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The Effectiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties

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THE EFFECTIVENESS OF THE WORLD BANK'S ANTI-CORRUPTION EFFORTS:

CURRENT LEGAL AND STRUCTURAL OBSTACLES AND UNCERTAINTIES

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I. INTRODUCTION

Corruption is widely considered the single most severe impediment to development and growth in developing countries.[1] Corruption in developing countries is not simply a domestic problem, but often involves a variety of actors within and outside of developing countries. Curbing cross-border, or transnational, corruption through legal channels raises unique legal and administrative issues of jurisdiction, investigative cooperation and conflict of laws that may not exist in purely domestic anti-corruption efforts. These issues have led to numerous multilateral efforts to control transnational corruption, including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[2] the Inter-American Convention against Corruption,[3] and the United Nations Convention against Corruption,[4] all of which require countries

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1. Cheryl W Gray & Daniel Kaufmann, *Corruption and Development*, FINANCE AND DEVELOPMENT, Mar. 1998, at 7. ("In recent survey of more than 150 high-ranking public officials and key members of civil society from more than 60 developing countries, the respondents ranked public sector corruption as the most severe impediment to development and growth in their countries.").

2. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1997), 37 I.L.M. 1 (1998), *available at* http://oecd.org/dataoecd/41/242031210.pdf (last visited Feb, 8, 2004) [hereinafter OECD Convention].

3. Inter-American Convention against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39 (1996), 35 I.L.M. 724 (1996), *available at* http://www.oas.org/juridico/English/Treaties/b-58.html (last visited Feb. 6, 2004) [hereinafter Inter-American Convention].

4. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (2003), *available at* http://untreaty.un.org/English/notpubl/Corruption_E.pdf (last visited Feb. 16, 2004) [hereinafter U.N. Convention].

to criminalize corrupt activity and urge cooperation between nations to investigate and prosecute transnational corruption.[5]

In 1996, the World Bank[6] joined these multilateral efforts by publicly announcing an institutional commitment to combat corruption within the World Bank and within World Bank financed projects carried out by governments in the developing world.[7] Disbursing over $19 billion in loans per annum,[8] the World Bank is exposed to significant operational risk for corruption and fraud. For example, Northwestern University political economist Jeffrey Winters estimates that corruption diverted upwards of 30 percent of development funds lent to Indonesia by the World Bank, totaling over $11 billion.[9] Several high-profile cases involving multinational Western firms in World Bank financed projects confirm the transnational nature of such corruption. In 2000, for example, the World Bank suspended its support for a $100 million water project in Ghana awarded to a unit of Enron Corporation, citing an unexplained $5 million payment by Enron.[10] Additionally the World Bank raised objections to Enron projects in Nigeria, India and Mozambique.[11]

While a vast and developing literature attempts to define corruption and address its causes and consequences,[12] the World Bank assigns its own meaning to the terms "corruption" and "fraud" in its Procurement Guidelines and Consultant Guidelines. The definitions set forth by the Bank in the Procurement Guidelines,

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5. OECD Convention, *supra* note 2, at art. 9; Inter-American Convention, *supra* note 3, at art. II(2); U.N. Convention, *supra* note 4, at art. 1.

6. For the purposes of this article, "World Bank" or "Bank" solely denotes the International Bank for Reconstruction and Development (IBRD), the largest organization under the World Bank Group structure. *See* World Bank Group, About Us, Organization, Five Agencies, One Group, *at* http://www.worldbank.org/ (last visited Feb, 16, 2004). The World Bank Group also includes the International Finance Corporation, the International Development Association, the Multilateral Investment Guarantee Agency, and the International Centre for Settlement of Investment Disputes. *Id.*

7 WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: PROGRESS AT THE WORLD BANK SINCE 1997 1 (2000) [hereinafter PROGRESS SINCE 1997].

8. 1 WORLD BANK, ANNUAL REPORT 2002 8 (2002). Figure combines IBRD and IDA lending.

9 Jeffrey A. Winters, *Criminal Debt*, *in* REINVENTING THE WORLD BANK 101, 102 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002). *See also* Jane Perlez, *Ahead of Re-election Run, Indonesia President Is Chased by Corruption Complaints*, N.Y TIMES, Jan. 26, 2003, at 8 ("The concerns about corruption come with many news reports this week that 20 percent of World Bank and other foreign loans are siphoned off every year by the Indonesians.").

10. *Justice Eyeing Enron in Bribe Probe*, CBS News, Aug. 5, 2002, *available at* http://www.cbsnews.com/stories/2002/08/20/national/printables519319.shtml (last visited, May 1, 2004).

11. John R. Wilke, *Enron Criminal Probe Focuses On Alleged Corruption Abroad*, WALL ST. J., Aug. 5, 2002, at A1. *See also* Karen MacGregor, *Acres Loses Appeal on Bribery Charge in Lesotho*, GLOBE AND MAIL, Aug. 18, 2003, at B3 (Acres International, Canadian multinational engineering firm, lost an appeal of a conviction on bribery charges related to a World Bank financed water project).

12. *See generally* Ibrahim F.I. Shihata, *Corruption: A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 453-59 (1997) (describing corruption from the perspectives of economics, political science, law, sociology, public administration, and business); David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455 (1999) (proposing that current definitions of corruption may be over-inclusive).

which are nearly identical to the Consultant Guidelines, are as follows:

> (i) "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution; and
>
> (ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the Borrower of the benefits of free and open competition.[13]

While the definition of corrupt practice does not explicitly prohibit outside parties from corruptly influencing World Bank staff,[14] the World Bank Staff rules provide that "[s]taff members shall not accept in connection with their appointment or service with the Organizations any remuneration, nor any benefit, favor or gift of significant value from any such governments or other entities or persons ..."[15] The Staff Rules further state that "[n]either a staff member nor a member of his immediate family shall accept a direct financial interest in any Bank Group transaction ..."[16] The rules also define staff misconduct to include the "[m]isuse of Bank Group funds or other public funds for private gain in connection with Bank activities or employment, or abuse of position in the Bank for financial gain."[17]

In accordance with these provisions, the World Bank Sanctions Committee carries out sanctions for violations of the Procurement Guidelines, Consultant Guidelines and Staff Rules.[18] Allegations of corruption or fraud are first investigated by the Department of Institutional Integrity (INT),[19] an allegedly independent office within the World Bank that reports directly to the President of the Bank.[20] If INT believes there is reasonably sufficient evidence of fraud or

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13. World Bank, Guidelines: Procurement under IBRD Loans and IDA Credits, § 1.15(a) (1999), *available at* http://www.worldbank.org/ (last visited Feb. 6, 2004) [hereinafter Procurement Guidelines]. *See also* World Bank, Guidelines: Selection and Employment of Consultants by World Bank Borrowers, § 1.25(a) (1999), *available at* http://www.worldbank.org/ (last visited Feb. 6, 2004) [hereinafter Consultant Guidelines].

14. It is also unclear whether the term "public official" in the World Bank's definition of corrupt practice includes World Bank staff members.

15. World Bank, Staff Manual, Staff Rules, § 0.01, Principle 3.1(b) (1999) [hereinafter Staff Rules].

16. *Id.* at § 3.01, ¶ 7.01.

17. *Id.* at § 8.01, ¶ 3.01(d).

18. World Bank Group, Sanctions Committee Procedures, § 1(a)(3) (2001), *available at* http://www.worldbank.org/ (last visited Feb. 6, 2004) [hereinafter Sanctions Committee Procedures].

19. *Id.* at § 3(a).

20. *See* U.S. GEN. ACCOUNTING OFFICE, WORLD BANK: MANAGEMENT CONTROLS STRONGER, BUT CHALLENGES IN FIGHTING CORRUPTION REMAIN, GAO DOC. NO. NSIAD-00-73, at 12 (2000) (finding World Bank's Investigation Unit did not have the necessary independence from the Bank s president. While reforms were subsequently undertaken by the World Bank to create a more independent structure for investigations, it is unclear whether the GAO's conclusions have been repudiated), *available at* http://www.gao.gov/ (last visited Mar. 22, 2004) [hereinafter GAO REPORT].

corruption, it can refer the matter to the Sanctions Committee for punitive measures.[21]

The World Bank Staff Rules provide that "termination of service shall be mandatory where it is determined that misuse of Bank funds or other public funds for private gain in connection with Bank activities or employment, or abuse of position in the Bank for financial gain" has occurred.[22] The Procurement and Consultant Guidelines include provisions allowing the World Bank to retract an award or contract if a bidder has engaged in corrupt or fraudulent practices in the bidding or execution stages of the award or contract.[23] The World Bank may also declare a firm or individual ineligible, indefinitely or for a stated period of time, to secure a Bank-financed contract.[24] Currently one hundred seventy-one firms and individuals are debarred, either permanently or for specified periods of time, from receiving World Bank-financed contracts.[25] The Bank does not maintain a public list of the names or the number of staff members who have been terminated for fraud and corruption.[26]

Given its prominence in the world of development finance and its status as the first development finance organization to implement a comprehensive anti-corruption regime, the World Bank assumed a leadership position in the movement to eliminate corruption from the field of international aid. Despite its successes, however, significant legal and structural obstacles and uncertainties threaten the effectiveness of the World Bank's anti-corruption efforts. This article analyzes a number of these obstacles and uncertainties including the expansive due process rights of employees and unclear procedural requirements imposed on the Bank during criminal referrals, uncertainties surrounding the standard of proof in internal corruption proceedings, the lack of a system of investigative cooperation and cross-debarment and structural impediments arising out of the Bank's operational model, governance structure, oversight capacity and staff incentives. In the face of these obstacles and uncertainties, this article also offers recommendations for the World Bank to improve its anti-corruption practices.

21. Sanctions Committee Procedures, *supra* note 18, at § 3(c).

22. Staff Rules, *supra* note 15, at § 8.01, ¶ 4.01.

23. Procurement Guidelines, *supra* note 13, at §§ 1.15(b)-(c); Consultant Guidelines, *supra* note 13, at §§ 1.25(b)-(c).

24. Procurement Guidelines, *supra* note 13, at § 1.15(d); Consultant Guidelines, *supra* note 13, at § 1.25(d).

25. World Bank Group, Projects, Procurement, List of Debarred Firms, World Bank Listing of Ineligible Firms: Fraud and Corruption, *at* http://www.worldbank.org/ (last visited Apr. 15, 2004).

26. *See* World Bank Group, Preventing Corruption in World Bank Projects, *at* http://www1.worldbank.org/publicsector/anticorrupt/preventing.htm (last visited Feb. 12, 2004).

II. LEGAL OBSTACLES AND UNCERTAINTIES SURROUNDING CRIMINAL REFERRALS OF ALLEGED CORRUPT ACTIVITY

A. Background to the Practice of Criminal Referrals at the World Bank

Criminal sanctions have traditionally been a part of the legal regime to combat corruption in individual nations.[27] All of the major international agreements against corruption require signatory governments to criminalize corrupt activity.[28] In the United States, criminal referral of corrupt activity to local and federal prosecutors is an established tool for ensuring the integrity of those institutions.[29] Following this bureaucratic norm, the World Bank began to refer allegedly corrupt activity to national prosecutorial bodies.

In two 2002 cases, former World Bank employees pled guilty in the United States District Court for the District of Columbia to felony counts related to corrupt activity they engaged in while employed at the World Bank.[30] The U.S. Department of Justice's prosecution of these two individuals was initiated via criminal referrals from the World Bank's Legal Department.[31] The cases also mark the first two instances of employees of an international organization being prosecuted under the Foreign Corrupt Practices Act. In the first case, *United States v. Sengupta*,[32] the defendant, Gautam Sengupta, pled guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 and to a second count in violation of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-3.[33] The World Bank employed Mr. Sengupta as a Task Manager in Washington D.C. from 1993 to 2000.[34] "Task Managers are responsible for individual development projects and as one of their duties ensure that proper feasibility studies are

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27 Philip M. Nichols *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 629 (2000) ("Bribery is universally condemned and is criminalized by every country in the world.").

28. *See* OECD Convention, *supra* note 2, at art. 1 Inter-American Convention, *supra* note 3, at art. II; U.N. Convention, *supra* note 4, at art. 1.

29. *See* Thomas E. Holliday & Charles J. Stevens, *Disclosure of Results of Internal Investigations to the Government or Other Third Parties, in* INTERNAL CORPORATE INVESTIGATIONS 279, 283-92 (Brad D. Brian & Barry F McNeil eds., 2003) (noting disclosure of criminal activity is required of certain highly regulated industries and for companies dealing in securities while other companies may disclose voluntarily).

30. *See* A.B.A., WHITE COLLAR CRIME 2003 506-49 (2003) (providing the Plea Agreement and Statement of Facts for both cases and the Information for *United States v. Basu*).

