the opportunity, to participate therein through ceasing corrupt and fraudulent practices, voluntarily disclosing all information in their possession about practices sanctionable by the WB, and enhancing their compliance system and controls. In exchange, the WB does not publicly debar the participants for disclosed sanctionable practices and keeps their identities confidential. But in case a participant conceals some information and/or continues to engage in sanctionable practices, then participant faces mandatory 10-year public debarment.

As for the VDP in the AfDB, it only serves as a mitigating factor in determination of sanctions against the firm or individual, which voluntarily disclose information on fraud or corruption of which they have knowledge or in which they are involved in.

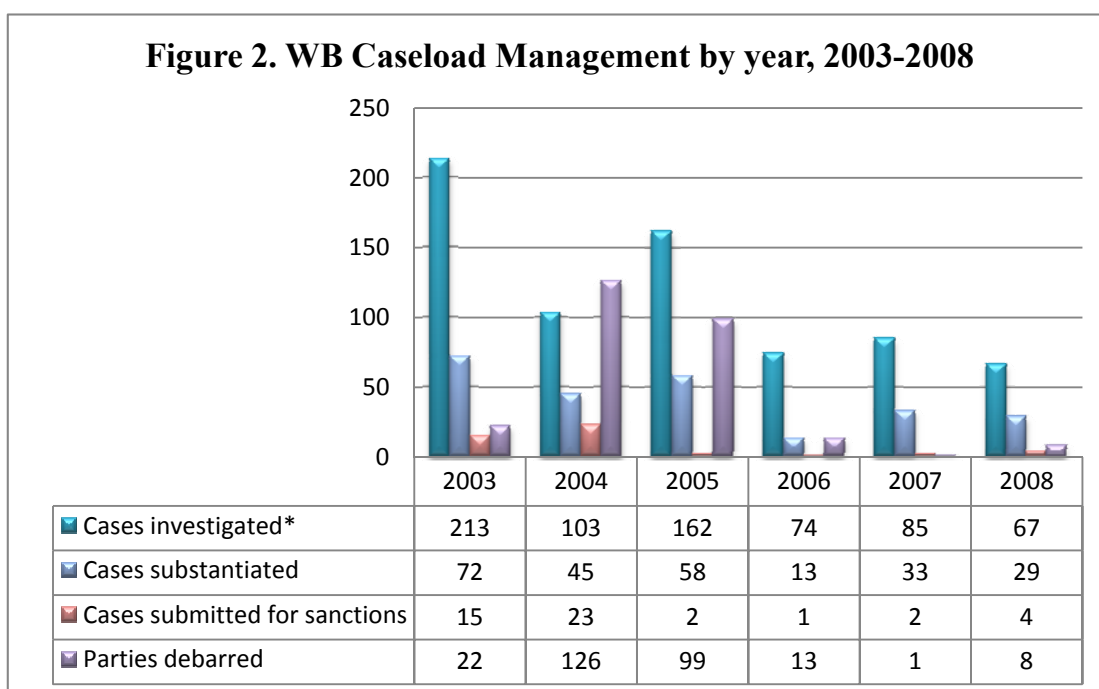
J. Debarment practices by the MDBs

The status of the debarment practices by the MDBs is outlined in Table 2 below:

Table 2. Status of the Debarment Practices by the MDBs			
MDBs	Introduction of the debarment clause in the MDB policies	Nº of the debarred parties	Nº of the cross-debarred parties (as of 1 February 2010)
WB	1996	379 (as of 10 December 2009)	N/A
ADB	1998	673 (as of 17 December 2009)	N/A
IADB	1995	146 (as of 1 February 2010)	N/A
AfDB	1999	9 (as of 13 November 2009)	N/A
EBRD	1998	N/A	1

In the INT's Annual Report 2008, it was pointed out that “the statistic in isolation is not a benchmark of success. Each case is unique in its complexity, and each presents its own factual challenges, including the scope of documents to be reviewed or investigative interviews held. Ultimately, the impact and value of the case to the WB would be the determining factor.”⁵⁵¹

However, there is a quite curious fact about this table. Considering that the WB and the ADB started implementing their debarment policies approximately at the same time (1999 and 1998, respectively), and bearing in mind that one case can result in debarment of several firms and/or individuals (subsidiaries, directors, etc.), it is still unclear, why the number of parties debarred by the ADB far exceeds that of the WB. To find out the possible reason of this gap, let us have a look at the caseload management in these two Banks during 2003-2008,⁵⁵² based on the data derived from the annual reports of the INT and OAI:

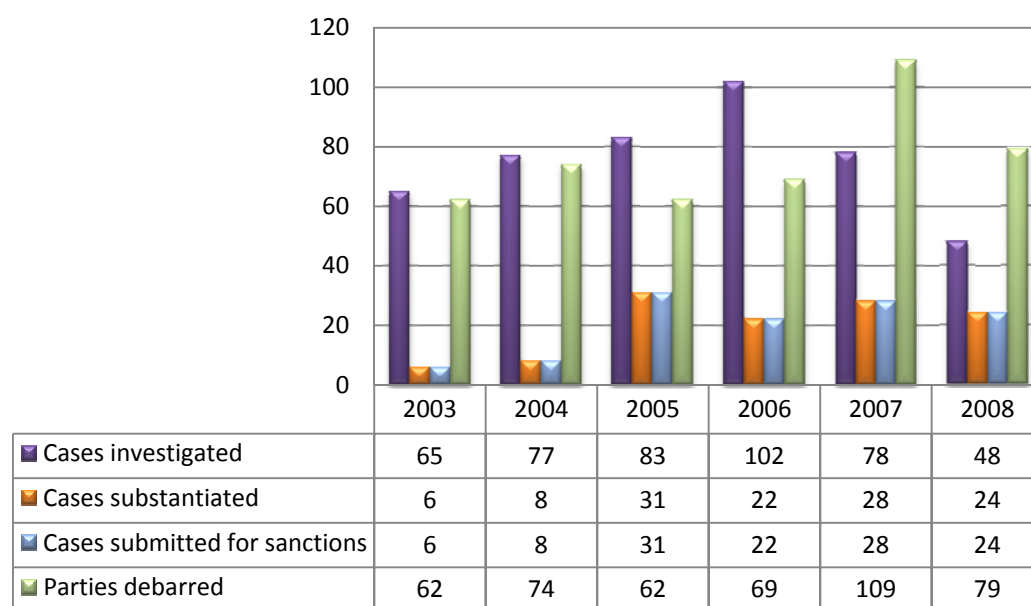


* Comprise substantiated, unsubstantiated and unfounded cases. “Substantiated” means evidence showed wrongdoing “more likely than not” to have occurred and should be submitted for sanctions.

⁵⁵¹ World Bank (2008): *INT Annual Report*, 4, http://siteresources.worldbank.org/INTDOII/Resources/INT_AnnualReport_web.pdf (accessed 14 December 2009).

