

Debarment as an Anti-Corruption Means

- a review report -

by

Jon Moran, Jeremy Pope & Alan Doig

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1 Report overview and summary

A company is debarred¹ by a government or multilateral agency when it (and usually other companies with which its directors or principals are engaged) is formally prohibited from tendering for projects that the agency is funding (or supporting the funding for) in another country if, after enquiry and examination by the agency, that company is adjudged to have been involved or is involved in the use of corruption to secure past or current projects with either the agency or other agencies who operate similar policies which are considered recognised as also applicable to the debarring agency.

There are a number of reasons why corruption in the public procurement process is unacceptable. In economic terms it reduces competitive bidding into competitive corruption, with contracts being won by companies less able to provide the goods and services needed by either inflating prices or diminishing quality in delivery. In major cases the consequences of such corruption can be extensive, including the funding of needless projects, over-priced projects and avoidable debt, with a deepening of poverty and a denial of development to the people of the country concerned. In political terms, corruption can involve major decision-makers in the recipient countries, with the result that corrupt bidders can effectively prop up and support failed governments and undermine democratic gains.

This study into debarment was intended to focus on the effectiveness of a formal debarment (or blacklisting) process as a means to challenge corruption openly, and in particular debarment as a means of reducing levels of corruption in public procurement processes. The anticipated questions included: Can we document the success of debarment policies? Can debarment strengthen transparent and open procurement procedures, ensure honest competitive bidding, and eliminate collusion? What are the legal and practical constraints to international and donor specific debarment?²

The purpose is to assess the extent of debarment and examine issues concerning its use (or non-use). If it was thought that debarment has a value in its use to combat fraud and corruption in the public procurement process, the purpose is also to make suggestions that may guide its introduction or improve its effectiveness.

The study demonstrates that debarment can be effective as one of a number of means to deter and - if detected - sanction those involved in corruption during the public procurement process in early stages of use. It must be clearly stated that while a number of multilateral and bilateral agencies are now beginning to use debarment as a sanction, many developed countries have yet begun to introduce similar sanctions as part of their export credit support to their companies operating transnationally. Evidence-based analysis of the impact of debarment is thus almost non-existent. One aspect of this study – the analysis of the Lesotho Highland Water Supply project - suggests that debarment could be a potent deterrent. Indeed three case studies at state (New York), national (Singapore) and international (World Bank) levels, confirm that agencies do

¹ “Debarred” is the expression used in this study. The process is described at times as “blacklisting”.

² Informal “debarment” practices are not within the purview of this inquiry. Some governments employ informal and unpublicised “due diligence” practices before contracting which include the integrity of the entities involved. It may be thought preferable for these processes to be formal and transparent, both in fairness to those tendering for business and to enable them to function as a deterrent.

consider that debarment has a role in the range of means intended to protect the integrity of the public procurement process.

However this study also clearly argues that debarment can only ever have a limited role in securing integrity in public procurement. To have an acceptable and effective role in such processes, the study notes a number of conditions which should be evident in order to expedite its use, and maintain the integrity of its purpose, both as deterrent and as sanction. The study also strongly notes the need for the role of debarment to be adopted uniformly and comprehensively across all those agencies engaged in the public procurement process at national and international levels.

2 The research question

2.1 Project Specification

The research project was defined as follows: Debarment as an Anti-Corruption Means. The project was intended to focus on the effectiveness of debarment (or blacklisting) as a means to challenge corruption, and in particular debarment as a means of avoiding corruption in public procurement processes. The anticipated questions included: can we document the success of debarment policies? Can debarment strengthen transparent and open procurement procedures, ensure honest competitive bidding, and eliminate collusion? What are the legal and practical constraints to international and donor specific debarment? The study was to be based on existing knowledge from the literature and recent experiences, as well as in-depth descriptions of approaches undertaken by identified agencies at national and international level who were known to operate debarment policies.

The purpose was to assess the extent of debarment, issues concerning its use (or non-use), and to make suggestions, if it was thought that debarment had a value in its use to combat fraud and corruption in the public procurement process, that may improve its effectiveness.

2.2 Research Questions

The research questions to be answered were suggested as:

- Can we document the success of debarment policies?
- Can debarment strengthen transparent and open procurement procedures, ensure honest competitive bidding, and eliminate collusion?
- What are the legal and practical constraints to international and donor specific debarment?

2.3 Definitions and Intentions

A company is debarred by an agency when it (and usually other companies with which its directors or principals are engaged) are formerly prohibited from tendering for projects that the agency/donor/country is funding (or supporting the funding for) projects in another country if, after enquiry and examination by the agency, wherever in the world the projects may be, and whatever they may involve, that company has been involved or is involved in the use of corruption to secure previous or current projects³.

For the purposes of this study, we took as our starting point the policy position that corruption in the obtaining and retaining of business is undesirable, particularly where the recipient country is a lesser developing economy. We have taken this for a number of reasons. First, it can reduce competitive bidding into competitive corruption, with contracts being won by companies less able to provide the goods and services needed by either inflating prices or diminishing quality in delivery. The same policy reasons that favour international competitive bidding also apply to the need to deter corrupt conduct. Second, international (or “grand”) corruption can involve major

³ Corruption here relates to the payment and receipt of some benefit, financial or in kind, between a holder of public office, elected or appointed, and an individual or corporate entity that gives some advantage to the latter and which the former has or appears to have responsibility for through their office.

decision-makers in the recipient countries, with the result that corrupt bidders can effectively prop up and support failed governments and undermine democratic gains. Third, the consequences of such corruption can be the funding of needless projects, over-priced projects and avoidable debt, with the deepening of poverty and the denial of development to the people of the country as a whole among the consequences. In a word, the corrupt are attacking “good governance”.

The incorporation of the OECD Convention on the international dimension of corruption has, like the United States’ Foreign Corrupt Practices Act, given legal shape to increasing concerns that not only should corruption be addressed in relation to international procurement but that lesser developing economies should be protected from the financial consequences of procurement corruption. At the same time, the small (but operationally significant) number of multilateral donors adopting similar approaches underlines the importance attached to integrity in the public procurement process. That all parties should become involved in strengthening the public procurement process should be acknowledged. When corruption is detected firm action is called for on the part of the funding agencies concerned as well as the investigative agencies and judicial systems in lesser developing countries. Indeed, apart from the implications for resources and for post-award inquiries, the focus should be on prevention and deterrence in the public procurement process before funding and projects are awarded.

For this to be achieved, effective sanctions for companies who act corruptly is a desired outcome if debarment is to act as a deterrent – but the purpose of debarment is not solely to “punish” the corrupt but to strengthen the integrity of the contracting procedures so as to ensure value for money. Firms are not, therefore, debarred for reasons of retribution but to encourage them, and others, to raise their standards of conduct to acceptable levels. The best possible outcome of any debarment process is companies demonstrating their commitment to transparency and honesty throughout the procurement cycle.

2.4 Project Scope

The project involved:

- A literature review on debarment; An analysis of available surveys – those of the Organisation for Economic Co-operation and Development (OECD) and various country surveys of their National Integrity Systems – on the extent and nature of debarment;
- Three case studies on debarment by agencies;
- The preparation of a case study of the debarment implications of the Lesotho Highland Water Supply scandal;
- Analysis of issues relating to debarment and recommendations for action.

2.5 The Report Structure

The Report is structured as follows:

PART I

Section 3: discusses the material comprising the research data – review of published material; three case studies; the Lesotho Highland Water Supply study.

Section 4: analyses the main themes and findings from the research data.

Section 5: seeks to answer the research questions.

Section 6: makes recommendations and proposals on the way forward.

PART II

Section 1: provides the themes and issues from the published material in detail.

Section 2: provides the full case study responses.

Section 3: provides the Lesotho Highland Water Supply study in full.

THE ANNEXES

(Contained in a separate document)

- Case study questionnaire
 - The database searches
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3 Debarment: Summary of the research data

3.1 Introduction

This section discusses the material comprising the research data.

Sources

Database searches, using appropriate keywords that incorporate blacklist+/debar+ and variants, have produced a limited amount of academic and practitioner material, much of related to tax and money laundering issues (including the Financial Action Task Force's [FATF] blacklists) and much to the activities of those donor agencies implementing a debarment policy. A number of articles include blacklisting and debarment among lists of recommendations for dealing with corruption but rarely do so on the basis of empirical evidence as to why its has been used and what is the added-value of its inclusion.

Most of the literature also applies to donor activity; there is virtually no information on in-country debarment procedures and practices, apart from the USA [see Annexes – 2]. Overall the available material is sporadic but the surveys and critiques in the debarment symposium identified by the searches raise some interesting issues, discussed below in Part II.1 of this Report.

In-depth Country Studies

In addition to the literature reviews and the study of existing practitioner material, the project undertook three in-depth country studies. These were chosen for specific reasons.

Firstly, the country studies provided examples of high profile debarment policies, and were likely to provide accessible and credible sources of quality data. Secondly the case studies provide important contrasts: they range from debarment policies which have operated for a length of time (New York) over the medium term (Singapore) and are relatively new (World Bank); also in terms of contrast they range from an international organisation (World Bank), to a developing jurisdiction (Singapore) to a developed jurisdiction (New York).

As well as contrasts there were also important common themes. All three studies are seen as successes. The Singapore study was chosen to highlight the implementation of a high profile and apparently rigorous debarment policy instituted by a government with an effective record in controlling corruption in other areas. The New York study was chosen for two reasons: one is that New York provides an important contrast as an example of a developed jurisdiction which, by its own admission, is a jurisdiction which faces long-standing corruption problems, but which has instituted a comprehensive anti-corruption programme of which blacklisting is a part. The World Bank was selected as an example of an international organisation running a blacklisting policy.

The Methodology chosen was in the form of a written questionnaire [see Annexes – 1.] with questions aimed to produce a qualitative and quantitative data for comparative analysis. Questions were devised to provide rigorous descriptive data and data from which strong interpretations could be drawn. Questions combined 1] descriptive cues – that is they were aimed at gaining normative data on the development and operation of policies. 2] evaluative cues –

these were aimed at eliciting responses which provided subjective information on the operation of the policies 3] suggestive cues – these were aimed at gaining recommendations for improvements to the policy [the full responses to the questionnaire are in Part II.2 of this Report].

Lesotho Highlands Water Supply Study

To add to the existing literature on debarment, and the three case studies, a study of the Lesotho Highland Water Supply Scandal was commissioned from an expert who has been following closely both the various cases, and the blacklisting procedures adopted by the World Bank to assess issues relating to debarment in practice. (The full study is in Part II.3 of this Report).

4 Analysis

4.1 Published Material

This report clearly highlights the fact that the current (English speaking) literature on debarment cannot function as a basis for a comprehensive analysis of the effectiveness of the policy, its effect on corporate behaviour, and its effects on the official and unofficial costs of bidding processes. In short, there is limited material on debarment and virtually none on debarment in practice. This is a gap which this study cannot fill. This would require more in depth analysis based on comprehensive long range and comparative field research covering both institutions and companies.

The policy, media and academic literature which is available provides a number of clear themes. Those promoting debarment – and they range from DAC consultants to advocacy groups such as The Corner House – see debarment as one means of ‘fireproofing’ or protecting the procurement process. There are both multilateral and bilateral agencies who use debarment, ranging from the World Bank to the UK Export Credit Guarantee Department, but little agreement on how to implement debarment, the grounds for debarment and the exchange of information between government departments, export credit agencies and multilateral and bilateral donor agencies. The OECD survey of export credit agencies not only notes this disjuncture in criteria for debarment but also the absence of more than a handful of cases when debarment has actually been used.

Debarment is thus not only an activity where there is no agreement when debarment is used, under what criteria and in relation to what type of export credit support sought, and no arrangements to exchange information, but is also an activity where there is little guidance and coordination on its use – and usefulness. For example, the publicly available material covering debarment by the World Bank or the Financial Action Task Force often rests on journalistic comment and anecdote.

The database searches clearly identify the USA as the leading user of debarment at state, national and international levels. The literature here points to a number of issues, including an apparent move at Federal and state level to weaken debarment systems in many areas. This is particularly noteworthy. It may be a result of successful business lobbying. However the material on the legal framework, on information-sharing and sanctions has also led to concerns. These include:

- The tendency to use debarment against smaller firms; large companies are made to comply by means other than debarment.
- There are exemption processes, and these appear to favour large companies; particularly in relation to Federal procurement, large companies may be removed from a debarment list to allow them to bid for a contract.
- Debarment is seen by critics as not having improved the efficiency of procurement practices; it is seen as a practice which creates bureaucracy and delay;
- There is confusion over the criteria for debarment – reasons for debarment do not rest solely on allegations of corruption, but also on labour and environmental practices;

- The process is not seen as fair. There is a need to ensure that debarment is not selective (i.e., agencies should work together to make debarment more effective by sharing lists);
- Efforts should be made from the outset to improve corporate standards to minimise the use of debarment.

4.2 The Case Studies

The investigation of suspected wrongdoing

In **Singapore** there is no investigation as such. The Ministries concerned will report suspicions of wrongdoing to the Standing Committee on Debarment [SCOD] in the Ministry of Finance.

The administrative guidelines do not contain an investigation procedure. As no provision is made for interviewing of witnesses/ any parties, or the perusal of any documentation, it appears that there is no procedure for the ascertaining of the veracity of the facts.

However, if ‘investigations’ merely means the first-instance determination of the facts independent of any ascertaining of the veracity of the facts, it appears that for the case of contracts which involve individual Ministry Departments, where recommendations to the SCOD have to be approved by the Permanent Secretary or his delegate, the investigative function rests with the respective parent Ministry. For the case of Government Procuring Entities (GPE) that are Statutory Boards (semi-public sector agencies created by an Act of Parliament and funded by the state), which can submit the recommendations directly to SCOD without going through their parent Ministries, as long as these are approved by the Statutory Board’s CEO or his nominee of Divisional Director rank, the investigative function would appear to rest with the Statutory Board itself.

However, if the ground for debarment is corruption, the matter would be referred to the Corrupt Practices Investigation Bureau (CPIB) which would then be the investigating authority.

The **World Bank** has a small investigation team in the Department of Institutional Integrity [INT] which deals with procurement as part of its other roles in safeguarding proper procedures.

The investigators can access all the World Bank’s records relating to the procurement. Otherwise, they are limited only to what the respondent, witnesses or a government provide. Under the Guidelines, the companies are required to provide relevant information (at least books and records), but – as a practical matter – they can refuse (and/or can keep fraudulent books). They can only be debarred for actions regarding a specific procurement.

The investigation process is staff intensive, and more staff could be well used. INT has 30 professionals working in 6 teams, one of which is concerned with offences by Bank staff (all allegations of which receive a full investigation). Many “tips” come from Bank staff as well as from company whistle blowers or disgruntled ex-staff. Sometimes (although this varies), country officials or prosecutors cooperate with INT in investigations.

In **New York**, an impressive investigation capacity in the form of the Bureau of Investigation covers a wide range of cases.

The Department of Investigation (DoI) investigates fraud, corruption and unethical conduct in the 70 agencies in New York. It investigates such conduct by city employees and contractors. If necessary it refers cases to the relevant authorities for prosecution (e.g. the Attorney General). The DoI conducts disclosure (VENDEX) checks on employees and contractors and calls for, and investigates, financial disclosures by the same.

The DoI is a law enforcement agency with powers specified by law. The DoI, as mentioned can request financial disclosure from individuals/groups. The DoI can investigate on the basis of VENDIX reports which potential contractors have to fill in. The DoI can also examine other relevant procurement information. DoI can engage in surveillance and investigation in the way that other law enforcement agencies can under the relevant state and Federal law.

The DoI is a major body with a budget of \$20 million and significant investigatory power, including approximately ex-police personnel, lawyers, forensic accountants and computer specialists. This capacity is required to investigate the complex structures around many procurement frauds. Even where the frauds are not complex - many frauds in New York city are remarkably crude - the DoI has the capacity to investigate a number of cases. In 2002 and 2003 the DoI investigated between 1,600 and 1,700 cases and processed them via arrest, criminal referral, civil referral (for financial restitution etc.), disciplinary referral and other disposal. In 2002 the DoI investigations led to \$44 million being levied or recovered from individuals/companies.

