

Note

Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects

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Large-scale infrastructure projects are a vital part of the World Bank's development agenda, but the World Bank and host countries alike have placed little emphasis on combating corruption attached to these projects. Investigation of ongoing corruption and punishment of offenders is an important end goal in itself, and can be an important deterrent to future corruption. The World Bank and host countries face challenges in properly pursuing investigation and punishment, but the results certainly are worth the effort. This Note explores the importance of investigating and punishing corporate corruption on World Bank-funded large-scale infrastructure projects, and presents practical suggestions as to how investigation and punishment processes might be made more effective. Specifically, host countries and the World Bank should utilize a "trigger" mechanism, by which investigations by one party automatically trigger investigations by the other, in order to increase accountability. Other factors – including the willingness of third party states to assist in these efforts – also influence the outcome, but the triggering mechanism may be an important step forward. The outcome of the Lesotho Highlands Water Project corruption investigations provides a useful illustration of how such a cooperative triggering mechanism might work.

INTRODUCTION

The World Bank has identified corruption as one of the "greatest obstacles to economic and social development."¹ In response, it has

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1. Overview of Anticorruption Continued, WORLD BANK, <http://go.worldbank.org/K6AEEPROC0> (last visited Jan. 27, 2011); see also *Combating*

developed extensive, aggressive anti-corruption campaigns and offered financial support to good governance programs aimed at reducing corruption in loan-recipient countries. Yet corruption remains an obstacle even to the disbursement of Bank aid; Jeffrey Winters estimates that “[s]ince its founding, the World Bank has participated mostly passively in the corruption of roughly \$100 billion of its loan funds intended for development.”² These funds usually are transferred to developing countries via loans, which place the burden of repayment on future generations who will have to pay the entire principal and accrued interest despite having initially received only seventy cents on the dollar for these loans.³

These figures take into account all types of corruption, most notably the direct looting of loan monies by government officials. Winters cautions that corporate corruption – usually in the form of bribes to government officials in order to circumvent neutral bidding processes – makes up only a minor percentage of the estimate.⁴ Yet these statistics mask the gravity of entrenched corporate corruption on large-scale infrastructure projects in developing countries. These projects have the potential to assist countries in meeting their development goals by increasing revenue and fulfilling the economic and social needs of their most impoverished communities,⁵ but they also act as lightning rods for corruption, environmental degradation, and human rights violations against the communities that the projects are intended to benefit.⁶ Corruption exacerbates the problems of environmental degradation and human rights violations.⁷

Dealing with these challenges is vital, as infrastructure projects have been important to the World Bank’s development strategies, and likely will remain so in the future. In 2009, Robert Zoellick, President of the Bank, pledged to increase Bank lending to infrastructure to \$45 billion over the next three years, citing such projects’ ability to “create jobs as well as build a foundation for long-term economic growth.”⁸ This pledge will increase

Corruption in the Multilateral Development Banks: Hearing Before the S. Comm. on Foreign Relations, 108th Cong. 1-2 (2004) (statement of Sen. Richard Lugar, Chairman, S. Comm. on Foreign Relations).

2. Jeffrey A. Winters, *Criminal Debt*, in *REINVENTING THE WORLD BANK* 101, 101 (Jonathan R. Pincus & Jeffrey A. Winters eds., 2002).

3. *Combating Corruption in Multilateral Development Banks: Hearing Before the S. Comm. On Foreign Relations*, 108th Cong. 25, 28 (2004) (statement of Jeffrey A. Winters, Associate Professor, Northwestern University) [hereinafter Winters Statement].

4. *Id.*

5. See, e.g., WORLD BANK, *THE WORLD BANK ANNUAL REPORT* 21 (2009).

6. See George Ledec & Juan David Quintero, *Good Dams and Bad Dams: Environmental Criteria for Site Selection of Hydroelectric Projects* 1 (World Bank, Sustainable Development Working Paper No. 16, 2003), available at http://siteresources.worldbank.org/LACEXT/Resources/258553-1123250606139/Good_and_Bad_Dams_WP16.pdf.