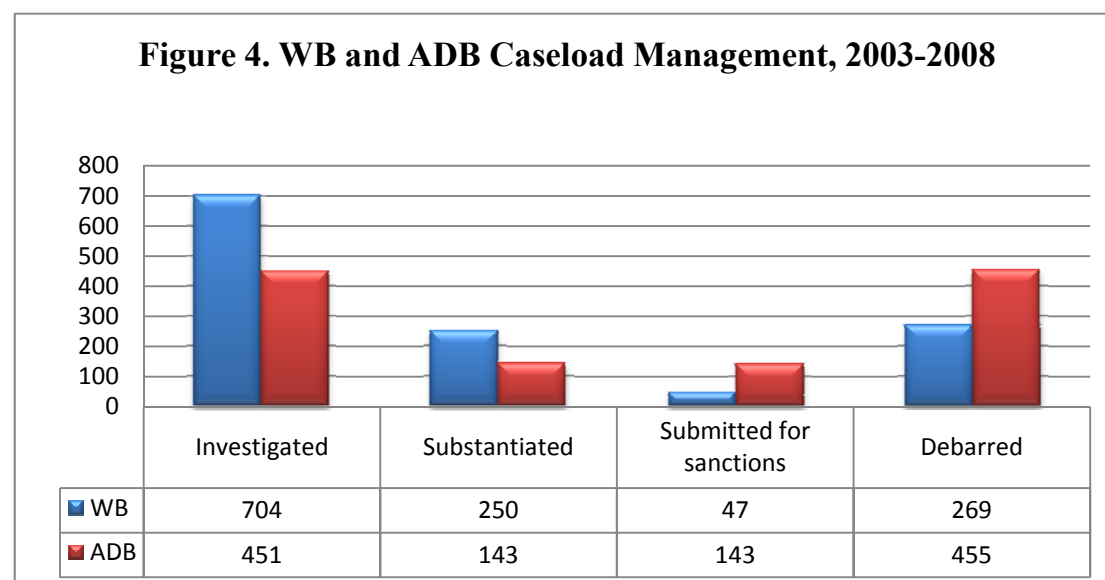
⁵⁵² The choice of this timeframe is explained by the public availability on the annual reports for only those years.

Figure 3. ADB Caseload Management by year, 2003-2008*



* Due to the inconsistency in the OAI's annual reports and difficulties with retrieving data therefrom, as well as lack of separation between external and internal cases, the figures provided in this table are based partially on personal calculations and might, therefore, not be very accurate.

Figure 4 compares the caseload management of the ADB and the WB for the period of 2003-2008, based on the totals illustrated in Figure 2 and Figure 3:



As we can see from Figure 4, the number of cases investigated and substantiated by the WB exceeds that of the ADB by 40% and 44%, respectively. At the same time, only 19% of the cases substantiated were referred for sanctions in the WB compared

to the 100% in the ADB, which in its turn, affected the number of the parties debarred.

As it was mentioned in the INT's Annual Report 2007, "INT's objective is not to increase the number of substantiated cases but to provide solid investigative findings in order to resolve the allegations made."⁵⁵³ However, the overall objective of the INT's investigations is to detect fraud and corrupt practices, and once there is an evidence that they "more likely than not" have occurred, INT should submit cases for sanctions. Figure 2 illustrates a drastic decrease in a number of such submissions during the period of 2005-2008. Apparently, INT's eagerness to provide "solid investigative findings" switched its whole focus to the investigations, while disregarding the necessity of referring the Notices of Sanctions Proceedings (NoSPs) to the Evaluation Officer (previously, to the Sanctions Committee). Lack of the NoPs, being the documents to initiate the sanctions procedure, caused a delay in the transition from closing investigations to bringing cases to sanctions.⁵⁵⁴

Besides, the implementation of the sanctions reforms in 2006, which replaced the Sanctions Committee by the Sanctions Board and created the position of Evaluation and Suspension Officer, resulted in a transition period and added up to the slowdown in the WB's ability to move sanctions proceedings forward.

As for the ADB, the Table 3 illustrates that the number of the cases submitted for sanctions corresponds to the number of the cases substantiated, which can be explained by a more simplified procedure of submitting cases for sanctions than in the WB.

Consequently, the number of cases referred for sanctions affected the number of the parties debarred. This seems to be a good explanation, why the ADB is so ahead of the WB.

⁵⁵³ World Bank (2007): *INT Annual Report*, 15, <http://siteresources.worldbank.org/INTDOII/Resources/fy07report-complete.pdf> (accessed 14 December 2009).

⁵⁵⁴ In 2009, to clear the backlog of cases for sanctions for the previous years, INT created a specialized litigation unit devoted to drafting and preparing proposed NoSPs. As a result, that year, INT submitted 40 proposed NoSPs to EO, compared to 9 NoSPs over the course of 2005-2008.

CHAPTER X. CONCLUDING REMARKS

A. *Criticism of Debarment*

Many of the debarment systems in place have been criticized for being unfair and inefficient. *Steven Schooner* compared them with paper tigers – “pretty to look at, but not to fear”.⁵⁵⁵ The flaws revealed by critics as jeopardizing fairness and efficiency of debarment make them suggest that other ways of securing bidder compliance might be more successful. These flaws, in addition to the lack of right of appeal and resistance to public disclosure of the blacklists in some of the MDBs, already discussed above in subchapters G.3. and H of Chapter IX, include, but are not limited to:

a) *Application of debarment mainly towards small companies*

This criticism appears mostly in relation to the WB, accusing it of turning a blind eye to corruption involving large multinational companies that win the most profitable contracts, financed by the Bank with money donated by the governments of the countries where these companies originate from.⁵⁵⁶ This fact can also be considered as politization of debarment decisions. *Acres* and *Lahmeyer* were the first multinational companies to be debarred by the WB. On the one hand, this act was criticized for the delay, and, on the other hand, it raised a question whether by doing so the WB “acted primarily on the merit of the case, or to deflect the mounting criticism and prove that its public pronouncements against corruption have weight”.⁵⁵⁷

b) *Lack of right to cross-examination*

Lack of the right to cross-examine the accuser is often considered as a violation of a due process.⁵⁵⁸ Difficulties in providing this right are rooted in the necessity of obtaining consent of the accuser to be cross-examined,⁵⁵⁹ which is hard to achieve since an accuser may decline to be questioned or even identified, and as it is common in administrative proceedings, MDBs cannot compel a person’s attendance and testimony.⁵⁶⁰ The WB’s

⁵⁵⁵ Schooner, *supra* note 138, at 219.

⁵⁵⁶ Hearne, *supra* note 377.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Oberdofer et al., *supra* note 528, at 3.

⁵⁵⁹ WB Sanction Reform, *supra* note 243, at 3.

⁵⁶⁰ Thornburgh et al, *supra* note 156, at 55-58.

January 1998 Operational Memorandum provided for the provision permitting to do so, but in practice it turned out to be impossible to implement, therefore it was decided not to reflect this provision in the August 2001 Procedures.

c) *Lack of transparency on ongoing or past investigations*

Some critics claim the lack of transparency on ongoing or past investigations is the reason why the accused contractor cannot develop its case until it receives a formal debarment notice.⁵⁶¹ Besides, the WB was accused of not issuing any written decisions or advisory opinions publicly, which would help interpret its guidelines and procedures, because “the provisions are subject to broad interpretation”.⁵⁶² It should be noted that by now all MDBs publish annual reports containing statistics on trends in allegations, reporting, and investigative outcomes. Moreover, following Volker’s Recommendations, the World Bank has started disclosing redacted investigative reports on its website since 13 September 2007.⁵⁶³

d) *Reliance on witness testimonies*

Some respondents complain that the witness testimonies given to investigators are “hearsay” and cannot be admitted as evidence. As correctly claimed by *Thornburgh* in the context of the WB, the debarment process is not a judicial proceeding and “there are valid reasons that formal rules of evidence do not apply”.⁵⁶⁴ These reasons are rooted in the fact that bank investigators lack law enforcement powers, which would enable them, to compel testimony from material witnesses. Therefore, they have to rely on what those involved in a case are willing to reveal.

e) *Lack of time-effectiveness*

Debarment procedures are often criticized for their slow speed. An extremely lengthy process can undermine the purpose of the policy – to secure integrity and protect funds.