31. Glenn T. Ware, Lecture at Harvard Law School (Apr. 11, 2003) (presentation on file with author).

32. Both the Plea Agreement and Statement of Facts for *United States v. Sengupta* were filed in the United States District Court for the District of Columbia on January 30, 2002. A.B.A., *supra* note 30, at 506, 519.

33. A.B.A., *supra* note 30, at 506.

34. *Id.* at 519.

completed for each proposed project."[35] In his role as Task Manager, Mr. Sengupta entered into a scheme whereby he caused the awarding of four contracts to a Swedish consultant in exchange for kickback payments totaling $127,000.[36] For one of the contracts, Mr. Sengupta assisted the Swedish consultant in wiring $50,000 to a Kenyan official overseeing the implementation of a World Bank project, with knowledge that the payment was a kickback,[37] in violation of the Foreign Corrupt Practices Act.[38]

In the second case, *United States v. Basu*,[39] the defendant, Ramendra Basu, pled guilty to identical counts of conspiring to commit wire fraud in violation of 18 U.S.C. § 371 and to violating the Foreign Corrupt Practices Act, 15 U.S.C. 78dd-3.[40] Mr. Basu served as an officer in the Consultant Trust Funds Office at World Bank headquarters in Washington, D.C. from 1996 to 2000, except for approximately three months in late 1997.[41] As a Trust Funds officer, the defendant's duties included recommending consultants to Task Managers and approving Task Managers' requests for Consultant Trust Funds."[42] In this capacity, Mr. Basu met with the Swedish consultant and Mr. Sengupta and agreed to "facilitate the payment of bribes" from the former to the latter.[43]

In September 1997 Mr. Basu left his job at the World Bank and joined the staff of the Swedish consulting firm and also secured employment there for his father, brother-in-law, and a close friend.[44] At that time, Mr. Basu agreed to receive ten percent of the value of all contracts that he worked on for the Swedish consultant.[45] By January 1998, the Swedish consultant had been awarded three contracts by the World Bank Task Manager, Mr. Sengupta.[46] In December 1997 Mr. Basu returned to his position at the World Bank, though he continued to perform work on World Bank contracts with the Swedish consultant and continued to receive compensation for his services.[47] Furthermore, Mr. Basu also played a role in facilitating the corrupt payment of $50,000 to a Kenyan government official, providing the bank account number of a Kenyan firm to whom the

35. *Id.*
36. *Id.* at 521-22.
37. *Id.*
38. *See* 15 U.S.C. §§ 78dd-1-78ff (2000) (although the defendant was convicted of aiding in the bribery of foreign official, the 1998 Amendments to the Foreign Corrupt Practices Act extend the designation of foreign official to include officials of public international organizations. This amendment extends the reach of the act to now include corrupt activity between corrupt actors and World Bank staff regardless of whether a government official in a developing country is involved).
39. The Information for *United States v. Basu* was filed in the United States District Court for the District of Columbia on November 26, 2002. A.B.A., *supra* note 30, at 525. The Plea Agreement and Statement of facts were filed on December 17 2002. *Id.* at 533, 545.
40. *Id.* at 533.
41. *Id.* at 525-26.
42. *Id.* at 545.
43. *Id.* at 546.
44. *Id.* at 547.
45. *Id.*
46. *Id.*
47. *Id.*

Swedish consultant wired the illicit payment.[48]

As of April 2004, both defendants are awaiting sentencing. In both cases, the statutory maximum sentence is "a term of imprisonment up to five years, followed by a term of supervised release of three years; a maximum fine of $250,000, and a special assessment of $100.00 for each felony count "[49] The defendants also were ordered to repay $127,000 to the World Bank as restitution to account for the loss to the institution as a result of the corrupt payments involved in the case.[50] Furthermore, the non-economic personal and reputation costs to each of the defendants who, prior to his involvement in this scheme, held prominent positions in the leading global development finance institution, are also notable.

Criminal referrals were also made in this case to Kenyan and Swedish prosecutors. While the Kenyan prosecution is still ongoing, a court in Sweden, in February 2004, sentenced two Swedish contractors to prison for 18 months and 12 months respectively for bribery [51]

The plea agreements orchestrated by the Department of Justice (DOJ) include a provision that should strengthen the World Bank's anti-corruption efforts. Both agreements require the defendants to cooperate with the World Bank in the investigation of any matter about which the defendants have knowledge. Specifically, the provision states that

> The defendant agrees to disclose completely and truthfully all information regarding his activities and those of others in all matters about which he has knowledge or hereafter acquires knowledge concerning any matter about which the United States, The World Bank, or the Government[s] of Sweden [or Kenya] may inquire. Defendant agrees to accompany agents of the United States, The World Bank, or the Government[s] of Sweden [or Kenya] to any location in order to accomplish that purpose Defendant agrees to answer all questions completely and truthfully and must not withhold any information.[52]

This provision gives the World Bank the opportunity to compel cooperation from the defendants, subsequent to their termination from World Bank employment. The provision is an especially valuable tool because the defendants would otherwise no longer be required to cooperate with World Bank investigators under the World Bank Staff Rules[53] and because the World Bank does not have the power to compel cooperation otherwise. Given the possibility that the corruption scheme in which Mr. Sengupta and Mr. Basu engaged might involve additional World Bank employees, consultants or borrower country agents, this provision allows the World Bank to continue their investigation with the assistance of the

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48. *Id.* at 548.

49. *Id.* at 534.

50. *Id.* at 507.

51. Gus Selassie, *Swedish Nationals Convicted of Bribery, Connection with World Bank-Funded Project in Kenya*, WORLD MARKETS RES. CENTRE DAILY ANALYSIS, Feb. 6, 2004.

52. A.B.A., *supra* note 30, at 508, 534-35.

53. Staff Rules, *supra* note 15, at § 8.01, ¶ 5.04 (requiring staff members to cooperate in investigations).

defendants.

This provision is an unprecedented development in the landscape of international organizations and their anti-corruption efforts. For the first time, an international financial institution assisted national prosecutors of a Member government and also helped coordinate prosecution efforts between Member governments, without an express mutual legal assistance treaty that provides for such cooperation. The World Bank's authority to do so presumably derives from its own treaty obligations under its Articles of Agreement requiring it to "make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted."[54] The deterrent and punitive value of effective criminal prosecution helps to maintain the integrity of all World Bank loans.

Although it is unclear whether the DOJ would revoke its plea agreement with the defendants if they refused to cooperate with the World Bank under this provision, the threat of revocation may be potent enough to ensure the cooperation of the defendants. The World Bank should, when possible, use this new legal assistance provision in its anti-corruption efforts while also working with the DOJ to ensure that they include and enforce the provision in future plea agreements involving World Bank employees.

The use of criminal referrals is a positive development in the World Bank's strategy to curb corruption in its projects. In addition to providing a legal instrument to secure cooperation from corrupt actors after the termination of their employment, criminal referrals provide an additional avenue by which to seek punishment for corrupt behavior, providing further deterrence of such activity

B. C v. International Bank for Reconstruction and Development[55] *and Bank Disclosure Policies — Roadblocks to Effective Criminal Referral*

The World Bank is generally immune from judicial process in member State courts for matters arising out of the employment relationship.[56] To protect the employment rights of its staff, the World Bank has its own internal Administrative Tribunal that hears and grants judgments in cases brought by employees for violations of their employment contracts or terms of appointment, including staff rules and related regulations.[57] A recent decision by the Administrative Tribunal, *C v. IBRD*, addresses for the first time the issue of criminal referrals by the World Bank. The decision imposes serious limitations on criminal referrals that will

54. World Bank Group, International Bank for Reconstruction and Development, Articles of Agreement, art. III § 5, *available at* http://www.worldbank.org/ (last visited Feb. 6, 2004) [hereinafter IBRD Articles of Agreement].

55. C v. Int'l Bank for Reconstruction and Dev., Dec. No. 272 (World Bank Admin. Trib. 2002) [hereinafter *C v. IBRD*].

56. *See* Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) (analyzing World Bank Articles of Agreement, International Organizations Immunities Act, and customary international law).

57 World Bank, World Bank Administrative Tribunal, Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation, art. II (2001), *available at* http://wbln0018.worldbank.org/crn/wbt/wbtwebsite.nsf (last visited Mar. 22, 2004).

undoubtedly weaken the efficacy of such referrals as a punitive and deterrent tool in the Bank's anti-corruption efforts.

In the case, the Applicant was referred to the DOJ in connection with allegedly corrupt activity that had led to his termination from employment at the World Bank. The Applicant contested the decisions of the World Bank, *inter alia*, (1) "to refer the case to the DOJ for prosecution without notifying him;" (2) "to deny him access to relevant documents and evidence necessary to his defense;" and (3) "to withhold from him information in his personnel file while failing to inform him of its transfer to third parties."[58] The Tribunal held in his favor, announcing that the Bank's Staff Rules and Policy on Disclosure of Information require the World Bank to notify an employee of a criminal referral and to provide him with copies of most of the documents referred to the DOJ.[59] The Tribunal ordered the World Bank to pay the Applicant $150,000 in damages for its failure both to notify him and to provide him with documents, in addition to damages for other unrelated claims.[60]

This section reviews this decision along with the applicable World Bank administrative provisions and cites numerous flaws both in the Tribunal's reasoning and in the World Bank's policies on disclosure. In order to fully benefit from the deterrent and punitive value of criminal referrals, the Administrative Tribunal should reverse itself and the World Bank should introduce new regulations for disclosure in corruption-related criminal referrals to counter the Tribunal's holding and to reform the current regulations.

1. Referral and Notification Requirements

As an international organization, the World Bank is not governed by the laws of any nation and must rely on its administrative rules and Tribunal decisions to define the rights of its employees. These rights are codified primarily in the World Bank Staff Rules. Throughout *C v. IBRD*, the Tribunal cites World Bank Staff Rule section 2.01, paragraph 5.01 as the source of law for the World Bank's right to refer an employee to prosecutors and for that employee's right to be notified of such a referral. Staff Rule section 2.01, paragraph 5.01 states:

> The following staff records and personnel information may be released to persons outside the Bank Group without the authorization of the staff member concerned: (a) basic employment data such as name, employment status, employment dates, job title and department; (b) compensation and pension information released to member governments for tax purposes; (c) pension records made available to a consulting actuary; (d) visa status of staff and dependents reported to governmental authorities; (e) pension, benefits and salary records made available to external auditors and accountants; (f) information necessary for processing medical, workers' compensation and other insurance claims; (g) benefits information necessary to coordinate exchange or joint benefits programs, and

58. *C v. IBRD*, Decision No. 272, at ¶ 4.
59. *Id.* ¶ 25.
60. *Id.* ¶ 35.

> information necessary to coordinate benefit policies with other international organizations; and (h) information on a staff member's salary, accrued separation grant, accrued pension benefits, and designated pension and insurance beneficiaries released consistent with a final court order or request from a judicial or civil authority in cases of divorce or family maintenance to which a staff member has not responded within 30 days of the Bank Group bringing the request or order to the staff member's attention.
>
> *The Bank Group will not release other personnel information to outside parties, including member governments and their representatives, without the staff member knowledge, except in cases of emergency situations or upon advice from the Legal Department of the Bank to release information for legal proceedings or law enforcement efforts. In such cases, the staff member will be notified as soon as reasonably possible of what information is released and to whom.*[61]

The Staff Rule explicitly allows the World Bank to refer personnel information to third parties and requires the World Bank to notify an employee of the release of a narrow category of personnel information for legal proceedings or law enforcement efforts, "as soon as reasonably possible."[62] In *C v. IBRD*, the Tribunal applies this provision for the first time to an actual case and, through reasoning that is often incorrect and unclear, expands the World Bank's duty to notify employees and creates significant uncertainty about the disclosure rules in subsequent cases.

(a) Notification of the Referral to the Department of Justice

The Tribunal writes that "the disclosure requirement imposed upon the Bank by this Staff Rule covers both the fact of a referral and the content of what is being referred."[63] The Tribunal then disposes of the Applicant's claim, that the World Bank referred him to the DOJ without notification, finding that it is "clear from the record that the Applicant was aware of the fact of a referral being made to the DOJ. This was not the result of specific notification to him but transpired from the general context in which the Bank conducted its investigation and pursued its cooperation with United States and Swedish authorities."[64]

It is unclear whether the Tribunal is implying that a blanket right exists to be notified of a referral to prosecutors. Under the Staff Rule, the duty to notify an employee depends upon the type of information referred, attaching only when "other personnel information," not specified in clauses (a) through (h) of the rule, is referred. For example, if the World Bank refers only basic employment data such as the name and employment status of an employee, under clause (a) of the rule, notification to the employee of the referral would not be required.[65]

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61. *Id.* ¶ 5 (emphasis in original) (quoting Staff Rules, *supra* note 15, at § 2.01, ¶ 5.02).
62. *Id.*
63. *Id.* ¶ 7
64. *Id.*
65. *Id.* ¶ 5.