The process of debarment

The debarment procedures in all three case studies are administrative, not judicial. They operate as part of the overall procurement process, to strengthen the process and send out a public signal. The administrative process varies in nature. In **Singapore** it is quick and streamlined. The **World Bank** and **New York** have processes which incorporate hearings and a defence by suspected companies and individuals is allowed.

In **Singapore** there is no formal hearing and no appeal system – and indeed no hearings have been contemplated in the debarment procedure. No witnesses are called or heard in person, and no primary evidence is adduced. Rather, the evidence is presented to the SCOD in the form of written submissions (“recommendations”), by the GPE that seeks the debarment. Hence the questions pertaining to the adduction and interpretation of evidence, the calling of witnesses and the availability of counsel are not applicable.

The SCOD does not function as a tribunal as such; there is no hearing and there is no debarment officer, analogous to the Deputy Public Prosecutor in the criminal hearings context, who argues the case in opposition to a defendant or defence counsel before an adjudicating party. Rather, the evidence is presented to the SCOD in the form of written submissions by the GPE that seeks the debarment. Before the GPE makes the recommendations, it has an administrative duty to warn, in writing, the defaulting party that it is going to do so, and to ask them to explain their default within 10 days (presumably of the date of the warning letter). The letter of explanation has to be submitted together with the recommendation to the SCOD.

In the **World Bank** there is a formal hearing conducted by the Sanctions Committee, which is adversarial in nature. Lawyers may be present. Written submissions are accompanied by a signed statement that they are “truthful to the best of the signer’s knowledge.” Evidence is given orally and in written form. The committee may call witnesses; the respondent may make or provide a

statement. Members of INT who investigated the matter are present. Cross-examination does not take place but rebuttal evidence may be presented. Evidence is recorded in the record of proceedings – the notice, reply, etc. (Little oral testimony is used, although it could be under the procedure. When it is used, it would be recorded). Third parties (i.e. other bidders) are permitted to attend if called by the Committee. They entitled to present evidence and that evidence is shared with the INT, the Sanctions Committee, and the respondent.

In **New York** the process is as follows: the proceeding will be initiated by the head of an public Agency after s/he has consulted with legal counsel. The Agency head then petitions the Office of Administrative Trials and Hearings (OATH). The individual/company is sent a notice of proposed debarment. The individual/company is provided with a time limit to reply to the debarment application. The individual/company may request a hearing. This hearing operates under OATH rules. If debarment is decided on, OATH sets the time limit.

Whilst this petition is being considered the Agency may suspend the accused person/firm for up to three months. This suspension is not part of the debarment process. The decision is made by the chief contracting officer of the agency. This decision can be appealed, but only to the head of the Agency. The suspected entity has to establish a degree of innocence. The balance of proof is not criminal, although rigorous evidence must be supplied.

The individual/company can take civil action against the New York City government if it feels the decision is wrong and has caused substantial loss. This latter course of action has occurred.

Sanctions

Sanctions vary. In **Singapore** the criteria vary with the grounds for debarment. More pertinently to the remit of this research project, if the ground is corruption, there is a minimum debarment period of 5 years, with no upper limit provided for.

If the parent corporation is involved in corruption, after 1st April 1997 its subsidiaries are also debarred. As companies on which debarred directors/partners/sole proprietors sit will also be debarred, if the subsidiary is involved in corruption and its directors also sit on the parent company's board, then the parent company would be debarred.

In the **World Bank** Individuals are debarred as well as companies. The criteria for the length or extent of a particular debarment depend (as noted in the Committee Procedure VII (e) Factors Affecting Sanction Decision) as follows:

The Committee may consider the following factors in determining an appropriate sanction:

- Egregiousness and severity of the Respondent's actions;
- Past conduct of the Respondent involving fraudulent or corrupt practices;
- Magnitude of any losses caused by the Respondent;
- Damage caused by the Respondent to the credibility of the procurement process;
- Quality of the evidence against the Respondent (NB: Once the decision is made to debar, the quality is not relevant to the duration.)
- Mitigating circumstances; (The environment in which the contractor works – e.g. in a country/sector where little or nothing can be done without corruption – may be taken into consideration.)

- Savings of Bank resources or facilitation of an investigation being conducted by the INT occasioned by the Respondent's admission of culpability or cooperation in the investigation or hearing process; (This would be a factor in the severity of the penalty, not in its existence.)

In determining the term the key factor is the likely affect on the quality or quantity of the output contracted for. The length of debarment would be relative to the size of the offence in relation to the amount of the contract. Debarred are all those under debarred controlling persons or entities: “an appropriate sanction [may] be imposed on any individual or organization that, directly or indirectly, controls or is controlled by the Respondent.” It could be confined (e.g. to a holding company), but this is not frequent. A repeat offender gets lifetime debarment.

The seniority of those involved is a factor. If a low level or “rogue” employee or an aberrational disgruntled one was involved, the chance of debarment of the firm might be reduced – i.e. if the company was thought to have made all reasonable efforts to train re and enforce ethical conduct.

With regard to mitigating circumstances codes of conduct that are enforced are no excuse. Corruption would usually indicate a lack of adequate enforcement. The Bank would insist on dismissal of staff shown to have been involved in the affair, and although it might affect the duration of debarment, it would not change the fact of debarment.

In **New York** the public agency head can request a debarment of up to five years. Individuals are debarred as well as companies. The criteria for the length or extent of a particular debarment once a case is found includes the seriousness of offence and the risk posed to the procurement process. The impact on the particular project is a factor, including the impact on the workers involved e.g. the DoI investigates labour violations in contracts as a major criterion. City contractors are required to pay their workers the ‘prevailing wage’ and failure to do so leaves the individual/corporation open to criminal and administrative penalties. The seniority of those involved is not a factor. Investigations and sanctions have focused on very low level individuals/companies, as well as high level individuals/companies.

In terms of mitigating circumstances, there is variation. There is a generally strict interpretation of the rules because bidders are informed in detail of the requirements of conducting business with the city and of the standards they have to meet. However debarment is by no means an automatic penalty. The individual/company may have its contract terminated. However a report of this will be entered on the relevant database and will be available for access by agencies the next time a contract is tendered for.

It should be noted here that on a more long term basis there is provision for the city government to conduct business with companies that would otherwise be debarred. This is done through the Independent Private Sector Inspector General Programme. Under this programme bidders are awarded a contract if they agree to be monitored by an outside agency in the form of a law or an audit firm. The Programme was instituted in 1996. From 1996-2002, twenty firms performed contracts under this programme.

4.3 The Lesotho Highland Water Supply Study

Despite the approaches to debarment in the three case studies above, the Lesotho Highland Water Supply study shows the practical issues relating to debarment. The issue of debarment

arose following the Lesotho government's decision to initiate investigations and subsequent prosecutions into companies alleged to have paid bribes to a senior public official. The investigations were resource-intensive and extensive, and the defendants willing to deploy procedural and evidential tactics as part of their defence, although most were found to be guilty.

4.4 The Issues

The issues the analysis raises relate to:

- The speed and efficiency of the debarment process. If the process is lengthy and inefficient it will undermine the purpose of the policy – to secure integrity and faith in public bidding processes.
- The criteria on which debarment is based. The criteria for debarment can range from failure to meet contract specifications, to wider issues such as labour or environmental practices as well as corruption.
- The contrast between legal and administrative approaches to debarment.
- The lack of information on the effect of debarment on bidder decision making.
- The organisation and resourcing of any debarment policy.
- The standard of evidence for a debarment process.

In addition, the Lesotho Highland Water Supply study raises issues about debarment in practice, including:

- The World Bank's decision to delay its administrative processes concerning debarment while the criminal trials were underway.
 - Whether a conviction in one jurisdiction would be recognised as an equivalent conviction in the country of the company concerned. In other words, could a company be debarred in its home country if the offence under which they have been convicted in another country does not exist?
 - What is the corporate responsibility of a parent company for the actions of its employees, or employees of a subsidiary company, in another country, and how encompassing does debarment become in terms of its application across corporate structures?
 - Can agency debar a company on the basis of documentation or courtroom evidence, irrespective of the outcome of a criminal trial? Should an agency always take cognisance of the decisions of a court in a national jurisdiction (i.e., should a conviction of corruption by a responsible employee always lead to debarment?).
 - Can a company avoid debarment by claiming corporate reforms or by merger or other forms of corporate restructuring consequential on a conviction – through what evidence, and verified by whom?
 - How far should multilateral and bilateral agencies be influenced by the transnational export policies pursued by national governments?
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5 Towards answering the research questions

5.1 Can we document the success of debarment policies?

Can we document the success of debarment policies? How effective has debarment been in reducing levels of corruption in public tendering? Is there evidence to demonstrate that the prospect of debarment has had a salutary effect on prospective bidders for public contracts? The answer is presently in the negative. There is no evidence available as yet that clearly establishes that this is the case. It is difficult to document the success of debarment policies. A decline in reports of corruption might be a basic measure, but these reports might be due to other factors. For example it might be due to changes in the procurement process generally. The effectiveness of debarment might depend on the value of specific contracts in specific areas (New York appears to be an example here). Getting evidence would require access to procuring institutions. Further, in order to triangulate the research access to the bidding corporations would be necessary.

Intuitively, it can be assumed that the existence of debarment procedures and their likely enforcement must have an inhibiting influence on those bidding for public contracts. It is fair to assume this, not least because the consequences of being debarred can be so grave (as evidenced by the example of the Canadian corporation, Acres, in connection with the Lesotho Highlands Water Supply project).

However, debarment by itself is unlikely to make significant inroads into corruption where this is endemic, as it is in a number of developing countries. The procedure is a tool that can be brought to bear on the issue, but has to be seen as just one (albeit an important one) of a series of measures to tighten up public tendering procedures. As in anti-corruption strategies generally, there is no “silver bullet”, and this is not one. Clearly, the availability of debarment will strengthen transparent and open procurement procedures, but it will not, by itself, ensure honest competitive bidding or eliminate collusion.

The World Bank has set the international standards for debarment, but the regional banks have failed in material respects to follow the World Bank’s lead. It can safely be assumed that, by the regional banks insisting that their debarment lists be kept secret, their practices have not been as effective as the World Bank’s. Further the failure to aggregate data both weakens the concept and also does not suggest a united front to contractors and consultants.

As this study is completed, there is uncertainty as to the legal position where a consortium of corporations has been involved in corrupt conduct. Is it possible as a matter of law to proceed against a consortium as such (there is a court ruling against proceeding with criminal charges against a partnership of corporations)? Or is it necessary to proceed against the individual corporations (and if so, what would be the evidential requirements to obtain a conviction)? A further problem has been encountered where a corporation has re-structured itself or been sold – how does debarment apply to new or merged corporate identities?

5.2 What are the risks for an administration in introducing the practice?

First, the risk is one of resources. As in other areas of criminal conduct, not every allegation of corruption can be investigated, and relatively high thresholds will be needed to screen out vexatious complaints. This can also lead to allegations of selectivity and unfairness in implementation (as noted in some of the material above, a perceived tendency is to target the smaller companies whose use of bribery is less sophisticated and easier to unravel).

Second, an administration has to choose between introducing a process that is essentially administrative in nature (as is the case in the case studies) or else is one administered through the court system (as has been the choice made by South Africa).

The criminal process, however, is dependent on a conviction being obtained as the penalty of debarment forms an element of the sentence. This means that if a prosecution fails to get a conviction against an individual, perhaps for technical reasons, the enterprise could not be debarred even though the fact that an offence by someone from the enterprise had been involved in corruption. It is useful for the court to have these powers for use in appropriate cases, however it does not serve broader purposes. A court-based process is most likely to meet the most stringent procedural requirements but will be less efficient, given that evidential requirements will be at their most demanding. It is also possible for courts to confirm pre-trial agreements as to what sanctions should be applied, but in the absence of agreement there would not be quite the same flexibility as would be the case where penalties are set by administrative means (e.g. requirements that particular staff be dismissed, etc. would generally be beyond the competence of a court).

Third, there is an element of risk in that suspected corporations may resort to legal challenges in the courts in attempts to block debarment hearings or to review their findings, with consequential resource implications.

Fourthly, there is the risk that IFIs and others may not respect the outcomes of debarment proceedings, resulting in them insisting that “debarred” corporations nonetheless be entitled to tender for projects that they are financing (in the name of “international competitive bidding”) or the financing will not go ahead.

Finally, there is the risk of creating distrust with the private sector, which is deeply suspicious about debarment procedures in foreign countries, not least because of a lack of faith in the professionalism and/or integrity in their administrations. This will particularly be the case if the debarment policy is not clearly managed and efficiently operated.

5.3 What are the arguments against?

It can be argued that the process is inherently unfair to smaller corporations, which it has the potential to bankrupt, and favours large corporations, who have proved in the United States to be able to strike deals over penalties with regulators that fall short of debarment.

There is no evidence that this is the case. For large corporations, of course, the prospect of a debarment that was automatic and covered all of its operations could see the errant conduct on the part of a rogue employee result in catastrophic losses of business.

Whatever the approach, it needs to be one that is essentially fair, and is seen to be fair, appropriate and proportionate to the conduct that is being penalised. Certainly, the proliferation of very small operations listed on the World Bank website, and the absence of recognisable “names”, has been used to call the integrity of the Bank’s debarment process, however unfairly, into question. No debarment process should be permitted to serve to undermine public confidence in the institution exercising it.

The main argument against using debarment is that it is a complicated and expensive policy to operate, and that much policy and academic literature suggests that other ways of securing bidder compliance might be more successful.

5.4 What powers ought the debarring authority to possess?

At the investigative stage, the authority requires power to require the production of documents. Such a power could be conferred through an administrative instrument, perhaps being written in to standard public tender procedures, or else by contract. Such provisions may or may not be enforceable through court orders in the country in question, but will be of limited value when dealing with corporations domiciled abroad. There ought therefore to be the expressed right of the authority to draw such conclusions as it believes to be appropriate from any failure to produce documents. It would greatly assist in the investigation stage if questions can be put that are required to be replied to by affidavit (i.e. on oath, so that anyone found to be stating untruths would be liable to prosecution for perjury).

At the debarment stage, the option of penalties falling short of debarment should be kept open. In some instances, dismissal of staff with appropriate losses of benefits and severance pay may be considered adequate. The debarring authority should also have the power to require a corporation to take remedial steps within its management and management structure either before a debarment is lifted or as a condition for it not being imposed.

5.5 What should the process of debarment entail?

If a debarment process is to be instituted, the following recommendations are suggested:

- It is recommended that the process be administrative rather than judicial in nature.
- The administrative process should have some form of appeal.
- The investigation of suspected wrongdoing should properly resourced and managed.
- If debarment is proved there should be strict penalties.
- If a redemption policy is to be available this should be credible.
- The criteria for the length and extent of debarment should be related to the offences, perpetrators and value.
- Mitigating circumstances could follow a set procedure.
- Any debarment policy should be very clearly stated and integrated into all procurement documents.
- Any policy leading to debarment must be properly resourced.

5.6 How can the deterrent effect be made most effective?

First, the liability to debarment should be made abundantly clear in the relevant documentation so that corporations preparing tenders are under no illusions as to the possible consequences of corrupt conduct. Second, debarment proceedings should proceed regardless of the stature and standing of the corporation concerned. The host government of the corporation may well be tempted to intervene to make representations on behalf of its corporation, so that transparency in the processes is essential to minimise the scope for unwarranted interference or pressure.

5.7 What are the legal and practical constraints to international and donor specific debarment?

In respect of their own debarments:

Legal constraints

National organisations will have to respect any constitutionally-protected rights. Some will have legal traditions that will enable administrative penalties to be imposed without having resort to court processes. However, their procedures will need to be such as to comply with the national requirements of good administrative practice if debarments are not going to be overturned by the courts on applications for judicial review.

Practical constraints

The IFIs and bi-lateral donors do not have any extra-territorial legal powers that would enable them to investigate allegations of corruption as effectively as prosecutors and criminal investigators can by requesting mutual judicial assistance. They are also unable to compel firms to produce documents or to make statements, or to summons and cross-examine witnesses. Debarments, too, can be extremely time-consuming and involve significant expenditure, particularly where international elements are involved. For example, the conducting of a forensic survey by a reputable international accounting firm can be prohibitively expensive. As against these considerable costs the organisations have to balance the need to maintain the integrity of the projects they fund if their programmes are to reach desired goals.