⁵⁶¹ Oberdofer et al., *supra* note 528, at 3.

⁵⁶² *Ibid.*

⁵⁶³ World Bank, *Status of Recommendations from Volcker Independent Review of INT*, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21924818~menuPK:34480~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (accessed 16 October 2009).

⁵⁶⁴ *Thornburgh et al, supra* note 156, at 56.

f) *Lack of cost-effectiveness*

Critics often raise the issue of the costs involved in the debarment proceedings. The expenses might be related, for example, to the investigative missions, involvement of external investigators and reputable international accounting firms.

B. Challenges in Using Debarment

One of the main challenges MDBs face during the debarment procedure, is a lack of extra-territorial legal powers that would enable them to investigate allegations of corruption as effectively as prosecutors and criminal investigators can, by requesting mutual judicial assistance.⁵⁶⁵ As a result, they do not have sufficient power to compel the production of evidence or witness testimonies, such as issuing warrants, seeking subpoenas, engaging in search and seizure, or exercising other intrusive powers. Thus, it might happen that corrupt firms or individuals can avoid sanctioning measures by MDBs, if the latter fail to obtain sufficient evidence. Therefore, to facilitate the imposition of sanctions on corrupt firms, they have to cooperate closer with national law enforcement authorities or should automatically debar firms that have been convicted in a national court regarding an MDB-funded project.

Another challenge is that, although all MDBs extend debarment to individuals and/or organizations which directly or indirectly control or are being controlled by a debarred firm, there is still a risk that debarred firms might act through their affiliates or newly established firms. At the same time, there is also a risk that a parent or subsidiary company, or an agent, a joint venture or a consortium partner, or a subcontractor of the other company can be debarred for the actions of another company over which they had no control, and in situations where they were not involved in corrupt conduct.⁵⁶⁶ Therefore, before debarring an affiliated company and determining the length of debarment, MDBs should take into account the factors, whether there was an authorization by the company to commit the corrupt act, whether it was complicit in the corrupt act, and if so, the level of its involvement.

⁵⁶⁵ Moran et al., *supra* note 140, at 19.

⁵⁶⁶ UK Anti-Corruption Forum, *supra* note 167, at 4-5.

They should also consider it as a mitigating factor, when participants in cartel agreements decide to provide the relevant information, documents, proof and evidence on the existence of such an agreement.⁵⁶⁷

Finally, as the WB INT pointed it out itself in its annual report 2009,⁵⁶⁸ it is a great challenge to conduct investigations in an efficient and effective manner in light of the volume of allegations that it receives, the complexity and covert nature of the fraud and corruption that may be found, and the political sensitivity of launching certain investigations. These challenges added up with the length of time needed to complete investigations are the key challenges for all MDBs.

C. Conclusion

The right to freely exercise a trade or profession is proclaimed in the constitutions of many countries as well as in various international instruments. Therefore, debarment might be considered as an infringement of this right which cannot even be appealed in the national courts due to the immunity of the MDBs discussed in subchapter G..3 of Chapter IX.

However, despite the legal vacuum caused by the international nature of the MDBs, the Respondents, as discussed above, are granted certain rights during debarment proceedings. Since debarment substitutes or complements a criminal conviction, MDBs tend to meet the due process criteria, as set by the national criminal laws, which would normally be required, where a state authority is involved.

On the other hand, debarment by MDBs being of an administrative nature, does not deprive the sanctioned parties of the possibility to continue their professional activity in general as a criminal conviction would do, but is limited to their ineligibility to

⁵⁶⁷ Ondráčka, *supra* note 141, at 16. For more information about discovering and breaking of cartel agreements, the so-called *leniency program*, see http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf (accessed 2 June 2009).

⁵⁶⁸ INT Report 2009, *supra* note 198, at 18.

obtain MDB-funded contracts either permanently or for a stated period of time. Thus, debarment by MDBs can also be considered as a business decision.

Many of us have come across the English proverb “*He who pays the piper calls the tune*”. The essence of this saying is that paying for something entitles the donor to decide in detail how the money is used. Because of being paid, the piper is accountable to the paymaster. As a result, the paymaster acting as a judge, will require the piper to prove that he has fulfilled the required instructions.

Similarly, when an MDB is financing the project, it can demand its proper implementation and usage of money for the intended purpose. Therefore, if, on the basis of the preponderance of the evidence, it is determined that the company or an individual had more likely than not engaged in fraud or corruption, that would be enough for an MDB to decide that it does not want to work with this company/individual.

Another justification of debarment can be expressed by the quotation from Molière: « *Je ne suis point d'humeur à payer les violons pour faire danser les autres* ». ⁵⁶⁹ MDBs are funding projects to promote development and eradicate poverty in beneficiary countries, and not to “feed” the corrupt government officials letting fraud and corruption occur and turning a blind eye to them.

However, when debarment is public and names of the debarred firms and individuals are accessible to everyone, the consequences thereof might be devastating and go beyond the initial intentions of the MDBs’ debarment policies. As a result of the lost reputation or stigmatization, the debarred parties will most likely be put out of business. In addition, when debarment is imposed on a firm, it might result in a so-called “corporate death penalty”, hurting thereby innocent third parties: the stakeholders, who are unable to affect the conduct of corporate executives especially in large firms; creditors; employees who will become unemployed paying for the

⁵⁶⁹ Molière (1671): “*La Comtesse d'Escarbagnas*”, scene VIII - “*I am not at all in the mood to pay the fiddlers for others to dance*”.

wrongdoings of the top management;⁵⁷⁰ the community in which the firm is located since it might be one of the few or the only firm in place to do what it does; suppliers; and consumers, who will most likely pay higher prices because of the lower competition.

While it is true that the threat of going out of business can be a powerful deterrent and an incentive to compel firms to make a real effort to prevent their employees from wrongdoings, the dramatic consequences, that debarment can entail, contradict MDBs' intention to impose it only for the protection of their funds and not to punish. Debarment of firms and individuals from MDB contracts is already a severe measure since it limits the business opportunities of the sanctioned parties and might be fatal to those of them for which these contracts are key sources of revenue. However, being a business decision and at the same time being imposed with consideration of the respondents' due process rights, debarment might be considered as a fair step.

Undoubtedly, a certain level of tension will always exist between the MDBs' efforts to ensure that they only fund corruption-free contracts and the private sector's protests against "unfairness" of their debarment and attempts to prove that the fact of having been involved in corrupt practices in the past does not necessarily mean that they will not be able to provide economically advantageous contracts in the future. At the same time, MDB officials should bear in mind the significance of the duties that the debarment policies entrust to them, and they should use sound judgment in exercising the substantial power they have at their discretion. Over the last few years, many changes have been made to remove procedural flaws and weaknesses. And although there is still room for improvement, current procedures in place represent a fair and reasonable framework to balance competing interests of both parties by ensuring efficient deterrent effect, due process, reinstating eligibility of the "wrongdoers" earlier than envisaged subject to certain conditions, and avoiding dire consequences for innocent parties.

