

THE DEBARMENT OF CORRUPT CONTRACTORS FROM WORLD BANK-FINANCED CONTRACTS

Sope Williams

I. Introduction	278
II. Background to the World Bank Procurement Guidelines	279
III. World Bank Anti-Corruption Policy	280
IV. World Bank Debarment Policy and Procedures	283
V. Grounds for Debarment	286
A. "Corrupt Practice"	287
B. "Fraudulent Practice"	287
C. "Collusive Practices"	288
D. "Coercive Practices"	288
VI. Rejection of a Proposal for Award	289
A. Introduction	289
B. The Persons Who May Be Rejected	289
1. Joint Ventures	290
2. Subcontractors	291
C. Contracting Entities That Must Abide by the Rejection	291
D. Procedure for Rejection	291
E. Consequence of Rejection	293
F. The Mandatory Nature of Rejection	293
G. Remedies and Recourse for Affected Suppliers	293
VII. Debarment	294
A. Introduction	294
B. The Persons Who May Be Debarred	295
C. Contracting Entities That Must Abide by the Debarment	296
D. Procedure for Debarring	297
E. Length of Debarment	298
F. Range of Debarment Measures	299
G. Avoiding Debarment: The Voluntary Disclosure Program	300
H. Relevance of Corruption Convictions	301
I. Consequence of Debarment	301
J. The Discretionary Nature of Debarment	302
K. Remedies and Recourse for Affected Suppliers	302
1. Immunity	302

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2. International Law	302
3. Interest in Providing Recourse for Aggrieved Persons.....	303
4. Administrative Burden.....	303
5. Bank Objectives	303
VIII. Conclusion.....	305

I. INTRODUCTION

The World Bank¹ is globally the largest development bank. The Bank came into existence in 1946 to provide post-war reconstruction aid to countries devastated by the Second World War,² but later changed its focus to provide development finance for developing countries.³ Like most multilateral development banks, the Bank imposes good-governance and anti-corruption requirements⁴ on borrower countries where it provides structural lending or finances a development project. The Bank also requires that the procurement process for funded projects is conducted according to Bank procedures.⁵ An important aspect of its procurement procedures is focused on controlling corruption within these projects. To this end, Bank procurement guidelines provide for the debarment of corrupt contractors from Bank-financed contracts.

This article will analyze Bank measures requiring the debarment⁶ of corrupt suppliers from Bank-financed projects. Although these measures are jurisdictionally limited to procurements funded by the Bank, Bank practice provides some insight into the challenges created by a debarment requirement irrespective of the nature of the legal system or limits of its jurisdiction. As the first multilateral development bank to utilize debarment where corruption was established within a project, the Bank led the way for other development

1. The World Bank Group is a generic term that refers to 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). However, strictly speaking, the term “World Bank” refers to the IBRD. In this article, the term “World Bank” (the Bank) will refer to the IBRD and the IDA as the procurement procedures for both institutions are the same.

2. See Articles of Agreement of the International Bank for Reconstruction and Development art. I, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134, *amended* Dec. 16, 1965, 16 U.S.T. 1942, 606 U.N.T.S. 294 [hereinafter Articles of Agreement].

3. See Michael P. Malloy, *Shifting Paradigms: Institutional Roles in a Changing World*, 62 *FORDHAM L. REV.* 1911, 1911, 1923 (1994); Herbert V. Morais, *Testing the Frontiers of Their Mandates: The Experience of the Multilateral Development Banks*, 98 *AM. SOC'Y INT'L L. PROC.* 64, 64 (2004).

4. Concrete anti-corruption measures taken by the Bank include loans to developing countries to build accountable public sectors and direct technical assistance to assist in outlawing bribery, nepotism, and other corrupt practices and promoting transparency. See Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 193, 203 (1999); Lawrence Tshuma, *The Political Economy of the World Bank's Legal Framework for Economic Development*, 8 *SOC. & LEGAL STUD.* 75, 78–79 (1999).

5. WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS ¶ 1.1 (2004) [hereinafter PROCUREMENT GUIDELINES].

6. MARIO A. AGUILAR ET AL., PREVENTING FRAUD AND CORRUPTION IN WORLD BANK PROJECTS: A GUIDE FOR STAFF 9 (2000).

banks that have, with slight modification, since adopted similar policies.⁷ As a result, Bank practice in relation to debarment informs the practices of these institutions.

This article sets out the background to the Bank's procurement regulatory framework, offers an introduction to the Bank's anti-corruption policy, and then critically examines the exclusion and debarment measures as used by the Bank. The article concludes that the costs of improving the effectiveness of the debarment policy may outweigh any benefits, and the limitations on the debarment mechanism may need to be accepted as inherent in the nature of the debarment mechanism.

II. BACKGROUND TO THE WORLD BANK PROCUREMENT GUIDELINES

As an international development institution, the World Bank funds capital-intensive projects in developing countries, which are implemented by means of procurements in these countries. By its Articles of Agreement,⁸ the Bank is required to ensure that loan proceeds are used for the purposes for which the loan was granted, with due regard to considerations of economy and efficiency.⁹ The Articles also prohibit the Bank from taking political or noneconomic considerations into account¹⁰ or interfering in the political affairs of its members.¹¹ This raised a quandary for the Bank in deciding how to ensure that the disbursement of loan proceeds through project procurements is conducted in an open, transparent, and competitive manner in countries that might have weak public administration systems, or lax or nonexistent public procurement regulation, without interfering with the borrower's internal administration. To circumvent this problem, the Bank makes it a condition of its finance that project procurement is done according to Bank procurement guidelines.¹² Although the procurement process is subject to Bank rules, the process is managed by the borrower, with the Bank merely taking a supervisory role to ensure that the process is properly conducted.¹³

The first formal direction on Bank procurement, issued in 1964, contained the procedures to be used by Bank staff in conducting international competitive bidding (ICB).¹⁴ These initial documents have undergone significant

7. See AFRICAN DEV. BANK GROUP, RULES OF PROCEDURE FOR PROCUREMENT OF GOODS AND WORKS § 2.12; ASIAN DEV. BANK, PROCUREMENT GUIDELINES ¶¶ 1.14 (2006); INTER-AM. DEV. BANK, BASIC PROCUREMENT POLICIES AND PROCEDURES OF THE IDB (WORKS AND GOODS) § 1.4.

8. Articles of Agreement, *supra* note 2.

9. *Id.* art. III, § 5(b).

10. *Id.*

11. *Id.* art. IV, § 10.

12. PROCUREMENT GUIDELINES, *supra* note 5, ¶¶ 1.1.

13. SUEARROWSMITH ET AL., REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 137 (2000).

14. Robert Hunja, *Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines*, 6 PUB. PROCUREMENT L. REV. 217, 218 (1997).

revision over the years “to reflect the Bank’s changing membership, changes in the field of procurement and in the Bank’s own lending products.”¹⁵ In relation to corruption control, the most significant review of Bank procurement procedures occurred in 1996 when the Bank introduced a new paragraph dealing with fraud and corruption in Bank procurements.¹⁶ This new paragraph established the Bank’s intention to debar firms engaging in corruption in bidding for Bank-financed contracts and also contained a clause permitting borrowers to include a “no-bribery” pledge in bid documentation. The paragraph on corruption was again revised in 2004 to include collusion and coercive practices in the list of prohibited activities¹⁷ and grant the Bank contractual access to bid and contract documentation¹⁸ and the power to audit the accounts of suppliers.¹⁹

In general, the procurement guidelines are quite detailed, providing procedural requirements relating to bidding procedures, splitting of contracts, advertising, and the qualification of bidders. The guidelines also provide information on the nature of tender documentation, bid evaluation, payment methods, and contract award procedures. The emphasis in the procurement guidelines is on the need for economy and efficiency in the procurement process, competition, encouraging the local industry, and transparency.²⁰ The Bank’s procurement guidelines generally require the use of ICB within certain parameters²¹ and thresholds as defined in the Loan Agreement between the Bank and the borrower. ICB basically means that procurements are advertised internationally and are open to persons beyond the borrower country.²²

III. WORLD BANK ANTI-CORRUPTION POLICY

This section explains the Bank’s involvement in corruption issues and discusses the general framework of the Bank’s anti-corruption policy.

The Bank’s concern with corruption as a developmental issue is relatively recent, having emerged with the assumption of James Wolfensohn to the presidency of the Bank in 1995.²³ Before then, the Bank was resolute in

15. *Id.*

16. WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS ¶ 1.15 (1995) (revised Jan. and Aug. 1996, Sep. 1997, and Jan. 1999).

17. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14.

18. Françoise Bentchikou, *The World Bank’s Sanctions Process*, in ORG. FOR ECON. CO-OPERATION & DEV., FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT 227, 241–42 (2005).

19. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(e).

20. *Id.* ¶ 1.2.

21. *See id.* ¶¶ 2, 3.3.

22. *Id.* ¶ 1.6.

23. Ibrahim F.I. Shihata, *Corruption: A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT’L L. 451, 475 (1997). It has been argued that the Bank’s concern with corruption coincided with the United States’ increased attack on international bribery during the Clinton administration. *See* Nii Wallace-Bruce, *Corruption and Competitiveness in Global Business: The Dawn of a New Era*, 24 MELB. U. L. REV. 349, 362 (2000).

not taking measures against corruption,²⁴ especially beyond the projects it financed. However, it was always clear that growth and development were directly correlated with corruption,²⁵ and the Bank was frequently criticized for its attitude toward corruption in borrower countries. According to a former Bank legal counsel, “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.”²⁶ The growing prominence of corruption in economic, political, and developmental discourse²⁷ as a development inhibitor led the Bank to eventually adopt a comprehensive, multipronged policy against corruption.