Debarments carried out by developing countries

It would seem that the primary constraint to debarments imposed by developing countries insofar as international and bi-lateral donors are concerned is a lack of confidence in the fairness and integrity of debarment systems in developing countries where there is systemic corruption. The problem may be even broader. Countries and most IFIs (with the conspicuous exception of The World Bank) largely decline to publish them, or to share their debarment lists with others. There would be clear advantages in countering corruption, and in protecting the integrity of their own operations, for debarment lists to be shared as between IFIs and bi-lateral donors, so as to enable this information to be used in appropriate ways when corporations named on the lists are tendering for business. Even better would be the regular publication of debarment lists by all those who have the practice. In fairness to those named, where corruption is found to have taken place and penalties short of debarment have been imposed, these others, too, should be published.

It would also seem that if the World Bank (for one) has declined to debar a particular contractor, and that contractor has been convicted in the courts of the country concerned, the Bank would,

nonetheless, regard that country's government as being prohibited automatically from excluding the corrupt contractor should it wish to bid for a World Bank-funded project in that country. It is understandable for the institutions to proceed with care, but such a consequence would seem undesirable.

6 Recommendations and the way forward

6.1 The Research Questions

The research questions were:

- Can we document the success of debarment policies?
- Can debarment strengthen transparent and open procurement procedures, ensure honest competitive bidding, and eliminate collusion?
- What are the legal and practical constraints to international and donor specific debarment?

6.2 Some Answers

Debarment policies are presently limited in their use and there is little record of their use outside a small number of international and bilateral donor agencies, and countries. Success is hard to determine.

Debarment is essentially a preventive measure, designed to deter companies from indulging in corrupt conduct to win and retain the contracts being financed. To be effective as a disincentive, debarment must carry consequences for misconduct sufficient to act as a deterrent, both for the company and pour encourager les autres. Debarment must also carry with it a foreseeable possibility of corruption being detected and the rules against it being enforced fairly and firmly. A range of possible penalties must therefore be available that match the range of the contractual benefits that can be a lure for the corrupt

Although it is possible to document the occasions on which debarment has been invoked, it is impossible to determine whether the very presence of the possibility of being debarred has resulted in a change in corporate behaviour without considerable research and numerous off-the-record interviews with senior officials in companies engaged in international competitive bidding.

The picture is clouded further by the fact that in the context of international bidding, the procedures introduced by the World Bank are of comparatively recent origin whereas patterns of disclosure in corruption cases suggest that it is generally some time before corrupt conduct becomes manifest, other than when it is practised by newcomers – a fact that may explain the reason why, until the Acres case in July 2004, the only companies the Bank had disbarred were small enterprises that some suspect were mere shells for corrupt deals rather than substantive business operations.

Although debarment procedures are generally promoted by reform and advocacy organisations, many countries, ECAs and donor agencies seem reluctant to adequately resource and implement an effective debarment policy for whatever reasons – be they legal, procedural, financial, or the possible impact on own-country businesses.

On the other hand, **debarment is identified as a potentially important component in promoting transparent and open procurement procedures**, and as a means for underwriting honest competitive bidding. The steady introduction of developed country legislation

incorporating the OECD Convention will create the links for extra-jurisdictional corruption inquiries, particularly where the recipient country is also committed to effective investigation, and the necessity of a debarment policy. Similarly, as the Convention is implemented, the 2003 *United Nations Convention against Corruption* will help to provide and reinforce avenues for inter-jurisdictional mutual legal assistance.

Multilateral and bilateral agencies would find it increasingly difficult to justify to home and international audiences official support or awards of contracts to companies identified as involved in payment of bribes abroad.

This of course will raise, as this report notes, all the legal and practical constraints to international and donor specific debarment – the level of proof required, the type of process, levels of fiduciary responsibility, the type of sanction, the resourcing of investigations, and so on. Most of these, however, can be accommodated within procurement guidelines and be made the subject of contract.

This report cannot address all of those constraints, but it does conclude that:

- Debarment has a clear role as a deterrent;
- This role at present is limited by the few agencies who have adopted the procedures; and that
- Expansion of the role and the effectiveness of the use made of debarment is dependant on a number of issues which this report has identified.

If debarment is not introduced, then consideration should be given to introducing some practices from the policy. These include:

- Stronger processes of disclosure;
- The establishment of policies to increase the checking of, and transparency of, bidding documents;
- The idea that bidding companies should sign statements to the effect that their bid is legally and ethically sound;
- The establishment of a database on allegations of impropriety to build up a picture which can at least be used to tighten up bidding processes;
- The establishment of policies to pass on suspicions of criminal behaviour to the relevant law enforcement agencies;

6.3 What the case studies tell us

Some clear conclusions are evident from the case studies.

Debarment has received a great deal of publicity as an anti-corruption strategy. **However, its success in ensuring good governance will be limited if it is relied upon as the main policy for this.** Like any sanction, its power relies on the idea that rule breakers will be caught so that potential rule breakers will be deterred from even trying (it alters the risk versus profit ratios that are understood to govern premeditated acts of corruption). If the procurement process as a whole cannot prevent corrupt companies or individuals winning contracts, debarment by itself will not remedy this. One of the important lessons of the experiences of Singapore, the World Bank and New York State is that **debarment is only one part – albeit an important part - of a properly organised procurement process.**

Therefore **other existing procurement processes also need to be risk assessed and refined in order to prevent fraud** by, for example, eliminating opportunities for corrupt bidding via qualification for bidding, disclosure, transparency in the bidding process and standards of transparency and controls over the extent of post-contractual variations of price or specifications.

The questions that need to be asked before a blacklisting process is considered are: What are the strengths or weaknesses of the existing procurement process? What is blacklisting expected to achieve for the agency in question?

6.4 Recommendations for any debarment policy

If a debarment process is to be instituted, the following recommendations are suggested:

It is recommended that the process be administrative rather than judicial in nature. Although the grounds for debarring a person or company may even involve suspicion of some criminal activity, the institution of a court-led process is not necessary and may cause unreasonable delay. One of the problems with many anti-corruption strategies is that they adopt an overly-legalistic approach. Recent thinking may show that the best way to combat corruption is not the passing of new laws and legal processes. Rather it lies in adopting flexible administrative and organisational approaches. An administrative process may highlight evidence of criminal wrongdoing but that should not be the concern of the blacklisting process. An administrative process is sufficient, less costly and less complex. Administrative penalties are common features in both the civil law jurisdictions and those using common law.

The human rights guarantees contained in the constitutions of most countries reflect international standards and rightly require that persons accused of a crime be presumed innocent until their guilt is established beyond reasonable doubt, by a competent, independent and impartial tribunal.⁴

The basic presumption of innocence and the burden of proving guilt beyond a reasonable doubt is limited to criminal cases. The International Covenant on Civil and Political Rights and other international and regional human rights instruments as well as national human rights protections apply only to cases where a person is “...charged with a criminal offence...”

In many countries, the lower, balance-of-probabilities standard of proof may be where used remedies are being sought but where no one has been actually charged with the commission of a crime.

For example, countries such as Italy⁵, Ireland⁶ and the United States⁷ provide, under varying conditions, for the civil (or “preventive”) confiscation of assets suspected to be derived from

⁴ Universal Declaration of Human Rights, Art. 11 Para 1; the International Covenant on Civil and Political Rights, Art. 14 Para 2, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 Para 2, the American Convention on Human Rights, Art. 8 Para 2, and the African Charta of Human and Peoples Rights, Art. 7 Para 1.

⁵ Art. 2ter Italian Law No.575/ 1965, provides for the seizure of property, owned directly or indirectly by any person suspected of participating in a Mafia-type association, when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said property constitutes the proceeds of unlawful activities. The seized property becomes subject to confiscation if no satisfactory explanation can be provided for its lawful origin.

certain criminal activities. Such forfeiture laws do not require proof of illicit origin "beyond reasonable doubt". Instead, they accept proof on a balance of probabilities. Administrative penalties, too, are commonly imposed in the United States by the Security and Exchange Commission (Shell Oil were recently disciplined to the tune of \$120 million civil penalty and a \$5 million commitment to developing a better compliance function; and further fined £17 million for market abuse by the UK Financial Services Authority, both imposed without any court hearing⁸).

The European Court of Human Rights has reviewed the compatibility of this type of provision with the principle of the presumption of innocence.⁹ Based on three criteria for determining the criminal nature of a provision - the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty - the Court concluded that a confiscation classified as a preventive measure does not have the degree of severity as that of a criminal sanction.

The administrative process should have some form of appeal, although this may be limited if:

- The original administrative process allows challenge and defence; and
- If it is likely that the criteria in place for an appeal do not allow those suspended to abuse the process; and
- If the debarment is not suspended whilst the appeal takes place

In terms of the investigation of suspected wrongdoing:

- Any investigative process leading to debarment needs to be properly resourced;
- Any investigative process should also be strengthened by an effective system to allow the reporting of suspicions, ideally a freephone telephone line, post-box and internet; and
- There should be basic 'threshold' rules which have to be satisfied before an investigation can be commenced.

Overall, in terms of a) the registering of complaints, and b) the standards of evidence needed before a proper investigation is started, it is important that the debarment process reach appropriate standards since, like many anti-corruption initiatives, it runs the risk of becoming a kangaroo court or a political tool. For example if it is easy to make a report this may simply encourage rival companies to make a complaint about corruption, particularly if these companies are connected to political figures.

In preparing a case for debarment a number of important questions need to be addressed:

- What quality of evidence is to be allowed? It is recommended that evidence should at least have to be corroborated and the failure of important witnesses to attend and submit to questioning be taken into account. In the Lesotho case, a key witness who had provided a statement to the investigators declined to appear in person on the grounds of ill-health.

⁶ According to the Proceeds of Crime Act 1996 of Ireland the High Court upon application can seize assets that are suspected to be derived from criminal activity. Seizure can be ordered without prior conviction or proof of criminal activity on the part of the (civil) respondent, who, to defeat the claim, is required to establish the innocent origins of his suspicious and hitherto unexplained wealth.

⁷ The US Forfeiture Laws introduced the concept of "civil action" against the property itself, which allows for proving the illicit origin on a balance of probabilities.

⁸ *Guardian* newspaper, 321 July 2004, page 26, *British watchdog catches up with US bare*.

⁹ European Human Rights Commission, No. 12386/ 1986

- How is evidence to be presented? In written or oral form? It is suggested that written evidence be the main form of evidence submission. Such evidence should be formally attested by affidavit and the debarment tribunal should have the power to require witnesses to attend and submit to questioning where the tribunal considers this to be necessary.
- How is evidence to be challenged and under what circumstances? For example it is recommended that those suspected should have the appropriate time to respond to the charges, and be able to request a hearing.
- How is the hearing to be conducted? For example it is recommended that third parties be present at the hearing and that the judgement could be based on the evaluation of a panel with third party representation.
- What are the criteria for establishing guilt? Beyond reasonable doubt? On the balance of probabilities? 'On the balance of probabilities' would appear a reasonable test and to be the one favoured by agencies administering other forms of administrative sanction. It is all the more appropriate when it is considered that the agencies do not have law enforcement powers to take coercive action, to conduct searches and to subpoena witnesses (bring witnesses to court under compulsion).

If debarment is proved there should be strict penalties. A recommendation that other relevant organisations should debar the guilty party could be complicated and unfair. However other organisations should have access to the list of debarred companies. They can then choose or not to incorporate it in any restrictions they may develop for their own procurement practices. Mutual recognition of debarments is a means to raise the bar further for those tempted to be corrupt and so adds to the preventative power of the measure.

If a redemption policy is to be available this should be credible. There has been substantial criticism of a number of debarment policies in the USA for the manner in which companies can 'jump off and jump on' the lists of debarred companies, or may quickly be pardoned and allowed to bid for contracts. If there is not a credible policy of suspension, then any debarment policy is not convincing and resources should be spent on other forms of prevention.

It is argued that the criteria for the length and extent of debarment should be:

- The seriousness of the offence
- The seniority of the individuals involved
- The value of the contract

Although other criteria could be included - such as effects on the environment and effects on workers - it is suggested this would be to introduce complications, as it may be difficult to measure such effects.

Mitigating circumstances should be taken into account. This could follow a set formula:

- Did the company deny the offence until it was proved?
- How open and cooperative was the company in the investigation?
- What, if any, corrective systemic actions have the individual/company taken since the complaint was first made?
- Have relevant individual staff been disciplined, and if so, was this proportionate to their involvement in the corrupt conduct?

As the World Bank argues, the mere fact that a company has a code of conduct should not be allowed to function as a mitigating factor because it should not have been breached in the first place. The real question in this context is how energetically a company has been in promoting adherence to its code of conduct among its staff and its suppliers.

The fact that a debarment policy is in operation, what the processes involved in debarment are, the rules on which debarment is based, and the sanctions involved in an individual or company is debarred **should be very clearly stated and integrated into all procurement documents**, as is the case in the case studies. This ensures fairness, and may have a deterrent effect.

These procedures - a clear statement that a debarment policy operates; the use of a hearing if requested; the presence of third party involvement and a clear rule of proof and clear criteria for debarment - should secure the confidence of the business community. The operation of clear rules to ensure probity should not affect business adversely (and there is no specific evidence that this has happened in Singapore, although it is raised in the US by manufacturers associations).

Any policy leading to debarment must be properly resourced - a particularly important factor in developing countries as events in Lesotho have demonstrated clearly. Had the government of Lesotho not taken the policy decision that the country could not afford being labelled as suffering from what it called “the African disease”, the corrupt conduct would never have been brought to light.

The need for capacity in running a debarment system requires:

- Effective general intelligence on the business registration of individuals/companies i.e. normal company governance;
- Effective intelligence for the purposes of debarment or risk;
- Effective sources of intelligence on companies/individuals acting unethically and effective intelligence exchange on these matters;
- Exchanges with other relevant central and local government agencies on individuals/companies subjected to debarment;
- An effective investigatory capacity (including a right to cross-examine witnesses on oath).

Debarment policies should take into account the position of the country where corruption has been identified. The judicial system of the country may be able to accommodate a successful prosecution of the corrupt company concerned. Where it has been able to do so (and where there are no grounds to believe that those involved have been denied a fair trial), at the very least, the right of that country to refuse to permit the company to bid for business there should be respected. Under existing rules, had the World Bank elected not to debar Acres International, the government of Lesotho would have been powerless to prevent Acres from bidding for further business in Lesotho if it was World Bank funded (on the grounds that to do so would be contrary to the Bank’s rules on international competitive bidding).

6.5 The Way Forward

The report recommends in summary that:

- Debarment is a useful means by which development and funding agencies can:

- (a) provide protection for their good governance policies, and;
 - (b) protect the integrity and cost effectiveness of their own processes by strengthening procurement procedures so as to deter corrupt conduct by providing an effective sanction against those involved when it is detected.
- The development of the role and use of debarment would be helped by the development of good practice by those agencies and countries that use debarment. To this end, it is recommended that a template document be prepared – drawing on material in this report – and that it be promoted as a significant part of any portfolio of responses to deal with corruption;
 - a) That the Utstein Group of countries take a lead in developing and promoting the use of such a template;
 - b) That the Utstein Group of countries seek to promote compliance with the template through an institution such as the OECD on the basis of its 2003 survey and, as with the GRECO evaluations, regularly review the development of a debarment policy both as a free-standing issue and as part of assessing the implementation of the Convention;
 - c) That information be sought by members of the Utstein group of countries to determine why it is that multilateral and bilateral agencies are at present unwilling to support a generic debarment database, and that such information sharing and coordination be encouraged, beginning with the Utstein Group of countries.
 - d) That the Utstein Group of countries give favourable consideration to suitable requests for assistance from developing countries where there are grounds to believe that corruption may have taken place in a major procurement exercise that is unlikely to be investigated and sanctioned effectively for lack of resources for the country to do so.
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Part 2

7 Themes and Sources: Review of Published Material

7.1 Sources

Database searches, using appropriate keywords that incorporate blacklist+/debar+ and variants, have produced a limited amount of academic and practitioner material, much of related to tax and money laundering issues (including the FATF blacklists) and much to the activities of those donor agencies implementing a debarment policy. A number of articles include blacklisting and debarment among lists of recommendations for dealing with corruption but rarely do so on the basis of empirical evidence as to why its has been used and what is the added-value of its inclusion. Most of the literature also applies to donor activity; there is virtually no information on in-country debarment, apart from the USA.