⁵⁷⁰ Arthur Andersen's going out of business in 2002 as a result of its conviction for destruction of Enron-related documents made 28,000 employees in the US lose their jobs.

Right now it is too early to say whether debarment has a significant effect in reducing corruption in MDB-funded projects. None of the MDBs has a performance indicator of the debarment policy.

However, despite its flaws and bearing in mind that debarment is only one of the mechanisms used by the MDBs to fight corruption in the projects they fund, I think, debarment is an important mechanism as it can serve as a deterrent signaling to borrowers and contractors that the MDBs are strengthening their anti-corruption efforts. As *Patricia Adams* said in the context of the WB, “if the Bank doesn’t debar the companies, the future of corruption will become much more secure”.⁵⁷¹

And yet, as I already argued above, debarment policies should only be in place when they go hand in hand with respect for the due process rights, which is the case in the MDBs. Thus, being a fair sanction, debarment is not only consistent with the idea of rule of law, but also contributes in the strengthening thereof by enhancing respect of the companies and individuals for existing rules and regulations. This being said, debarment goes beyond the initial intention of the MDBs to make it as an “act of self-defense” to protect their own financial interests.

⁵⁷¹ Hearne, *supra* note 377.

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e=true&height=650&width=850](http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535805~pagePK:64257043~piPK:437376~theSitePK:4607,00.html?keepThis=true&TB_iframe=true&height=650&width=850) (accessed 15 April 2010)

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ANNEXES

ANNEX I. Synthesis Table on Debarment Procedure in MDBs

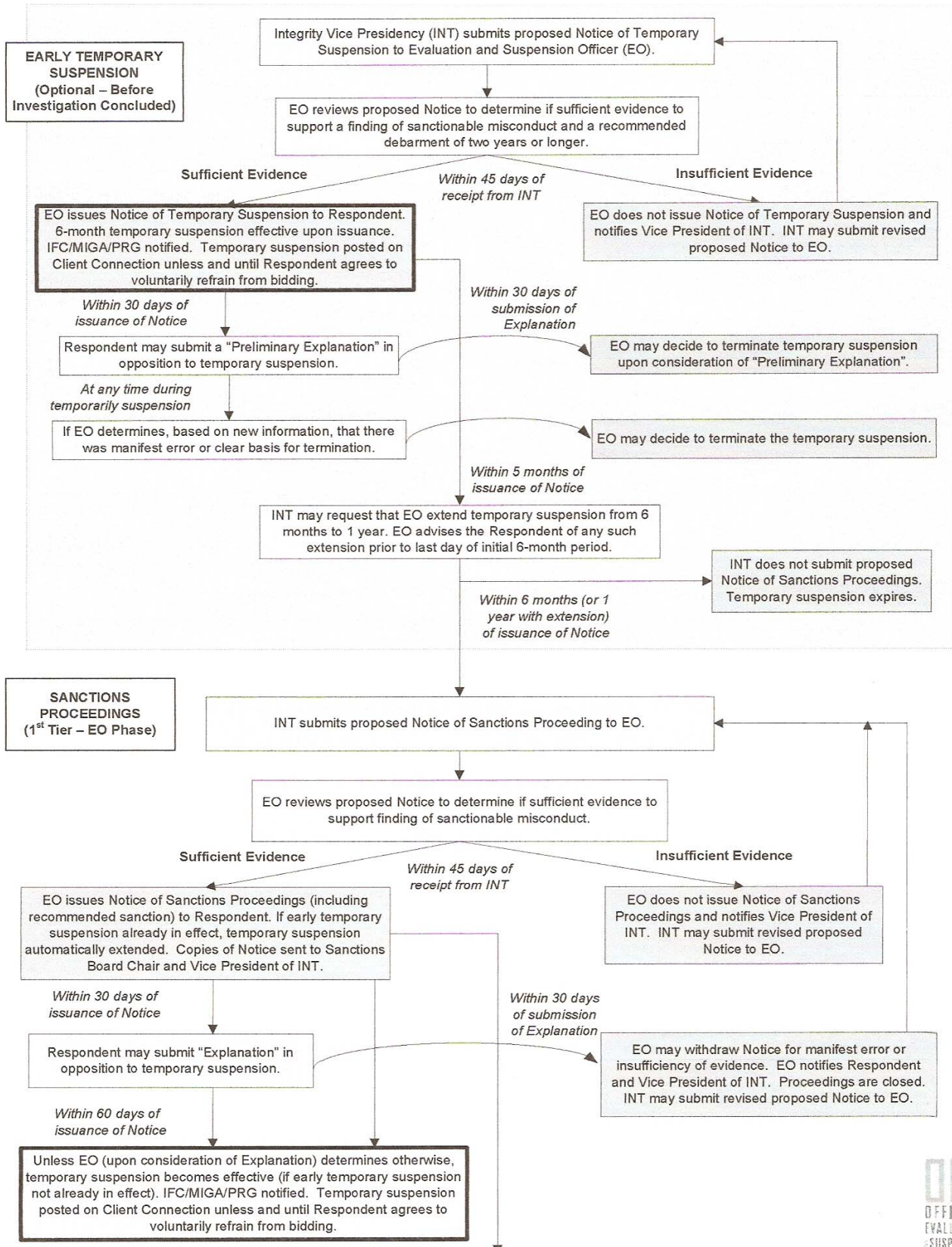
MDB	Legal basis	Grounds for debarment	Actors involved in the debarment proceeding	Range of sanctions	Length of debarment	Publicity of debarment decisions
WB	Guidelines: Procurement under IBRD Loans and IDA Credits, Section 1.14 Guidelines: Selection and Employment of Consultants by World Bank Borrowers, Section 1.22 Guidelines on Preventing and Combating Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants Sanctions Procedures	Corrupt, fraudulent, collusive, coercive and obstructive practices	<i>Investigations:</i> World Bank's Integrity Vice Presidency (INT) <i>Sanctions:</i> - Evaluation and Suspension Officer (EO) - Sanctions Board	Letter of reprimand, debarment, conditional non-debarment with conditional release, restitution	Indefinitely or for a stated period of time (length depends on the mitigating and aggravating factors; average length is 3 years)	YES
ADB	Procurement Guidelines, Section 1.14 Guidelines on the Use of Consultants by Asian Development Bank and its Borrowers, Section 1.23 Integrity Principles and Guidelines Integrity Guidelines and Procedures	Corrupt, fraudulent, collusive and coercive practices	<i>Investigations:</i> Office of Anticorruption and Integrity (OAI) <i>Sanctions:</i> Integrity Oversight Committee (OIC) <i>Appeals:</i> Sanctions Appeal Committee (SAC)	Letter of reprimand, debarment	Minimum debarment period: 1 year Maximum debarment period for first violation: - individuals: indefinitely - firms: 7 years Debarment period for subsequent violation (after being reinstated): - individuals: indefinitely - firms: up to 10 years	NO