The Bank has, since inception, disbursed over \$568 billion as development finance²⁸ and is thus “exposed to significant operational risk for corruption and fraud.”²⁹ Within the Bank’s Articles of Association, there is no express provision requiring the Bank to take measures against corruption in Bank-financed projects. For many years, this, as well as the provisions prohibiting the Bank from interfering in, or being influenced by, the internal affairs of a borrower country³⁰ were given as the reasons why the Bank did not respond to the allegations regarding its apparent nonchalant attitude to corruption in borrower countries and within Bank projects.³¹ However, the Articles also provide that the Bank shall ensure that the proceeds of any loan are used only for the purposes for which the loan is granted.³² When the Bank eventually decided to face the problem of corruption, this provision

24. James D. Wolfensohn, *Corruption Impedes Development—and Hurts the Poor*, INT’L J. GOV’T AUDITING, Oct. 1998, at 1.

25. PAOLO MAURO, THE EFFECTS OF CORRUPTION ON GROWTH, INVESTMENT AND GOVERNMENT EXPENDITURE 17 (Kimberly Ann Elliott ed., 1997).

26. Shihata, *supra* note 23, at 476.

27. Termed the “corruption eruption.” The term was apparently first used in Moisés Naím, *The Corruption Eruption*, 2 BROWN J. WORLD AFF. 243, 245 (1995). See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM (1999); David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)*, 33 CORNELL INT’L L.J. 593, 595–96 (2000); Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 272–74 (1999); Philippe Pierfos & Christian Hudson, *The Hard Graft of Tackling Corruption in International Business Transactions*, J. WORLD TRADE, Apr. 1998, at 77, 79; James W. Williams & Margaret Beare, *The Business of Bribery: Globalization, Economic Liberalization, and the “Problem” of Corruption*, 32 CRIME L. & SOC. CHANGE 115, 115–18 (1999).

28. Figures for both IDA and IBRD lending. WORLD BANK, THE WORLD BANK ANNUAL REPORT 2005: YEAR IN REVIEW 8 (2005).

29. Parthapratim Chanda, *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, 316 (2004).

30. Articles of Agreement, *supra* note 2, art. IV, § 10.

31. See, generally, DICK THORNBURGH ET AL., 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 (2000) [hereinafter THORNBURGH REPORT]; THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 31 (1997) [hereinafter HELPING COUNTRIES 1997]; Shihata, *supra* note 23, at 474.

32. Articles of Agreement, *supra* note 2, art. III, § 5(b).

was interpreted as being broad enough to grant legitimacy to the Bank's anti-corruption efforts.³³

The stimulus for the Bank's initial approach to the corruption problem can be traced to internal memoranda³⁴ that highlighted the issue of corruption and concluded that not all aspects of national governance were precluded from Bank consideration.³⁵ Corruption was eventually incorporated into the Bank's development agenda and the Bank is now at the forefront of the fight against corruption.

The Bank's anti-corruption policy stems from two factors. The first is a desire to ensure that Bank funds are used for the purposes for which they were granted, as required by the Articles of Agreement. The second is the realization that ineffective lending harms development and has severe consequences for citizens in borrower countries.³⁶

In desiring the proper expenditure of Bank funds, the Bank was responding to widespread criticism against its complicit role in corruption in borrower countries such as Russia,³⁷ Indonesia,³⁸ Kenya,³⁹ and Bangladesh.⁴⁰ To ensure that Bank loans were not dogged by corruption, the Bank initially focused on "analytical rigor at the project approval stage."⁴¹ This often led to the creation of a paper trail that was, at best, counterproductive and did not really lend itself to removing corruption in Bank projects.⁴² The Bank further took steps to ensure transparency in its procurement procedures and revised its procurement guidelines to make corruption a ground for rejecting a tender, debarring a contractor, or canceling a loan to a borrower country. Other measures introduced to curb corruption included capacity building assistance to borrower countries⁴³ and the suspension of further loans in countries where

33. Chanda, *supra* note 29, at 349.

34. 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, December 21, 1990 (Feb. 5, 1991); Legal Opinion of the General Counsel, SecM95-707, Prohibition of Political Activities in the Bank's Work, July 11, 1995 (July 12, 1995).

35. WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992); WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE (1994).

36. JEFFREY A. WINTERS, CRIMINAL DEBT IN REINVENTING THE WORLD BANK 120 (Jonathan R. Pincus & Jeffrey A. Winters eds., Cornell Univ. Press 2002); MAURO, *supra* note 25, at 17; Cheryl W. Gray & Daniel Kaufman, *Corruption & Development*, FIN. & DEV., March 1998, available at <http://www.worldbank.org/fandd/english/pdfs/0398/020398.pdf>.

37. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS ch. 5 (2002).

38. Jared Levinson, "Living Dangerously": Indonesia and the Reality of the Global Economic System, 7 J. INT'L. L. & PRAC. 425 (1998); JEFFREY A. WINTERS, POWER IN MOTION: CAPITAL MOBILITY AND THE INDONESIAN STATE (1996).

39. K. KIBWANA & S.C. WANJALA, THE ANATOMY OF CORRUPTION IN KENYA: LEGAL, POLITICAL, AND SOCIO-ECONOMIC PERSPECTIVES (1996).

40. Tim Tucker, *A Critical Analysis of the Procurement Procedures of the World Bank*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 153-55 (Sue Arfowsmith & Arwel Davies eds., 1998).

41. Susan Rose-Ackerman, *The Role of the World Bank in Controlling Corruption*, 29 LAW & POL'Y INT'L BUS. 93, 104 (1997).

42. Tucker, *supra* note 40.

43. Rose-Ackerman, *supra* note 41, at 112; OECD DAC Network on Governance, *Synthesis of Lessons Learned of Donor Practices*, in FIGHTING CORRUPTION 38-47 (2003).

corruption is found to be endemic or the Government does not show a strong commitment to the eradication of corruption.⁴⁴

The Bank's policy against corruption is based on four main strategies. The first is to ensure that the procurement process contains preventive and punitive elements against corruption. The Bank's policy of debarment of corrupt contractors as mentioned above assists in executing both these elements. Second, the Bank ensures that the pre-approval stage of loans and projects is rigorous and contains input from all interested parties.⁴⁵ Third, measures are taken to ensure that, institutionally, the Bank is corruption free.⁴⁶ Finally, the Bank has improved auditing and supervision requirements in its projects.⁴⁷

It is safe to say that the Bank has mainstreamed anti-corruption in all aspects of its operations,⁴⁸ by "conceptualizing corruption as a public sector developmental challenge."⁴⁹ The Bank's increasing commitment to anti-corruption issues may be illustrated by the changing geography of its loan portfolio. While 0.6 percent of Bank lending supported fiscal management and procurement reform in 1995, by 2005 that figure had jumped to 4.6 percent. Similarly, the proportion of Bank projects with an anti-corruption element jumped from 0.4 percent in 1995–96 to 5 percent in 2004–05.⁵⁰

A few comments may be made about the success of the Bank's anti-corruption measures. It had previously been estimated that 30 percent of Bank funds have been lost to corruption since the Bank began lending.⁵¹ Recent evidence suggests that many Bank-financed projects are still subject to corruption and that approximately 10 to 15 percent of contract value is lost to bribery.⁵² If these figures can be taken as a measure of the effectiveness of the Bank's anti-corruption measures, then the Bank's anti-corruption efforts have had only limited success in reducing corruption in Bank projects.

IV. WORLD BANK DEBARMENT POLICY AND PROCEDURES

The Bank introduced the rejection and debarment of contractors involved in corruption in Bank-funded projects in the 1996 revision to its procurement

44. The Bank has suspended loans on projects in Indonesia (Sept. 1999), Kenya (Jan. 2006), Uzbekistan (Mar. 2006), and Cambodia (June 2006). See <http://www.brettonwoodsproject.org>.

45. WORLD BANK OPERATIONAL MANUAL, GOOD PRACTICES 14.70; see also Sabine Schlemmer-Schulte, *The Impact of Civil Society on the World Bank, the International Monetary Fund and the World Trade Organization: The Case of the World Bank*, 7 ILSA J. INT'L & COMP. L. 399, 403–04 (2001).

46. WORLD BANK STAFF R. 3.01.

47. WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES 10.02.

48. WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: PROGRESS AT THE WORLD BANK SINCE 1997 ch. 4 (2000) [hereinafter HELPING COUNTRIES 2000].

49. THORNBURGH REPORT, *supra* note 31, at 10. Note that Country Assistance Strategies, which provide the framework for Bank involvement in a country, must address governance and corruption issues.

50. World Bank, *How the World Bank Fights Corruption*, <http://www.worldbank.org>.

51. WINTERS, *supra* note 36, at 102, 111.

52. Nathaniel Hobbs, *Corruption in World Bank Financed Projects: Why Bribery Is a Tolerated Anathema* 24–29 (DESTIN Working Paper Series, 2005), <http://www.lse.ac.uk/collections/DESTIN/pdf/wp65.pdf>.

guidelines. Debarment is increasingly becoming a widely used anti-corruption mechanism in regulated public procurement systems⁵³ and may be defined as an administrative remedy utilized to disqualify contractors from obtaining public contracts or acquiring extensions to existing contracts for alleged breaches of law or ethics.⁵⁴ The Bank also defines debarment as declaring a firm ineligible either indefinitely or for a stated period of time to be awarded a Bank-financed contract.⁵⁵ Debarment may include disqualification for three kinds of behavior. First, debarment could be directed at past violations of law, ethics, or anti-corruption norms that are unrelated to public procurement.⁵⁶ 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.

The Bank's debarment policy is directed at, and confined solely to, contractors who commit breaches of the Bank's anti-corruption provisions in a Bank-funded project.⁵⁷ The policy is implemented by either rejecting a supplier from a particular procurement for a breach of the rules of that process⁵⁸ or by debarring a supplier from future Bank contracts for past violations of the Bank's procurement procedures.⁵⁹ The Bank, however, will not take measures against a contractor who is guilty of corruption occurring outside the Bank context.