In terms of the literature, the majority of material on debarment comes – in English-language publications – from Transparency International and The Corner House. Both are unequivocally in favour of debarment both as mechanism for retribution but also for compliance¹⁰ - an emphasis also promoted by a range of other advocacy ad practitioner review publications:

From: DAC Network on Governance. (2003). Synthesis of lessons learned of donor practices in fighting corruption: Report was prepared for the DAC Network on Governance by a team of consultants led by Mr. Bruce B. Bailey. OECD

122. Procurement, in any country, is one of the areas most vulnerable to corruption. To fully deal with corruption issues in procurement the complete chain of procurement activities must be considered, starting with the development of terms of reference and specifications through to the operational aspects of delivery and installation of goods or equipment, as well as services. From a development agency perspective there are a variety of ways to look at procurement:

- Fireproofing or protecting procurement directly (a) controlled and managed by donor agencies and (b) protecting donor interests with respect to procurement made using loan funds.
- Strengthening and protecting local procurement which is delegated to partners, such as in community level projects.
- Harmonizing systems and developing common approaches, as in the case of SWAPs.
- Using procurement rules as a level to ratchet up integrity (i.e. through sanctions, blacklisting, etc).
- Making partner country procurement systems more effective.

From: Implementation of the ECG's Action Statement of December 2000 on Export Credit Support - Presentation to the ECG By Michael H. Wiehen, Member of the Board, Transparency International 23 April 2003

¹⁰ Stansbury, N. (2003). *Anti-corruption initiative in the construction and engineering industry*. Transparency International (UK).

None of the ECAs¹¹ seem to seriously consider or even allow the possibility of denying access to export support to a company that has previously been shown to use bribery (either by “sufficient evidence” or even “legal judgement of bribery”), the so-called blacklisting or debarment. We find this also quite disappointing. We know through the feedback from our National Chapters that some ECAs are at least debating internally how to react to bribery judgements by courts of other countries, such as the recent cases in Lesotho. We believe cases like this should invoke ECA sanctions anywhere. Furthermore, the fact that an applicant company is blacklisted publicly by the World Bank in regard to a different project should at least invoke a higher degree of due diligence by each ECA, as we hear happens in the Canadian EDC and in several other ECAs. If an applicant is debarred by the World Bank with regard to the same project the ECA is considering, this of course would be more than “sufficient evidence” with all the consequences previously described.

We are pleased to note that the UK ECGD requires its applicants to declare that “to the best of our knowledge or belief, neither we nor any of our directors appears on any list of contractors or individuals debarred from tendering for or participating in any project funded by the World Bank or any other multilateral or bilateral aid agency, or has at any time been found by a court to have engaged in any corrupt activity.” Should this not be adopted by all the ECAs?

From: Emilie Thenard, Coordinator of the EU ECA Reform Campaign, to Members of the EPOC Committee, OECD, 2003.

8. Accountability and Compliance

...ECAs adopt a full-fledged accountability and compliance mechanism. Its objectives should include:

- Being an independent fact-finding organ to which local communities and other stakeholders can appeal in case of problems with an ECA-supported project;
- Ensuring that activities supported by the ECA abide by all human rights, social and environmental policies and, more generally, that the project respects the rights and environment of the affected peoples;
- Providing affected communities with effective remedy;
- Applying to client companies a range of sanctions, including suspension of support and blacklisting if any of the norms are not respected;

From: Select Committee on International Development [Sixth Report](#)

20. ...DFID notes that ECGD does make cover void if corruption by a UK company is discovered and urges consideration of how ECGD can bring greater focus to detecting

¹¹ ECA – Export Credit Agency, a public body responsible for providing public funding cover against risk of loss and non-payment relating to exports to risk countries

cases of corruption in relevant projects. They also "encourage ECGD to implement a black listing system of UK companies found to have been involved in corrupt practices in a court of law".

21. John Weiss for ECGD did not think that they had had in his experience any instances "of companies of whom we have had allegations, or indeed proof, of corruption or bribery that has led us to refuse cover". This is in our view a cause for concern. We plan to consider the question of corruption more closely in a future inquiry. We do not, however, think that simply looking for corruption in the project being covered is adequate. It does not appear that a past record for corruption does much to damage ECGD's assessment of the track record and competence of a company applying for cover. A conviction for corruption or bribery should have consequences for future contracts, both to ensure such practice is not repeated by the company concerned and to act as a deterrent to other companies which might be considering similar practices. The World Bank has a list of firms ineligible to be awarded a World Bank-financed contract because they were found to have violated the fraud and corruption provisions of their Procurement or Consultants Guidelines. In the current version of the Listing, 36 of the 54 companies listed are United Kingdom companies. In a recent written answer the Minister of Trade said that "ECGD has no record of having provided support to any of the firms on that List". This appears, however, not to be the result of any conscious blacklisting but rather circumstance. **We recommend that ECGD blacklist companies convicted of bribery or corruption, at least those found on the World Bank Listing of Ineligible Firms.**

22. There remains the question of what to do when a company seeking cover is being prosecuted for bribery or corruption. There are obviously difficulties in that charges can be unfounded or malicious, and in that in certain jurisdictions processes can take an extremely long time. Simply to refuse cover in such circumstances would obviously be unjust. As unjust would be the postponing of a decision until the trial came to a conclusion - in such circumstances the contract would invariably be won by a competitor. **If, once ECGD cover has been granted, the company concerned is found guilty of corruption or bribery, we recommend that cover be void immediately.** Recent written answers made clear that ECGD is to introduce new procedures to bring their practices into line with the OECD Bribery Convention. We expect the issue also to be addressed in the conclusions of the Review of ECGD's Mission and Status. We will consider the adequacy of ECGD's new arrangements in the context of our current inquiry into Corruption.

7.2 Surveys

Indeed, advocacy groups argue that debarment should be promoted, not in the least because its use is growing and it does appear to have some impact. In its critique of the UK government's Export Credit Guarantee Department, The Corner House¹² argues that debarment is used by:

Various countries including the United States, Singapore, China and Sweden

¹² Hawley, S. (2003). Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department. The Corner House.

South Africa and Germany are in the process of introducing a system of blacklisting companies found guilty of corruption from public procurement. In the US, companies found guilty of fraud and bribery in government contracts in the US can be debarred from such contracts by both state and national government for three years. Reinstatement is not automatic, but subject to the company (or individual) proving beyond doubt that the problems have been resolved.

The US Export Credit Agency, Ex-Im

Under Ex-Im's new mandate authorised in June 2002, the Agency is required to hold a list of and debar for three years all companies that have violated the 1977 US Foreign Corrupt Practices Act or other named legislation.

The World Bank

Under the Bank's debarment policy, which it has operated since 1997, firms are declared ineligible for World Bank contracts if an investigation by a special unit within the World Bank's Internal Audit Department proves them guilty of fraud or corruption. The World Bank is also in the process of setting up a blacklist for wider use by other multilateral development banks and aid agencies.

Some multilateral agencies are now also taking action. Apart from the World Bank discussed below, the European Commission in 2003 moved to blacklisting individuals and companies involved in dishonesty or misrepresentation may be excluded from future work. This is not a new initiative. A Commission Communication dated 21 May 1997 to the Council and the European Parliament on the Union policy against corruption proposed, *inter alia*:

8. Blacklisting provides a mechanism to recognise an undertaking which has been identified as having committed some offence involving corruption. For example, such undertakings can be excluded from entitlements under the EAGGF Guarantee Fund or from competing for further contracts. For information purposes and/or with a view to imposing penalties, it would be useful to set up a comprehensive system applicable to all areas where Community finances are at risk. The civil liability of firms using corrupt practices should be developed, and individuals who report instances of corruption (whistle blowers) should be adequately protected from victimisation.

Thus the procurement documentation now includes a standard requirement that:

Candidates or tenderers will be excluded from participation in a procurement procedure if:

- a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata*;
- c) they have been guilty of grave professional misconduct proven by any means which the Beneficiary can justify;
- d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the

- country in which they are established or with those of the country of the Beneficiary or those of the country where the contract is to be performed;
- e) they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;
 - f) following another procurement procedure or grant award procedure financed by the Community budget, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations.

7.3 Issues and Themes

In general, progress on debarment is slow and patchy. The OECD survey on ECAs confirms the overall picture; little has been written on the issue outside advocacy groups; there has been little official discourse on the merits of a debarment policy and how it would work; and there is a patchwork response in relation to the actions of individual countries. In its 2003 survey, the OECD¹³ looked at the actions of ECAs in relation to allegations or evidence of corruption. While most respondent OECD countries require an undertaking (31 required such an undertaking; only 2 did not) from companies not to engage in bribery and most (27) include such an undertaking as a condition of support, the question of official sanction was limited. Of the respondent countries¹⁴ in relation to evidence of bribery prior to official export support:

25 could deny support for the specific transaction on the suspicion of bribery, rising to 28 on 'sufficient' evidence of bribery and 32 on the basis of a legal judgement. The numbers obliged to act under these 3 categories were nil, 12 and 15 respectively and the available of discretion in so acting was 8, 20 and 25 respectively. In relation to the denial of official support for all business by the same company the figures dropped.

12 could deny support for the business in general on the suspicion of bribery, rising to 17 on 'sufficient' evidence of bribery and 20 on the basis of a legal judgement. The numbers obliged to act under these 3 categories were nil, 2 and 2 respectively and the available of discretion in so acting was 1, 8 and 8 respectively.

Of the respondent countries in relation to evidence of bribery after official export support and the possibility of denying access for any future support for any business, only 9 could do so on suspicion of bribery (none were obliged to do so, and none had the option to do so); 11 could do so on sufficient evidence (but none could or had to do so) and 13 could do so after a legal judgement (but none were obliged to do so and only 3 had the discretion to do so).

Only one country had experience of blocking support on a specific transaction and none had any experience or practice of what could be termed blacklisting or debarment. Few if any countries proposed further action or had any actual experience of debarring companies and none indicated any wish or intent to share data on blacklisted companies or evidence of abuse (although a number did inform their law enforcement agencies of braches of the law).

¹³ OECD. (2003). *Working Party on Export Credits and Credit Guarantees: Responses to the 2002 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits – as of 31 March 2003*. OECD.

¹⁴ 3 countries – Hungary, South Korea and Japan returned responses from two ECAs in their countries.

The NIS studies¹⁵ confirm that there are few countries that operate such a policy in practice – see Table 1, next page.

In general, apart from the existence of a debarment policy, there are a number of issues relating to the practice of such a policy: is it a legal or an administrative function; is information shared; do agencies coordinate what they do and/or cooperate in what they do; does the practice match the policy.

These questions are explored further in the one country – the USA – where the database searches suggest debarment approaches are most developed.

Question	Country	Response
Are there provisions for blacklisting of companies proved to have bribed in a procurement process?	Argentina	No, there are no records or databases of previous contracts.
	Bangladesh	Yes , there are such provisions. Companies have been black-listed for various reasons. But it is not known if any has been black-listed for paying a bribe in procurement processes.
	Botswana	There are no formal provisions laid down for dealing with such companies. However, in practice this is done. The name of such a company will be removed from the register of companies that can participate in tenders with the CTB. As an example, Wade Adams' name was removed in 1992 when it was involved in a corruption scandal affecting the Botswana Housing Corporation.
	Brazil	Yes . Not only proven corruptors are barred from participating in further bids for certain periods, but there are also financial penalties and the perpetrators can be subjected to criminal charges. Very rarely corruptors are punished, because there's no paper trail and no testimonials. At the most, procurements are court-ordered to be interrupted and, in some cases, contracts are cancelled. One of the law's vulnerabilities is the fact that, although blacklisted firms are prohibited to bid during certain periods of time, their owners' names are not entered into a register. Thus, "blacklisting" doesn't work, as it suffices to open a new firm.
	Bulgaria	No
	Canada	No. The Canadian Criminal Code provides for lack of ability to contract only if convicted under certain sections of the Criminal Code. There is no blacklisting per se of companies by federal departments.
	Colombia	No
	Fiji	No
Gambia	No	

¹⁵ The NIS studies are based on an approach developed by Jeremy Pope, Transparency International. The Fraud Management Studies Unit, Teesside Business School, have undertaken 2 surveys (one funded by the Dutch government and one by the UK government). The surveys comprise a report and a completed questionnaire. One question in the latter is: *Are there provisions for blacklisting of companies proved to have bribed in a procurement process?* The question relates to any public procurement process, and not solely involving donor funding.

	Ghana	No
	India	Yes
Are there provisions for blacklisting of companies proved to have bribed in a procurement process?	Jamaica	No
	Jordan	No
	Kazakhstan	No
	Kenya	No. Flawed procurement procedures can open a systematic avenue for ripping off public resources by well-connected contracting firms. Concerned about such wastage, both the PAC and PIC have in the past recommended the blacklisting of some firms and pinpointed individuals who should not hold public office. Unfortunately, a number of individuals censured have been appointed to executive positions elsewhere, while the identified firms continue to be awarded government projects in total disregard of the PAC and PIC recommendations.
	Lithuania	No
	Malaysia	No
	Malawi	No
	Mexico	Mexican legislation does not include a “black list” of companies. However, Article 77 of the Ley de Obras Públicas y Servicios relacionados con las mismas and article 60 of the Ley de Adquisiciones, discusses the selection, designation, employment, promotion, suspension or destitution of any person involved in the bidding process or the application of the contract when there is a personal interest (such as family or business) or a personal benefit. The penalties for committing such faults can be (depending on gravity of the fault).
	Mongolia	No
	Nepal	Yes
	New Zealand	No
	Nigeria	No
	Pakistan	Yes. The International Federation of Consulting Engineers FIDIC which has been incorporated in the Procurement Procedures established by the Pakistan Engineering Council Rules of Procurement spells out the procedures for blacklisting. Under these rules, the awarded contract can be canceled once it is proved that it was awarded on corrupt acts. Blacklisting rules are also available
	Papua New Guinea	No
	Senegal	Yes. Order in Council n° 82.690 date 07.09.1982 provides for sanctions against faulty companies
	South Korea	Yes
	Tanzania	Part VI of the Public Procurement Act no.3 2001 carries provisions concerned with Fraud and Corruption for procuring and approving entities as well as tenderers, suppliers, contractors and consultants under public financed contracts.

		Section 60(2) of the Act provides that “where a procuring entity or an approving authority is after appropriate investigations, satisfied that any person or firm, to which it is proposed that a tender be awarded, has engaged in corrupt or fraudulent practices in competing for the contract in question, the entity or authority may: (a) reject a proposed for award of such a contract. (b) declare any person or firm ineligible for a period of 10 years to be awarded a public financed contract.
	Trinidad and Tobago	No
	Uganda	Yes , the “Code of Business Conduct” which comprises the schedule of the Public Finance (Procurement) Regulations 2000.
	United Kingdom	No
	Zambia	No
	Zimbabwe	Yes . In terms of section 39, bribery, fraud or collusion by a supplier renders the resultant procurement contract void. Where an entity is proved to have been involved in acts of corruption, fraud or collusion during the tendering process, or where a procurement contract has been cancelled on account of corruption or fraud, the State procurement Board may declare the supplier to be ineligible to participate in procurement proceedings with the State or any statutory body for such period as the Board may specify. The said period shall not exceed three (3) years [Section 41].

7.4 The USA Example

The surveys and database searches do show that, in terms of both the use of debarment and the discussion on its effectiveness, the USA appears to be the most common user. Given the long history of contract corruption in the USA, and governments’ attempts to address it (going back to the mid-19th century), there appears little policy debate about the appropriateness of debarment. Rather, the focus is very much on the procedural aspects of the implementation of debarment. Thus it is noticeable the number of website and other sources which provide information on debarment activities at State and Federal levels that cast some light on the issues raised above. The current (and limited) debate – see 1.5 below – is not about debarment as a policy but about issues of implementation. Before summarising such issues the following examples are a useful guide to some of the concerns discussed above about making debarment an effective deterrent and sanction:

What is debarment? An example of a definition and stated purpose

From: State of New Jersey Executive Order #34:

‘Debarment, suspension and disqualification are measures which shall be invoked by the State to exclude or render ineligible certain persons from participation in contracts and

subcontracts with the State, or in projects or contracts performed with the assistance of the subject to the approval of the State, on the basis of a lack of responsibility. These measures shall be used for the purpose of protecting the interests of the State and not for punishment. To assure the State the benefits to be derived from the full and free competition between and among such persons and to maximize the opportunity for honest competition and performance, these measure shall not be invoked for any longer than deemed necessary to protect the interests of the State’.