7. See, e.g., Wangari Maathai, *Foreword: Water in the Community: Why Integrity Matters*, in *GLOBAL CORRUPTION REPORT 2008: CORRUPTION IN THE WATER SECTOR* xix, xix (2008).

8. WORLD BANK, *supra* note 5, at 2. This spending far outstrips spending on good governance. See *id.* at 25.

World Bank spending on infrastructure development by \$15 billion when compared to the \$30 billion it spent from 2006-2009.⁹ The Joint International Financial Institutions/Development Finance Institutions Action Plan for Africa named “increasing lending to infrastructure projects” a primary objective for financial assistance to the region.¹⁰ The World Bank seeks to increase aid flow to infrastructure projects despite the economic downturn, and considers infrastructure projects to be a crucial source of jobs in the short-term of the financial crisis and a means by which countries might recover.¹¹ Furthermore, the World Bank’s influence over infrastructure development is compounded because even its minimal financial or technical support may signal to other potential financiers that the project is a legitimate and profitable investment.¹²

The ability of the World Bank, donor countries, and recipient countries to limit corruption on these projects will greatly influence the effectiveness of infrastructure spending. Although prevention programs are important, this Note argues that post-corruption investigation, prosecution, and punishment mechanisms are also critical to the successful deterrence of corrupt practices in Bank-funded procurement projects. The World Bank has developed investigation, prosecution, and punishment protocols, but has not utilized them effectively or consistently. The question remains whether the World Bank is capable of implementing them and willing to do so. In order to answer this question, this Note examines two hydroelectric dam projects: the Yacyretá Dam in Argentina and Paraguay and the Lesotho Highlands Water Project (LHWP) in Lesotho and South Africa. Both received World Bank funding, and both have been criticized for high levels of corruption. Yet while no corporation was prosecuted in relation to the Yacyretá Dam, the World Bank ultimately sanctioned two multinational corporations (MNCs) that received LHWP contracts after Lesotho successfully prosecuted the responsible government official and corporations.

The Lesotho example forms the basis for my central proposal as to how to improve the investigation and punishment of corporate corruption on World Bank projects. The World Bank has been greatly criticized for its initial refusal to investigate MNCs involved in the LHWP,¹³ and commentators have thus far used the LHWP scandal to demonstrate the weaknesses in both the borrowing government and World Bank approaches to corruption punishment and deterrence.¹⁴ While these points

9. WORLD BANK, *supra* note 5, at 16.

10. *Id.* at 8.

11. *Id.* at 2, 16, 21.

12. See, e.g., Korinna Horta, *The World Bank’s Decade for Africa: A New Dawn for Development Aid?*, 1 YALE J. INT’L AFF. 4, 15 (2005).

13. See, e.g., Lori Pottinger, *Lesotho Highlands Water Project: What Went Wrong?*, Presented at Chatham House Conference “Corruption in Southern Africa: Sources and Solutions” (July 10, 2000), available at <http://www.internationalrivers.org/en/africa/lesotho-water-project/lesotho-highlands-water-project-what-went-wrong>.

14. *Id.*

are valid, I argue that from this scandal may emerge a new “best practice” for investigating, prosecuting, and punishing firms guilty of bribery and fraud on Bank-funded infrastructure development projects.

Substantial changes must be made if the World Bank is to effectively combat corporate corruption and overcome institutional inertia in its infrastructure projects. In this Note, I offer a proposal for change that, if implemented, may improve the efficacy of corporate sanctioning processes in the World Bank and in domestic legal institutions. The proposed plan is three-pronged. First, I argue that the World Bank Sanctions Committee should introduce a trigger clause into its procedures. Under its terms, when either the borrower state or the Sanctions Committee opens a corruption investigation pertaining to the Bank-funded project, the other party must also open or re-open its own investigation into the alleged corruption. The Bank and the borrower state should either refuse to award contracts to corporations under investigation for bribery or fraud, or make awards contingent upon the corporation being found innocent of the charges. The second element of my proposal for change will require the borrower state and World Bank investigators to share information learned from the investigation. Third, the World Bank will establish a support fund for borrower governments that need monetary assistance to pursue corruption investigations and prosecutions.