This limitation may have consequences for the Bank's anti-corruption policy, as contractors who have been corrupt in other contexts may still gain access to Bank contracts. In other jurisdictions where debarment is utilized, the sanction may be imposed where the supplier is guilty of general corruption.⁶⁰ However, under Bank provisions, if a supplier has committed corruption in other contracts with the borrower, another country, or an international organization, the Bank is not required to debar such a firm. Clearly, commitment to a policy that requires debarment for all corruption, whether related to Bank contracts or not, will be difficult in the absence of a coordinated debarment policy in international procurement. However, there are indications that such coordination may materialize in the future. Recently, the multilateral development banks agreed to develop a uniform

53. See, for instance, Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts. Art. 45, 2004 O.J. L134/114; FAR 9.406; Prevention and Combating of Corrupt Activities Act No. 12 of 2004 § 28 (S. Afr.).

54. Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Exclusion and Debarment*, 5 PUB. PROCUREMENT L. REV. 211, 212–13 (2004).

55. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(d).

56. Christopher Yukins, *Suspension and Debarment: Re-Examining the Process*, 5 PUB. PROCUREMENT L. REV. 255, 256 (2004).

57. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14.

58. *Id.* ¶ 1.14(b).

59. *Id.* ¶ 1.14(d).

60. Schooner, *supra* note 54, at 212–13; Sope Williams, *The Mandatory Exclusions for Corruption in the New EC Procurement Directives*, 31 E.L. REV. 711 (2006).

“Framework for Preventing and Combating Fraud and Corruption” under which they have agreed to standardize definitions of corruption, improve the consistency of investigative rules and procedures, strengthen information sharing, and ensure that enforcement action taken by one institution is supported by the other institutions.⁶¹ If this document is translated to concrete action, it will mean that the multilateral banks will share information on corrupt practices and investigations and enforce debarments imposed by each other.

Other efforts toward coordination are being made by the European Parliament, which recently passed a resolution proposing the establishment of an international system of blacklisting that would prevent development banks from lending to corrupt regimes.⁶² In addition, the European Anti-Fraud Office (OLAF) is examining the viability of establishing a mechanism for the exchange of debarment information between Member States, EU institutions, and international financial institutions.⁶³ If established, such mechanism could be utilized by the Bank as a source of information for debarment.

It is hoped that these multilateral initiatives will lead to coordination in debarment among international financial agencies and other donors and perhaps a harmonized policy on debarment in international procurement. Such harmonization may have a significant impact on corruption in international business and increase the effectiveness of debarment as an anti-corruption tool.

Currently, the rationale behind the Bank’s debarment policy is threefold. First, debarment is intended to protect the Bank’s funds in accordance with the prescripts of its Articles of Agreement by ensuring that Bank funds are not lost to fraud and corruption.⁶⁴ Second, debarment supports the Bank’s anti-corruption policy by indicating its willingness to sanction corruption.⁶⁵ Third, debarment acts as a deterrent⁶⁶ against breaches of anti-corruption norms by increasing the economic costs of corruption, as the excluded⁶⁷ or

61. Press Release, World Bank, Multilateral Development Banks Agree on Common Approach to Fight Corruption (Feb. 17, 2006) (on file with author); Press Release, World Bank, A Framework for Fighting Fraud and Corruption (Sept. 16, 2006) (on file with author); see also A. Michael Stevens, *Compliance with Anti-Corruption Laws Through Access to Public Procurement: The Asian Development Bank Experience in Fighting Corruption and Promoting Integrity*, in ORG. FOR ECON. CO-OPERATION & DEV., *PUBLIC PROCUREMENT* ch. 28 (2005).

62. Resolution on Aid Effectiveness and Corruption in Developing Countries, EUR. PARL. Doc. P6_TA(2006)0141 (on file with author).

63. Press Release, OLAF, Joint Transparency International-OLAF Policy Roundtable on Blacklisting: Protecting EU Financial Interests Through Management of Effective and Transparent Debarment Systems (Jan. 20, 2006); see also Transparency International, *Recommendations for the Development and Implementation of an Effective Debarment System in the EU*, http://www.transparency.org/global=priorities/public_contracting/key_sectors/special_topics.

64. DICK THORNBURGH ET AL., *REPORT CONCERNING THE DEBARMENT PROCESSES OF THE WORLD BANK* 33 (2002).

65. Schooner, *supra* note 54, at 216.

66. See THORNBURGH ET AL., *supra* note 64, at 61; HELPING COUNTRIES 2000, *supra* note 48, at 18.

67. In this article, “exclusion” will refer to the Bank’s practice of rejecting the tenders of corrupt suppliers.

debarred supplier loses the potential to compete for future Bank-financed contracts. Additionally, where the exclusion or debarment is published, as is Bank practice, this can damage the reputation of the firm, affecting its ability to obtain business from other sectors.⁶⁸

V. GROUNDS FOR DEBARMENT

For the purpose of its anti-corruption policy, the Bank adopted a definition of corruption that is now widely used in anti-corruption discourse.⁶⁹ The Bank defines corruption as the “abuse of public office for private gain.”⁷⁰ This simple definition is broad enough to cover acts like bribery, theft of state assets, fraud, nepotism, the misallocation of government benefits, and other forms of bureaucratic corruption.⁷¹ In relation to Bank-funded procurements, the procurement guidelines further elaborate on the specific activities that may lead to debarment. Thus, the procurement guidelines provide as follows:

It is the Bank’s policy to require that Borrower’s . . . as well as bidders, suppliers, and contractors under Bank-financed contracts, observe the highest standards of ethics during the procurement and execution of such contracts. In pursuance of this policy, the Bank:

(a) defines for the purposes of this provision, the terms set forth below as follows:

(i) “corrupt practice” means the offering, giving, receiving or soliciting directly or indirectly, of anything of value to influence the action of a public official in the procurement process or in contract execution;

(ii) “fraudulent practice” means a misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract;

(iii) “collusive practices” means a scheme or arrangement between two or more bidders, with or without the knowledge of the Borrower, designed to establish bid prices at artificial, non-competitive levels;

(iv) “coercive practices” means 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.

68. In *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964), the impact of exclusion, was stated to be “a sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of ‘loss of face’ in the business community . . . in addition to the loss of specific profits from the business denied as a result of the debarment.”

69. Daniel Kaufman, *Corruption: The Facts*, FOREIGN POL’Y, Summer 1997, available at http://www.worldbank.org/wbi/governance/pdf/fp_summer97.pdf; Michael Johnston, *The Search for Definitions: The Vitality of Politics and the Issue of Corruption*, 48 INT’L SOC. SCI. J. 321 (1996); Mark E. Warren, *What Does Corruption Mean in a Democracy*, 48 AM. J. POL. SCI. 328 (2004).

70. HELPING COUNTRIES 1997, *supra* note 31, at 8.

71. *Id.* at 8–12.

A. "Corrupt Practice"

Corrupt practice is defined as either active or passive bribery.⁷² Bribery in international transactions,⁷³ and particularly in the execution of infrastructure projects,⁷⁴ is a serious problem for the Bank, and is regarded in some quarters as the most pernicious kind of corruption that exists in international development projects.⁷⁵ The recognition of the pervasiveness of bribery in international transactions has led to the criminalization of overseas bribery in many countries.⁷⁶ Thus, it is not surprising that the procurement guidelines attach sanctions to bribery. Under the procurement guidelines, the definition of corrupt practice is not limited to the prohibited activity during the procurement process but extends to bribery during the execution of the contract. Bribery during contract execution may occur where the contractor bribes to obtain the lax enforcement of contractual clauses or government regulations; or so that he may supply substandard products or avoid complying with requirements that precede payment under the contract; or to induce the borrower to ignore unjustified contractual delays.⁷⁷

B. "Fraudulent Practice"

Fraudulent practice refers to the making of fraudulent misrepresentations or omissions during the procurement process or in contract execution.⁷⁸ This will encompass misrepresentations as to the supplier's qualifications, financial misrepresentations, the falsification of contract implementation information and accounting records, the tender of misleading bids, malicious front-loading of contract prices, overbilling, and the alteration of invoices or other supporting documents.⁷⁹ Thus, any documentation-based change designed

72. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(a)(i).

73. Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 Nw. J. INT'L L. & Bus. 435 (2001); Daniel P. Ashe, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extra-Territorial Application of the United States Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897 (2005); Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657 (2000); Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?* 24 YALE J. INT'L L. 223, 235-36 (1999) [hereinafter Salbu, *Extraterritorial Restrictions?*]; Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 645-46 (2000).

74. See, e.g., MICHAEL H. WEIHEN, TRANSPARENCY INT'L, TRANSPARENCY AND CORRUPTION ON BUILDING LARGE DAMS 14 (1999), <http://www.dams.org/docs/kbase/contrib/ins204.pdf>. See also INFRASTRUCTURE NETWORK, INFRASTRUCTURE: LESSONS FROM THE LAST TWO DECADES OF BANK ENGAGEMENT, DISCUSSION PAPER 41-42 (2006), http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2006/02/07/000160016_20060207101539/Rendered/PDF/3519910vol.01.pdf.

75. Hobbs, *supra* note 52.

76. E.g., Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2000); Anti-Terrorism, Crime and Security Act, 2001, c.24 (U.K.). Thirty-six countries have criminalized overseas bribery in response to their obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. See <http://www.oecd.org>.

77. AGUILAR ET AL., *supra* note 6, at 3-9.

78. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(a)(ii).

79. AGUILAR ET AL., *supra* note 6, pt. 2.

to manipulate or alter procurement or contractual outcomes is prohibited. The definition of “fraudulent practice,” like the other listed offenses, focuses on the intention of the perpetrator in seeking to influence the procurement process or contract execution, and, as a result, negligent or innocent misrepresentations or omissions appear to be outside the ambit of the definition.