The Order provides a full legal framework, including grounds for debarment, length of debarment, responsibilities, publication of debarred companies, redress, etc.

Using Debarment and Information-Sharing

From: State of Hawaii Procurement Office:

Step 8: List of Debarred and Suspended Persons §3-126-18, HAR

A. A CPO making a suspension or debarment decision shall notify the State Procurement Office (SPO) of the action, including a copy of the decision to debar or suspend. The SPO shall issue an updated list of persons or firms debarred and suspended to all governmental bodies and post on website.

B. Upon notification of a debarment or suspension action from the SPO, a CPO shall make a written determination whether to allow the debarred or suspended person or firm to continue performance on any contract awarded prior to the effective date of the debarment or suspension.

From: Environmental Protection Agency:

Under EPA's [Suspension and Debarment Program](#), the Suspension and Debarment Division in OGD works with other EPA organizations, including the Office of the Inspector General, the Office of Acquisition Management, the Criminal Investigation Division, and the Grants Administration Division, as well as other Federal agencies, to develop suspension and debarment cases. These cases are then considered by EPA's Debarring Official. The Debarring Official issues written decisions based on the administrative record and refers material issues of disputed fact to an independent Fact-Finder. A decision to debar or suspend a company or individual is not punitive in nature but rather a business judgment to ensure the integrity of Federal programs.

Debarment, its extension beyond procurement and the requirements placed on applicants

From: Department of Health and Human Services in relation to National Research Service Award Individual Fellowship application

Executive Order 12549, "Debarment and Suspension," mandated development of a Government-wide debarment and suspension system for nonprocurement transactions with Federal agencies. Executive Order 12689 and Section 2455 of the Federal Acquisition Streamlining Act of 1994 further required Federal agencies to establish regulations for

reciprocal Government-wide effect across procurement and nonprocurement debarment and suspension actions. This reciprocity rule is effective for any debarment, suspension or other Government-wide exclusion initiated on or after August 25, 1995. HHS regulations implementing Executive Orders 12549 and 12689, and Section 2455 of the Federal Acquisition Regulation are provided in 45 CFR 76, "[Government-wide Debarment and Suspension \(Nonprocurement\) and Government-wide Requirements for Drug-Free Workplace \(Grants\)](#)." Accordingly, before a grant award can be made, the sponsoring institution must make the following certification (Appendix A of the HHS regulations):

- 1 The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals (including research personnel):
 - a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;
 - b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph 1.b of this certification; and
 - d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

7.5 The US Example: A Practitioner Critique

The question is whether the US approach works. In 2003, a colloquium¹⁶ at the George Washington University Law School brought together practitioners and lawyers whose main themes and conclusions about debarment were that the process was unfair, uneven, often politically or administratively circumvented by both sides. Some of the themes that emerged were that:

Fairness

The empirical evidence strongly suggests that the critics are right. From the perspective of the contractor community, the Government's suspension and debarment powers are not applied fairly. Conventional wisdom is that these tools are used heavily used against small firms and individuals who, confronted with a demanding, ruleobsessed government customer, frequently find themselves in over their heads. Conversely, large, important, or merely useful firms appear immune to the suspension and debarment remedy. For larger contractors, alternative actions – typically compliance agreements – seem to suffice. As POGO's¹⁷ database demonstrates, the Government has a long history of successfully prosecuting its contractors – or suing contractors for false claims – without suspending or

¹⁶ The George Washington University Law School. (2003). Public Law and Legal Theory Working Paper No. 88. Suspension and Debarment: Emerging Issues in law and Policy with a number of the papers to be published in Public Procurement Law Review (Draft) Volume 13 (Forthcoming 2004)

¹⁷ POGO – Project on Government Oversight

debaring them. Before Enron and Andersen, the only major defence contractor suspended for decades was General Electric, and that appeared a largely symbolic gesture.¹⁸

Centralized Information

The POGO... database includes all misconduct committed by federal contractors, whether during the course of doing business with the government or not. POGO takes the position that a company's actions are relevant whether working on public or private contracts. Having said that, POGO would be satisfied if the government demonstrated any willingness to suspend or debar large contractors more frequently simply for misconduct directly related to government contracting. That would go a long way to providing a meaningful deterrent to future poor practices.

POGO strongly supports HR 5292, the "Contractor Accountability Act of 2002", sponsored by Congresswoman Carolyn Maloney of New York with strong bipartisan support. HR 5292 does the following:

- Establishes a centralized database on actions taken against federal contractors and assistance participants, requiring a description of each of these actions. This will provide debarring officials with the information they need to protect the business interests of the United States.
- Places the burden of proving responsibility and subsequent eligibility for contracts or assistance on the person seeking contracts or assistance should they have been previously convicted of two exact or similar violations that constitutes a charge for debarment.
- It improves/clarifies the role of the Interagency Committee on Debarments and Suspension and provides for retention by the prosecuting Federal agency of fines paid by offender for reimbursement of costs associated with suspension and debarment activities".¹⁹

Improved Government Responsibility

Immediate changes obviously need to be made: (1) agency heads who are directly impacted by the inconvenience of dealing with a suspended or debarred contractor should not have authority to waive (or worse yet, delegate that authority to low-level procurement officials) the debarment without oversight by the Office of Management and Budget (OMB) or another high-level and impartial body; (2) clear and reviewable standards for what constitutes a "compelling reason" for a waiver should be issued; and (3) when it is functioning as a buyer, the Government's own requirements for corporate integrity -- including how and under what circumstances debarment can be lifted -- should be revised to comport with current standards of corporate accountability and those decisions should be overseen by an outside authority, just as the SEC oversees corporate compliance.

[Marcia G. Madsen. "The Government's Debarment Process: Out-of-Step with Current Ethical Standards". p1]

¹⁸ Professor Steven L. Schooner: *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, Page 7

¹⁹ Danielle Brian, Executive Director, Project on Government Oversight: *Contractor Debarment and Suspension: A Broken System*, page 31.

Improved Corporate Responsibility

Clearly, guidance in what constitutes an effective program to prevent and detect violations of law is widely available for corporations to follow, and for debarring officials to use in their decision making. To have an effective program, the corporation must exercise due diligence and otherwise promote a culture that encourages a commitment to compliance with the law. The minimum elements of an effective program are:

1. Corporate standards of conduct and internal controls.
2. Support of the standards and controls from the governing authority of the corporation by words and actions.
3. Communication of the standards and controls to all level of the organization by training and otherwise.
4. Auditing and monitoring of the effectiveness of the program.
5. An internal system by which employees and agents may report or seek guidance regarding potential or actual violations of law.
6. Disciplinary action for misconduct.
7. Prompt correction of failures in internal controls.

These seven elements of an effective program should be and often are considered by debarring officials in determining the proper disposition of a corporation within which an agent's conduct has been revealed to establish a ground for debarment. Absolute corporate liability can lessen the incentive for a corporation to devote the energy and resources required to sustain an effective program to prevent and detect violations of law. If the existence of a program didn't make any difference to the debarring official, why spend the effort? That simply is not good public policy. Those who complain against the agency when a convicted corporation nevertheless is spared debarment fail to recognize that the agency most likely has identified good and sufficient business reasons for the result".

[Richard J. Bednar. 'Emerging Issues in Suspension and Debarment: Some Observations from an Experienced Head'. p20]

8 The case studies

Below are the detailed responses to the questionnaire [the questionnaire itself is included in the separate document – Annexes].

8.1 Singapore

A. Context

What documents/laws etc. are there establishing the general approach to government procurement/contracting, including processes, existence of a Tender Board, etc (please reference the documents and attach them)?

Pursuant to the Agreement on Government Procurement 1994 under the WTO (“Marrakesh Agreement”), the legislature enacted the Government Procurement Act in 1997, which sets out the legal basis for the Minister (of Finance) to make regulations pertaining to procurement, the duties of Contracting Authorities (public bodies that have purchasing functions) to suppliers, and most significantly, the Challenge Proceedings procedure (whereby suppliers can challenge the Contracting Authorities if it is felt that the latter had breached these duties.

This legislation came into force five years later via the Government Procurement Act (Commencement) Notification 2002. In that year, secondary legislation setting out the procedures pertaining to the award of tenders (Government Procurement Regulations 2002); minor formalities with regard to the Challenge Proceedings (Government Procurement (Challenge Proceedings) Regulations 2002), and the ambit of “procurement” and “Contracting Authorities” (Government Procurement (Application) Order 2002).

In addition, the Ministry of Finance has produced documents to further describe the procurement process: Contracts and Purchasing Procedures (http://www.gebiz.gov.sg/scripts/doc/contract_purchasing.pdf) and Revenue Contracting Procedures (http://www.gebiz.gov.sg/scripts/doc/revenue_contracting.pdf).

What documents/laws etc. are there establishing the procedures/practice relating to blacklisting (please reference the documents and attach them)?

There is no legislation or case-law in Singapore to such effect. The blacklisting procedure is entirely an administrative creature. The main documents that pertain are Contracts and Purchasing Procedures and Revenue Contracting Procedures (see (1) above).

B. Blacklisting process

Is the process administrative or judicial in nature?

Administrative. There is no legislation, either primary or secondary, pertaining to the debarment process, and the procedures are wholly prescribed and implemented administratively. The

Ministry of Finance in Singapore prescribes the procedure, and its Standing Committee on Debarment (SCOD) implements it.

If administrative, is there recourse to the courts by way of judicial review? (Has this happened?)

At general law, as the debarment procedure is carried out pursuant to the SCOD's exercise of a public function, and the legislation on government procurement do not expressly oust the courts' jurisdiction in this respect, judicial review is possible.

A search on LawNet, where all reported and unreported cases in the local courts are stored electronically, yields no results for cases where debarment in the procurement context was considered.

What are the procedures associated with any administrative process:

Is there a formal hearing?

No formal hearings, or hearings of the to-be-debarred firms, have been provided for in the procedure set out by the Ministry of Finance.

Who conducts the hearing?

- Is it “adversarial” or “inquisitorial” in nature?
- Are lawyers present?
- Is evidence given on oath?
- Is evidence given in person or by affidavit?
- Is cross-examination allowed?
- How is evidence recorded?
- Are third parties (i.e. other bidders) permitted to attend?
- If so, are they entitled to lead evidence?
- What is the burden of proof to be discharged – beyond reasonable doubt or on the balance of probabilities (i.e. the criminal or the civil burden of proof)
- On whom does it rest?

As there is no formal hearing – and indeed no hearings have been contemplated in the debarment procedure – the sub-questions above cannot be answered as such. No witnesses are called or heard in person, and no primary evidence is adduced. Rather, the evidence is presented to the SCOD in the form of written submissions (“recommendations”), by the Government Procuring Entity (GPE) that seeks the debarment. Hence the questions pertaining to the adduction and interpretation of evidence, the calling of witnesses and the availability of counsel are not applicable.

Is it for the debarment officer to make out the case for debarment?

Is it for the suspected entity to establish a degree of innocence?

These two questions presuppose the traditional criminal law paradigm, where the State has to present its case and the defence has to raise a reasonable doubt. As the SCOD does not function

as a tribunal as such, and there is no hearing, it is not the case that there is a debarment officer, analogous to the Deputy Public Prosecutor in the criminal hearings context, who argues the case in opposition to a defendant or defence counsel before an adjudicating party. Rather, the evidence is presented to the SCOD in the form of written submissions (“recommendations”), by the Government Procuring Entity (GPE) that seeks the debarment. Before the GPE makes the recommendations, it has an administrative duty to warn, in writing, the defaulting party that it is going to do so, and to ask them to explain their default within 10 days (presumably of the date of the warning letter). The letter of explanation has to be submitted together with the recommendation to the SCOD.

If administrative, is there a right of appeal into the ordinary courts?

Appeals to the High Court from decisions of tribunals or persons are governed by Order 55 of the Rules of Court, which circumscribes its application to ‘every appeal which under any written law lies to the High Court from any court, tribunal or person’. No such right has been provided for in any legislation, or in the procedure established by the Ministry of Finance. Hence there is no ‘written law’ to such effect, and no right of appeal exists. This view is buttressed by academic commentary:

But a right of appeal is a statutory right; it is entirely a creature of a statute. One can take an appeal to a court against a decision of an authority only if the law provides for the same. An appeal does not lie unless the law expressly provides for the same.²⁰

C. INVESTIGATION PROCEDURES

Who conducts the investigation? What is their unit/agency? Does the same unit/agency always investigate debarment?

The administrative guidelines do not contain an investigation procedure. As no provision is made for interviewing of witnesses/ any parties, or the perusal of any documentation, it appears that there is no procedure for the ascertaining of the veracity of the facts.

However, if ‘investigations’ merely means the first-instance determination of the facts independent of any ascertaining of the veracity of the facts, it appears that for the case of contracts which involve individual Ministry Departments, where Recommendations to the SCOD have to be approved by the Permanent Secretary or his delegate, the investigative function rests with the respective parent Ministry. For the case of GPEs that are Statutory Boards (semi-public sector agencies created by an Act of Parliament and funded by the state), which can submit the recommendations directly to SCOD without going through their parent Ministries, as long as these are approved by the Statutory Board’s CEO or his nominee of Divisional Director rank, the investigative function would appear to rest with the Statutory Board itself.

However, if the ground for debarment is corruption, the matter would be referred to the Corrupt Practices Investigation Bureau (CPIB) which would then be the investigating authority.

Do they have specific powers under the relevant legislation?

²⁰ See - M. P. Jain, Administrative Law of Malaysia and Singapore (Singapore: Malayan Law Journal Pte Ltd, 3rd ed., 1997: 625.

No, debarment is not provided for legislatively. If the investigative authority is the CPIB, the CPIB has powers derived, not from the procurement legislation, but from the Prevention of Corruption Act.

What information can the investigators access etc.?

There is no mention in the administrative documents of the bodies responsible for the first-instance determination having any power to peruse primary documentation or to call witnesses. Hence, it appears that the only information that is available is the written memoranda/documentation that the Department with the closest nexus to the alleged defaulting contractor chooses to submit.

If the investigating authority is the CPIB, it has all the powers to procure information and summon witnesses as governed by general corruption law.

D. Sanctions

What are the criteria for the length or extent of a particular debarment once a case is found against an entity?

The criteria vary with the grounds for debarment. More pertinently to the remit of this research project, if the ground is corruption, there is a minimum debarment period of 5 years, with no upper limit provided for.

Is a distinction made between subsidiaries and parent corporations?

If the parent corporation is involved in corruption, after 1st April 1997 its subsidiaries will also be debarred. As companies on which debarred directors/partners/sole proprietors sit will also be debarred, if the subsidiary is involved in corruption and its directors also sit on the parent company's board, then the parent company would be debarred.

8.2 New York

A. Context

What documents/laws are there establishing the general approach to government procurement/contracting, including processes, existence of a Tender Board etc.?

New York City has a comprehensive system regulating procurement and establishing sanctions for breaches of procurement rules. Procurement is covered by State and City law and by a number of administrative procedures.

The New York City Procurement Policy Board sets overall rules and procedures for procurement; it does not have any role in administering contracts or dispute arising from a contract.

The New York City Procurement Policy Board has set out in detail the procedures, rules and regulations concerning procurement in documents Procurement Policy Board Rules and Vendor

Information Manual. A comprehensive site covering General Information for Vendors is located at: http://www.nyc.gov/html/selltonyc/html/new_vendors.html

As part of the establishment of overall procurement rules and practices, the New York City Procurement Policy Board developed the Procurement Ethics Guide 2002, which sets out the standards required of prospective contract bidders; describes the rules and procedures for bidding and rules and procedures whilst actually delivering the contract. A clear statement of sanctions for misconduct is included, as well as a brief 'Q&A' on important issues.