Furthermore, the Tribunal's subjective standard for notice, relying on the Applicant's awareness of the referral based on "the general context in which the Bank conducted its investigation,"[66] is unhelpful to the World Bank's legal department when referring future employees to prosecutors. The Tribunal provides no guidance on what kind of "general context" would suffice not to require notification in future cases. Given the remainder of the opinion, which holds that notification is required for the disclosure of various types of information,[67] the World Bank will probably err on the side of caution and notify the employee upon referral in future cases.

(b) Referral and Notification Requirements for Specific Documents

While Staff Rule section 2.01, paragraph 5.01 imposes a notification requirement upon the World Bank when "other personnel information" is referred, the Tribunal does not offer any definition of what constitutes personnel information for the purposes of the rule. For example, the Tribunal holds that hotel and travel information related to the Applicant's employment qualify as "other personnel information, without any factual or legal basis for considering such information personnel information.[68] The Tribunal also fails to define what is meant by "as soon as reasonably possible. It may be persuasively argued that it is unreasonable to inform an employee of the referral of information to criminal prosecutors until a formal indictment has been filed, because the risk the employee may destroy evidence, flee the jurisdiction or tamper with witnesses is such a serious one. Without any definition of "personnel information" or what is reasonable in terms of timing the notification, the World Bank's legal department must perform significant guesswork to determine what it can refer and when it must notify an employee of a referral.

While non-personnel information is not subject to Staff Rule section 2.01, paragraph 5.01, the Tribunal broadens the applicability of the rule to include non-personnel operational records. In considering the operational records referred in the case, the Tribunal writes that it "is satisfied that nothing in them relates to the accusations against the Applicant. It follows that such documents can be released without notifying him thereof."[69] The Tribunal implies that a notification requirement exists for non-personnel information if the Tribunal determines that the information is related to accusations against the Applicant. The test is a misguided expansion of the World Bank's notification requirements. The Tribunal cannot know whether the referred information relates to accusations against the Applicant simply because accusations have not been made by the DOJ. The Tribunal's test expands the notification requirements and is grounded in speculation and provides no clear rule for the World Bank legal department to follow.

66. *Id.* ¶ 7.
67. *Id.* ¶¶ 8-35.
68. *Id.* ¶ 11.
69. *Id.* ¶ 12.

Furthermore, the Tribunal announces disclosure and notification requirements for non-personnel information that may be personal in nature. The Tribunal relies on the World Bank's Policy on Disclosure of Information of March 1994, as revised effective 2002, which establishes constraints on the disclosure of information.[70] The relevant constraints, according to the Tribunal, include:

> (i) documents and information provided to the Bank only "on the explicit or implied understanding that they will not be disclosed outside the Bank, or that they may not be disclosed without the consent of the source; or even, occasionally, that access within the Bank will be limited" must be treated accordingly by the Bank;
>
> (ii) documents and records that are subject to the attorney-client privilege, or whose disclosure might prejudice an investigation, shall not be made publicly available, this constraint reflecting a general principle of privileged information even though it was explicitly introduced only in 2002; and
>
> (iii) appropriate safeguards must be maintained in order to protect the personal privacy of staff members and the confidentiality of personal information about them, all in accordance with the Principles of Staff Employment.[71]

The Tribunal finds that the existence of an express or implied condition of non-disclosure forbids the disclosure of certain non-personnel information to third parties.[72] In this case, the Tribunal finds that the release of bank records and credit card statements by private banks to World Bank investigators, with the consent of the Applicant, "was not expressly conditioned" on non-disclosure by the Bank.[73] The Tribunal also finds there was no implied understanding of non-disclosure because (a) "the disclosed information was fully available to the Applicant himself, as it originated in his own personal business"; (b) "his ability to defend himself was not jeopardized by the disclosure"; and (c) "the DOJ could in any event have subpoenaed the records in the ordinary process of discovery available in the United States legal system."[74]

The Tribunal's reasoning creates an unclear test for determining whether an implied understanding of non-disclosure exists in future cases. The Tribunal does not define what type of information could jeopardize an employee's ability to defend himself. In reality, no type of referral by the World Bank jeopardizes an Applicant's defense before the DOJ. Because the Applicant has not been indicted for any crime, he has no defense to prepare. If he is indicted, federal criminal procedure provides him adequate opportunity to respond to allegations and defend himself. His rights include the right to discovery, which includes the right to inspect all information in the government's possession, which is material to the

70. *Id.* ¶ 13.
71. *Id.*
72. *Id.* ¶ 15.
73. *Id.*
74. *Id.*

preparation of his defense.[75] The Tribunal does not consider this line of reasoning and instead creates an unclear test to determine the existence of an implied condition of non-disclosure.

Finally, the Tribunal holds that the World Bank may refer its investigative file to prosecutors, but must notify the Applicant of the referral.[76] This report includes "summaries of various interviews conducted in the context of the Bank's investigations, including interviews with the Applicant and other persons (inside and outside the Bank) implicated in the relevant events" and "other materials that came out in the course of these interviews."[77] While the Tribunal admits that the investigative report is "not related to 'personnel matters,'" it applies the notification standard for "other personnel information" of Staff Rule section 2.01, paragraph 5.01 [78] The Tribunal offers no justification for applying this notification standard to the investigative report. In the process, the Tribunal greatly expands the notification requirement imposed on the World Bank.

In looking to the Staff Rules and the Policy on Disclosure of Information to determine what may be referred to prosecutors, the Tribunal ignores the World Bank Sanctions Committee Procedures, which include a provision allowing for the disclosure of any information related to criminal activity The Procedures provide that "[i]f the Director of the INT determines that laws of member countries may have been violated by a Respondent, the Director may at any time make available to the law enforcement or administrative authorities of the countries involved any information relating to such a violation."[79] The Sanctions Committee Procedures pertain in large part to the relationship between the World Bank and its employees, as they discuss an employee's rights throughout sanctioning proceedings.[80] These procedures are a legitimate source of law for the question of the World Bank's right to refer documents to criminal prosecutors and should have been addressed by the Tribunal and deemed dispositive in favor of the Bank on the issue of the right to refer documents.[81] Instead, the Tribunal's opinion failed to mention any of these procedures.

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75. FED. R. CRIM. P 16(a)(1)(C).

76. *C v. IBRD*, Decision No. 272, at ¶ 21.

77. *Id.* ¶ 16.

78. *Id.* ¶ 18.

79 Sanctions Committee Procedures, *supra* note 18, at § 16(a).

80. *Id.* at intro.(d).

81. *Cf.* de Merode v. World Bank, Decision No. 1 (World Bank Admin. Trib.1981). In *Merode*, the Tribunal held that, in addition to other sources of law, "elements of the legal relationship between the Bank and its personnel are also to be found in the Personnel Manual, the Field Office Manual, various administrative circulars and in certain notes and statements of the management. *Id.* ¶ 22. The Tribunal cautioned, however, that "not all the provisions of these manuals, circulars, notes, and statements are included in the conditions of employment. Some of them have the character of simple statements of current policy or lay down certain practical or purely procedural methods of operation. It is, therefore, necessary to decide in each case whether the provision constitutes one of the conditions of employment. *Id.*

(c) Referral and Notification Requirements after *C v. IBRD*

C. v. IRBD produces an intricate, and often ill-defined, web of considerations for the World Bank's legal department regarding disclosure and notification related to criminal referrals. The legal department must work without knowing whether there is a blanket right to notify an employee of a criminal referral, regardless of the type of information referred. The lack of a definition for both "personnel" information and notice "as soon as reasonably possible" confounds the application of Staff Rule section 2.01, paragraph 5.01. For non-personnel information that falls outside of that rule, the World Bank must determine whether the Tribunal will feel that the referred information relates to accusations against the employee, despite the fact that the DOJ has not made any accusations. Furthermore, if the referral includes non-personnel information that is personal, the World Bank must determine whether an express or implied condition of non-disclosure exists and whether the referral will jeopardize the employee's defense before the DOJ, again without any accusations being made by the DOJ. The Tribunal must make all of these considerations under the shadow of an expensive potential monetary judgment.

The result of all of these considerations, in practical terms, is that the World Bank will now notify employees of all documents referred to the DOJ and may reconsider some referral decisions to avoid thorny questions, such as the existence of implied conditions of non-disclosure. This result is detrimental to the World Bank's overall anti-corruption strategy in two serious ways.

First, notification of referrals creates serious risks that the employee will obstruct the criminal investigation. In its pleadings, the Bank raised concerns that the Applicant "might attempt to destroy evidence, flee the jurisdiction, or harass and intimidate witnesses" once he is notified or granted access to investigative documents.[82] The Tribunal casts aside these concerns by stating that, in this case, the Applicant has cooperated with the World Bank and the DOJ, allaying any fears of obstruction by the Applicant.[83] The Tribunal's reasoning is based upon a naive assumption. The Applicant is required to cooperate with World Bank investigators under World Bank Staff Rules.[84] His carrying out his duties as an employee does not mean that he has refrained or will refrain from covering up his corrupt activity once he is notified that he has been referred to the DOJ. In fact, referral for criminal prosecution raises the possible harm an employee may face and may provide a greater incentive to an employee to cover up his activities. The Tribunal is simply in no position to know whether the Applicant has engaged or will engage in such obstructive activities, simply because he may have cooperated in the past.

Second, the complex disclosure and notification requirements imposed under *C v. IBRD* will probably result in the World Bank referring fewer documents to national prosecutors. This development will impact the effectiveness of criminal

82. *C v. IBRD*, Decision No. 272, at ¶ 24.

83. *Id.*

84. Staff Rules, *supra* note 15, § 8.01, ¶ 5.04 ("Staff members are required to cooperate in the investigation and failure or refusal to do so may constitute misconduct.").

prosecutions, by both limiting the scope and pace of criminal investigations. The result will be a reduction in the usefulness of criminal referrals as a punitive and deterrent tool for corruption within the World Bank and a weakening of the overall anti-corruption efforts of the World Bank.

2. Access to the Documents Referred

(a) Personnel Documents

The Tribunal also reads Staff Rule section 2.01, paragraph 5.01 to include a right to view the *contents* of the personnel information referred to criminal prosecutors.[85] It reads the rule to require the World Bank to give the Applicant the actual documents falling under this rule.[86] The Tribunal provides no legal reasoning for this conclusion. Instead, it is possible to interpret the rule narrowly as requiring a notification of only what information has been released, which might consist simply of a list of the documents referred, rather than copies of the documents themselves. Unfortunately, the Tribunal does not ponder the nuances of rule interpretation but rather decrees that the rule encompasses access to the documents themselves.

(b) Non-Personnel Documents — The Investigative Report

The component of the Tribunal's holding that will be the most detrimental to successful criminal referrals is the finding that the Applicant should receive copies of the World Bank investigative report referred to the DOJ.[87] The investigative report includes summaries of interviews with the Applicant and witnesses, investigator notes and other materials uncovered during the investigation.[88]

The Tribunal finds that the Applicant's access to the referred investigative report is "a matter that essentially is governed by principles of due process and fair treatment."[89] For the Tribunal, access to the investigative report is essential for the Applicant's right to respond to allegations against him. The principal authority the Tribunal cites is its previous decision, *King v. International Bank for Reconstruction and Development*.[90] The Tribunal writes:

> The Tribunal set out detailed standards for the handling of misconduct under Staff Rule 8.01 in *King*, Decision No. 131 [1993]. The Tribunal assigned particular importance to the conduct of the investigation, to the right of the accused staff

85. *C v. IBRD*, Decision No. 272, at ¶ 7

86. *Id.*

87. *Id.* It is important to be clear that the Tribunal found the referral of the investigative report permissible under the World Bank's Policy on Disclosure of Information. *See* Staff Rules, *supra* note 15, at § 2.01, ¶ 5.01. The Tribunal did not analyze the disclosure under World Bank Staff Rule section 2.01, paragraph 5.01, which applies to personnel information, assumedly because it did not consider the documents to constitute personal information, although the Tribunal did not explicitly say so.

88. *C v. IBRD*, Decision No. 272, at ¶ 16.

89. *Id.* ¶ 17

90. *Id.* ¶ 23

> member to respond, and to questions of due process. In respect of the right to respond, the Tribunal specifically held that "the entitlement of the staff member to respond presupposes an exact knowledge of the charge made against him and extends to the right to give a properly considered answer to, or comment upon, every aspect of the case made against him."[91]

The Tribunal was correct in finding that *King* established a "basic rule of due process that an accused person should be confronted with a specific charge and be given an opportunity to reply to it."[92] The *King* decision, however, dealt solely with an employee's due process rights in the context of allegations in *internal* disciplinary proceeding.[93] The Tribunal extends the due process protection in *King* to an entirely different context—the relationship between an employee and his national authorities in a prosecution against him.[94] The Tribunal's extension of an employee's due process rights to this context is flawed on numerous grounds.