C. “Collusive Practices”

Collusion between bidders is a well-documented phenomenon in public procurement⁸⁰ and has been described by Klitgaard as an arrangement among possible suppliers, wherein they agree, before bids are submitted, on a price over and beyond what is competitive and decide who among their number will submit the winning, but still artificially high, bid while the other suppliers submit extremely high bids (that have no chance of winning).⁸¹ The proceeds from the winning bid may be shared between the suppliers, or the suppliers may choose in rotation who is to win the tender every time, thus ensuring that each participant in the arrangement obtains a government contract at some point in time irrespective of that participant’s competitiveness or ability to deliver value to the Government. The arrangement need not be overly sophisticated, but to succeed it must involve the suppliers in the market who are most likely to obtain the contract.

D. “Coercive Practices”

Coercion implies the use of force or personal violence to achieve a stated purpose. In procurement, coercion usually accompanies collusion—to prevent outsiders from submitting bids or to force suppliers to join the collusive arrangement.⁸² The Bank similarly incorporates the element of violence into its definition of coercive practices. The definition focuses on the intention of the actor, so that the violence must be directed at influencing the victim’s participation in the procurement process or affecting the execution of a contract.⁸³

From the above, it is clear that the Bank adopts a wide range of offenses against which it will take action. In defining the offenses, the motive of the offender is important and the actions must be directed at securing a particular outcome. It may be that by focusing on motive, the offenses are able to cross cultural boundaries, and circumvent arguments relating to the cultural specificity of the nature of corruption.⁸⁴

80. ROBERT KLITGAARD, CONTROLLING CORRUPTION ch. 6 (1988). See also Glenn Ware & Gregory Noone, *The Anatomy of Transnational Corruption*, 14 INT’L AFF. REV. 29, 37 (2005); ROBERT KLITGAARD ET AL., CORRUPT CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION 46–48 (2000); G.L. ALBARNO ET AL., PREVENTING COLLUSION IN PROCUREMENT, HANDBOOK OF PROCUREMENT (Nicola Dimitri et al. eds., 2006).

81. KLITGAARD, *supra* note 80, ch. 6.

82. *Id.*

83. For an example of the use of coercion by organized crime in the New York City procurement system, see JAMES JACOBS ET AL., GOTHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME (1999).

84. Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399, 401 (2000); Brian Harms, *Holding Public Officials Accountable in the International Realm: A New*

VI. REJECTION OF A PROPOSAL FOR AWARD

A. *Introduction*

There are two sanctions the Bank may impose where it discovers that fraud or corruption has occurred in a Bank contract. These sanctions are rejecting a proposal for the award of a contract (exclusion) and debaring a firm from obtaining Bank-financed contracts in the future.⁸⁵ Rejection or exclusion is directed at a particular procurement process and will be considered here first.

The Bank procurement guidelines provide for the rejection of the bid of a corrupt supplier. Paragraph 1.14(b) states the Bank “will reject a proposal for award if it determines that the bidder recommended for award has, directly, or through an agent, engaged in corrupt, fraudulent, collusive or coercive practices in competing for the contract in question.” By this, the Bank will refuse to award the contract to the recommended bidder who is found to have engaged in the prohibited acts. Such a rejection is intended to affect the supplier’s ability to participate in the particular procurement and will not prevent the rejected bidder from participating in Bank-financed contracts in the future.

The rejection of a proposal for an award as an anti-corruption measure has not received the same attention from the Bank as its debarment measure. This reduced emphasis is illustrated by the fact that there are no explicit guidelines issued by the Bank on the procedures for implementing the measure, and the procedure for rejection appears to be part of the Bank’s general procedure for prior review of the procurement process.

B. *The Persons Who May Be Rejected*

Under the rejection measure, the bid of the recommended bidder is rejected if a prohibited act is committed while competing for the contract. In the context of Bank operations, the question that arises is whether such a rejection will affect other persons who may be involved in the tender. Notably, many Bank contracts are medium to large development projects and the size and complexity of these projects may mean that some bids are

Multi-Layered Strategy to Combat Corruption, 33 CORNELL INT’L L.J. 159 (2000); Kenneth Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT’L L. REV. 1021 (1998); Daniel J. Smith, *Kinship and Corruption in Contemporary Nigeria*, 66 ETHNOS 344, 344–64 (2001); Salbu, *Extraterritorial Restrictions?* *supra* note 73, at 235–36; J. Kim & J. Kim, *Cultural Differences in the Crusade Against International Bribery: Rice Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL’Y J. 549, 549–80 (1997). *But see* Daniel Kaufman, *Anti-Corruption Within a Broader Developmental and Governance Perspective: Some Lessons from Empirics and Experience*, Statement to the High Level Political Signing Conference for the United Nations Convention Against Corruption in Mexico (Dec. 9–11, 2003), <http://sitesources.worldbank.org/INTCHINA/resources/318862-1121421293578/anticorruption.pdf>; David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT’L L. 465 (1999); Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, in *CORRUPTION AND THE GLOBAL ECONOMY* 175, 177 (Kimberly Ann Elliott ed., 1997).

85. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(b), (d).

submitted by partners in a joint venture,⁸⁶ or include subcontractors.⁸⁷ This raises the question whether a rejection will affect such partners or subcontractors.

1. Joint Ventures

The Bank's standard prequalification documents define a joint venture as an "ad-hoc association of firms that pool their resources and skills to undertake a large or complex contract..."⁸⁸ A joint venture denotes cooperation between commercial entities that are not a partnership.⁸⁹ A joint venture is usually defined by reference to factors including an agreement to associate for joint profit; a contribution of money, property, knowledge, or skill to a common undertaking; a right to participate in the management and profits of the enterprise; a duty to share in losses; and a limitation to a single undertaking.⁹⁰

In a typical Bank project open to ICB, some foreign bidders may enter into a joint venture with a domestic supplier. It is believed that such joint ventures increase the chances of obtaining the contract as borrower governments prefer them, believing that local participation will benefit the domestic economy.⁹¹ Research also has shown that in a corrupt environment, foreign investors prefer joint ventures as the vehicle of investment to assist them in negotiating the corrupt bureaucracy.⁹²

In a tender for a Bank contract involving a joint venture where one of the partners was involved in corruption in bidding for the contract, any rejection of the bid may apply to all the partners. This is because under the procurement guidelines, the liability of the partners to a joint venture for *the bid* and the contract is joint and several.⁹³ Thus, it is arguable that any liability faced by one partner in respect of the bid, including rejection, may be shared by all the partners. In addition, in bidding for the contract, the joint venture partners would have submitted only one bid.⁹⁴ Thus, if that bid is rejected, all parties relevant to that bid will be affected by the rejection, even if the prohibited activity was committed by only one party.

86. *Id.* ¶ 1.10.

87. WORLD BANK, STANDARD PROCUREMENT DOCUMENT: PREQUALIFICATION DOCUMENT FOR PROCUREMENT OF WORKS AND USERS GUIDE cl. 4, 24 (2002) [hereinafter PREQUALIFICATION DOCUMENT FOR WORKS], available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/harmpqw-ev1.pdf>.

88. See GLOSSARY TO PREQUALIFICATION DOCUMENT FOR WORKS, *supra* note 87.

89. IAN HEWITT, JOINT VENTURES ch. 1 (2001).

90. *Id.*

91. *But see* Brian J. Aitken & Ann E. Harrison, *Do Domestic Firms Benefit from Direct Foreign Investment?: Evidence from Venezuela*, 89 AM. ECON. REV. 605, 605–18 (1999).

92. BEATA K. SMARZYNSKA & SHANG-JIN WEI, WORLD BANK REPORT, CORRUPTION AND COMPOSITION OF FOREIGN DIRECT INVESTMENT: FIRM LEVEL EVIDENCE 2 (2000), <http://www.worldbank.org/wbi/governance/pdf/wps2360.pdf>; Ware & Noone, *supra* note 80, at 34.

93. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.10; PREQUALIFICATION DOCUMENT FOR WORKS, *supra* note 87, cl. 4.1.

94. PREQUALIFICATION DOCUMENT FOR WORKS, *supra* note 87, cl. 4.5.

2. Subcontractors

Where a tender included the particulars of subcontractors⁹⁵ and the bid is subsequently rejected, any subcontractors included in that bid also will be affected: first, because it is impossible to separate the contractors who are reliant on each other's expertise to submit a successful bid; and, second, because the borrower may not impose the subcontractor on another bidder.⁹⁶

C. Contracting Entities That Must Abide by the Rejection

As mentioned earlier, the borrower is responsible for the award and administration of contracts⁹⁷ for Bank-funded projects, which must be conducted in line with Bank prescripts. Although the responsibility for the procurement process lies with the borrower, the Bank will not finance any contracts that are not procured in accordance with its agreement with the borrower.⁹⁸ Thus, where the Bank rejects the proposal for an award of contract made by the borrower, the borrower, or any agency conducting the procurement process on its behalf,⁹⁹ is forbidden from awarding the contract to the rejected supplier.

D. Procedure for Rejection

The procurement guidelines do not describe the procedure for rejecting a proposal for an award of contract. This may be because the procedure for rejection is subsumed within the Bank's procedure for prior review of the procurement process.

Under the procurement guidelines,¹⁰⁰ a borrower may only award a contract on receipt of a "no objection" notice from the Bank,¹⁰¹ which, in effect, is the Bank's consent to a contract award decision. For the Bank to give this consent, once the borrower has received and evaluated all bids, it must send to the Bank a detailed report on the comparison of the bids received, the reasons for its recommendations for the award of the contract, and any information that the Bank may reasonably request.¹⁰² The Bank's task manager responsible for overseeing the project¹⁰³ examines these documents and determines whether the Bank will object to the borrower's decision to award the contract to a particular supplier. If there is information at this stage that the bidder engaged in a prohibited practice in competing for the contract, and the borrower proposes to award the contract to that bidder, the Bank may reject this proposal.

95. *Id.* cl. 25.

96. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.10.