Some contracts require competitive procedures; other do not [value is an issue here]. The New York City Council sets the rules under which a competitive process is triggered.

Individual contracts are awarded by Agency Heads. An Agency Head is defined by the New York City government as: "heads of city, county, borough or other office, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury."

Is there a general concern over government procurement corruption?

Yes, for three reasons. 1] The large amount of government contracting, which amounts to approximately \$9 billion per annum presents an opportunity for criminal gain. 2] Corruption related to city government contracts has regularly involved organised crime. This has been evident in contracts for the construction industry, waste clearance and disposal, cleaning, building and road repair, building maintenance. 3] There is a significant amount of corruption unconnected to organised crime. These cases are perpetrated by individuals or networks of individuals and can amount to large sums of money.

What documents/laws are there establishing the procedures/practice relating to blacklisting?

The procedures relating to blacklisting are incorporated in the general documents concerning procurement discussed above. The issues of infringing on contract processes and delivery are well integrated into the bidding process.

Describe the standard procurement process

Firstly a bidder must be on the list of bidders permitted to receive invitations to tender. This is known as being prequalified.

Secondly once bidding, a contractor must undergo screening. The major method for this is the VENDEX system. A VENDEX examination is normally conducted on the lowest bidder for a contract. VENDEX applies in the following circumstances: vendors in line for a contract of \$10,000 or over and which they are the sole bidder; any single contract amounting to \$100,000 or over; or if the individual's/company's business with New York City in any one year is \$100,000 or over must fill in a complex questionnaire to decide their suitability. In 2002 66,000 VENDEX checks were made.

- There are a list of criteria on which a bidder may be refused:
- failure to fully disclose via the normal procedures [see VENDEX]

- non-compliance with material specifications of contract
- non-compliance with the terms and conditions of the contract
- failure to provide proper pricing information
- failure to sign the bid properly
- failure to sign alterations to the bid properly
- late bids
- insufficient bid security
- failure to submit information requested by the contractor

If a bid is refused on these grounds the contractor is referred to as non-responsible. An appeal may be made against this decision.

Third, if a contract is awarded the person/company can subsequently be debarred due to:

- false statement on a VENDEX form
- fraud
- theft
- embezzlement
- bribery
- price fixing
- “any other offense that indicates a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a supplier to the City”

Companies have been debarred both before the bidding process due to information received [a subject of controversy] during the bidding process, as a result of a VENDEX check, and during their performance of a contract under the criteria specified above.

Is it possible to identify what types of contracts/companies/projects are most vulnerable to the activities that lead to blacklisting?

In a general manner. Many contracts offered by New York City government contain possibilities for unethical actions which lead to blacklisting. Contracts for ‘low level’ services such as cleaning and catering can be valuable since the government disburses \$9 billion worth of contracts per annum. Similarly organised crime can be involved in these contracts. The idea that organised crime operates only in illegal markets or in legal markets [construction] which may create big profits is a misleading idea. Organised crime is involved in a number of areas such as garbage disposal or road repair which can generate substantial income. This applied to individuals not connected to organised crime. However if one area were to be selected as being risky it would be construction.

B. Blacklisting process

Is the process administrative or judicial in nature?

The process is administrative but may have criminal implications. For example if an individual/company deliberately submits false information as part of a background VENDEX check this may constitute fraud.

If administrative is their recourse to the courts by way of judicial review?

No. The individual/company can take civil action against the New York City government if it feels the decision is wrong and has caused substantial loss. This latter course of action has occurred.

What are the procedures associated with any administrative process?

The process is as follows:

As mentioned debarment proceedings may be instituted at any time towards an individual/company. The proceeding will be initiated by the head of an Agency [see the definition of Agency in A. CONTEXT above] after s/he has consulted with legal counsel.

The Agency head petitions the Office of Administrative Trials and Hearings (OATH). The Agency head can request a debarment of up to five years.

The individual/company is sent a notice of proposed debarment. The individual/company is provided with a time limit to reply to the debarment application. The individual/company may request a hearing. This hearing operates under OATH rules. If debarment is decided on, OATH sets the time limit.

Whilst this petition is being considered the Agency may suspend the accused person/firm for up to three months. This suspension is not part of the debarment process. The decision is made by the chief contracting officer of the agency. This decision can be appealed, but only to the head of the Agency.

Is it for the suspected entity to establish a degree of innocence?

Yes

What is the balance of proof?

Not criminal, although rigorous evidence must be supplied.

If administrative, is there a right of appeal to ordinary courts?

Not Known

What are the procedures associated with any judicial process?

N/A

If judicial, is there a right of appeal into the ordinary courts?

N/A

If appeals have been excluded, have these exclusions been tested in the courts?

Not Known

C. Investigation procedures

Who conducts the investigation?

The Department of Investigation [DoI]. The DoI investigates fraud, corruption and unethical conduct in the 70 agencies in New York. It investigates such conduct by city employees and contractors. If necessary it refers cases to the relevant authorities for prosecution (e.g. the Attorney General). The DoI conducts VENDEX checks [see above] on employees and contractors and calls for an investigates financial disclosures by the same.

Do they have specific powers?

No additional powers other than those specified by law. The DoI is a law enforcement agency.

What information can the investigators access?

The DoI, as mentioned can request financial disclosure from individuals/groups. The DoI can investigate on the basis of VENDIX reports which potential contractors have to fill in. The DoI can also examine other relevant procurement information. The DoI can engage in surveillance and investigation in the way that other law enforcement agencies can under the relevant state and Federal law.

What lessons are available in terms of the success or failure of investigations?

A particularly powerful lesson for developing countries. The DoI is a major body with a budget of \$20 million and significant investigatory power, including approximately ex-police personnel, lawyers, forensic accountants and computer specialists. this capacity is required to investigate the complex structures around many procurement frauds. Even where the frauds are not complex - many frauds in New York City are remarkably crude - the DoI has the capacity to investigate a number of cases. In 2002 and 2003 the DoI investigated between 1,600 and 1,700 cases and processed them via arrest, criminal referral, civil referral (for financial restitution etc.), disciplinary referral and other disposal. In 2002 the DoI investigations led to \$44 million being levied or recovered from individuals/companies.

There is great debate over the effectiveness of investigative agencies, particularly those which employ - or lead to - the levying of financial penalties on suspects. This is the case with regard to the Serious Fraud Office in the UK, the Serious Fraud Office in New Zealand, the Asset Recovery Bureau in the Republic of Ireland and other relevant agencies in the United States. Developing countries should carefully consider the requirements of establishing a credible investigatory function for policing contracts and providing the evidence for debarment.

The system in New York required strengthening with whistleblower legislation to encourage reporting. The system in New York has recently encouraged reporting via the internet to add to a long existing phone line.

D. Sanctions

Are individuals debarred as well as companies?

Yes

What are the criteria for the length or extent of a particular debarment once a case is found against an entity?

Seriousness of offence; risk posed to the procurement process.

Is a distinction made between subsidiaries and parent corporations?

Not Known

Is the impact on the particular project a factor?

Yes

Or the impact on the environment?

Not Known

Or the impact on the workers involved?

Yes, the DoI investigates labour violations in contracts as a major criteria. City contractors are required to pay their workers the 'prevailing wage' and failure to do so leaves the individual/corporation open to criminal and administrative penalties.

Does either have to be an actual impact or is potential impact a factor?

Not Known

Is the penalty confined to a particular part of an entity's business portfolio or does it attach to the whole of its operation?

Not Known

Is the seniority of those involved a factor?

No. Investigations and sanctions have focused on very low level individuals/companies, as well as high level individuals/companies.

What is regarded as mitigating circumstances?

This varies. There is a generally strict interpretation of the rules because bidders are informed in detail of the requirements of conducting business with the city and of the standards they have to meet [see the documents cited in section A. CONTEXT] However debarment is by no means an automatic penalty. The individual/company may have its contract terminated. However a report

of this will be entered on the VENDEX database and will be available for access by agencies the next time a contract is tendered for.

It should be noted here that on a more long term basis there is provision for the city government to conduct business with companies that would otherwise be debarred. This is done through the Independent Private Sector Inspector General Programme. Under this programme bidders are awarded a contract if they agree to be monitored by an outside agency in the form of a law or an audit firm. The Programme was instituted in 1996. From 1996-2002 20 firms performed contracts under this programme.

Does the penalty apply to all corporations with the same management?

Not Known

Is there any evidence of donor/IFI funding opposition to the practice as transgressing procurement competition requirements?

N/A

Is the publicly available document list enforced by agencies other than the agency which made the debarment?

Not enforced, but the list is available to other state governments, other local governments (municipal) and the Federal Government. These agencies may use the debarment information in their decisions.

E. Assessment and impact of blacklisting

- Is the policy governed by a medium or a long term strategy?

A long term strategy. It is particularly important to note that the New York debarment policy has been refined over time. There was criticism over the VENDEX system and the quality of intelligence and over the implementation of the debarment system. The VENDEX system appears to have been markedly improved.

Further, debarment is only one component of an anti-corruption architecture which includes laws and policies on corruption and whistleblowing, criminal investigation bodies, criminal and civil penalties, risk assessment and the use of criminal and civil cases to refine anti-corruption policy, and a strong public relations programme. Whilst parts of the New York strategy have been subject to legitimate criticism, it is evident that the city clearly enforces an anti-corruption policy.

Are there performance indicators for the policy?

No, statistics are available but they are not accompanied by a methodology combining performance indicators and an analysis of outcomes.

Is the policy subject to any regular review process to evaluate success or performance indicators?

Yes, there are regular internal reviews of the policy incorporating the view of relevant actors. As mentioned the Procurement Policy Board reviews policy. The Department of Investigation also has input.

How many corporations have been blacklisted in the last five years?

In the Schools construction sector alone 430 firms have been debarred on criteria including past criminal offences, poor performance and links to organised crime.

On average, how long does a blacklisting process take?

Not Known

What policies are in place to ensure blacklisted companies do not undermine the list?

The VENDEX check, mentioned above. The DoI may request financial disclosure or conduct an investigation as a result of intelligence from the VENDEX answers, information on the existing VENDEX entry or from intelligence from the relevant city government agency head or a citizen. Firms have been blacklisted on the basis that they are fronts for previously disqualified firms.

This demonstrates the need for a basic record keeping of companies' registration and personnel (i.e. a 'Companies House' record site) which investigatory agencies can check, as well as the development of a workable database on firms similar to the VENDEX which is able to cross check data.

Is there reliable evidence that any companies have established policies to avoid being blacklisted?

No, but the procurement process has ethical and professional issues, and the outlining of sanctions, clearly embedded in it.

Overall, does the process work?

Depends on the criteria adopted. According to a liberal campaign group (Corporate Crime Reporter Public Corruption in the United States CCR 2004), which analysed US government and criminal and civil legal reports from 1993-2002, New York was ranked the 10th most corrupt state in the USA. However this report did not disaggregate the results to show whether procurement was a major part of this.

The question also begs a counterfactual analysis: what would the position would be if the policy was not in place? The answer is probably worse. The size of New York City procurement provides opportunities for corruption, and the historic role of organised crime in the city is also a factor. Corruption control may have been helped by the Federal, state and city authorities campaign against organised crime in the early 1990s (e.g. against John Gotti) , when the debarment policy was being introduced, but it is reasonable to suppose debarment has played a role in controlling corruption in procurement. What may have helped to a greater extent is the fact that, as mentioned, procurement is only one (minor?) part of an anti-corruption architecture in New York. Also crucial is the comprehensive system of disclosure that bidders have to submit to in order to conduct business with the city. The city has a number of investigative organisations, particularly the Department of Investigation, which are credibly resourced to

investigate allegations of corruption with an eye to bringing criminal charges or civil restitution. This is probably more important than the threat of debarment.

How much attention is given to blacklisting in the media?

Attention is given not only to blacklisted companies but to any individuals and companies convicted of corruption related offences. Detailed press releases cover the cases and names in depth.

Is a register kept of blacklisted companies and published?

The list is available to all New York City agencies, other state governments, other local governments (municipal) and the Federal Government. These agencies may use the debarment information in their decisions.

Is there a policy on what a blacklisted company must do to be re-included on tender lists?

There is provision for the city government to conduct business with companies that would otherwise be debarred. This is done through the Independent Private Sector Inspector General Programme. Under this programme bidders are awarded a contract if they agree to be monitored by an outside agency in the form of a law or an audit firm. The Programme was instituted in 1996. From 1996-2002 20 firms performed contracts under this programme.

Have there been any examples of repeat offenders (the same company, or the same managers in a different company)?

Yes, the same managers in a different company, the same company using a 'front' company.

Does it (seem to) render the processes cleaner?

Yes

Does it (seem to) work better in some sectors than others?

This would require more in depth analysis.

If so, how do we know (has there been any research)?

The city government is quite clear on its procurement and debarment policies. Information is available via published documents, via the internet, via email request. An article on debarment in New York was quite critical of the city's debarment approach. It did raise some important questions concerning whether debarment a) affected the efficiency of government operations and b) could be circumvented. However the system was in its infancy at that stage and the article produced no credible long term analysis of whether the policy was working or not.

Is there room for improvement?

Probably not in the debarment policy. As mentioned the most important factor about the debarment policy is that it functions as a penalty as part of a rigorous bidding and checking/risk

assessment procedure. It is more important to develop a rigorous procurement system rather than relying on debarment to underpin the system. New York has a vigorous criminal investigation and prosecution policy which may be more of a deterrent than debarment. Also important is the use of civil financial penalties on those individuals/companies committing transgressions during their contract.

If the context of the debarment policy is important, so is its actual functioning. If there are regular exceptions, if individuals/companies can quite easily be redeemed then the policy will be ineffective.

The New York experience demonstrates the need for capacity in running a debarment system: effective general intelligence on the business registration of individuals/companies i.e. normal company governance; effective intelligence for the purposes of debarment or risk (such as the VENDEX system); effective sources of intelligence on companies/individuals acting unethically; effective intelligence exchange on these matters; and exchange with other relevant central and local government agencies on individuals/companies selected for debarment.

In addition, many of these matters may raise civil liberties issues.

8.3 World Bank

A. Context

What documents/laws etc. are there establishing the general approach to government procurement/contracting, including processes, existence of a Tender Board, etc (please reference the documents and attach them)?

See, for procurement of goods, works, and services:

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

And, for selection of consultants:

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060656~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

Is there a general concern over government procurement corruption – please describe background and reasons, etc?

Yes. The WB has long sought to be exemplary in the procurement it finances; otherwise it would be vulnerable to charges of abetting borrowers in corruption, which wastes the money loaned.

What documents/laws etc. are there establishing the procedures/practice relating to blacklisting (please reference the documents and attach them)?

See:

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84269~piPK:60001558~theSitePK:84266,00.htm>

Describe the standard procurement process (value, type of service/project, etc) and identify over the past ten years where in that process companies have been blacklisted, with case studies or examples.

About 150 firms debarred; 5 letters of reprimand but no debarment. See, for list:

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20066549~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

Is it possible to identify what types of contracts/companies/projects are most vulnerable to the activities that lead to blacklisting?

The least competitive ones. The best procurements are those involving international competitive bidding.

B. Blacklisting process

Is the process administrative or judicial in nature?

Administrative.

If administrative, is there recourse to the courts by way of judicial review? (Has this happened?)

No.

What are the procedures associated with any administrative process: Is there a formal hearing?

Yes.

Who conducts the hearing?

The Sanctions Committee

Is it “adversarial” or “inquisitorial” in nature?

Adversarial.

Are lawyers present?

They can be.

Is evidence given on oath?

Written submissions are accompanied by a signed statement that they are “truthful to the best of the signer’s knowledge.”

Is evidence given in person or by affidavit?

The committee may call witnesses; the respondent may make or provide a statement. Members of the Institutional Integrity Department who investigated the matter are present.

Is cross-examination allowed?

No, but rebuttal evidence may be presented.

How is evidence recorded?

It is in the record of proceedings – the notice, reply, etc.. (Little oral testimony is used, although it could be under the procedure. When it is used, it would be recorded).

Are third parties (i.e. other bidders) permitted to attend?

If called by the Committee.

If so, are they entitled to present evidence?