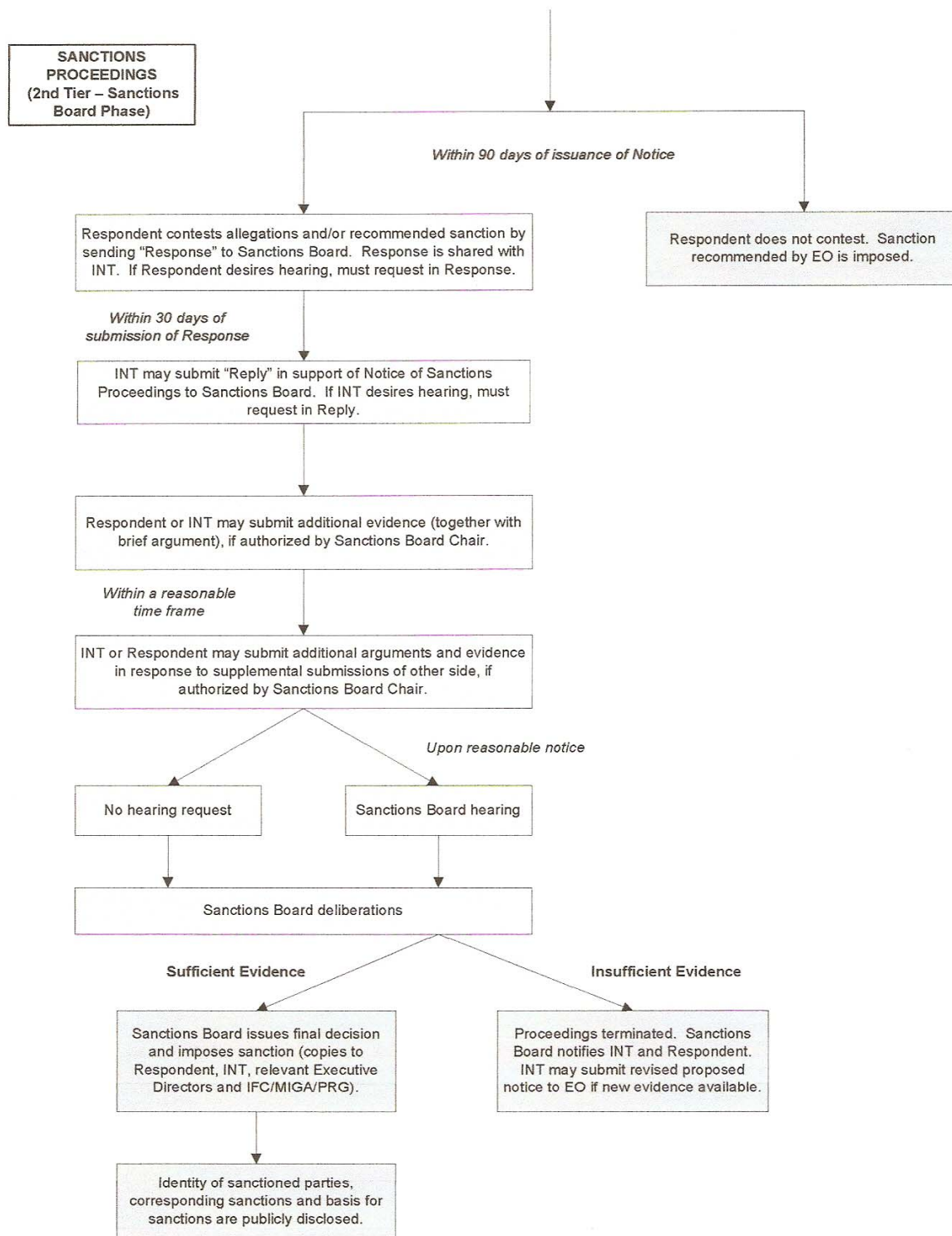
IADB	<p>Policies for the Procurement of Works and Goods, Section 1.14</p> <p>Policies for the Selection and Contracting of Consultants, Section 1.21</p> <p>Sanctions Procedures</p>	Corrupt, fraudulent, collusive and coercive practices	<p><i>Investigations:</i> Office of Institutional Integrity (OII)</p> <p><i>Sanctions:</i> - Oversight Committee on Fraud and Corruption (OCFC) - Sanctions Committee</p>	Letter of reprimand, debarment, condition on contracting, restitution	Permanently or for a stated period of time (length depends on the mitigating and aggravating factors; average length is 4 years)	YES
AfDB	<p>Rules and Procedures for Procurement of Goods and Works, Section 1.14</p> <p>Rules and Procedures for Recruitment of Consultants, Section 1.22</p> <p>AfDB Sanctions</p>	Corrupt, fraudulent, collusive and coercive practices	<p><i>Investigations:</i> Integrity and Anti-Corruption Division (IACD)</p> <p><i>Sanctions:</i> - Advisory Committee on Corruption and Fraud (ACCF) - the President</p>	Letter of reprimand, debarment	Indefinitely or for a stated period of time (length depends on the mitigating and aggravating factors; average length is 3 years)	NO
EBRD	<p>Procurement Policies and Rules, Section 2.9</p> <p>Enforcement Policy and Procedures</p>	Corrupt, fraudulent, collusive and coercive practices	<p><i>Investigations:</i> Office of the Chief Compliance</p> <p><i>Sanctions:</i> - Enforcement Committee - the President</p>	Debarment, conditional non-debarment, debarment with conditional release	Indefinitely or for a stated period of time (length depends on the mitigating and aggravating factors)	YES

ANNEX II. Synthesis Table on Due Process Rights during Debarment Procedure in MDBs

MDB	Notice to the Respondent before imposing a sanction	Period of time given to the Respondent to contest allegations and/or sanction	Period of time given to the MDB to respond to the Respondent's response	Right to hearing	Right to Appeal
WB	YES	90 days	30 days	YES	NO (however, under the two-tiered sanctions system, when the Respondent contests allegations and/or sanctions recommended by the EO, the case is being fully and independently reviewed by the Sanctions Board irrespective of availability of new facts)
ADB	YES	No prescribed delay available	No prescribed delay available	NO	YES, subject to discovery of new facts (to a special Sanctions Appeal Committee)
IADB	YES	60 days and 20 days to the second reply (after MDB's reply)	20 days	NO, subject only to the Sanctions Committee's discretion	NO, but subject to discovery of new facts the debarred party may within 1 year from the issuance of the debarment decision (but no later than 30 days following discovery of new facts) request the sanctioning body to reopen the case
AfDB	YES	Unlimited, once evidence brought by Respondent is credible and relevant to investigations	As required on a case-by-case basis	NO	NO, but subject to discovery of new facts the debarred party may within 90 days from the issuance of the debarment decision request the sanctioning body to reopen the case
EBRD	YES	No less than 30 days	20 days	YES	NO