97. *Id.* ¶ 1.2; WORLD BANK OPERATIONAL MANUAL, OPERATIONAL POLICIES 11.00 ¶ 13 (2001).

98. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.12.

99. *Id.* ¶ 1.2.

100. *Id.* app. 1.

101. *Id.* app. 1, ¶ 2(c). A "no objection" notice is a notification from the Bank to the procuring entity in the borrower country that the Bank does not object to the procurement decision reached.

102. *Id.* ¶ 2.54.

103. WORLD BANK OPERATIONAL MANUAL, BANK PROCEDURES 11.00 ¶ 8 (2001).

The Bank's review procedures provide that the Bank may only object to the decision to award the contract if the intended award would be inconsistent with the Loan Agreement or the Procurement Plan,¹⁰⁴ and these review procedures do not *expressly* mention fraud or corruption as grounds for the Bank's rejection of an award. However, the Loan Agreement incorporates the Bank's procurement guidelines and specifies how these guidelines are to govern the procurement process.¹⁰⁵ Thus, a tender tainted with corruption would be inconsistent with the procurement guidelines as incorporated by the Loan Agreement.

The question that remains is what, if any, investigative tools are utilized by the Bank at this stage to confirm that the proposed tender is tainted with corrupt activity? It is unclear how much effort the task manager must put into substantiating allegations of corruption during the review process, but it is arguable that such investigations may not be conducted with the same rigor as investigations leading to a debarment, as the review process does not lend itself to a full-blown investigation. In many cases, the prior review is limited to ensuring that the procurement documents comply with the conditions of the Loan Agreement and does not extend to verifying the accuracy of these documents.¹⁰⁶ Further, as rejection is not as severe a sanction as debarment, and only affects the immediate contract, the depth of investigation applicable to the debarment process may not be wholly necessary.

Finally, although the Bank has the right to review any contract prior to the contract being awarded, this power is usually exercised in relation to a percentage of contracts that are above a certain value threshold,¹⁰⁷ as it is deemed uneconomical to review small contracts.¹⁰⁸ This threshold is country specific and determined by evaluating the borrower's ability to properly implement the procurement. Currently prior review is utilized in only 25 percent of Bank contracts.¹⁰⁹ Although resource constraints prevent the Bank from conducting prior review of the 40,000 procurements it conducts annually, this limitation significantly reduces the utility and efficacy of the remedy of rejection. Rejection may be further limited by the few cases in which the Bank will receive information about corruption before a contract is awarded, since review is conducted on the basis of information obtained from the borrower, and where bribery has involved the borrower's officials, this information will probably not be forwarded to the Bank.¹¹⁰

104. This plan details the methods of procurement that will be used by the borrower. See PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.16.

105. HELPING COUNTRIES 2000, *supra* note 48, at 8.

106. JOHN LINARELLI, *Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION, *supra* note 40, ch. 7.

107. WORLD BANK, PROCUREMENT UNDER WORLD BANK-FINANCED PROJECTS FY 05 ANNUAL REPORT 2-3.

108. HELPING COUNTRIES 2000, *supra* note 48, at 15.

109. WORLD BANK, BANK-FINANCED PROCUREMENT MANUAL § 5.2.

110. Of course, there may be exceptions to this, such as information supplied by a disgruntled employee of the borrower or where the corrupt officials are no longer in post and the corruption is uncovered by subsequent employees.

E. *Consequence of Rejection*

The effect of the Bank's decision to reject a tender is that the bidder recommended for the contract by the borrower is not awarded the contract. Where this occurs, the borrower has two options: it may either restart the process by inviting new bids from the initially prequalified firms (where a prequalification procedure was used)¹¹¹ or invite wholly new bids;¹¹² or, with the agreement of the Bank, re-invite bids from the suppliers that submitted bids in the first instance.¹¹³

Where a proposed winning tender is rejected by the Bank, there is no indication as to whether the rejected bidder may resubmit its bid in a new procedure related to the contract from which it was rejected. However, it seems clear that resubmission should not be permitted as this will result in the prior rejection imposing very little cost or deterrent on the rejected bidder.

F. *The Mandatory Nature of Rejection*

It appears that the Bank's rejection of a bid is mandatory where the prohibited acts performed by the bidder are revealed in a prior review procedure. The mandatory nature of rejection may be inferred from the imperative language in which the sanction is couched.¹¹⁴ Consequently, the task team reviewing a contract must reject a proposed bid where corruption has occurred and may not exercise discretion in the matter.

G. *Remedies and Recourse for Affected Suppliers*

When a bid is rejected by the borrower, the bidder is entitled to an explanation from the borrower either in writing or at a debriefing meeting.¹¹⁵ The outcome of this meeting, with any information containing the bidder's protests and the borrower's response, should be submitted by the borrower to the Bank.¹¹⁶ Bidders also may directly send copies of their communications with the borrower directly to the Bank,¹¹⁷ and may complain to the Bank if the borrower does not respond promptly to the bidder's queries or the bidder has any other complaint against the borrower.¹¹⁸

Where a bid is rejected on account of corruption, and the bidder is not satisfied with the explanation offered by the borrower, the bidder may request a meeting from the Regional Procurement Adviser (RPA) of the borrowing country. However, this meeting is limited to a discussion of the complainant's bid and not those of competitors,¹¹⁹ and there is no provision allowing the Bank to take remedial action.

111. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 2.9.

112. *Id.* ¶ 2.61.

113. *Id.* ¶ 2.62.

114. *Id.* ¶ 1.14(d).

115. *Id.* ¶ 2.65.

116. *Id.* app. 1, ¶ 2(e).

117. *Id.* app. 3, ¶ 11.

118. *Id.*

119. *Id.* app. 3, ¶ 15.

Although an aggrieved bidder is not entitled to any remedies per se, Bank staff are permitted to delay the issuance of a “no-objection” notice until “all outstanding complaints are addressed to the full satisfaction of the Bank.”¹²⁰ Where a complaint is received shortly after a no-objection notice has been issued, the RPA may briefly suspend the contract award pending the resolution of the complaint.¹²¹ This brief suspension will create an incentive for borrowers to properly and promptly address all complaints, and also may mean that the Bank may withdraw a no-objection notice after it has been issued if corrupt activity is found to have occurred at this stage.

It should be noted that the meeting between the bidder and the RPA is not a hearing, and a bidder is not entitled to a hearing on the Bank’s decision to reject its bid. As will be discussed below, a hearing is only available to a person in debarment proceedings where the matter is brought before the Sanctions Committee. Bidders, in effect, do not have any rights of recourse against the Bank, as there is no legal relationship created between bidders or suppliers and the Bank for the purpose of instituting a challenge procedure.¹²² The relationship between a supplier and a borrower is governed by the bidding documents. Any contracts that arise exist between the supplier and the borrower exclusively;¹²³ therefore, suppliers do not have rights or claims arising from the existence of the loan between the borrower and the Bank.¹²⁴

VII. DEBARMENT

A. Introduction

The second measure the Bank may use where a contractor has engaged in corrupt or fraudulent practices is debarment, which is the disqualification of a contractor from future Bank-funded contracts.¹²⁵ Debarment is the most common Bank measure against corruption, and between 1999 and 2001, it was the sole sanction used against corrupt suppliers.¹²⁶ Under the procurement guidelines, the Bank will debar a firm permanently or temporarily if the firm engages in a prohibited practice while competing for, or executing, a Bank-financed contract.¹²⁷ Debarment thus operates against offenses committed in the pre- and post-contract stages of procurement. As a sanction against corruption, debarment has undergone significant reform in terms of both the procedures used to debar and the substance of the measure.¹²⁸

120. WORLD BANK, BANK-FINANCED PROCUREMENT MANUAL § 5.2.

121. *Id.* § 5.1.

122. ARROWSMITH ET AL., *supra* note 13, at 110.

123. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.1.

124. *Id.* See the criticism of the Bank’s position in Marta de Castro Meireles, A Critical Analysis of Remedies and Secondary Policies Under the World Bank Procurement System 95–97 (2006) (unpublished Ph.D. thesis, University of Nottingham).

125. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(d).

126. Database of debarred firms available at <http://www.worldbank.org>.

127. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(d).

128. See, generally, THORNBURGH ET AL., *supra* note 64, at 61; WORLD BANK, REFORM OF THE WORLD BANK’S SANCTIONS PROCESS (2004) [hereinafter SANCTIONS PROCESS REFORM],

B. *The Persons Who May Be Debarred*

The Bank's guidelines empower it to debar both natural and legal persons.¹²⁹ In recognizing that debarred firms do not necessarily cease to seek public contracts, as they may continue to bid "under different corporate identities and through different officers,"¹³⁰ the Bank extends the debarment to entities related to the respondent.¹³¹ This power to debar related entities is created first through the Operational Memorandum, which created the Sanctions Committee,¹³² and provides that debarment automatically affects "any firm that owns the majority of the accused firm's capital, or of which the accused firm owns the majority of the capital."¹³³ Second, the Sanctions Committee procedures, in listing the persons that will be affected by a debarment, state that where a sanction is imposed on a particular respondent, "an appropriate sanction may also be imposed on any individual or organization that, directly or indirectly, controls or is controlled by the respondent."¹³⁴ This extension of debarment applies whether the associated entity is in existence at the time the sanctions are imposed or is formed at a later date during the period that the sanctions remain in effect.¹³⁵

Extending debarment to related firms and individuals may present some challenges to the Bank. First, it may be difficult for the Bank to discover whether a related person or firm has the necessary connection to a debarred firm that may lead to its debarment, especially where a firm operates through a network of subsidiaries and affiliates. Second, investigations into the networks of company ownership may be prohibitively expensive, as it costs \$2,000 to \$10,000 to investigate a typical applicant for a public contract.¹³⁶ As a result, firms that have been debarred from Bank contracts may, in the absence of in-depth investigations, still have access to such contracts through a complex network of subsidiaries, affiliates, and related companies owned by the

available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/06/29/000160016_20040629112806/Rendered/PDF/295270rev.pdf.

129. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(d).

130. Frank Anechiarico & James G. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. SCH. L. REV. 143, 172 (1995); THORNBURGH ET AL., *supra* note 64.

131. The term "respondent" refers to a person or firm that is the subject of debarment proceedings.

132. The Committee was created in 1998 to implement the debarment provisions included in the 1996 procurement guidelines. See Memorandum from Joanne Salop, Dir., Operations Policy & Strategy, World Bank on Fraud and Corruption Under Bank-Financed Contracts: Procedures for Dealing with Allegations Against Bidders, Suppliers, Contractors, or Consultants ¶ 2 (Jan. 5, 1998) [hereinafter Operational Memorandum], in AGUILAR ET AL., *supra* note 6, at 41 (Exhibit 6); see generally Andres Rigo Sureda, *Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 187-92 (Laurence Boisson de Chazournes et al. eds., 2002).

133. Operational Memorandum, *supra* note 132, ¶ 5.

134. WORLD BANK, SANCTIONS COMMITTEE PROCEDURES § 13(d), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84271~piPK:84287~theSitePK:84266,00.html>.

135. *Id.*

136. Anechiarico & Jacobs, *supra* note 130, at 172.

same principals that own the debarred firm. The ability of firms to circumvent debarment through related firms will limit the effectiveness of the sanction, although, as will be seen, the Bank's proposed reforms to the debarment process may reduce the ability of firms to circumvent debarment in this way.

The Bank focuses on control and not ownership as the method of establishing a connection between the respondent firm and its affiliates. The focus on control and not ownership stems from a recognition that it is possible to control the activities of a separate firm without owning a majority interest in that firm.¹³⁷ The main categories of associated persons that the Bank thus recognizes as being liable to debarment are firms that have a common ownership with the respondent (i.e., sister companies) and firms that bear some degree of responsibility for the fraud or corruption, even if they do not have a direct connection with the wrongdoing (i.e., parent/holding companies).¹³⁸

Once the Bank debars a firm, it lists the names of all debarred persons on its website, including debarred associated persons. Debarment is discretionary, but when the Bank does debar associated firms, it is not clear what principles are employed. Presumably, the Bank will be looking for a degree of relationship or involvement of the debarred firm in the associated firm that will make the debarment illusory if the associated person is not also denied access to Bank contracts.

As will be discussed further below, the proposed reforms to the sanctions process purport to go further than the current extension of debarment to associated firms, to impose the debarment on any individual or organization that at any time directly or indirectly controls or is controlled by a respondent.¹³⁹ It appears that under these reforms, the Bank intends to extend the debarment to all firms that were controlled by the respondent prior to the debarment, irrespective of whether the respondent still controls that firm at the date of the debarment.

The document elaborating the proposed reforms to the debarment process provides no clarity on how the Bank intends to implement the extension of the debarment under the proposed reforms. These reforms would mean the Bank would need to conduct an investigation into the business history of the respondent, and could prove to be quite costly.¹⁴⁰ The Bank already spends in excess of \$10 million a year on investigations and sanctions¹⁴¹ and this amount is set to increase with these proposed extensions of a debarment.

C. Contracting Entities That Must Abide by the Debarment

A debarred person or firm is ineligible to receive a Bank-financed contract for the period of the debarment. Thus, in subsequent Bank-financed contracts,

137. THORNBURGH ET AL., *supra* note 64, at 76.

138. *Id.* at 75–76.

139. SANCTIONS PROCESS REFORM, *supra* note 128, ¶ 41.

140. Anechiarico & Jacobs, *supra* note 130, at 172.

141. World Bank, *Corruption: How the World Bank Fights Corruption: At a Glance*, <http://siteresources.worldbank.org/EXTPARLIAMENTARIANS/Resources/VinayBharagava.pdf>.

the borrower or any agency conducting the procurement on its behalf must examine the list of debarred firms on the Bank's website to ensure that persons bidding for the contract have not been debarred.¹⁴² In addition, in conducting the prior review procedure before a contract is awarded,¹⁴³ the task team reviewing a procurement procedure also must ensure that the bidder recommended for award is not ineligible to receive a Bank-financed contract.

D. Procedure for Debarring

The debarment procedures are about to undergo significant reform. This section examines current debarment procedures and the proposed reforms.

Currently, all allegations of fraud and corruption in Bank-financed projects are referred to the Bank's Department of Institutional Integrity (INT).¹⁴⁴ This department was created pursuant to a report that examined the Bank's anti-corruption measures and made recommendations for reform.¹⁴⁵ The INT receives all complaints or allegations of corruption in Bank-financed contracts and investigates whether an offense that may lead to debarment has occurred. In conducting its investigations, the INT may require the production of documents, records, accounts, contracts, etc., from any bidder, supplier, contractor, or government in relation to a Bank-financed contract.¹⁴⁶

The INT's mandate is limited to investigating and making recommendations, but it has no power to impose a sanction on erring suppliers. Once the INT completes its investigation into the alleged offense, it refers the evidence and a recommendation for an appropriate sanction in the form of a document called the "proposed notice of debarment proceedings" to the Sanctions Committee (the Committee). The Committee is responsible for taking action against any contractor after the allegations against him or her are substantiated by the INT.

Once the Committee receives the evidence of the alleged offense from the INT, it prepares a written report, which is made available to the respondent. The report includes the notice of debarment proceedings prepared by the INT, the available evidence against the firm, and an explanation of the sanctions process.¹⁴⁷ In the case of a proposed debarment, the respondent is given sixty days to respond in writing and a hearing date is set. At the conclusion of the hearing, in which the respondent and the principal investigator each presents his or her case, the Committee decides if there is "reasonably sufficient evidence"¹⁴⁸ that the alleged offenses were committed, and on that basis

142. HELPING COUNTRIES 2000, *supra* note 48, at 18.

143. PROCUREMENT GUIDELINES, *supra* note 5, app. 1.

144. Allegations may be received from staff, bidders, or members of the public. The Bank created an international, multilingual telephone hotline and an email address for the receipt of anonymous complaints. HELPING COUNTRIES 2000, *supra* note 48, at 16.

145. THORNBURGH REPORT, *supra* note 31, at 42.

146. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(e).

147. WORLD BANK, SANCTIONS COMMITTEE PROCEDURES § 4(b).

148. *Id.* § 3(c).

makes a recommendation to the president of the Bank, who makes the final decision concerning imposition of the sanction.

Under the proposed reforms to the debarment process, the debarment procedure will be modified. In the new procedure, the INT sends the evidence and the recommendation of the proposed debarment to a Bank official designated the "Evaluation & Suspension Officer."¹⁴⁹ This person examines the evidence and decides whether it leads to a finding that the firm in question engaged in fraud or corruption. If it does, the Evaluations Officer issues a notice of debarment proceedings to the respondent, giving the respondent forty-five days to explain in writing why it should not be temporarily suspended from future Bank contracts pending the final outcome of the proceedings. The Evaluations Officer may then, within sixty days of issuing the notice to the respondent, impose a temporary suspension on the firm pending the final outcome of the debarment process. Where the respondent decides to contest the allegations, the matter is placed before the Sanctions Board.¹⁵⁰ If the respondent does not contest the allegations, the temporary suspension is automatically converted into the sanction recommended by the Evaluations Officer, unless INT requests that the Sanctions Board review the proposed sanction.

Where a matter proceeds to the Sanctions Board, the respondent has an opportunity to present his or her case and the Board has to decide whether it is more likely than not that the respondent committed the alleged offenses.¹⁵¹ Once this determination has been made, the Board will impose the appropriate sanction without recourse to the Bank president. The Board's decision is final and not subject to appeal.

E. Length of Debarment

Debarment may be imposed indefinitely or for a stated period.¹⁵² At the inception of the sanctions process, the most commonly used sanction was indefinite debarment,¹⁵³ and between March 1999, when the first debarments were issued, and April 2001, all the firms debarred by the Bank were debarred permanently,¹⁵⁴ and one firm was debarred for 999 years. However, the Bank subsequently relaxed the severity of these sanctions, and most debarments since 2001 have been for an average of three years.¹⁵⁵

In determining the length of a debarment, the Sanctions Committee may take various mitigating or aggravating factors into account.¹⁵⁶ These include factors such as the severity of the respondent's actions, the respondent's

149. SANCTIONS PROCESS REFORM, *supra* note 128, ¶¶ 9, 17.

150. *Id.* Membership of the Sanctions Board will be reconstituted to include non-Bank staff.

151. THORNBURGH ET AL., *supra* note 64, at 46–50.

152. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(d).

153. THORNBURGH ET AL., *supra* note 64, at 58.

154. Seventy firms were debarred by the Bank during this period.

155. See, generally, World Bank, World Bank Listing of Ineligible Firms, <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>.

156. The Operational Memorandum establishing the Sanctions Committee provided that "the recommended period of ineligibility may be limited or indefinite depending on the magnitude of the offense." See, also, THORNBURGH ET AL., *supra* note 64, at 19, 65.

past conduct in relation to fraud and corruption, the losses caused by the respondent, the damage caused to the procurement process, the quality of evidence against the respondent, the respondent's cooperation in the investigation, and any other relevant factors.¹⁵⁷

In the proposed reforms to the sanctions process, the Bank has expanded the scope of aggravating and mitigating factors to include whether or not Bank staff were involved in the bribery, whether the respondent obstructed the investigation by destroying evidence, mitigating circumstances, whether the respondent's cooperation was of real benefit to the Bank, and the extent of the respondent's voluntary disclosure of information.¹⁵⁸

F. *Range of Debarment Measures*

The proposed reforms to the sanctions process will expand the range of measures that may be imposed by the Sanctions Committee. As mentioned above, under the current procedures, debarment is the main sanction used by the Bank against corrupt contractors. Although the Sanctions Committee procedures permit "any other sanction that the Committee deems appropriate under the circumstances,"¹⁵⁹ the only other sanction used has been to issue letters of reprimand.