Most importantly, the DOJ has not made any allegations against the Applicant. Once allegations are made, in the form of a grand jury indictment or information, the Applicant will have a chance to face his accuser, the United States government, and undertake discovery of prosecution documents and respond to any charges in a court of law without any "guesswork," a concern the Tribunal cites explicitly.[95] The Applicant's due process rights under the United States Constitution are protected from the moment his file is referred to the DOJ and he may petition the court with any procedural grievances he may have. Thus, his ability to defend himself against any allegation by the DOJ has not been impaired in any manner, a concern the Tribunal raises.[96]

Furthermore, like any other individual under investigation by the DOJ, the Applicant does not have a right to access the files and records in the possession of prosecutors prior to the start of formal criminal proceedings. In the U.S, and common law systems generally there simply is no right to know where you stand in the eyes of prosecutors while they investigate you, a privilege to which the Tribunal believes the Applicant is entitled.[97] Even in internal World Bank proceedings, under *King,* the employee does not have a right to information about his case until a formal allegation is made.[98] In civil law systems, a suspect's right to access investigative documents similarly attaches only once the formal investigative process has been launched by either the police or the public prosecutor, though the defendant may have access to files earlier than in common law systems.[99] Neither system compels a victim to turn over her documents or the

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91. *Id.* (quoting King v. Int'l Bank for Reconstruction and Dev., Decision No. 131, at ¶ 35 (World Bank Admin. Trib. 1993) [hereinafter *King v. IBRD*]).

92. *King v. IBRD*, Decision No. 131, at ¶ 35.

93. *King v. IBRD*, Decision No. 131, at ¶¶ 29-82.

94. *See C v. IBRD*, Decision No. 272, at ¶¶ 3-35.

95. *C v. IBRD*, Decision No. 272, at ¶ 26.

96. *Id.* ¶ 32.

97. *Id.* ¶ 21.

98. *King v. IBRD*, Decision No. 131, at ¶¶ 33-37.

99. *See* Mario Chiavario, *Private Parties: The Rights of the Defendant and the Victim*, in EUROPEAN CRIMINAL PROCEDURES 541, 558 (Mireille Delmas-Marty and J.R. Spencer eds., 2002).

content of her communication with the police to the defendant. In both systems, the suspect's due process rights are only in relation to the national authority investigating him, not to the victim who refers him.

The Tribunal's decision in *C v IBRD* creates an unprecedented right of access to the DOJ investigation that is flawed on legal grounds under procedural rules of both common law and civil law systems. Prior to the Tribunal case, the Applicant was in no different position than any other individual under investigation by the DOJ. The Tribunal's holding, however, puts him in a privileged position as compared to all other individuals under the DOJ's jurisdiction. It alters the relationship between him and his member government to the detriment of the latter and is thus an illegitimate intrusion into the domestic legal process of a member government.

The Tribunal also reasons that "[s]trict enforcement of due process will also likely avoid accusations of a general nature unsupported by specific evidence that could mislead the national authorities."[100] This concern is allayed by the fact that government prosecutors are charged with the task of evaluating evidence for its veracity and integrity when constructing a case. If the facts of an investigative file contain speculative assertions, prosecutors can disregard such facts, or refrain from pursuing the prosecution. If unsubstantiated facts are introduced during trial, the criminal process allows the defense to produce contrary evidence and attack the veracity of any testifying witness.

The Tribunal also errs in its rationale for granting access to the documents by placing an inordinate degree of evidentiary weight to the investigative reports referred to the DOJ by the World Bank. The Tribunal raises alarm that "none of these documents bears the signature of the Applicant as evidence of his having admitted or accepted its conclusions."[101] The Tribunal ignores well-established rules of evidence in the U.S. denoting such summaries and notes as inadmissible hearsay [102] At trial, the court would require the World Bank investigator to testify about his interviews and would not allow the summaries themselves to be introduced as evidence. The procedural protections of the U.S. legal system make the Tribunal's protection unnecessary The result is only to impede the effective criminal investigation of the alleged corrupt activity

The *C v. IBRD* holding is further flawed on the grounds of fundamental policy considerations. Notification of criminal referral and access to referred documents raises the risk that an employee will engage in activities to obstruct the criminal investigation. As described earlier, the Tribunal is in no position to determine whether such obstruction has occurred or will occur based solely on the Applicant's prior cooperation, much of which was required by the World Bank's Staff Rules.

Even assuming the Applicant has not engaged in obstructive activity he may

100. *C v. IBRD*, Decision No. 272, at ¶ 26.

101. *Id.* ¶ 25.

102. FED. R. EVID. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

not know the full extent of the facts uncovered against him. With access to the investigative file, the employee could read witness interviews and see documents, which he may not have before known existed. His new knowledge could plausibly change his disposition with respect to cooperating. The Tribunal cannot know the risk of the Applicant destroying evidence, fleeing the jurisdiction or tampering with witnesses until the Applicant views the documents that have been referred to the DOJ. In this scenario, where an employee's level of cooperation could easily change, a bright-line rule barring access to such documents would ensure that employees who would want to obstruct the investigation would not have an opportunity to do so.

The Tribunal continues and states that "[n]or could the documents concerned be in any way destroyed or tampered with by the Applicant as they were already in the hands of the Bank and, later, of the Department of Justice."[103] The risk is not that the Applicant will destroy the specific files that have already been referred; rather, the risks are that other related evidence not yet subpoenaed will be destroyed, or the Applicant will tamper with witnesses before they are deposed by prosecutors or testify in the case. By ignoring the true risk involved in granting employees access to the investigative report, the Tribunal's rationale for allowing access to the documents is further flawed.

By saying that the facts of this case provide no specific risks, the Tribunal creates an ambiguous rule for the World Bank to follow in subsequent cases. Should the World Bank withhold its investigative report when it believes the person is a flight risk and expose itself to additional adverse judgments by the Tribunal if the Applicant does not flee? It is more likely that the Tribunal's holding will result in the World Bank turning over the investigative report to all subjects of referral in the future. This result is a disastrous policy as the real risks outlined above, ignored by the Tribunal in *C v. IBRD*, may be present in future cases and the effective subsequent prosecution of corruption may be seriously compromised.

Finally the Tribunal states that it has "reservations with respect to unnecessarily secretive procedures, which tend to result in unfair accusations and investigations."[104] Questioning the administrative procedures and judgments of divisions within the World Bank is a core component of the mandate of the Administrative Tribunal. The characterization of corruption investigations and subsequent criminal referral as "unnecessarily secretive, however, reveals a fundamental misunderstanding of the nature of effective anti-corruption efforts within organizations. Secrecy during an investigation and in the referral of information to prosecutors is essential to ensure that a suspect does not obstruct the investigation. There are sufficient due process guarantees already in place to ensure that such secrecy does not impose an unfair result upon a World Bank employee. Under *King*, the employee has a right to face his accuser in an internal

103. *C v. IBRD*, Decision No. 272, at ¶ 24.
104. *Id.* ¶ 26.

investigation.[105] Under the laws of his national jurisdiction, the employee has a right to face his national accuser in a court of law The Tribunal's reservations in this regard are both redundant and misguided and result in an unprecedented expansion of employee due process rights that guts the mechanism of criminal referral as an anti-corruption tool at the World Bank.

3. Addressing the Legal Obstacles of *C v. IBRD* and World Bank Rules

The explicit provisions of the Staff Rules and the Policy on Disclosure of Information impose limits on referrals while contemplating some form of employee notification.[106] The requirements specified in those provisions are expanded and complicated in the Tribunal's holding in *C v. IBRD*. In order to restore the World Bank's anti-corruption efforts, the procedures related to criminal referrals should be reformed. A new Staff Rule ought to be implemented allowing for the referral of any information, both personnel and non-personnel, to prosecutorial bodies in cases involving employee corruption, without notification and access.

Such a narrow provision would carve out a small area of full and unfettered disclosure for special cases involving corruption. Criminal referrals are different from disclosures to the general public and the due process and privacy rights of employees referred to the DOJ are protected under U.S. laws. Any remaining concerns about employee privacy should be outweighed by the World Bank's need for effective anti-corruption efforts, for which secrecy is essential. While staff opposition to such a new rule may be significant, the absence of such a provision will aid corrupt employees, who break the laws of the nations in which they work, in avoiding the most serious consequences for their actions.

III. STANDARD OF PROOF CONCERNS IN INTERNAL CORRUPTION INVESTIGATIONS

The official standard of proof needed to be met to impose sanctions is evidence that is "reasonably sufficient to support a finding that the Respondent engaged in a fraudulent or corrupt practice "[107] The World Bank Tribunal has never announced the precise meaning of the "reasonably sufficient" standard.

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105. *Id.* ¶ 23; *King v. IBRD*, Decision No. 131, at ¶ 36.

106. *See* World Bank, The World Bank Policy on Disclosure of Information, June 2002, at § IV ¶ 89. In its discussion of the World Bank Policy on Disclosure, the Tribunal ignores one explicit constraint. "The individual records and personal medical information of Executive Directors and their Alternates and Advisors, of the President of the Bank, and of Bank staff, *as well as proceedings of internal appeal mechanisms and investigations, are not disclosed outside the Bank, except to the extent permitted by the Staff Rules*. *Id.* (emphasis added). While the Tribunal does not address whether the files referred in this case would qualify as "proceedings" of investigations, it is plausible that they could. Furthermore, the Tribunal ignores the Sanctions Committee Procedures which provide a blanket right of referral, contrary to the Policy of Disclosure and the holding of the current case. Thus, there is a need for an explicit Staff Rule provision allowing referral of all types of documents related to corruption investigations without notification to bring clarity to the legal regime for referral and to bolster the effectiveness of criminal referrals.

107 Sanctions Committee Procedures, *supra* note 18, at § 13.

While no standard is without some uncertainty, the World Bank's standard, standing alone, is devoid of any meaning without further definition of the clause "reasonably sufficient to support. The World Bank standard, as it currently stands, could require anything from evidence that establishes that the corrupt activity was more likely than not to have occurred (the common preponderance of the evidence standard) to evidence that establishes beyond a reasonable doubt that the corrupt activity occurred. A recent case raises serious concerns about the standard of proof applied in World Bank administrative proceedings involving corruption and fraud.

In September 2002, the High Court of Lesotho convicted Acres International, a prominent multinational engineering firm, of two criminal counts of corruption related to bribes paid to a senior government official in Lesotho for contracts related to an $8 billion water project, of which the World Bank contributed $150 million.[108] Prior to the criminal conviction, the World Bank's Fraud and Corruption Committee had conducted a two-year investigation into Acres and found insufficient evidence to justify debarment.[109]

This sequence of events, in which evidence against Acres clears the higher hurdle of reasonable doubt in a criminal proceeding in Lesotho, while failing to satisfy the presumably lower standard of proof in the World Bank, raises serious concerns about the efficacy of the World Bank's sanctioning mechanism. Before one discredits the World Bank's sanctioning mechanism, it is important to note that the Lesotho court, being a national criminal body, may have accessed evidence unavailable to World Bank internal investigators, given the lack of subpoena power of the World Bank.[110] Furthermore, the integrity of the criminal procedure in Lesotho should be further studied to ensure that the conviction was free from any political motivation or other impropriety. The World Bank, noting the conviction in Lesotho, formally reopened its investigation of Acres in March 2004.[111]

Despite these factors, however, the Acres case reveals a need for clarification of the "reasonably sufficient" standard in World Bank corruption proceedings. A standard roughly equivalent to the common "preponderance of the evidence" or "more likely than not" standard might be an appropriate approach. These standards, which are widely used in legal systems around the world in non-criminal matters, are regarded as balancing the interests of fairness to defendants with the interest of judicial expediency. If the current "reasonably sufficient" standard is higher than a preponderance of the evidence, lowering the standard

108. Michael Dynes, *Net Closes on Western Corruption in Africa*, TIMES (LONDON), Oct. 28, 2002, at 16.

109. Catherine Porter, *Oakville Engineering Company Braces for African Bribery Verdict*, TORONTO STAR, Sept. 12, 2002, at D01.

110. *See id.* Defense counsel for Acres argued that the evidence was identical to evidence presented at the World Bank internal proceeding. *Id.* Such claim should of course be taken with grain of salt, as it is clearly meant to imply that the defendant should be freed of all charges in the pending matter.

111. David Pallister, *World Bank Corruption Inquiry May Blacklist Firm*, GUARDIAN, Mar. 16, 2004, at 18.

could rid the Bank of corrupt agents, like Acres, in a more timely and effective manner while ensuring the fundamental fairness of the sanctioning system.