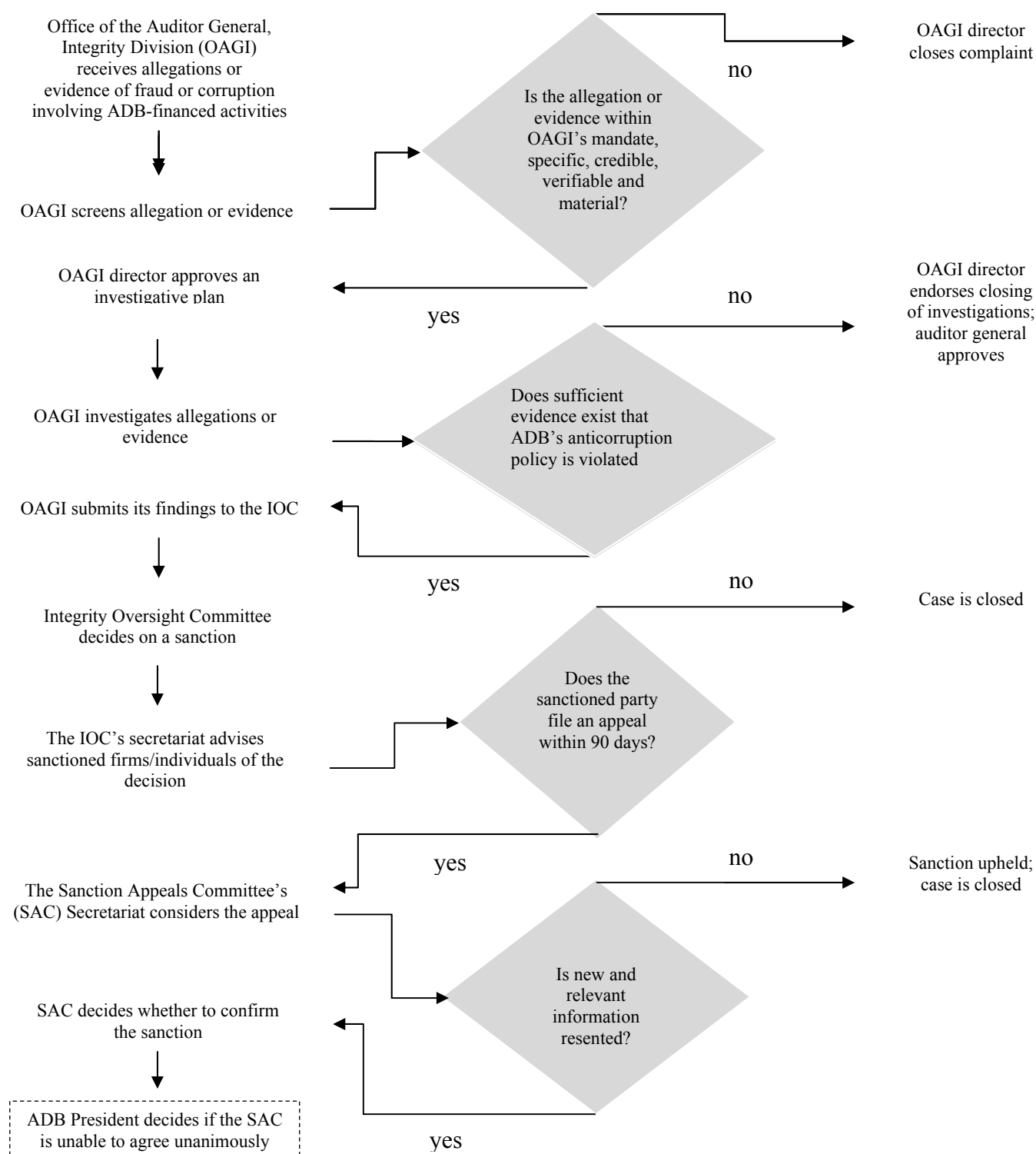
ANNEX III. Sanctions Process in the WB





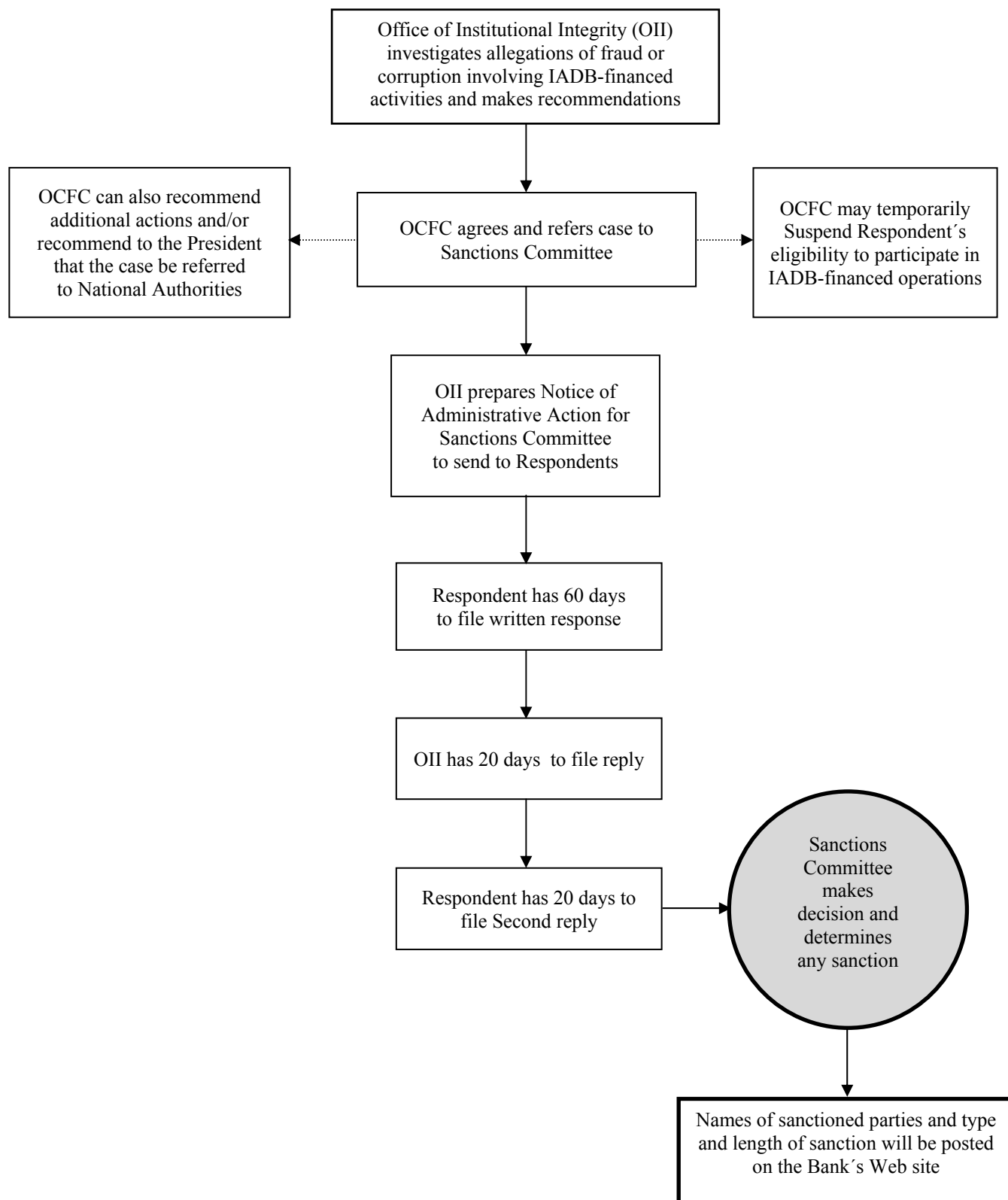
Source: WB, Office of Evaluation and Suspension (WB website)

ANNEX IV. ADB's Process for Dealing with Allegations of Fraud or Corruption Involving Bidders, Consultants, Contractors, Suppliers, or Other Third Parties to ADB-funded Activity