Once the proposed reforms are implemented, the Sanctions Board will be able to impose two new debarment-related measures. These measures are conditional nondebarment and temporary debarment with conditional release.

Under a conditional nondebarment, the Sanctions Board would require a firm that has been "peripherally associated" with misconduct to institute certain organizational changes that would reduce the likelihood of the firm engaging in misconduct in the future. A failure to carry out the required acts would result in the firm's debarment.¹⁶⁰ Although the Bank does not define "peripherally associated" with misconduct, perhaps a firm may obtain this sanction where the corruption is committed by a rogue member of staff in a firm that clearly does not tolerate such practices. The remedial measures the Bank may require of such a firm include the termination of the employment of employees involved in fraud or corruption, the making of restitution to the Bank or the affected government, the initiation of an effective business ethics training program, the adoption of a compliance program incorporating audits by auditors selected or approved by the Bank,¹⁶¹ and the correction of corporate deficiencies in the honesty of its dealings.¹⁶²

157. WORLD BANK, SANCTIONS COMMITTEE PROCEDURES § 13(e).

158. SANCTIONS PROCESS REFORM, *supra* note 128, ¶¶ 37–39. The Bank recently established a Voluntary Disclosure Program, which is discussed below.

159. WORLD BANK, SANCTIONS COMMITTEE PROCEDURES § 13(c).

160. THORNBURGH ET AL., *supra* note 64, at 62; SANCTIONS PROCESS REFORM, *supra* note 128, ¶ 35.

161. This measure mirrors the trend toward the use of independent inspectors general by unethical firms still wishing to participate in U.S. public procurement. Frank Anechiarico & Ronald Goldstock, *Monitoring Integrity and Performance: An Assessment of the Independent Private Sector Inspector General*, PUB. INTEGRITY (forthcoming 2006).

162. THORNBURGH ET AL., *supra* note 64, at 62.

A temporary debarment with conditional release operates as a normal temporary debarment, but the firm ceases to be debarred once it meets certain conditions of release imposed by the Bank. These conditions are similar to the requirements for a conditional nondebarment described above.¹⁶³

G. Avoiding Debarment: The Voluntary Disclosure Program

In August 2006, the Bank expanded its anti-corruption tools by the introduction of a Voluntary Disclosure Program (VDP). The aim of the VDP is to fight corruption through prevention and deterrence¹⁶⁴ and improve the Bank's investigative capabilities through private-sector cooperation. Under the VDP, individuals or entities who have been involved in the Bank's procurement process are given incentives to comply with Bank rules and guidelines¹⁶⁵ and disclose knowledge of corrupt practices in Bank projects.

A firm intending to participate in the VDP submits a request and its background data to the Bank. If its application is accepted, the firm must sign an undertaking committing itself not to engage in misconduct in Bank-funded contracts, and binding itself to voluntarily disclose all sanctionable misconduct that it might previously have been involved in. To facilitate this disclosure, the firm must conduct an internal investigation into any previous Bank contracts that were tainted by misconduct and submit the report of this investigation to the Bank. Once the Bank verifies the accuracy of the report, the firm must adopt a compliance program and enter into an agreement with an independent compliance monitor, acceptable to the Bank, who will monitor the firm's adherence to the compliance program.

In exchange for this, the Bank will not debar the firm and will keep the firm's participation in the VDP confidential. However, if the firm breaches the conditions of the VDP by, *inter alia*, continuing to engage in misconduct, withholding information relating to past 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 firm. This debarment will be conducted through the Bank's regular debarment process and will be publicized.

The VDP is important to the Bank's anti-corruption efforts and the sanctions process because it gives the Bank an alternative source of information from which it may fight corruption. The VDP also gives the Bank the ability to decipher the nature and typology of corruption occurring in its projects and increases the range of tools that the Bank may utilize against such corruption.

163. SANCTIONS PROCESS REFORM, *supra* note 128, ¶ 35.

164. Press Release, World Bank, World Bank Launches Voluntary Disclosure Program (Aug. 1, 2006) (on file with author). See also Pascale Dubois & Jason Matechak, *World Bank Battles Corruption Through New Voluntary Disclosure Program*, 3 INT'L GOV'T CONTRACTOR ¶ 73 (2006).

165. WORLD BANK, VDP GUIDELINES FOR PARTICIPANTS, ¶ 2 (2006), available at <http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPGuidelinesforParticipants.pdf>.

H. *Relevance of Corruption Convictions*

The Bank conducts its own investigations into allegations of corruption and does not generally rely on domestic prosecutions or take corruption convictions into account. In many countries, the prequalification of bidders may include procedures to ensure that potential suppliers do not possess criminal convictions.¹⁶⁶ However, Bank prequalification procedures are limited to determining the capability and resources of the bidder to perform large or complex contracts¹⁶⁷ and consider factors such as the experience and past contractual performance of the bidder; its capabilities with respect to personnel, equipment, and manufacturing facilities; and its financial position.¹⁶⁸

Although Bank prequalification procedures do not expressly permit the borrower to take corruption convictions into account when prequalifying bidders, it is possible to infer the power to do so from the Bank's standard prequalification documents, which give the borrower the right to reject any application for prequalification without incurring liability to the applicants.¹⁶⁹ Although this should not be used as the basis for arbitrary exercises of discretion, it may be grounds for the rejection of an application to qualify where the borrower is aware of the applicant's previous convictions for corruption.

While the Bank does not generally use corruption convictions as the basis of debarment, a corruption conviction relevant to a Bank-financed project may be the basis for an investigation. Recently, a firm that was cleared by the Bank's sanctions process because the Bank determined that there was insufficient evidence to debar the firm was later convicted in a domestic court for corruption relating to the same Bank-financed project. The Bank then re-opened its investigation, and with the evidence that emerged at trial, debarred the firm.¹⁷⁰ This case illustrates that some of the limitations the Bank faces in investigating accused firms, such the inability to compel the production of relevant documents or witnesses,¹⁷¹ may lead to an approach that increasingly utilizes relevant convictions for corruption in the debarment process.

I. *Consequence of Debarment*

Once a firm has been debarred or declared ineligible to receive future Bank contracts, the Bank publishes the name of the debarred firm and the period of debarment on the Bank's website. That firm (and its affiliates, where the debarment is extended to them) may no longer participate, in any capacity, in future Bank-funded procurements for the duration of the debarment.

166. T.M.C. ASSER INST., PREVENTION OF AND ADMINISTRATIVE ACTION AGAINST ORGANISED CRIME: A COMPARATIVE STUDY OF THE REGISTRATION OF LEGAL PERSONS AND CRIMINAL AUDITS IN EIGHT EU MEMBER STATES (1997).

167. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 2.9.

168. *Id.*

169. PREQUALIFICATION DOCUMENT FOR WORKS, *supra* note 87, ¶ 26.1.

170. Press Release, World Bank, World Bank Sanctions Acres International Ltd. (July 23, 2004) (on file with author).

171. THORNBURGH ET AL., *supra* note 64, at 17.

Debarment from Bank-financed contracts does not affect existing contracts.¹⁷² This approach differs from that adopted in some jurisdictions, where debarment may be accompanied by the termination of existing contracts with the supplier.¹⁷³

J. *The Discretionary Nature of Debarment*

Although the Bank is required to sanction a firm or individual where corrupt activity is found,¹⁷⁴ it has the discretion to sanction using either debarment or a letter of reprimand. So far, debarment is the major sanction used against fraud and corruption and letters of reprimand are rarely used.¹⁷⁵ The Bank's approach in making debarment discretionary differs from the increasing trend in domestic jurisdictions where debarment for corruption is mandatory, although the requirement to debar corrupt firms in domestic jurisdictions is usually subject to limited and defined public interest exceptions.¹⁷⁶

K. *Remedies and Recourse for Affected Suppliers*

As discussed above in the context of rejection, the Bank does not provide remedies for suppliers with complaints against the debarment process. Thus, a supplier that feels it was unfairly treated, or that the length of a debarment is too harsh, or that a supplier who engaged in fraud or corruption was not debarred, has no legal or administrative remedies against the Bank or its staff. As discussed below, there are several reasons for this.

1. Immunity

The Bank and its staff have immunity from domestic jurisdiction for anything done in connection with their employment.¹⁷⁷ This immunity frees the Bank from the peculiarities of national politics by immunizing the Bank "from legal process, from financial controls, taxes and duties."¹⁷⁸

2. International Law

The procurement guidelines, once incorporated by reference into the Loan Agreement, become international law and cannot be overridden by

172. *Id.* at 39–40.

173. FAR 9.405-1; Rachel E. Kramer, *Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?* 34 PUB. CONT. L.J. 539, 541 (2005); Sope Williams, *The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa*, 51 J. AFR. L. (forthcoming 2007).

174. PROCUREMENT GUIDELINES, *supra* note 5, ¶ 1.14(d).

175. World Bank, Listing of Firms Letters of Reprimand, <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>.

176. See *supra* note 173; Williams, *supra* note 60.

177. PHILIP SANDS & PIERRE KLEIN, BOWETT: THE LAW OF INTERNATIONAL INSTITUTIONS 490–91 (Sweet & Maxwell 5th ed. 2001); C.W. JENKS, INTERNATIONAL IMMUNITIES 41 (1961); Articles of Agreement, *supra* note 2, art. VII, § 8. *But see* KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 118–19 (2002).

178. *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983).

domestic law.¹⁷⁹ Thus, a supplier may not allege that the Bank's actions are not in conformity with due process as determined by national law, as the Bank is "insulated from accountability within domestic legal systems."¹⁸⁰

3. Interest in Providing Recourse for Aggrieved Persons

The Bank does not have the same interest that national legal and administrative systems have to ensure that administrative procedures may not be faulted, or that aggrieved persons always have a right of recourse. In addition, as mentioned in the context of remedies for rejection, bidding for a Bank contract does not create any legal relationship between the Bank and potential suppliers for the purpose of instituting a challenge procedure.