The World Bank could also follow the example of some U.S. government agencies that consider civil or criminal convictions against a contractor for certain related or unrelated offenses, such as theft or tax evasion, as sufficient evidence as a matter of law for debarment.[112] The World Bank could similarly regard debarment from government contracting systems in member governments as sufficient grounds to debar contractors from World Bank contracts. While these contractors would not have committed any fraud against the World Bank, a pattern of poor performance on prior contracts can be enough of a substantial risk to World Bank contracts as to require debarment.[113] Such an approach, however, might yield a far greater number of debarments of firms and individuals from Western countries that have more developed national government debarment systems. Such a result might prove to be a substantial political impediment to instituting such a system of debarment. The World Bank could impose shorter periods of debarment in cases such as these to compensate for the lack of a full investigation into firms. The Bank could also institute a system of suspensions, or short term freezing of funding, pending full investigation. Suspensions usually require a lower standard of proof, so that the initiation of criminal or civil proceedings for certain offenses can trigger a suspension.[114]

A further development that could dramatically reduce the time spent on investigations and more easily locate and eradicate corrupt activities is the implementation of an illicit enrichment provision in the World Bank's Sanctions Committee Procedures. Illicit enrichment provisions generally function by allowing prosecutors to introduce evidence of a government official's unexplained wealth or extravagant standard of living and to shift the burden to the person to prove a legitimate source for that wealth or standard of living.[115] A failure by the government official "to provide an adequate explanation would mean that the official must have traded on the governmental authority vested in him for personal gain."[116]

Illicit enrichment is most notably used in the successful anti-corruption efforts of Hong Kong.[117] Furthermore, all major multilateral conventions call for signatory

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112. *See e.g.*, Steven A. Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, REPORTER, Mar. 1999, at 4 (discussing suspension and debarment rules in the United States Air Force).

113. *Id.* at 5 (writing that the U.S. Air Force has wide latitude to debar firms for a history of unsatisfactory performance on private contracts, conduct that is neither criminal nor related to public contracts. The author points out, however, that agencies have failed to take advantage of such broad discretion).

114. *See id.* at 4.

115. Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP LAW 793, 813 (2001).

116. *Id.* at 814.

117 Section 10(1) of the Hong Kong Prevention of Bribery Ordinance provides that:

(1) Any person who, being or having been prescribed officer, (a) maintains standard of living above that which is commensurate with his present or past official emoluments;

governments to establish illicit enrichment as a criminal offense.[118] Illicit enrichment is not a criminal offense in jurisdictions like the U.S. because it conflicts with a defendant's constitutional right to refrain from testifying against himself in a criminal matter.[119] However, the notion of illicit enrichment and burden-shifting to a defendant can be found in U.S. civil proceedings, including civil asset forfeiture actions related to criminal activity [120] Evidence that a person is living beyond his lifestyle can help build probable cause to support a civil forfeiture action which, when established, shifts the burden to the accused to prove, by a preponderance of the evidence, the legitimate source of the asset in question.[121]

Illicit enrichment provisions recognize the importance of integrity among public officials and understand both that unexplained wealth is a powerful indicator of impropriety among civil servants and that evidence of corruption is often hard to gather, a challenge that is even more acute in the case of the World Bank, given its lack of subpoena power.[122] Establishing illicit enrichment, without an adequate explanation by the official, as a sufficient ground to find against an employee for breaching his duties to the World Bank could offer a faster and more effective method of finding and expelling corrupt actors from the World Bank.

An illicit enrichment provision would not violate any established due process rights of World Bank employees. Employees do not have a privilege against self-incrimination in internal investigation proceedings. In fact, the World Bank staff is subject to an express duty to cooperate in internal investigations. World Bank Staff Rule section 8.01, paragraph 5.04, states that in internal investigations, "[s]taff members are required to cooperate in the investigation and failure or refusal to do so may constitute misconduct, which can serve as a ground for termination under the Staff Rules.[123] The World Bank also expressly allows

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> or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

Hong Kong Prevention of Bribery Ordinance, *available at* http://www.icac.org.hk/eng/prevt (last visited Jan. 30, 2002).

118. *See* Inter-American Convention, *supra* note 3, at art. IX (mandating that signatories "[s]ubject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions. Among those States Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention."). *See also* OECD Convention, *supra* note 2, at art. 1, 2; U.N. Convention, *supra* note 4, at art. 20.

119 U.S. CONST. amend. V

120. *See* United States v. Edwards, 885 F.2d 377 (7th Cir. 1989).

121. *See id.* at 390 (holding where "a defendant's verifiable income cannot possibly account for the level of wealth displayed and where there is strong evidence that the defendant is a drug trafficker, then there is probable cause to believe that the wealth is either direct product of the illicit activity or that it is traceable to the activity as proceeds.").

122. *See supra* note 110, and accompanying text.

123. Staff Rules, *supra* note 15, at §8.01, ¶5.04; *see also id.* § 0.01, Principle 7.1(b)(iv).

internal investigators to "[c]all upon any staff member for the production of documents believed to have probative value."[124] While the World Bank Tribunal has not addressed whether staff members have a privilege against self-incrimination during investigations, the express Staff Rules nowhere establish or suggest such a privilege, but rather enunciate the opposite—a duty to cooperate.[125] Given the lack of a self-incrimination privilege, the World Bank should proceed with an illicit enrichment provision that considers unexplained wealth or extravagant lifestyle, without adequate explanation, as sufficient to find staff misconduct. A guarantee that financial records would not be disclosed to third parties, other than criminal prosecutors in the case of corrupt activity, should be made to protect the privacy of staff members.

The World Bank should also consider widespread financial disclosure requirements for employees, covering all sources of income, to safeguard against conflicts of interest. Currently, less than fifty senior World Bank officials are subject to such disclosure.[126] Financial disclosure requirements for public officials are seen as an essential component to ensuring the integrity of public organizations. In the U.S., for example, detailed annual financial disclosures are required of members of all three branches of government.[127] Public officers of only the highest grade are usually required to file, though given each grade has ten steps, the total number of such officials across the federal government is significant.[128] A wider base of individuals subject to such disclosure would increase transparency and provide preliminary evidence under any illicit enrichment provision once enacted.[129]

IV INVESTIGATIVE INFORMATION SHARING AND CROSS-DEBARMENT

Currently, the World Bank does not have investigative information sharing or cross-debarment agreements with other multilateral or bilateral development

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124. *Id.* §8.01, ¶5.04.

125. Providing employees with such a privilege would be contrary to the Staff Rules as well as detrimental to effective fact-finding and resolution of internal corruption investigations. Given the Tribunal's expansive view of employee due process, and the suspiciousness with which it views the World Bank's investigations, the World Bank may want to include an explicit provision, such as a staff rule, that enunciates the fact that employees do not have privilege against self-incrimination. Note that the issue of whether statements made by employees in a World Bank administrative proceeding can later be excluded in a subsequent prosecution in a national court has not been litigated.

126. Staff Rules, *supra* note 15, at § 3.01, ¶ 8.02 (noting only "[s]taff members at the level of vice president or above" are subject to the requirement); *see also* World Bank Group, Senior Management, at http://web.worldbank.org/ (last visited Feb. 6, 2004) (listing senior management positions).

127. *See generally* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

128. *See e.g.*, 5 C.F.R. § 2634.202 (2003) (defining public filer for the purposes of executive branch disclosure requirements).

129. In summary, U.S. government disclosure rules measure the sources and value of income and do not require the disclosure of a public official's net worth. Ethics in Government Act, at §§102, 202, 302. Net worth evidence would have greater evidentiary value for World Bank investigators, in the event that an illicit enrichment provision is adopted. Any effort to implement such disclosure requirement, or any further disclosure requirements for that matter, would face significant political opposition from staff members.

finance institutions. Transnational corruption often involves repeat players who may practice in numerous developing countries and contract with different development banks. Sharing investigative information with other development finance institutions and instituting a system of cross-debarment can expedite the World Bank's corruption investigations and ensure that corrupt firms and individuals can not be debarred by one lender only to find another institution to defraud.

Substantial obstacles against implementing investigative information sharing and cross-debarment agreements with other institutions exist. The first is the lack of uniformity between different organizations in the quality of investigations and the standards of proof used. In April 2003, the Fourth Conference of Investigators of International and Bilateral Institutions convened in Brussels to address this concern.[130] Representatives from the World Bank and the United Nations presented a number of Uniform Guidelines for investigations, which were endorsed by representatives from international and bilateral institutions.[131] The guidelines include ethical principles for investigators, detailed procedural rules for investigating and administering inculpatory and exculpatory findings, policies on the confidentiality and protection of witnesses and the due process rights of subjects.[132] The Uniform Guidelines, however, are only aspirational principles to which institutions are not bound. A second obstacle is the risk of institutions debarring firms for political purposes. A bilateral institution may debar foreign firms more often than domestic firms or may target specific firms for political purposes, under the rouse of a corruption investigation.

The World Bank could sidestep these limitations by creating investigation information sharing and cross-debarment agreement only with institutions that conform to the uniform guidelines. Any agreement could also require institutions to open their respective investigation files for review by their partner institutions, in order to ensure that institutions are meeting the ethical and procedural requirements of the uniform guidelines. Furthermore, the World Bank could require additional evidence in cases in which it suspects that political motivations marred the referring institution's investigation, or it could exercise its discretion and not debar the firm. Given these suitable responses, an investigative information sharing and cross-debarment regime would be a viable approach for the World Bank to undertake to increase the effectiveness of its anti-corruption efforts.

130. *See* Press Release, European Anti-Fraud Office, The 4th Conference of International Investigators held in Brussels on 3rd and 4th April 2003 (Apr. 4, 2003), *available at* http://www.europa.eu.int/geninfo/info-en.htm (last visited Feb. 15, 2004).

131. *Id.*

132. Address before The 4th Conference of International Investigators (Apr. 2003) (on file with author).

V STRUCTURAL CONSTRAINTS TO EFFECTIVE ANTI-CORRUPTION EFFORTS AT THE WORLD BANK

The World Bank's operational model, governance structure, oversight capacity, staff and contractor incentive structure, bureaucratic norms, political motivations and the status of the internal investigate body all pose additional obstacles to the control of corruption within the World Bank. This section addresses the problems arising when structural attributes of the Bank impede effective anti-corruption efforts or even create incentives contrary to the goal of curbing corruption at the World Bank.

A. The World Bank s Operational Model

Under the World Bank Articles of Agreement, the World Bank is authorized only to lend to governments and to third parties when the loan is guaranteed by the government in which the party is located.[133] Governments in developing countries are responsible for the execution of projects and are given a large degree of discretion to carry out projects.[134] Government agencies charged with implementing projects are responsible for procuring firms and contractors for projects and managing and disbursing the loan funds.[135]

Structurally, this operational model exposes the World Bank to significant corruption risk. Developing country governments are plagued with weak procurement systems, insufficient supervisory personnel for projects, inadequate resources for investigating and prosecuting corruption and poor legal rules and procedures to prevent, detect, and address corruption.[136] For example, in a recently approved $46 million World Bank urban revitalization loan to Brazil,[137] the World Bank noted that the coordinating agency in charge of overseeing the entire project, FIDEM, "has the minimum structure necessary to undertake a project of this type,

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133. IBRD Articles of Agreement, *supra* note 54, at art. III § 4, *available at* http://www.web.worldbank,org/ (last visited Feb. 6, 2004) ("The Bank may guarantee, participate in, or make loans to any member or any political sub-division thereof and any business, industrial, and agricultural enterprise in the territories of member, subject to the following conditions: (i) When the member in whose territories the project is located is not itself the borrower, the member or the central bank or some comparable agency of the member which is acceptable to the Bank, fully guarantees the repayment of the principal and the payment of interest and other charges on the loan.").

134. While World Bank loan documents are not publicly disclosed, World Bank Project Appraisal Documents offer detailed descriptions of World Bank financed projects. Generally, the borrower government manages the majority of the project with assistance from a World Bank Task Manager and World Bank consultants. Project Appraisal Documents and other documents can be accessed on-line at: http://www-wds.worldbank.org/ navigation.jsp? pcont=browdoc (last visited Feb. 6, 2004).

135. *See e.g.*, WORLD BANK, PROJECT APPRAISAL DOCUMENT ON A PROPOSED LOAN IN THE AMOUNT OF US$46.0 MILLION TO THE STATE OF PERNAMBUCO, BRAZIL WITH THE GUARANTEE OF THE FEDERAL REPUBLIC OF BRAZIL FOR THE RECIFE URBAN UPGRADING PROJECT, REP NO. 23331-BR (Apr. 2003) (listing specific government responsibilities related to a recently approved $46 million World Bank urban revitalization loan to Brazil) [hereinafter PROJECT APPRAISAL DOCUMENT].