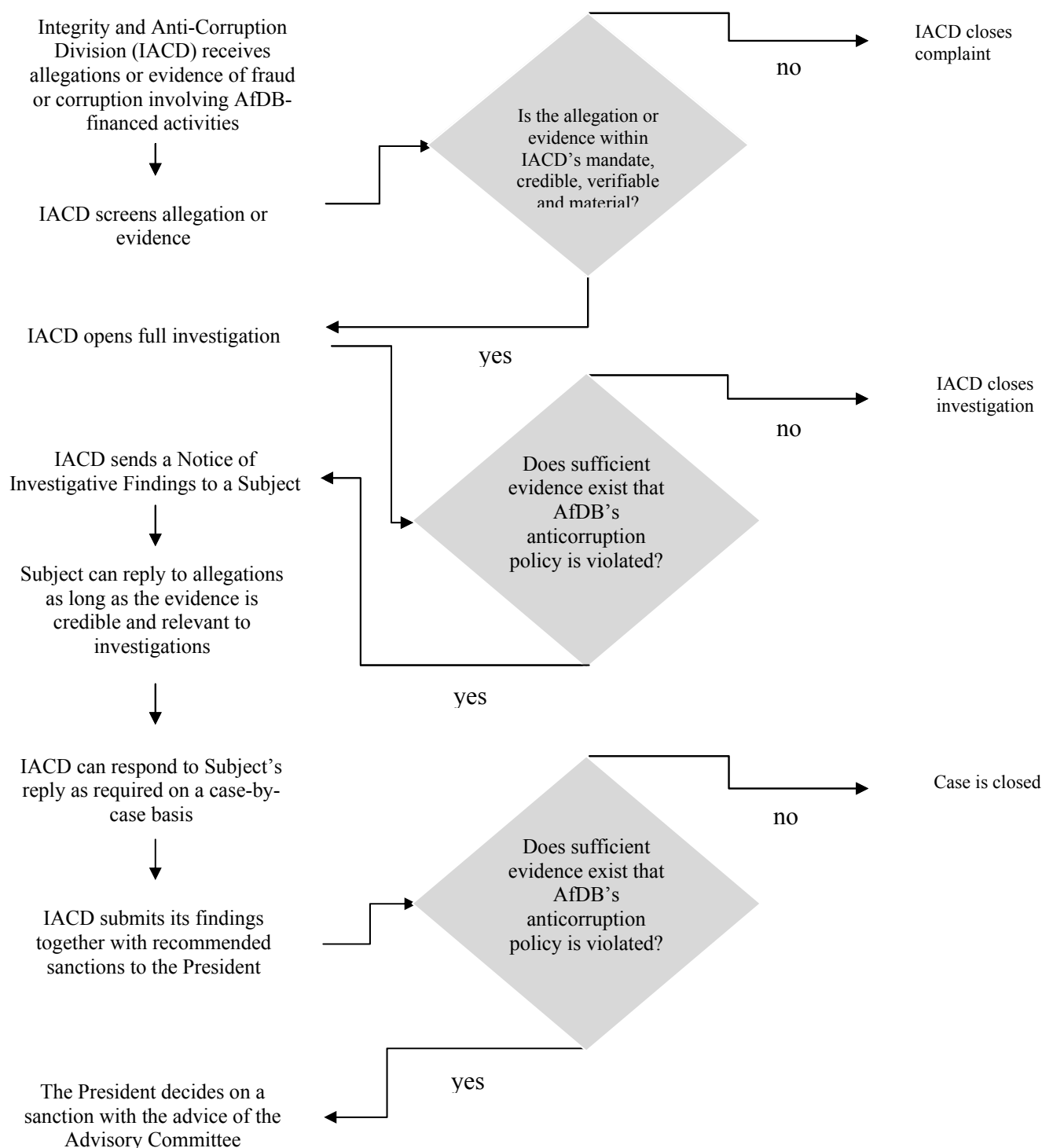
Source: ADB, Office of Anti-Corruption and Integrity (ADB website)

ANNEX V. IADB's Process for Dealing with Allegations of Fraud or Corruption Involving External Parties

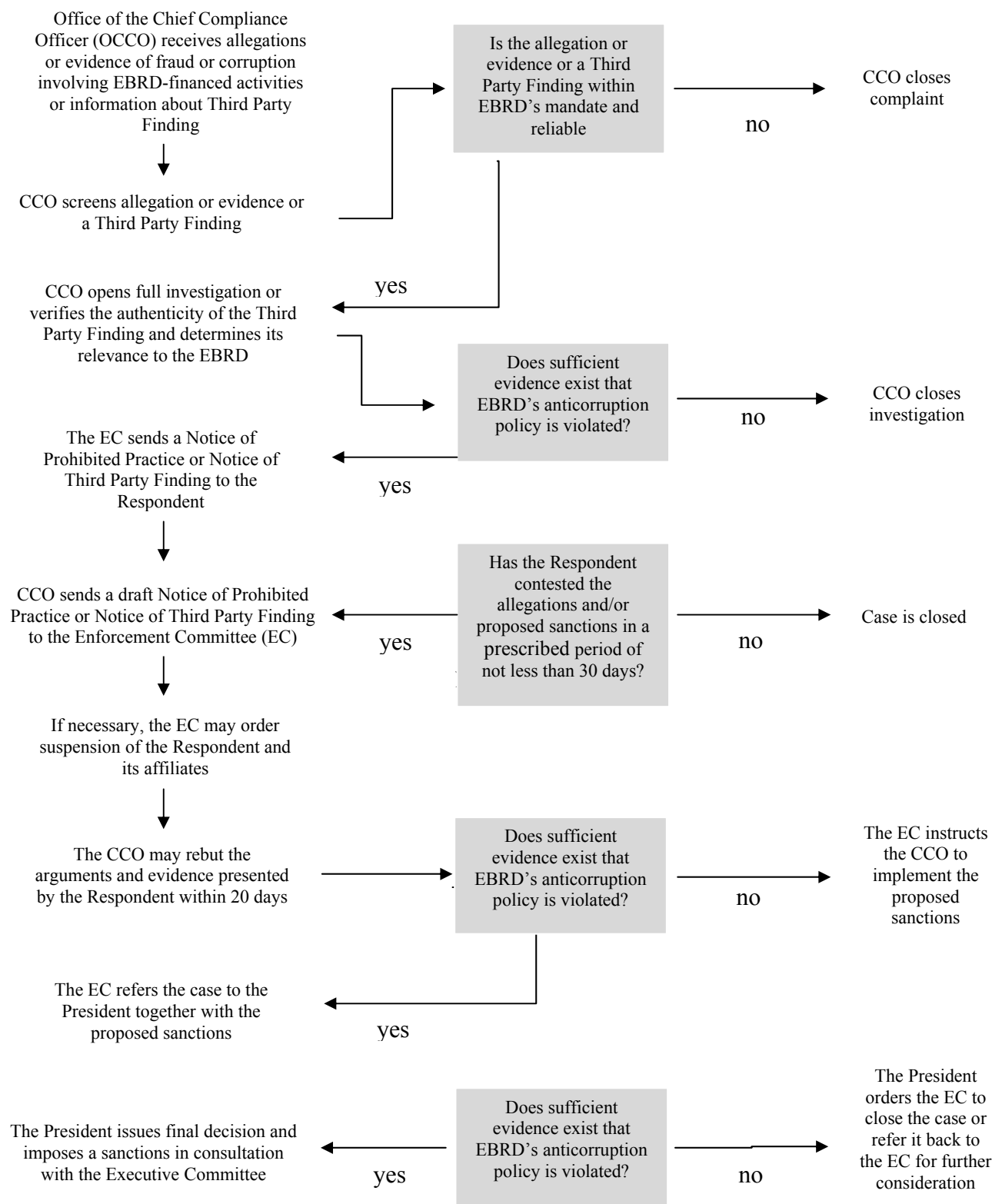


Source: IADB, Office of Institutional Integrity (IADB website)