Yes, and that evidence is shared with the INT (Department of Institutional Integrity), the Sanctions Committee, and the respondent.

What is the burden of proof to be discharged – beyond reasonable doubt or on the balance of probabilities (i.e. the criminal or the civil burden of proof)?

See below.

On whom does it rest?

On INT, to establish that a balance of probabilities exists re the offense; then, the burden shifts to the respondent.

Is it for the debarment officer to make out the case for debarment

INT has the responsibility. There is staff to the Sanctions Committee (a Committee Secretary – from the Legal Department), but no “debarment officer”.

Is it for the suspected entity to establish a degree of innocence?

The Committee must find the evidence of corruption “reasonably sufficient.”

If administrative, is there a right of appeal into the ordinary courts?

No.

What are the procedures associated with any judicial process:

Process is not judicial.

If appeals have been excluded, have these exclusions been tested in the courts?

No. The World Bank is not subject to national courts.

C. Investigation procedures

Who conducts the investigation? What is their unit/agency? Does the same unit/agency always investigate debarment?

The Department of Institutional Integrity. Always.

Do they have specific powers under the relevant legislation?

The procurement is made subject to the World Bank Procurement Guidelines by the Loan Agreement with the government. The Guidelines incorporate by reference the Debarment procedures, which outline the roles and powers of the Sanctions Committee.

What information can the investigators access etc.?

All the WB's records relating to the procurement. Otherwise, only what the respondent, witnesses or government provide. Under the Guidelines, the companies must provide relevant information (at least books and records), but – as a practical matter – they can refuse (and/or can keep fraudulent books). They can only be debarred for actions regarding a specific procurement.

What lessons are available in terms of the success or failure of investigations?

The process is staff intensive, and more staff could be well used. INT has 30 professionals working in 6 teams, one of which is concerned with offences by Bank staff (all allegations of which receive a full investigation). Many “tips” come from Bank staff as well as from company whistle blowers or disgruntled ex-staff. Sometimes (although this varies), country officials or prosecutors cooperate with INT in investigations.

D. Sanctions

Are individuals debarred as well as companies?

Yes.

What are the criteria for the length or extent of a particular debarment once a case is found against an entity?

See VII(e) – quoted below – of the Procedures. A repeat offender gets lifetime debarment. The length of debarment would be relative to the size of the offense in relation to the amount of the contract.

Is a distinction made between subsidiaries and parent corporations?

“an appropriate sanction [may] be imposed on any individual or organization that, directly or indirectly, controls or is controlled by the Respondent.”

Is the impact on a large operation an element in determining the term?

The key factor is the likely affect on the quality or quantity of the output contracted for.

Is the impact on the particular project a factor?

See above.

Or the impact on the environment?

No.

Or the impact on the workers involved in the corrupt entity?

No.

In the entities who lost out to the corrupt entity?

Does either have to be an actual impact or is potential impact a factor?

No.

Is the penalty confined to a particular part of an entity's business portfolio or does it attach to the whole of the operation?

It could be confined (e.g. where a holding company), but this is not frequent.

What precautions can be taken to avoid those guilty from establishing new companies or operations with others as the "fronts" as directors?

Debarred are all those under debarred controlling persons or entities.

Is the seniority of those involved a factor?

Yes. If a low level or "rogue" employee or an aberrational disgruntled one was involved, the chance of debarment of the firm might be reduced – i.e. if the company was thought to have made all reasonable efforts to train re and enforce ethical conduct.

What is regarded as mitigating circumstances?

Codes of conduct that are enforced?

This is no excuse. Corruption would usually indicate a lack of adequate enforcement (but see above).

Dismissal of staff shown to have been involved in the affair?

The Bank would insist on this, and although it might affect the duration of debarment, it would not change the fact of debarment.

From the Committee Procedure:

VII (e) Factors Affecting Sanction Decision: The Committee may consider the following factors in determining an appropriate sanction:

1. egregiousness and severity of the Respondent's actions;
2. past conduct of the Respondent involving fraudulent or corrupt practices;
3. magnitude of any losses caused by the Respondent;
4. damage caused by the Respondent to the credibility of the procurement process;
5. quality of the evidence against the Respondent; [No. Once the decision is made to debar, the quality is not relevant to the duration.]
6. mitigating circumstances; [The environment in which the contractor works – e.g. in a country/sector where little or nothing can be done without corruption – may be taken into consideration.]
7. savings of Bank resources or facilitation of an investigation being conducted by the INT occasioned by the Respondent's admission of culpability or cooperation in the investigation or hearing process; [This would be a factor in the severity of the penalty, not in its existence] and
8. any other factor that the Committee deems relevant.

Does the penalty apply to all corporations with the same management? etc.

It used to, but now there is more flexibility. This is up to the Sanctions Committee.

Is the possibility of liability to debarment routinely brought to the attention of those likely to tender for government business? If so, how?

Yes, through the Guidelines.

How many cases of debarment have there been in the past 10 years?

About 150.

What history of legal challenges to the process?

There is no history of legal challenge.

Is there any evidence of potential bidders being deterred from bidding as a result of the practice?

No evidence, but it may have happened..

If so, what are the reasons?

Conversely, I could surmise that some companies would be more likely to bid if they were confident that the process would be devoid of corruption.

Is confidence in the integrity of the debarment system a factor?

Yes, at least among large companies.

Is there any evidence/experience of donor or IFI etc. funding opposition to the practice as transgressing procurement competition requirements?

No, but the process does not apply at present to IFC or MIGA.

Is the publicly available debarment list enforced by agencies other than the agency which has made the debarment? [i.e. does the ADB, IADB, or AfDB honor the WB's debarment list and does the WB honor theirs, if they have one?] Do all agencies of a given government honor one agency's debarment list, or the debarment list of the World Bank? If not, why not?

No. Under the policy, debarment is purely related to a particular contract funded by the World Bank. Sometimes, however, bilaterals call the Bank for relevant information. WB itself could not, under current policy, honor debarments by other IFIs. Some IFIs automatically honor local debarment lists – which may be unreliable. It is conceivable that at some time the IFIs could create a consolidated debarment procedure, which would have greatly heightened deterrent effect, but now they do not have one. Short of general “cross-debarment” by all IFIs, other IFIs than the World Bank could take the position (which they do not now) that a contractor debarred by the Bank would not be eligible to bid on the contracts which they financed – on the grounds that the Bank's process had been determined to be reliable and the agency did not wish to deal with corrupt bidders. One could even, in theory, envisage the EC and country governments honouring Bank debarments, although there could be legal complications were the debarments to be challenged. As a lesser alternative, firms debarred by the Bank could be considered ineligible by other institutions until they had demonstrated suitable integrity reforms.

E. ASSESSMENT AND IMPACT OF BLACKLISTING

Is the policy governed by a medium or long term strategy?

Medium and long term.

Are there performance indicators for the policy? If so, how do these indicators work? e.g. are they based on whether reports of corruption have increased or decreased after blacklisting has taken place?

Not yet. Such indicators might have to take into account country/regional situations, as a baseline.

Is the policy subject to any regular review process to evaluate success or performance indicators?

Yes. The Department of Institutional Integrity files a semi-annual report with the President.

How many companies have been blacklisted in the last five years? What is the most important corporation ever to have been blacklisted?

About 150. Tomen (Japanese).

On average how long does a blacklisting process take?

Many months.

What policies are in place to ensure blacklisted companies do not undermine the list? e.g. by using proxy companies/bidders/representatives?

The blacklist extends to entities managed or controlled by the debarred.

Is there reliable evidence that companies are aware of a blacklisting policy is in operation?

Yes. It is in all the bidding documents.

Is there reliable evidence that any companies have established policies to avoid being blacklisted?

Codes of conduct and policies are of no use unless enforced. Many companies have codes of conduct which have primarily – sometimes solely -- public relations impact.

Overall, does the process work?

- *Does it (seem to) deter the corrupt?*

Yes, especially with respect to contracts involving international competitive bidding. The Bank must approve the proposed award, and most complaints to the Bank are made before that happens. However, complaints can be made to the Bank afterwards.

- *How much attention is given to the blacklisting in the media?*

There is always a press release. There is wide awareness of the web listing of debarred firms.

- *Is a register kept of blacklisted companies and published? If so, where is it available?*

Yes, on the WB web site.

- *Is there a policy on what a blacklisted company must do to be re-included on tender lists?*

The sanctions, for a given time period, are for past offences, and there is, at present, no redemption before the time has passed.

- *Have there been any examples of repeat offenders (the same company, or the same managers in a different company?)*

Yes.

- *Does it (seem to) render the processes cleaner?*

Yes.

- *Does it (seem to) work better in some sectors than it does in others?*

No.

- *If so, what are these sectors?*

N/A

- *If so (to a,b,c), how do we know? (has there been any research?)*

N/A

- *Is there room for improvement?*

Yes. There is a paper before the Board (to be considered in about a month) to improve the policies/procedure. [The Bank will not discuss its contents before Board approval. A study of the process was done for the Bank by Richard Thornburgh, former U.S. Attorney General. It constitutes the basis for the Board paper's change proposals. While not certain, I believe the recommendations to the Board for change include: encompassing IFC and MIGA contracts in the process, perhaps expanding the INT staff, creation of an independent second-tier review entity (loosely analogous to the World Bank Administrative Tribunal), some refinements in the definition of corrupt conduct, possible considerations permitting "redemption" (i.e. early removal from the list) under certain circumstances, reconstitution of the Sanctions Committee (all of whose members now have other full time Bank jobs, and other changes. Cross-debarment aspects are not, I believe, covered.] Board decision is expected in March, and changes to the Guidelines and process will be posted to the web site afterwards.

What are the "lessons learned" from the approach as a whole? (e.g. what pitfalls should others going down this route try to avoid?)

It might be advisable to correct the perception that there is no external review – perhaps by creating some kind of independent appeal mechanism such, perhaps, as the World Bank Tribunal or the Bank's independent Inspection Panel].

The process applies only to contractors, and does not take into account country factors. [This could, I think, mean either a multi-tiered process with the tiers (tears?) reflecting variant country conditions or perhaps linking the frequencies of debarments to aid levels – either to the sector or the whole country. I could also imagine introduction of tests to separate petty corruption (e.g. taking an official to dinner, relatively small anticipatory speed payments to customs) from corruption reasonably likely to affect a procurement outcome.

9 Lesotho Highlands Water Project – Corruption and Debarment²¹

9.1 Introduction

The purpose of this study is to highlight some of the difficulties inherent in prosecuting corporations for bribery, and to examine the relationship between prosecution and debarment, particularly by reference to the sets of criminal prosecutions which have occurred recently in Lesotho, some of which were still unfolding as this analysis was prepared.

9.2 Background

The background to these trials is complex. The Lesotho Highlands Water Project (LHWP) was the largest infrastructure project of its type in the world. The project was officially launched in 1986, with the signing of a Treaty by the governments of the Republic of South Africa, and the Kingdom of Lesotho.

The Treaty set up the administrative mechanisms and rules which would govern the construction of the dams and transfer tunnels to control the flow of the River Senq/Orange, providing water for South Africa and electricity and income for Lesotho. The two countries shared responsibility for the parts of the project which lay within their borders. Two parastatal authorities were created, namely the Lesotho Highlands Development Authority (LHDA), and the Trans-Caledon Tunnel Authority (TCTA) in South Africa.

At the outset of the project, Mr Sole was appointed Chief Executive of the LHDA. The position was inherently powerful and influential. Over the course of the next decade he abused his powers of office, increasing the control and influence he had over the award of contracts in the project to the point where he appears to have answered to no-one.

In 1993, the web of deceit and corruption began to unravel, with the election of a civil government in Lesotho. The LHDA was subjected to an audit, in which classic indications of corruption now showed up. A disciplinary enquiry followed, and its findings led to the dismissal of Sole. Sole vigorously resisted each stage of his departure from the organisation: in court, he challenged the Minister's powers in respect of both the enquiry and his dismissal.

In 1996, the LHDA began civil proceedings against Sole, for the return of the moneys which he had appropriated during his employment at the LHDA. During the course of the proceedings, it emerged that Sole had received moneys, from various companies, contracting and consulting at work on the LHWP, via agents/intermediaries

²¹ Prepared for TIRI (the governance-access-learning network) by Fiona Darroch, Barrister-At-Law, United Kingdom. Fiona Darroch has been following the trials closely and is in regular contact with members of the prosecution team.

The list of companies who had made such payments was extensive: generally, payments were made under the auspices of their agreements with the middlemen/representatives they used, with each party using numbered Swiss bank accounts in their dealings with each other. Sums of money finding their way into those bank accounts amounted to millions of dollars. The Lesotho Attorney General took the decision to embark upon the most comprehensive series of prosecutions for corruption. At the outset, in December 1999, the indictment contained nineteen groups or individuals, charged variously with the common law offences of bribery, fraud and perjury.

In May 2000, the corporate defendants met to discuss the defence tactics they might use. A programme of cooperative litigation was allegedly deployed to prolong the prosecution process: over a hundred separate preliminary applications were made to the court before the first trial began. These tactics extended the proceedings substantially, extending the pressure on the Lesotho authorities to halt the prosecutions, and increasing the costs to be borne by Lesotho.

In summary, over the course of the following months, separate trials were ordered, in respect of certain companies. One of the consortia, HWV, successfully applied to the court for an order that each member of the consortia was a separate legal entity, and as such, it should be tried separately.

The defendant companies - Acres, Lahmeyer and Spie - argued that they had not been correctly cited on the original indictment. They did not proffer alternatives, but one may infer that they would have offered up one of the company employees, which would have given rise to some interesting conflicts of interest. This is a particularly interesting point, since it goes to the heart of the difficult question of criminal corporate liability, a legal concept recognised in common law jurisdictions, but not known in countries where the civil code is the norm.

The court had been asked to rule on a wide range of preliminary issues: from the perspective of the corporate defendants, the question of jurisdiction was critical. Complex defence arguments were prayed in aid of the proposition that the court had no jurisdiction, if it could not be satisfied that the agreement for bribery had been made within the jurisdiction. However, such arguments did not prevail.

Acting Judge Cullinan, a highly experienced former Chief Justice of Lesotho, had presided over most of the preliminary applications, including the jurisdiction question. After an extensive survey of the jurisprudence, based on the assumption that the locations of the offences were unknown, he concluded that the law was that since the impact of the alleged offences were to be felt most keenly in Lesotho, then this was the appropriate jurisdiction for the trials.

At the outset of the proceedings, the Lesotho authorities had taken the view that it was critically important, given the significance of these trials, that the process of litigation should be seen to be highly competent, timely, and procedurally above reproach, all of which Cullinan AJ ensured. The sheer number of defendants, each with different interests, had presented the court with a logistical difficulty, which gave way to an application that the trials should be split.

This was a difficult issue for the court to decide. It would be prejudicial for Sole to be tried in conjunction with all the other defendants. Yet, in the course of his trial, allegations would be made about the conduct of the companies who had bribed him which the respective companies would not be in a position to address or rebut. Further, the time which would elapse as each

company was individually brought to book would result in a cloud, hanging over the concerned companies. It was unfair to each defendant, for one reason or another. Cullinan AJ took the view that this was nevertheless the way in which justice would best be served, and the long series of substantive trials finally began, with Sole, in June 2001. His alleged partner in crime, (and friend), Bam, had died of a heart attack earlier, and the prosecution of Mrs Bam was discontinued.

Sole himself decided to remain silent, throughout his trial, although he nevertheless took full advantage of all the procedural points his lawyers were able to take, such as trying to adduce new evidence when the prosecution and defence had both closed their cases. He was convicted of bribery on eleven counts, subsequently appealing unsuccessfully against the verdicts, although achieving a small reduction in his sentence.

Acres

Acres, a Canadian company, was the first corporate defendant to be tried.

Acres was accused of the common law offence of bribery. It was alleged that the company had made a number of payments to Mr Bam, in his capacity as the company's representative, and to his wife, over half of which were then passed on to Sole himself, as a bribe, to ensure the awards of certain contracts being made to Acres.

The destination, sequence, size and timing of these payments, together with the nature of the evidence of a representation agreement between the company and Mr Bam, all amounted to the circumstantial evidence from which the court was invited to infer that bribery had occurred. During the proceedings, which were presided over by Judge Lehohla, a number of witnesses gave evidence on behalf of Acres, although noticeably not Mr Witherall, the key defence witness who had previously given evidence to the World Bank during the Banks investigation.