136. GAO REPORT, *supra* note 20, at 16.

137 World Bank, *World Bank Approves $46 Million For Low-Income Urban Upgrading In Northeast Brazil*, Apr. 24, 2003.

but that structure is generally weak, understaffed and not entirely prepared to address the complexities involved in a large, inter-institutional and governmental project of this size."[138] Public procurement and financial systems in these countries may also be inadequate to ensure the integrity of the transactions. The appraisal document of the same urban revitalization loan to Brazil, for example, noted that FIDEM's "[o]verall procurement capacity is considered weak and the risk for the project is considered high."[139]

In addition, the World Bank's institutional mission to eradicate poverty[140] involves it in lending to the poorest countries in the world, which also tend to be the most corrupt.[141] The World Bank is also often called upon to lend to countries emerging from conflict situations where the institutional structures are often too weak to ensure the integrity of the funds lent to them.[142] In these situations, in which countries do not have adequate institutional "absorption capacity" to handle aid, lending can actually provide an incentive for governments to create poor governance structures so that aid money can be diverted for illegitimate uses.[143]

The World Bank is also a bank in the traditional sense of the word and its success is measured by traditional measures of banking success such as the rate of return of its projects, which depends on the number of loans it makes and its rate of default.[144] These measures ensure that the World Bank retains its superb credit rating, as the "IBRD raises almost all its money in the world's financial markets" where "[w]ith a AAA credit rating, it issues bonds to raise money and then passes on the low interest rates to its borrowers."[145] The pressure to make loans, and especially large loans, creates a "culture of loan approval," characterized by a pattern of overly optimistic and misguided lending that leads to a deterioration in

138. PROJECT APPRAISAL DOCUMENT, *supra* note 136, at 35.

139. *Id.* at 37.

140. The World Bank's Mission Statement begins with "[o]ur dream is a world free of poverty" and continues "[t]o fight poverty with passion and professionalism for lasting results. World Bank Group, About Us, Mission Statement, *at* http://www.worldbank.org/ (last visited Feb. 6, 2004).

141. At the time of this writing, the World Bank has active projects in all of the ten most corrupt countries according to the *2002 Transparency International Corruption Perceptions Index*. The countries from least corrupt to most corrupt are: Moldova, Uganda, Azerbaijan, Indonesia, Kenya, Angola, Madagascar, Paraguay, Nigeria, and Bangladesh. 2002 Transparency International Corruption Perceptions Index, *available at* http://www.transparency.org/pressreleases_archive/2002/dwld/cpi2002.presrelease.en.pdf (last visited Feb. 15, 2004).

142. Glenn T Ware & Gregory P Noone, *The Culture of Corruption in the Postconflict and Developing World*, *in* IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER ETHNIC VIOLENT CONFLICT 191, 194 (Antonia Chayes & Martha Minow eds., 2003). *See also* Paul Blustein, *G-7 Agrees That Iraq Needs Help With Debt; Important Roles Seen For IMF World Bank*, WASH. POST, Apr. 13, 2003, at A37

143. *See* Glenn T. Ware & Gregory P Noone, *supra* note 142, at 197 (discussing examples of corrupt governmental schemes that may occur in the developing country and post-conflict contexts).

144. *See* World Bank, About Us, What is the World Bank, *at* http://www.worldbank.org/ (last visited Feb. 15, 2004). The World Bank explicitly disagrees with this observation and describes itself as "[n]ot bank, but rather a specialized agency. The World Bank is not 'bank' in the common sense. It is one of the United Nations' specialized agencies, and is made up of 184 member countries. These countries are jointly responsible for how the institution is financed and how its money is spent. *Id.*

145. *Id.*

the quality of loans made and exposes them to corruption.[146]

> [P]ressure to lend encourages Bank operations staff to identify their interests with those of their clients in the recipient government. Task managers, who typically operate in one sector, develop working relationships with government officials in the relevant ministries. These officials, who implement projects under the supervision of the task manager, are also responsible—or are closely connected to the people responsible—for the approval of the next proposed Bank project for the sector. Given that the task manager wants the project and the government needs the loan, it does not take long for an understanding to develop in which problems associated with existing projects are overlooked in exchange for a smooth path for new projects in the pipeline.[147]

Furthermore, if "lending [declines], the Bank will shrink in size and become a less central player in the international economy."[148]

The World Bank itself first described this phenomenon in an internal 1992 report known as the *Wapenhans Report*, named after the World Bank Vice President who directed the study producing the report.[149] The report found that this culture of loan approval could be characterized by overly optimistic project appraisal ratings, poor identification of risk factors, and inconsistent and subjective evaluation criteria across projects that had resulted in over one-third of completed Bank projects qualifying as failures under the Bank's own evaluation criteria.[150]

The *Wapenhans Report* pointed towards gross corruption, finding that seventy-eight percent of the financial conditions in World Bank loans were not adhered to, a statistic that the report considered "startlingly low."[151] In subsequent years, numerous reports of widespread corruption in World Bank financed projects have surfaced. In 1997 for example, *Business Week* alleged that over $100 million of a $500 million World Bank loan to the Russian coal sector either could not be accounted for or had been diverted.[152] At the time of the story, the World Bank was

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146. Bruce Rich, *The World Bank Under James Wolfensohn*, *in* REINVENTING THE WORLD BANK 26, 43 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002). *See also* HOWARD N. WHITE & A. GESKE DIJKSTRA, PROGRAMME AID AND DEVELOPMENT: BEYOND CONDITIONALITY 489 (2003) ("aid agencies exist to give away money, and there is an ample literature documenting that individual and agency performance are assessed on the quantity of aid rather than its quality"). *See also* MICHELLE MILLER ADAMS, THE WORLD BANK: NEW AGENDAS IN A CHANGING WORLD 5 (1999) ("Most staff members believe the 'approval culture' is still in place"); PAUL J. NELSON, THE WORLD BANK AND NON-GOVERNMENTAL ORGANIZATIONS: THE LIMITS OF APOLITICAL DEVELOPMENT 89 (1995) ("The institutional tendency to define success in terms of money moved is in keeping with the tendency in official development circles to assess the adequacy of the industrial world's aid efforts by reference to the amounts of money or per centages of GNP devoted to the cause.")

147. Jonathan R. Pincus, *State Simplification and Institution Building in Development Project*, *in* REINVENTING THE WORLD BANK, at 76, 98 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002).

148. ADAMS, *supra* note 146, at 18.

149. World Bank, Portfolio Management Task Force Report Findings (1992), *available at* http://www.worldbank.org/html/opr/pmi/maintxt5.html (last visited Feb. 14, 2004).

150. *Id.*

151. *Id.*

152. Carol Matlack, *What Happened to the Coal Miners Dollars? At Least $100 Million from a World Bank Loan is Lost*, BUS. WK., Sept. 8, 1997, at 52.

preparing a new $500 million loan for the Russian coal sector, and *Business Week* observed that "World Bank officials seem surprisingly unperturbed by the misspending. They contend offering loans to spur change is better than micromanaging expenditures."[153]

While the risk of default should logically provide a counter-incentive to an overzealous "culture of lending, the risk of default is nearly inexistent in the case of World Bank loans. All World Bank loans are guaranteed by governments, which reduces the risk of loss for the loan to nearly zero,[154] as history shows that developing countries governments rarely default on World Bank loans.[155] The reasons for this phenomenon vary by country, but include the high levels of dependence upon development assistance common in some countries, the weight private lenders place on a country's good standing with the World Bank, the lower interest rates and longer repayment terms countries can get from the World Bank *vis-a-vis* private lenders, and the lack of access to the international capital markets of many countries due to a below investment grade credit rating. With the risk of default minimized to nearly zero, any significant risk to World Bank lending decisions is removed, and a "culture of loan approval" is free to thrive, exposing World Bank funds to higher risks of corruption.[156]

B. The World Bank s Governance Structure

The World Bank's governance structure may also contribute to the "culture of loan approval" and the lack of critical attention given to projects. The World Bank is owned by Member governments who provide paid-in and callable capital in exchange for ownership shares in the Bank.[157] Member governments benefit from

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153. *Id.*

154. Allan H. Meltzer, et. al, *Report of the International Financial Institution Advisory Commission* (2000), *available at* http://www.house.gov/jec/imf/meltzer.htm (last visited Feb. 12, 2004) ("the host government guarantee, required by all Bank lending, eliminates any link between project failure and the Bank's risk of loss"). In 1998, the U.S. Congress set up the International Financial Institutions Advisory Commission, chaired by Allan Meltzer and including prominent economists, business people and politicians, to review the usefulness of number of international financial institutions. *Id.* The commission released the report in March 2000. *Id.*

155. *See* ADAMS, *supra* note 146, at 19 (noting that "[o]ver the years, a normative consensus has formed among lending institutions and borrowing countries alike that treating the World Bank as a preferred creditor is a central part of playing by the rules of international finance.").

156. One commentator cautions against viewing the World Bank as "simply money-pushing institution. *See* Devesh Kapur, *The Changing Anatomy of Governance at the World Bank*, *in* REINVENTING THE WORLD BANK, at 54, 71. Professor Kapur notes that the Bank's lending has leveled off in the 1990s, except for limited bail out lending. *Id.* However, according to its annual report, the IBRD increased its new lending by one billion dollars in fiscal year 2002. ANNUAL REPORT, *supra* note 8, at 26. The flattening in the 1990s may be more attributable to a global economic downturn beginning in 1999 rather than the absence of an overzealous "culture of lending. It is also possible that allegations of widespread corruption and irresponsible lending have applied pressure upon the Bank to reduce its lending. Professor Kapur also notes that any money-pushing by the World Bank is dwarfed by private sector lending to developing countries and that more attention should be placed on the much larger unregulated system of international capital flows rather than the relatively small scale activity of the World Bank. Kapur, *supra* note 146 at 71.

157 IBRD Articles of Agreement, *supra* note 54, at art. II.

the business and sales generated by Bank projects and place pressure on the Bank staff to approve more and bigger loans.[158] For example, the U.S. share in procurement and contracting volume combined from the World Bank is twenty-one percent.[159] Governments and creditors within member countries may also push for new loans so that developing countries can continue to service their debt.[160] These interests provide little incentive to reign in new loans and projects. Member governments also lack the incentive to criticize the activities of other Member governments, lest they cast a light upon their own practices.

C. *Lack of and Limits to Project Oversight for Corruption*

In addition to an incentive structure that promotes overly optimistic lending, the World Bank lacks the ability to oversee all of its projects to ensure the integrity of project funds. The World Bank requires borrowers and project implementation entities to provide the Bank with annual independently audited financial statements.[161] An investigation into World Bank management by the U.S. General Accounting Office (GAO) in the year 2000 found that

> [t]he Bank is required to approve the selection of the auditors. However, Bank guidance on auditor selection acknowledges that it is often not possible to ensure the independence of auditors, particularly government auditors that are used for auditing Bank-financed projects in many countries. The Bank guidance states that government auditors are frequently not professionally qualified accountants—many are political appointees, and some are public service administrators. Furthermore, the Bank has been concerned that government auditing institutions sometimes are understaffed, underfinanced, and subject to political pressure.[162]

In addition, audits are limited in their ability to reveal core issues of fraud and corruption, in that business records upon which financial statements are based may be fraudulent and left uninvestigated.[163]

The scale of lending activity that the World Bank undertakes and its geographical dispersion across the globe can create a trade-off between effective oversight and efficiency Supervision missions to all project sites are implausible due to cost and time constraints. The IBRD and IDA generate about 40,000 individual procurement contracts annually, of which 10,000 (60 percent of value) undergo prior review by Bank staff.[164] The remaining 30,000 are subject to

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158. Winters, *supra* note 9, at 122.

159 MICHAEL D.V DAVIES, THE ADMINISTRATION OF INTERNATIONAL ORGANIZATIONS: TOP DOWN AND BOTTOM UP 355 (2002).

160. BERTIN MARTENS ET AL., THE INSTITUTIONAL ECONOMICS OF FOREIGN AID 4 (2002).

161. PROGRESS SINCE 1997, *supra* note 7, at 8.

162. GAO REPORT, *supra* note 20, at 16.

163. Winters, *supra* note 9, at 116 (citing a task manager who states, "The auditors themselves—and I've talked to a number of them—they admit freely that all they do is look at the books. If the books balance, they say 'we've looked at it according to international auditing standards, and we find that the records are in order. But the records themselves could be fraudulent. Auditors will tell you it's not their job.")

164. WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK

selective "post-audit" review,[165] which is rarely carried out.[166] Even in cases of prior review, without a complaint about the procurement contract under review, it is very difficult to find evidence of a kickback or bribe payment from the contract itself.[167]

The 2000 GAO report also found that loan appraisal documents remained unduly optimistic. The report found that a

> review of 12 projects approved after November 1998 confirmed that the Bank's senior decision makers still have not adequately assessed the risks posed by potential corruption and weak managerial capacity of borrowers Only 4 of the 12 projects we reviewed identified corruption or undue political interference as a critical project risk (even as a low or negligible one), even though Bank reports had indicated that corruption is a problem in all of the countries included in our project sample.[168]

Review of a randomly selected recent loan appraisal document showed that the Bank seems to have made minor progress in its review of corruption.[169] The appraisal repeatedly noted the high levels of risk in procurement and financial management as well as political risk.[170] Corruption risk was not specifically addressed as a risk factor but was eluded to once in the appraisal, finding that an external audit had been conducted on the main implementing agency and had reported no misuse of the preliminary funds for the research and development of the project.[171] The Bank should consider creating a distinct component in loan appraisal documents for corruption risk assessment, as they currently do for social and environmental impact.[172] Corruption risk should also be included in the sensitivity analysis of the project's cost-benefit calculation, as it directly impacts the financial outcomes of a project.

The clear inability to oversee all of its projects requires the World Bank to be especially vigilant in its termination of corrupt employees and in its debarment of firms. The World Bank's oversight regime has been compared to the self-reporting tax regime of the Internal Revenue Service.[173] In such systems, probity may only be achieved when the consequences of being caught for fraudulent conduct are serious enough to outweigh the low probability of being caught.[174] Stronger and swifter sanctions in internal corruption proceedings, including criminal convictions of corrupt actors, and a larger number of debarments and terminations are necessary to achieve this outcome in World Bank projects. The

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34 n.27 (1997).

165. *Id.*

166. Winters, *supra* note 9, at 119.

167. *See id.* at 119-20.

168. GAO REPORT, *supra* note 20, at 19-20.

169. *See* PROJECT APPRAISAL DOCUMENT, *supra* note 135.

170. *Id.*

171. PROJECT APPRAISAL DOCUMENT, *supra* note 135, at 96.

172. *Id.*

173. Winters, *supra* note 9, at 119.

174. *See id.* at 119-20.

World Bank must also disseminate information of its successes in anti-corruption proceedings more effectively to provide notice to governments and corrupt actors that the penalties for corruption are severe and mounting. The recent criminal convictions of two former World Bank employees, for example, were not publicly disclosed by the World Bank, so any deterrent value that their convictions may have had on other corrupt actors was lost.

D. Staff Incentives and Organizational Structure

The incentive system and the organizational structure under which World Bank staff operates may often oppose the aims of effective corruption control. Like any bank officer, staff members have an interest in generating new and larger loans to further their professional prominence within the organization.[175] Due to the difficulty in measuring the impact of loans, evaluation of staff within aid agencies often concentrates more on the number of loans made.[176] Staff members also cultivate personal relationships with country representatives and may feel pressure not to offend them or the Member government they represent.[177] The desire of country representatives to secure new loans combined with the staff member's incentive to generate loans can sacrifice critical analysis of lending decisions for corruption and other risks.[178] Rotation of staff can be used to break personal connections and reduce corruption risk. The World Bank could consider such a system, though it might involve a significant trade-off between anti-corruption effectiveness and professional expertise, as regional or sector experts are moved to new regions and sectors.

E. Sentiments Regarding Project Corruption and Development

Another obstacle to effective anti-corruption efforts is a norm voiced by some staff members that a project with corruption is a lesser evil than no project at all.[179] By this logic, the people of a developing country are better served by a school construction project with a fifty percent corruption rate, in which 500 out of the required 1000 schools are built, than with no project that results in zero schools.

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175. NELSON, *supra* note 146, at 90 ("Careers at the World Bank have long been built primarily by designing projects that win Board approval. It is commonplace in insider discussions that staff advance primarily by identifying, designing, negotiating and preparing projects that the Board will approve and that further the investment program in country.").

176. ADAMS, *supra* note 146, at 5 ("In the development field where the criteria for success are so long-term and uncertain, lending volume was one of the ways in which the Bank could be judged as having an impact. As a result, the Bank's organizational culture puts premium on concluding loans, especially large loans, and staff members have been evaluated and promoted on their success in doing so"); *see also* MARTENS ET AL., *supra* note 160, at 4.

177 Marcus W Brauchli, *Speak No Evil: Why the World Bank Failed to Anticipate Indonesia Deep Crisis*, WALL ST. J., July 14, 1998, at A1 ("World Bank officials knew corruption in bank-funded projects was common, but never commissioned any broad reports tracking how much money was lost to it, in part, some bank officials say, because they feared having to confront the government."). *See also* Rich, *supra* note 146, at 43 (citing World Bank internal report noting "fear of offending the client".)

178. Pincus, *supra* note 147.

179. Winters, *supra* note 9, at 120.

One senior World Bank official is quoted as saying, "[i]f you take the amount of 30 percent loss it means 70 cents [on the dollar] got used for development after all."[180]

While logically persuasive, this proposition has been attacked as shortsighted and naively optimistic. A task manager is cited as retorting:

> .[M]y experience has been—and it's the experience of a lot of other people there [on the operations side of the Bank]—if they're busy stealing 30 percent, they're not paying any real attention to the other 70, even assuming 30 percent is all they're taking. What you're really doing is really ruining the whole effectiveness of the investment itself If you let out a contract for $2 million, and you get the few civil servants at the top sharing $600,000 or 30 percent, do they care if the contractor puts in concrete that is just sand and water? Do they care if the contractor doesn't put reinforcing steel in the structures? They don't care. So when Bank people say we're at least getting 70 cents of good development on the dollar, no you don't. Because the contractor either has to make back the money that he's kicked back, or he just figures, "hey it's open season, I do what I want and no one is going to challenge me. And so you have this feeding frenzy, and the end result is you get very little development.[181]

Furthermore, the notion that projects with corruption can be a "second-best" to clean projects ignores the long-term phenomena of escalating corruption. In an escalating corruption scenario, corrupt government officials who safely divert half of an initial contract are emboldened to divert larger shares of subsequent contracts until the project is reduced to simply a transfer of funds to the corrupt official, with no project component at all.[182]

This norm of overlooking corruption may be most prevalent when a nation is experiencing rapid growth or undergoing social and economic transformations of which the World Bank approves. In the case of Indonesia, for example, World Bank oversight was lacking because "the World Bank considered this sprawling archipelago's rise from poverty its great triumph."[183] In early 1998, World Bank President James Wolfensohn admitted that "[w]e were caught up in the enthusiasm of Indonesia I am not alone in thinking that 12 months ago, Indonesia was on a very good path."[184] The World Bank Indonesia country head spoke of "a trade-off between, shall we say being pure and helping people We have to decide every morning when we wake up, are we doing more good than harm?"[185] But when that same country head visited a dozen villages looking at schools built with World Bank funding, "[a]ll were crumbling only months after their completion, the evident result of massive corruption that resulted in use of substandard

180. *Id.* at 111 (citing an interview with Katherine Marshall and Julian Schweitzer at World Bank Headquarters in Washington D.C. on April 10, 1999).

181. *Id.* at 120.

182. *Id.* at 111, 120.

183. Brauchli, *supra* note 177

184. *Id.*

185. *Id.*

materials,"[186] confirming the critique offered above that development usually does not occur in such corrupt projects.[187]

The incidence of this norm among World Bank staff members is difficult to measure. While one can assume that most staff members are committed to the goals of anti-corruption, one cannot simply assume that most staff members would support wholly canceling many development projects because of corruption. Any tolerance of corruption based on this notion of a "second-best" remains an obstacle to effective corruption-fighting in the World Bank.

F Political Considerations in Lending

Political and foreign policy considerations often shape the lending decisions of the World Bank and lead to an overlooking of corruption risk. Throughout its history, the lending decisions of the World Bank have often followed the political and foreign policy aims of its largest shareholder, the United States. These external considerations explain the World Bank's decisions not to lend to Vietnam in the 1970s and 1980s, not to lend to Iran in the 1980s and 1990s, and to reduce lending to India and Pakistan after their nuclear tests in 1998.[188] During the Cold War, political allies of the U.S., including Indonesia, Turkey Mexico, Congo, and the Philippines continually received World Bank funding despite widespread corruption, repeated noncompliance with loan provisions, and political instability.[189] Most recently, the World Bank provided funding to reconstruction efforts in Afghanistan and is now being looked upon for funding in the Iraqi reconstruction effort, despite the lack of any reliable civil authorities in either locale.[190] These reconstruction efforts are also current cornerstones in American foreign policy efforts. The link between World Bank lending and political and foreign policy objectives of leading shareholders will continue to pose a risk to the integrity of World Bank loan funds.

All of these factors help explain why the World Bank has been reluctant to make long-term commitments to cut off funding for countries in the face of evidence of widespread corruption or of a generally corrupt business environment. The case of Kenya provides an illustrative example. In 1997 the World Bank suspended a $72 million dollar loan to Kenya, together with an IMF suspension of $220 million in loans, in the face of endemic corruption.[191] Despite the clear

186. *Id.*

187. Winters, *supra* note 9, at 111, 120.

188. Kapur, *supra* note 156, at 59-60.

189. Jonathan R. Pincus & Jeffrey A. Winters, *Reinventing the World Bank*, *in* REINVENTING THE WORLD BANK, at 1, 5-6 (citing Catherine Gwin, *U.S. Relations with the World Bank, 1945-1992*, *in* 2 THE WORLD BANK: ITS FIRST HALF CENTURY 195, 252-63 (Kapur et al. eds., 1997)).

190. World Bank, *New World Bank Grants Worth US $90 Million Reach Out Across Afghanistan*, June 6, 2002, *at* http://web.worldbank.org/· World Bank, *World Bank Supports International Reconstruction Fund Facility for Iraq*, Oct. 22, 2003, *at* http://web.worldbank.org/

191. Pamphil Kweyuh, *Kenya-Economy: World Bank Stops US$71.6 Energy Project*, INTER PRESS SERVICE, Aug. 13, 1997. *See also* Thomas Omestad, et al., *Bye-bye to Bribes: The Industrial World Takes Aim at Official Corruption*, U.S. NEWS AND WORLD REP Dec. 22, 1997, at 39.

failure of Daniel Arap Moi's administration to tackle corruption in Kenya—it made a number of public and administrative gestures—the World Bank resumed lending shortly thereafter, only to suspend loans again in December 2000.[192]

Only a month after a new president, Mwai Kibaki, took office in December 2002 pledging to curb corruption, the World Bank announced it would again resume lending as early as July 2003 if the government implemented measures demanded by IMF donors.[193] The Kenyan government launched a serious public effort to combat corruption, creating an anti-corruption commission and a new Ministry of Justice and Constitutional Affairs, appointing the head of Transparency International in Kenya to a senior governmental position overseeing public ethics and integrity forcing the resignation of the notoriously corrupt former Chief Justice, and requiring that all public officials disclose their wealth—with the President being the first to do so.[194]

The World Bank, however, did not require an actual reduction in the level of corruption nor did it conduct any assessments of changes in corruption levels or risk since the inauguration of the Kibaki government. The outcome of the current prosecution of the chief project director involved in the Kenyan road scandal that led to the U.S. convictions of two World Bank employees last year is still pending.[195] The Kibaki administration has not made any progress on World Bank demands that other top officials and contractors involved in that scandal be prosecuted and banned from future government tenders.[196] Kenyan Attorney General Amos Wako even cautioned recently that "the culture of corruption is deeply rooted and efforts to stop it might become entangled in political wrangling."[197] If the political will of the Kibaki government to fight corruption withers or runs into any major obstacles, the World Bank could find itself suspending lending for a third time.

The Kenyan government has also made promising developmental reforms in its first one-hundred days, beyond its anti-corruption reforms, by introducing universal free primary education, launching a scheme to restructure the financial system to benefit the agricultural backbone of the Kenyan economy building up strategic grain reserves to forestall food shortages, and passing a number of anti-crime measures that have reduced the crime rate in half across the country [198] For the World Bank, any risk of corruption seems to be outweighed by the need to support the developmental goals of the administration. The Kenyan case reveals that the notion of tolerating corruption risk when the broader development policies or practices of the country are favorable to the World Bank is still present.

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192. *See* Gus Selassie, *World Bank to Resume Development Assistance to Kenya*, WORLD MARKETS RES. CENTRE DAILY ANALYSIS, Jan. 30, 2003.

193. *Id.*

194. *U.S. Diplomat Highlights Kenya Actions Against Corruption and Terrorism*, ALL AFR., Sept. 13, 2003; *Kibaki, Cabinet Declare Wealth*, ALL AFR., Sept. 30, 2003.

195. Kevin Kelley, *Two Swedes Jailed over Bribes in Kenyan Deal*, ALL AFR., Feb. 6, 2004.

196. *Corruption Watch World Bank Kenya Counter Attacks*, AFR. ANALYSIS, May 8, 2002.