4. Administrative Burden

The Bank does not have the resources to spend in ensuring that all suppliers are placated, and has not attempted to provide comprehensive due process to all suppliers.¹⁸¹ The Bank's debarment process is goal and not procedure oriented, and the goal is to ensure that as much as is possible and reasonable, suppliers facing debarment are treated fairly. A bid challenge system would create significant administrative problems for the Bank if it became "enmeshed in investigating the claims of every disappointed bidder."¹⁸²

5. Bank Objectives

Controlling corruption through sanctions is supposed to facilitate Bank development objectives—not become an end in itself. An undue focus on the form of debarment proceedings may result in "goal displacement"¹⁸³ or a deviation from the Bank's primary objectives. Such goal displacement has been proven to occur in jurisdictions with an increasing focus on the procedures for corruption control¹⁸⁴ and may hinder the Bank in fulfilling its mandate. Goal displacement would occur if a cumbersome debarment system resulted in a "deflection of attention and organizational competence"¹⁸⁵ away from the Bank's primary mission. The establishment of such a system, if divorced

179. John W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 AM. J. INT'L L. 214, 228–29 (1996).

180. ARROWSMITH ET AL., *supra* note 13, at 149.

181. THORNBURGH ET AL., *supra* note 64, at 9.

182. ROSE-ACKERMAN, *supra* note 27, at 181.

183. This term was used by Robert Merton to mean a situation where "adherence to the rules, originally conceived as a means, becomes transformed into an end in itself..." until the instrumental and formalistic aspects of the bureaucracy become more important than the achievement of organizational goals. Robert K. Merton, *Bureaucratic Structure and Personality*, in READER IN BUREAUCRACY 365 (Robert K. Merton et al. eds., 1952).

184. Frank Anechiarico, *End-Runs and Hairly Eyeballs: The Costs of Corruption Control in Market Democracies*, 14 CONN. J. INT'L L. 379, 386 (1999); Frank Anechiarico, *Law Enforcement or a Community-Oriented Strategy Towards Corruption Control*, in CORRUPTION, INTEGRITY AND LAW ENFORCEMENT 299–300 (Cyrille Fijnaut & Leo Hubert eds., 2002); FRANK ANECHIARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* 179–81 (1996).

185. KLITGAARD, *supra* note 80, at 27.

from the national system of procurement remedies (where one exists), would duplicate roles and waste resources.

The Bank's refusal to create a remedial system for suppliers, however, has been criticized.¹⁸⁶ First, this is because affected suppliers are left without a remedy, as remedies in respect of Bank contracts may be unavailable under the domestic law of the borrowing country.¹⁸⁷ Second, although the Bank does not conduct the procurement process, and despite the absence of a formal relationship with the supplier, the Bank is able to influence the outcome of the procurement process and thus should "take responsibility for the fate of procurements" since it is in fact substantially involved in decision making.¹⁸⁸ Third, it is argued that a remedial system would make the procurement process more effective by reducing breaches of the Bank procurement guidelines, especially if the borrower or the agency conducting the procurement on its behalf is made responsible for any proven breaches.¹⁸⁹ Fourth, critics say that because the ability of creditors to sue the Bank has not resulted in burdensome litigation for the Bank, aggrieved contractors also should be permitted to sue the Bank.¹⁹⁰ This argument fails to recognize that the Bank is involved in over 40,000 contracts a year, making the potential for litigation burdensome in terms of numbers of litigants and jurisdictions in which the Bank would be subject to legal process.¹⁹¹ Finally, it has been suggested that the presence of a bid challenge system for Bank-financed projects may improve the effectiveness of the debarment policy. The argument is that having a bid challenge system could significantly increase the ability of the Bank to uncover corruption and impropriety in procurements.¹⁹² Proponents of a bid challenge system argue that these challenges would serve as an avenue for such acts to be revealed,¹⁹³ as well as serving "as a deterrent to improper conduct."¹⁹⁴ Although there is merit in this argument, establishing such a system may be difficult for the reasons stated above, and would have to be designed to maintain the balance between the need for redress, detecting corruption, and the efficiency of the procurement process.¹⁹⁵

186. de Castro Meireles, *supra* note 124, ch. V.

187. ARROWSMITH ET AL., *supra* note 13, at 143.

188. *Id.* at 150.

189. de Castro Meireles, *supra* note 124, ch. V.

190. ARROWSMITH ET AL., *supra* note 13, at 151.

191. By article VII, section 3 of the Bank's Articles of Agreement, the Bank is subject to the jurisdictions of courts in the territories of its members in which it has an office, has appointed an agent for accepting service, or has issued or guaranteed securities. The Bank has offices in 109 territories.

192. ARROWSMITH ET AL., *supra* note 13, at 139.

193. Daniel Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 PUB. CON. L.J. 427, 431 (2006).

194. *Id.*

195. Operational Memorandum, *supra* note 132; see also de Castro Meireles, *supra* note 124, ch. V.

VIII. CONCLUSION

The World Bank rejection and debarment measures represented a watershed in corruption control by a development institution. As stated earlier, several regional development banks have adopted the Bank's approach with slight modification and also have provisions for rejecting and debarring contractors who are guilty of fraud or corruption. While it seems likely that the policy has made at least some contribution to the modest reduction in corruption in Bank projects as discussed in Part III, this article has identified a number of factors that affect the utility of the policy as it currently applies.

First and foremost, it has been mentioned that the debarment measures are limited to suppliers guilty of corruption within Bank-financed projects. This limitation may affect the efficacy of the debarment measures as contractors guilty of corruption in, for instance, a contract with another international organization may still gain access to Bank contracts. As discussed earlier, it would be difficult for the Bank to debar contractors guilty of corruption in other contexts without a coordinated debarment policy in international procurement, although recent initiatives point to the fact that such a policy might eventually materialize. In the absence of such a policy, however, the Bank is, in principle, committed to sharing information on debarment with other multilateral development banks, which, in the future, may be extended to development agencies and regional organizations.

In spite of the absence of an express policy of debarring firms for non-Bank-related corruption, the Bank recently debarred five Japanese firms that were guilty of corruption outside of the Bank context at the behest of the Japanese Government. This might be evidence that the Bank is moving toward an approach that shows greater reliance on national information as well as a move toward a wider policy that debars firms involved in corruption outside of Bank contracts, even in the absence of formal procedures for doing so.

Second, even with respect to contractors engaged in corruption in Bank-financed projects, there are limits to the potential efficacy of the measures that the Bank may take. In this respect, the infrequent use of the prior review mechanism reduces the ability of the Bank to uncover corrupt activity. It was discussed above that the procedure for rejection is subsumed within the Bank's procedure for prior review of its contracts. This review, which may lead to rejection, occurs in only 25 percent of Bank contracts, where these contracts are above a certain threshold. The infrequent use of the prior review mechanism will limit the use and the effectiveness of rejection as an anti-corruption tool, especially as prior reviews become less frequent, as the Bank increasingly turns its focus toward smaller developmental projects and not the large infrastructure projects it was once known for financing. In addition, the nature of the prior review mechanism does not particularly lend itself to uncovering acts of corruption, as the review is limited to ensuring that the procurement

documents comply with the conditions of the Loan Agreement, and does not extend to verifying the accuracy of these documents.¹⁹⁶ Thus, where misleading documentation is furnished to the Bank, the Bank may still be unaware of a corrupt practice even after the conclusion of a prior review.¹⁹⁷

Another limitation on the efficacy of the exclusion and debarment policy is the absence of a bid challenge system. As discussed above, such a system may increase the effectiveness of the Bank's anti-corruption measures by serving as an avenue by which corrupt activities are brought to the attention of the Bank.

A fourth problem affecting the efficacy of Bank measures relates to the insufficiency of the Bank's investigative powers.¹⁹⁸ Although the ability of the Bank's investigators to uncover acts of fraud and corruption has improved in recent years, as illustrated by the increased number of cases brought before the Sanctions Committee, the limitations on the Bank's ability to compel the production of evidence or witnesses may mean that cases where corruption is known to have occurred but the Bank is unable to obtain hard evidence go unpunished. Closer cooperation between the Bank and client countries would grant the Bank access to information obtained by national prosecutors and facilitate the imposition of sanctions on corrupt firms. This raises the issue whether the Bank should automatically debar firms that have secured a conviction in a domestic court in relation to a Bank-financed contract.

Another factor with implications for the effectiveness of the Bank's debarment sanction is the ability of debarred firms to avoid detection through the use of affiliates or the adoption of a different corporate identity. It remains to be seen, however, whether the proposed extension of debarment to "any individual or organization that at any time directly or indirectly controls or is controlled by a debarred firm"¹⁹⁹ will reduce the ability of firms to avoid the effect of debarment in this way.

In conclusion, the Bank must be commended for its desire and commitment to eradicating corruption in its funded procurements, and more generally. However, the Bank must be aware that, because of the factors discussed above, the current rejection and debarment measures are perhaps not as effective as they could be in combating corruption within these contracts. It is suggested, however, that, in particular, the costs of increasing the use of the prior review mechanism and the problems of providing supplier remedies might outweigh the benefits to be derived therefrom and these limits may have to be accepted as inherent in the nature of the debarment policy.

196. LINARELLI, *supra* note 106.

197. de Castro Meireles, *supra* note 124, at 94.

198. In recognition of this, the United States passed a law that 10 percent of its funding to international financial institutions shall be withheld if the secretary of the Treasury is not satisfied that the institution is taking steps "to establish an independent fraud and corruption investigative organisation or office." Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 106-429, § 588, 114 Stat. 1900, 1900A-58 to A-59 (2001), *available at* <http://fas.org/asmp/resources/govern/PL-106-429.pdf>.

199. SANCTIONS PROCESS REFORM, *supra* note 128, ¶ 41.