When the time came for sentencing, Acres came to court pleading that a fine would be very difficult for them to pay. However, they produced no evidence to substantiate their claim, and were fined the equivalent of [Canadian dollars] \$C3.8 million.

The company then appealed. In the Appeal court, the issue was stark in its simplicity. Was the representation agreement (under which Acres alleged it had correctly made payments to Bam for services rendered by him to the company) a bona fides document, being evidence of a genuine agreement between the company and Bam, in which the money that Bam paid on to Sole was unknown to Acres? Or was it a sham, giving rise to the reasonable conclusion that the representation agreement was simply a device designed to conceal the true nature of the relationship between the company and Sole?

The Appeal Court judges re-assessed the evidence from the lower court: they looked at the need for Bam's services, the terms of the agreement scheduled thereto, the circumstances surrounding the agreement, the payments made under it – amounts, destinations, timings – and the timing of the agreements against the contracts which Acres won. The ineluctable and unanimous conclusion drawn by the Bench was that Acres had bribed Sole, using Bam as a conduit for that bribery.

The final part of the process for Acres was the possibility of debarment by the World Bank, with Acres allegedly lobbying the Canadian Government, and its representatives in the World Bank, in

an effort to avoid debarment. This was resolved when the World Bank resumed the process which was stalled by the criminal trials; the appendix below outlines the World Bank's decision.

The company is also paying the fines which were imposed upon it in the Court of Appeal in installments. Earlier it had applied to have payment of the fine imposed in the lower court suspended pending hearing of its appeal. Before this application was granted, an undertaking was given to Judge Steyn that, should its appeal fail, Acres would pay the fine forthwith.²²

Lahmeyer

Lahmeyer was the next corporate defendant to be tried. The company was found guilty, on a similar set of facts, and subsequently lost its appeal, once again having argued that the representation agreements it had made with Bam were bona fides, for the same sorts of reasons Acres had given to the court. The company met with the same lack of success, both at trial and in their subsequent appeal. The company also faces a concluding chapter in the debarment process.

Spie Batignolles

Faced with prosecution for bribery, a third corporation, Spie Batignolles produced a different line of defence.

Spie Batignolles Ltd was registered in Lesotho in 1987. A series of bribes were made by the company, prior to 1995. Contracts 124/5/6, and Contracts 129A/B were awarded to the Joint Ventures, LHPC and MHPC, in which Spie Batignolles was the lead partner. LHPC had been registered as a partnership on 29 January 1991, MHPC similarly on 24 March 1994. Both partnerships registered Spie Batignolles with its Lesotho company number.

The company has now gone through a series of manoeuvres, which led to its contention that the company in Lesotho, 'Spie 1', had been substituted by another, 'Spie 2'. Accordingly, the representative who had originally been served with the indictment had been wrongly served, and therefore the trial amounted to an abuse of process.

Specifically, on 19 May, 1995, the company had entered into a 'contribution and divestment agreement', with a French company called Gesilec. By the terms of the agreement, Spie Batignolles divested itself of all its assets and liabilities, into 'Gesilec', which renamed itself Spie Batignolles, on 27 June 1995. On the same date, the original Spie Batignolles, 'Spie 1', now merged with another company, namely Schneider SA, the new company assuming the name Schneider Electric SA. Crucially, before making any of these moves, it made no attempt to dissociate itself from any partnership agreements in Lesotho. The consequence was that the arguments which it deployed to avoid prosecution were all doomed to failure.

In his judgment on 11 December 2003²³, Nomngongo J said (at p6):

What this means is that when the original Spie Batignolles decided to dissolve itself apparently without the sanction of any court either here or in France what ever the law is in

²² The conduct of the company may give rise to an application to the court to commit its barrister for contempt of court, or to disbar him completely. At common law, undertakings given by a barrister to the court are personally binding on the barrister, and he or she must comply with the undertaking in the event of his/her client failing to do so.

²³

that distant land, it left its name in Lesotho and whatever else was associated with itself, including most of its employees... It never even bothered to change its registration number as an external company in Lesotho. It retained its face in this country intact. On the other hand it left in France the number on the basis of which it was registered in Lesotho as external company in the hands of a completely different entity. I have no doubt in my mind that this was calculated to deceive and to send the authorities of this country on a wild goose chase....[His Lordship went on to cite the statutory provisions with which the company had failed to comply] ...What all this leads me to is that whatever happened in France this was meant to mislead and calculated to deceive us in Lesotho. The present applicant was no doubt a party to such machinations as were done in France. It is hardly a coincidence that all the so called mergers deposed to by Salazar were done by resolutions of special shareholders meetings on the same date. All of these were done for no demonstrable reason around the time when the net was closing around one Mr Masupha Sole, who it is alleged received bribes from Spie Batignolles.....

This is a classic case where ‘fraudulent use is made of the fiction of legal personality for purposes of improper conduct.

Subsequently the prosecutors in Lesotho proceeded with the case, tracing the clear corporate relationships, and their work resulted in a guilty plea from Schneider/Spie, who now accepted liability for bribing Sole, and pleaded guilty in February 2004. The company was fined 10,000,000 Maloti.

It is clear from the negotiations leading to the plea that Schneider Electric SA had taken a pragmatic decision, fearing a damages claim from Spie 2, which had been sold to Amec, in February 2003 on the apparent basis that Spie 2 was free of any liability in Lesotho – an uncertain assertion for the Board to make, in circumstances where, until the ruling of Judge Nomngongo in December 2003, the issue of liability between the two companies had not been resolved. In a recent Amec AGM, the board was able to assert that the matter was now resolved, with all liability accruing to Schneider/Spie, none to Amec/Spie.

This defence depended for its success upon the failure of the prosecutors to address the requirements of company law in Lesotho. In simple terms, where a company re-invents itself, it presents the prosecutors with the challenge of identifying and prosecuting a defendant company which has taken a series of steps amounting to a sophisticated attempt to redistribute its identity, and therefore its liabilities. In current French jurisprudence, this would appear to be both legal and effective.

It is interesting to note that both companies using versions of this particular line of defence would trace the corporate manoeuvres giving rise to their defence back to the period in which Sole had fallen into disrepute with the LHDA. One might conjecture whether the companies concerned had thought to anticipate the possibility that the bribery would be discovered, and begun to take the steps which would distance them from its commission.

Impregilo

The board of a fourth corporation, the latest incarnation of Impregilo, faces prosecution later this year and is said to be making similar arguments in defence of the company. Summarised briefly, the company argues that the company now charged is not the company which should be charged,

which is no longer in existence, and therefore no liability for the bribery which is alleged can be tested in court.

Overview

It is too soon to estimate the full impact of these trials upon these corporations. In the short term, for Acres, it seemed that the key note of the company's attitude was that it found it difficult to recognise the due process of the law in Lesotho; the company expressed 'disappointment' in the rulings of the Lesotho court, rather than contrition, as well as lobbying to avoid debarment. In its public stance, it emphasised that the matter should now be seen in the light of the place which Acres subsequently occupied in the vanguard of anti corruption policies in the Canadian corporate world.

An observation from the legal perspective is that for effective good governance, it must be axiomatic that in circumstances where bribery has occurred, been detected, and a criminal conviction secured, then the defendant must accept that appropriate punishment must follow. This is essential if the process to be a complete, effective and suitable deterrent to others considering the same course of illegal conduct. Such punishment may include fines and debarment, notwithstanding the unfortunate consequences for the company which may flow from such punishments.

The trial of Lahmeyer raises a different point. Lahmeyer faces the same debarment procedure within the World Bank, but the doctrine of criminal corporate liability has no basis in German law, a civil code jurisdiction: indeed, there is no previous instance of the prosecution of a company for an economic crime. This complicates the question of jurisdiction even further. As things in some OECD member countries stand, prosecution of a company is confined to common law jurisdictions. Therefore, even now, under the Convention, and the enabling legislation in Germany, Lahmeyer itself would not have been prosecuted.²⁴

This issue lies at the heart of the question of the effectiveness of the legislation enacted by parties to the OECD Convention Combating Bribery of Foreign Public Officials.

Bribery is by its nature a secret offence. In the light of the Lesotho cases, it is clear that the two convicted companies bribed Sole over a period of years to an extent and in a manner which the courts found to have been sanctioned by the companies themselves.

Implications for World Bank Debarment Procedures

Both of these companies had benefited from financial support from the World Bank. When the allegations of corruption first surfaced, the World Bank began its own investigations. The investigations led to debarment proceedings being instituted against both companies. The evidence which formed the basis of the prosecutions in Lesotho, in particular the information which emerged from the Swiss bank accounts, was all available to the World Bank, at the outset of the debarment procedure.

²⁴ This represents a gap in Convention and could confer a "corrupt advantage" on corporations based in civil law jurisdictions.

However, the Bank decided that it did not have sufficient evidence, at that time, to debar either company. It retained its interest in the matters, however, indicating that if ‘further new evidence’ emerged in the course of the criminal trials, then it would revisit the debarment proceedings.

New evidence obviously did emerge during the course of the trials, and the Bank has now reopened the proceedings against Acres, with the hearing in Washington which led to Acres being debarred for 3 years – see appendix below.

Questions for the World Bank

The first question must be this: what is lacking in the investigative procedures of the Bank, that in the end they have had to rely upon the Lesotho prosecutors and court proceedings, to provide the evidence of what took place (proved to the criminal standard of “beyond reasonable doubt”), and that they, themselves, could not ascertain (even to meet the lower, non-criminal standard of proof “on the balance of probabilities”)?

The Bank currently occupies interesting, hybrid ground in law – it has immunity from prosecution itself, which gives it a certain autonomy whence it is accountable only to its government shareholders; yet it does not appear to have sufficient powers to conduct a forensic examination where bribery/fraud/corruption has taken place in projects that it finances.

In particular, the allegedly adversarial nature of its debarment process does not extend to permitting cross-examination during a debarment hearing. One might suppose that it was during the cross examination of the witnesses in the Acres trials that ‘new evidence’ arose. Accordingly therefore one might argue that anything less than forensic powers, given to an arms-length task force, for the purpose of investigating corporate corruption will stand little chance of success in the detection of serious instances of corruption.

The second question is this: what is the relationship between the Bank’s debarment process and the due process of a criminal prosecution within a national jurisdiction?

At present, there seems to be an informal relationship, in which information has been exchanged between the Bank and the Lesotho authorities. This group of prosecutions, dovetailing with the debarment procedures, is unprecedented, and certainly the Bank deserves credit for the cooperation it has extended to the victim country by making its own evidence available to the prosecutors. However, the Bank’s debarment procedure embraced the possibility that Acres might not, in the end, have been debarred at all, despite its criminal convictions.

Had Acres not been debarred, this would at least have implied contempt on the part of the Bank for the due process of law in the Lesotho courts. It would have been available for use by Acres to launch further attacks on the Lesotho courts and criminal justice system as being, at best, unreliable and at worst, perverse in its decisions. It certainly would not have augured well for other countries considering embarking on similar, devastatingly effective courses of action to root out corruption in their own jurisdictions.

It was alleged that behind the scenes in the Bank, some Canadian government might have been lobbying on behalf of Acres. One is obliged to conclude from this and all the other surrounding evidence that the Canadian prosecuting authorities would not have been encouraged to mount a prosecution of Acres themselves in the prevailing political climate. This conflict of interest is, on

one view, a fatal flaw in the OECD Convention Combating Bribery of Foreign Public Officials. A clear cut decision to prosecute becomes far more difficult to achieve where there are competing ‘public interests’, where difficulties of evidence-gathering can be exaggerated, and where a pragmatic view is the one most likely to prevail.

In the course of the Acres trial, Canadian lawyers expressed their concerns over the prosecution of a Canadian company in a foreign land, offering the rationale that Acres had learnt its lesson, and it had subsequently achieved such high corporate standards that it would be unfair for the company to have to revisit events in its history in this way.

This is an interesting construction of the notion of criminal corporate liability, that in some way corporate liability should be circumscribed by an arbitrary period of limitation – and that repentance after the event, and when facing punitive sanctions, is sufficient to remove any need for punishment.²⁵ Arguably, this approach within the Canadian legal community may have fortified Acres’ disinclination to pay the fine which was imposed as a sentence (it is now being paid in installments).²⁶

International Support

A final issue is the absence of cooperation or assistance from the international community for the Lesotho government in terms of evidence gathering, or staff support, or finances, etc. The only thing which is left is that the IFIs, led by the World Bank, should make an example of the companies which have been convicted, by debarring them, not just from World bank-financed contracts but from all developmental work financed by the IFIs and the donor community. The opportunity must be taken for governments and official organisations to make it plain to the private sector that the corruption game is one they will not tolerate. Otherwise, the Lesotho process will have gone, if not for nothing, then for far less than it should have done.

The major lesson in all of this is that debarment is the real fear for the companies, and it is the single most powerful tool, even more so than a criminal conviction.

APPENDIX: Acres debarment, announced in July 2004

The World Bank has sanctioned Acres International Limited (Acres), a Canadian company, as a result of corrupt activities related to its Bank financed contract associated with the Lesotho Highlands Water Project (LHWP). Acres was declared ineligible to receive any new Bank financed contracts for a period of three years.

The World Bank’s Sanctions Committee found that Acres engaged in corrupt activities for the purpose of influencing the decision making of the then Chief Executive of the Lesotho Highlands Development Authority (LHDA), the implementing agency for the LHWP. This activity violated the Bank’s procurement standards. In making its recommendation of a three-year debarment to Mr. Wolfensohn, the Committee considered a number of mitigating factors, including the fact that Acres had already been ordered to pay a criminal fine by the Lesotho courts

²⁵ The proposition is, of course, bizarre that a company should not be prosecuted because it has been caught out and has subsequently reformed its practices. Clearly, without the prospect of punishment the company would in all likelihood have continued with its practices. This is not to say that corporate reforms ought not to be taken into account when assessing appropriate sentences. They frequently are taken into account, or made a condition when sentences are fixed.

²⁶ Indeed, were the company within the jurisdiction of the Lesotho court, its officials could well have been imprisoned for their contempt of the court in delaying the payment of the fine. The failure to pay the fine is the more serious as the World Bank was among those who refused to assist Lesotho in the financing of the proceedings on the grounds that the country would recoup its costs on gaining convictions.

and that the relevant persons involved in Acres' work on the LHWP are no longer in positions of responsibility in the company.

In 1987 and 1991, Acres received significant contracts on the LHWP to provide technical assistance to the LHDA, the second for just under \$17 million. The Government of Lesotho announced criminal indictments in connection with alleged corruption in the LHWP in July 1999. Following the announcement of the indictments, the World Bank's Department of Institutional Integrity initiated an investigation into those allegations and, in particular, into whether consultants who had received contracts financed by the Bank had engaged in corrupt practices. At the conclusion of this earlier investigation, the Bank concluded that the evidence was not reasonably sufficient to show that the firm had engaged in corrupt practices and as a result did not sanction Acres at that time, but the Bank reserved the right to reopen the investigation in light of any additional information that might surface, including from the public proceedings in Lesotho. Following Acres' conviction of bribery in September 2002 by the High Court of Lesotho, the Bank reopened its investigation. In August 2003, the Court of Appeal of Lesotho upheld the High Court's decision on one of the two counts of bribery.

Once the indictments were announced in mid-1999, the World Bank provided extensive evidentiary support to the Lesotho prosecutors and made Bank staff available for interviews. The World Bank later assisted the Government by bringing together the Lesotho prosecutors with the various project funding agencies and EU anti-fraud officials. The Bank has now benefited from the investigative work done by the Lesotho Government in bringing the debarment case against Acres and in reviewing the evidence against others.

The LHWP is a large development project designed principally to transfer water from the Maluti Mountains in eastern and central Lesotho to the Gauteng Province of South Africa. Work on Phase I-A of the project was completed in 1998 at a cost of some \$2.6 billion. Work on Phase I-B is nearing completion and will cost an additional \$1.1 billion. The World Bank disbursed \$90 million to finance those elements of the water transfer component that related to detailed design work, construction supervision, project studies and technical assistance to LHDA. Acres was awarded the contract to provide technical assistance to the LHDA.