197. Press Releases and Documents, Voice of America, Kenya/Corruption (July 24, 2003).

198. Yu Xinchao, *Opportunities, Challenges Coexist in Reconstruction of Kenya*, XINHUA NEWS AGENCY, Apr. 14, 2003.

G. *Incentives for Firms and Contractors*

Firms and contractors who are hired by the World Bank or by governments to participate in World Bank financed projects can lack the proper incentives to report corruption to the World Bank. The World Bank currently does not have a provision that allows internal investigators to offer immunity to firms who assist in corruption investigations. So, a firm that has paid bribes to a government official in a World Bank financed project faces debarment if it comes forward with

allegations against the government official. If the firm has not engaged in corrupt activity but is aware of corruption, it may still not come forward out of a fear of losing future World Bank or government contracts. The creation of an anonymous hotline to report corrupt activity may mitigate the risk to whistleblower firms and contractors, but may not provide enough protection in the minds of some contractors to overcome the fear of retaliation in the bidding process for future projects.

H. *The Status of the Internal Investigative Body*

Another serious structural problem threatening the World Bank's anti-corruption efforts is the precarious status of the internal investigative body within the World Bank bureaucracy [199] In bureaucratic structures, internal investigations bodies tend to be viewed with reservations if not outright distrust. The World Bank Tribunal in *C v. IBRD* implied such a suspicion when it wrote that the internal investigative body performed in an "unnecessarily secretive" manner that violated the due process rights of employees.[200] The Tribunal has found due process defects in a number of other investigations.[201] These cases affirm the fears of some staff members that the work of the internal investigations department oversteps its authority and illegitimately intrudes into their employment relationship with the Bank. The fact that the Department of Institutional Integrity is an independent body accountable only to the President of the Bank heightens the distrust some within the Bank feel towards it.

The creation of an internal investigations body for the World Bank follows from the World Bank's Articles of Agreement, which includes a provision stating, "the Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted."[202] The World Bank has

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199. GAO REPORT, *supra* note 20, at 12 (observing that the Investigations Unit did not have the necessary stature within the World Bank).

200. *See C v. IBRD*, Decision No. 272, at ¶ 26 (World Bank Admin. Trib. 2002).

201. *See* Koudogbo v. Int'l Bank for Reconstruction and Dev., Decision No. 246, at ¶¶ 14, 43 (World Bank Admin. Trib. 2001). *See also* Dambita v. Int'l Bank for Reconstruction and Dev., Decision No. 243, at ¶¶ 26, 28 (World Bank Admin. Trib. 2001); Cisse v. Int'l Bank for Reconstruction and Dev., Decision No. 242, at ¶¶ 37, 43 (World Bank Admin. Trib. 2001). It is important to note that these decisions were decided when the internal investigative process was fragmented, prior to the creation of unified Department of Institutional Integrity. This new structure allegedly increases the Bank's system of checks and balances over the procedures of the internal investigations unit.

202. IBRD Articles of Agreement, *supra* note 54, at art. III § 5.

not formally established the Department of Institutional Integrity with an Executive Board order, as the United Nations has done with its internal investigations body through United Nations General Assembly resolution 48/218.[203] Approving a World Bank Executive Board order would bolster the organizational legitimacy of the investigations unit and would also establish the office permanently, removing any threat to its continued operation.

1. Recommendations for Addressing Structural Obstacles

A number of recommendations have already been offered in this paper to address some of the structural obstacles detailed above. These include issuing an Executive Board order formally establishing the World Bank's internal anti-corruption unit, providing the option of immunity from debarment to firms who come forward with allegations of corruption, rotating project staff more frequently, publicizing criminal referrals and other punitive measures against corrupt firms and individuals more widely to bolster the deterrence value of such activities, analyzing corruption risk as a distinct component in project appraisals and including corruption risk in the sensitivity analysis of the cost-benefit calculations of proposed projects.

Recommendations to address the serious challenges of the World Bank's operational model and governance have also been widely offered in the public domain. Some have recommended that the World Bank dramatically reduce its level of lending "until the quality of administration and supervision in projects, both on the Bank's part and on the borrower's side, is improved to a degree that the resources are not squandered."[204]

The *Meltzer Commission Report* draws a starker conclusion, calling for the elimination of all lending to countries with investment grade credit ratings.[205] The Commission recommends that loans to poor countries without access to capital markets should still be made but for institutional reform and that developmental aid should be aimed at public goods like health care and should be administered through performance based grants rather than loans.[206] The Meltzer Commission included some prominent dissenting members who attacked the Commission's recommendations as potentially threatening the fight against global poverty.[207] They questioned the Commission s recommendation to limit the nonconcessional lending of the IDA branch of the World Bank, which extends interest-free loans to

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203. *See* G.A. Res. 48/218B, U.N. GAOR, 48th Sess., 87th mtg., U.N. Doc. A/RES/48/218, at art. II, ¶9 (1994).

204. Winters, *supra* note 9, at 122-23 (Winters finds task managers who agree with him, such as one who concludes: "We're long way from turning the corner on the Bank's culture. There will not be real progress until there's genuine slowing down of the lending program.")

205. Meltzer, *supra* note 154.

206. *Id.*

207. *Id.* (dissenting statement of C. Fred Bergsten, Director, Institute for International Economics; Richard Huber, Former Chairman, President, and CEO, Aetna, Inc., Jerome Levinson, Former General Counsel, Inter-American Development Bank; and Esteban Torres, U.S. House of Representatives, 1983-99).

the poorest countries of the world.[208] They also questioned the commitment of Western governments to fund a grant-giving agency after the lending capital of the World Bank is returned to Western governments per the Commission's recommendations.[209] Finally, they feared the impact on developing countries of being forced to rely on international capital markets, which may be volatile.[210]

The World Bank had already undertaken one of the Meltzer Commission proposals, by aggressively pursuing capacity-building in developing countries to create the type of procurement, managerial and legal institutions necessary to ensure the integrity of its funds.[211] The *Overview of World Bank Activities in Fiscal 2002* noted that "[p]ublic administration was by far the leading sector for IBRD lending, receiving $3.6 billion, over 30 percent of the total. The significant amount of lending in the public administration sector reflects the Bank's focus on assisting its clients to improve development strategies, implement reform policies, and build institutional capacities."[212]

The movement towards institutional reform should proceed with caution. In the past, the use of economic aid as a tool for policy reforms has been mixed in its success and is a controversial and contentious topic.[213] In addition, the World Bank has espoused dramatically different patterns of thinking in the realm of institutional development over the past thirty years that should cast doubt on its knowledge base in governance reforms.[214] Furthermore, there is no accepted institutional formula for reducing corruption within countries and the tremendous variation between countries requires customized and local political solutions.[215] For these reasons, the World Bank should foster greater policy dialogue within

208. *Id.*

209. *Id.*

210. *Id.*

211. PROGRESS SINCE 1997, *supra* note 7, at 44.

212. World Bank, Overview of World Bank Activities in Fiscal 2002, *at* http://www.worldbank.org/ annualreport/2002/Overview.htm (last visited Feb. 8, 2004).

213. WHITE & DIJKSTRA, *supra* note 146, at 518 (for detailed analysis of the history and controversies related to aid conditionality with case studies of conditionality programs). *See also* WORLD BANK, ASSESSING AID 4 (1998) (The World Bank's own analysis of policy-based aid shows "that donor financing with strong conditionality but without strong domestic leadership and political support has generally failed to produce lasting change.").

214. *See* ADAMS, *supra* note 146, at 108 (describing the World Bank's view on state involvement in economic development as swinging pendulum over the past four decades). *See also* WHITE & DIJKSTRA, *supra* note 146, at 518.

215. *See generally* Mushtaq H. Khan, *Corruption and Governance in Early Capitalism: World Bank Strategies and Their Limitations*, *in* REINVENTING THE WORLD BANK, *supra* note 146, at 164, 181-83 (proposing that the World Bank's anti-corruption prescriptions are founded on misguided assumption that reducing the discretionary role of the State will promote growth. Instead, the historical evidence attests to the fact that all developed nations have undergone a period during which State intervention supported the interests of an emergent capitalist class at the expense of other classes. What separates the underdeveloped from the developed is that in the latter, the State had the political capacity to reign in the capitalist class to ensure that preferential disparate treatment did not become oriented towards the capture of State resources. The key, then, is not to "right-size" underdeveloped States with reforms that reduce their discretion, but to allow discretion and preferential treatment while supporting political reforms to ensure that political leadership can control the emergent capitalist class once it begins to thrive.)

developing countries about the power structures that foster and maintain corruption and how to diffuse power so that citizens may more easily hold their governments accountable for corruption.[216] For this reason, any anti-corruption governance reforms should be devised in collaboration with civil society and the population at large in developing countries.

A reasonable compromise between the viewpoints in the current debate on fundamental World Bank reform may be a viable avenue to follow The Bank has not sufficiently addressed concerns about its culture of overly optimistic lending decisions. A recent $46 million urban revitalization loan to Brazil attests to the continuing culture of lending optimism at the World Bank.[217] The loan appraisal document identified an overall project risk rating of "substantial."[218] The appraisal rated the risk associated with the project's implementing agency as "high, noting "[w]eak management and technical capacity of the executing [agencies' coordination of the project] (FIDEM and Municipalities), particularly in the areas of procurement and financial management."[219] The loan appraisal did mention risk mitigation strategies which included hiring numerous technical consultants to assist the implementing agency and numerous World Bank supervisory visits.[220] In spite of these measures, the World Bank should reconsider lending to projects with "substantial" overall risk ratings in which the primary weaknesses is in the main implementing agency Reducing lending to such risky projects might not necessarily produce an overall reduction in World Bank lending, as funding for safer projects and anti-corruption reform might be increased.

In the interim, as the World Bank addresses these larger institutional questions, it should ensure that its own internal investigations unit is properly financed and trained and has the proper legal framework within which to function. This framework would include the reforms related to the recent *C v. IBRD* opinion discussed above, the enactment of an illicit enrichment provision, a clear and effective standard of proof, and the ability to share information with other agencies and cross-debar. Increased public recognition of their efforts and an Executive Board order formally recognizing their existence as a mandated institution under the Bank's Articles of Agreement will also help to promote the stature of the internal investigations unit while increasing the deterrent value of their work. The internal investigative bodies should also provide training to national prosecutors in developing countries to help prosecute corrupt firms and individuals the World

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216. Some critics argue that the Bank's technical solutions to corruption overlook the power arrangements in all corrupt client countries that allow certain actors in society to flout formal rules for their personal benefit. Winters, *supra* note 9, at 113. The Bank itself admitted in its 1997 anti-corruption Framework that, "[i]n some countries the primary reason for divergence [from formal rules] may be political, a manifestation of the way power is exercised and retained. This limits what the Bank can do to help outside the framework of its projects. PROGRESS SINCE 1997, *supra* note 7 at 13.

217 World Bank, *World Bank Approves $46 Million for Low-Income Urban Upgrading in Northeast Brazil*, Apr. 24, 2003, *at* http://web.worldbank.org/.

218. The possible risk ratings were "high, "substantial, "modest, and "negligible or low. PROJECT APPRAISAL DOCUMENT, *supra* note 135, at 50-51.

219. *Id.* at 51.

220. *See generally id.*

Bank refers to them. Funding and training should also be provided to investigators and prosecutors in developing countries to help build corruption cases related to World Bank loans.

V CONCLUSION

In the face of a wealth of research on the debilitating effects of corruption in developing countries and mounting evidence of endemic corruption in World Bank projects, the World Bank announced an institutional commitment to curbing corruption in its projects in 1996.[221] Since then, the World Bank has launched a multi-pronged strategy to attempt to ensure the integrity of the projects it finances throughout the developing world. Nearly a decade later, the World Bank's anti-corruption efforts are continuing to develop in concert with a growing international effort to curb corruption. However, serious legal and structural uncertainties and obstacles stand in the way of full effectiveness of the World Bank's efforts. Expansive due process rights of employees in criminal referrals, an uncertain standard of proof in internal corruption investigations, no system of investigative cooperation and cross-debarment, and a series of fundamental structural impediments pose significant threats to the success of the World Bank's anti-corruption efforts. Substantive reforms ranging from a new Staff Rule ensuring secrecy during criminal referrals to the formal calculation of corruption risk in loan appraisal documents offer realistic ways to strengthen the anti-corruption efforts of the World Bank. Unless these necessary internal legal and structural reforms are undertaken, the integrity of all World Bank projects will be uncertain at best, imperiling the future of the broader global development project itself.

221. World Bank, News, Issue Briefs, Corruption, *at* http://web.worldbank.org/ (last visited Feb. 8, 2004).