ANNEX VI. AfDB's Process for Dealing with Allegations of Fraud or Corruption Involving External Parties



ANNEX VII. EBRD's Process for Dealing with Allegations of Fraud or Corruption Involving External Parties



Abstract

No country is immune to corruption. However, those who suffer the most from this evil phenomenon are poor people in developing countries. Each year Multilateral Development Banks (MDBs) including the World Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank are spending billions of dollars on loans intended for development and reduction of poverty in poor countries. Nevertheless, their efforts are in vain as long as these funds are being lost to corruption. Until the early 1990s, the problem of corruption was barely addressed either at national or international level, although everyone knew about its existence. In 1996, a speech of *James Wolfenson*, the then president of the World Bank, urging the international community to deal with the “cancer of corruption”, has put an end to a “*don’t ask, don’t tell*” policy regarding corruption. As a result, the problem of corruption has been brought to light leading to establishment of new anti-corruption policies. One of the mechanisms introduced was debarment, that is preclusion of the companies or individuals, the activities of which are in contradiction with the valid rules, from engaging in future contracts funded by the debarring institution permanently or for a certain period of time.

This dissertation examines corruption in the MDB-funded projects, the mechanism of its occurrence, its consequences and importance of combating it with the main focus on debarment as one of the anti-corruption mechanisms, its features and requirements, conditions, criteria and the procedure of its usage, as well as its implementation by the MDBs. The research was based on the published literature, information available on the Internet and personal communication with MDB representatives at the time of writing this dissertation. A thorough description of debarment proceedings in all five MDBs is followed by a comparative analysis thereof, showing their advantages and disadvantages. Although the research was unable to establish the efficiency level of debarment in reducing corruption, its existence as such while respecting the due process rights was proved to have a strong deterrent effect to prevent the individuals and companies from engaging in corrupt activities.

Zusammenfassung

Auch wenn wohl kein Land immun gegen Korruption ist, wirkt sich dieses negative Phänomen besonders schädlich auf die arme Bevölkerung von Entwicklungsländern aus. Die großen Summen, die alljährlich von den Multinationalen Entwicklungsbanken („MDBs“, nämlich der Weltbank, der Asiatischen, der Afrikanischen, der Inter-Amerikanischen Entwicklungsbank sowie der Europäischen Bank für Wiederaufbau und Entwicklung) an Krediten für die Förderung der Entwicklung und den Abbau der Armut diesen Ländern zur Verfügung stellen, bilden jedoch einen sinnlosen Aufwand, wenn sie der Korruption zum Opfer fallen. Bis in die frühen 90er Jahre war das Problem Korruption in der öffentlichen Diskussion sowohl auf der nationalen als auch auf der internationalen Ebene wenig präsent, obwohl man sich seiner Existenz bewusst war. 1996 hat das mittlerweile historische Wort von *James Wolfenson*, dem damaligen Präsident der Weltbank, vom „Krebsgeschwür der Korruption“, dem sich die internationale Gemeinschaft widmen müsse, das verbreitete Schweigen durchbrochen. Die Bewusstseinsänderung, die dadurch bewirkt wurde, mündete in die Entwicklung einer progressiven Antikorruptionspolitik. Zu den Mechanismen, die dabei geschaffen wurden, gehört der Ausschluss juristischer oder physischer Personen, deren Handlungen im Widerspruch zu geltenden Regeln stehen, von der Möglichkeit, dass ein Staat Aufträge an sie vergibt. Ein solcher Ausschluss von einer zukünftigen Vergabe – der über die Ingerenz der Bank gegenüber den Staaten wirkt – kann auf Dauer oder für eine bestimmte Zeit verfügt werden.

Die vorliegende Dissertation untersucht die Erscheinungen von Korruption in Projekten, die von den MDBs gefördert werden, ihre Auswirkungen und die Bedeutung ihrer Bekämpfung unter besonderer Berücksichtigung des Ausschlusses vom Vergabeverfahren („debarment“), die Merkmale und Erfordernisse eines solchen Ausschlusses, die Bedingungen, Kriterien und Verfahren zu seinem Einsatz sowie die praktische Implementation dieses Instruments. Die Untersuchung basiert auf der veröffentlichten Literatur, auf Informationen, die im Internet verfügbar sind, sowie auf persönlicher Kommunikation mit Angehörigen der MDBs während der Arbeit an der Dissertation. Auf eine genaue Beschreibung der Ausschlussverfahren bei jeder MDB folgt eine vergleichende Analyse und Bewertung ihrer Vor- und Nachteile. Auch wenn die Arbeit nicht statistisch oder sonst quantifizierend den Einfluss des

„debarment“ im Sinne einer erfolgreichen Bekämpfung der Korruption nachzuweisen vermag, erscheint die Annahme gerechtfertigt, dass seine schlichte Existenz im Zusammenhalt mit der Beachtung rechtsstaatlicher Grundsätze gegenüber Individuen und Unternehmen einen starken generalpräventiven Effekt hat, der korrupten Handlungsweisen entgegenwirkt.

Curriculum Vitae

Born in Baku, Azerbaijan, on 05 July 1982

EDUCATION

2006 – 2010	Doctoral Studies in Law , University of Vienna
2001 – 2004	Master Studies in International Law , Baku State University
1997 – 2001	Bachelor Studies in International Law , Baku State University

PROFESSIONAL EXPERIENCE

08/2008 – 04/2009	UNIDO/ Office of Legal Affairs, Vienna <i>Legal Consultant</i>
08/2007 – 12/2007	International Criminal Court/ Office of the Prosecutor, The Hague <i>Legal Assistant</i>
11/2006 – 05/2007	International Criminal Court/ Office of the Prosecutor, The Hague <i>Law Clerk</i>
11/2005 – 04/2006	UNIDO/ Office of Legal Affairs, Vienna <i>Legal Intern</i>
08/2005 – 10/2005	UNOV/ Office of Internal Oversight Services, Vienna <i>Volunteer</i>
03/2005 – 07/2005	European Commission/ European Anti-Fraud Office, Brussels <i>Trainee</i>
05/2004 – 02/2005	EU-funded TACIS Legal and Judicial Reform Project, Baku <i>Project Assistant</i>
10/2001 – 04/2004	“InterJurService Ltd.” Law Firm, Baku <i>Legal Assistant/ Lawyer</i>

LANGUAGE SKILLS

Fluent in English, Russian, Azeri; good knowledge of French, Turkish; fair knowledge of German

1. **International Tribunal on the Law of the Sea among Means of Peaceful Settlement of Disputes**, in: *Baku State University, International Relations and International Law Faculty, Materials of scientific conference dedicated to the eightieth anniversary of the President of the Republic of Azerbaijan*, Baku 2003
2. **On the Way of Establishment of the Permanent International Criminal Court**, in: *Ministry of Education of the Republic of Azerbaijan, Scientific Researches*, Baku 2003
3. **Some Aspects of International Cooperation on Fighting Terrorism and Contribution of Azerbaijan therein**, in: *Azerbaijan National Academy of Sciences, Institute of Philosophic and Political-Legal Researches, Digest of scientific researches*, Baku 2003
4. **Principle of Universal Jurisdiction in the System of International Justice**, in: *"Ganun" (social and political, scientific legal journal)*, Baku 2004