These elements are aimed at lessening – if they cannot altogether alleviate – the problem of lack of will. A constant threat to this approach’s success is global willingness to sanction corporate corruption; however, I argue that even assuming imperfect willingness, this combined approach is far more likely to decrease corporate corruption than an approach that utilizes only administrative sanctions or criminal prosecutions.

The Note proceeds in four parts. In Part I, I provide reasons why it is important to focus on corporate corruption. I also explore why investigation and punishment are crucial components of comprehensive anti-corruption strategies. In Part II, I compare the Yacretá Dam with the LHWP and place them both in the context of other large-scale infrastructure development projects. I then review the details of the LHWP scandal and identify explanations as to why the World Bank took action against corporations involved in the LHWP but has not investigated the Yacretá Hydroelectric Project corruption allegations. I ultimately conclude that the willingness of domestic jurisdictions to investigate and prosecute offending MNCs is the most important of these variables. In Part III, I review the merits and weaknesses of the domestic hard law approach to the issue, and the merits and weaknesses of the World Bank’s administrative remedy approach. In Part IV, I examine the merits and weaknesses of using a combined approach, ultimately finding that this approach is superior to alternative processes.

I. INVESTIGATING CORPORATE CORRUPTION ON LARGE-SCALE INFRASTRUCTURE PROJECTS: PURPOSE AND IMPORTANCE

A. Targeting Corporate Corruption in Infrastructure Projects

In the mid-1990s, the World Bank adopted a comprehensive anti-corruption strategy that consists of five pillars, the first of which is to “prevent[] fraud and corruption within World Bank projects.”¹⁵ The Bank continues to fall short of meeting this goal for three reasons. First, World Bank staffers often prioritize the organization’s anti-corruption agenda below infrastructure project completion.¹⁶ World Bank officers feel “a pressure to lend” in the World Bank’s results-focused approach to aid.¹⁷ As one senior official explained, “[w]e look more than anything else at what the project achieves . . . We look, for instance, at whether schools get built, not how the money was spent to build them.”¹⁸ The World Bank governance structure may further contribute to this “culture of loan approval.”¹⁹ As a result, the World Bank may be likely to accept some corruption as a cost of development. Second, the World Bank has traditionally focused its anti-corruption efforts on institutional structures.²⁰ Third, when the Bank does combat corruption on its development projects, it tends to focus its energies on government officials – who represent the institution – and not the corporations who supply the bribes.²¹

15. MARIO A. AGUILAR ET AL., WORLD BANK, PREVENTING FRAUD AND CORRUPTION IN WORLD BANK PROJECTS: A GUIDE FOR STAFF 2 (2000).

16. Parthapratim Chanda, *The Effectiveness of the World Bank’s Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties*, 32 DENV. J. INT’L L. & POL’Y 315, 347 (2004) (noting that Bank staff may perceive corrupt development projects as an acceptable “second-best” and favorable to cancelling the projects entirely).

17. Winters Statement, *supra* note 3, at 28.

18. Winters, *supra* note 2, at 111 (quoting World Bank senior official Katharine Marshall).

19. Chanda, *supra* note 16, at 342-343.

20. Tara Polzer, *Corruption: Deconstructing the World Bank Discourse* 20 (London Sch. of Econ. Dev. Stud. Inst., Working Paper Series No. 01-18, 2001), available at <http://www2.lse.ac.uk/internationalDevelopment/pdf/WP18.pdf>.

21. For example, the World Bank’s first published guidelines stated that if consultants are granted contracts through methods of misprocurement, the World Bank may revoke the funding promised to the borrower, but the guidelines did not identify punishments for the contracting company or consultant. Only in recent revisions have they incorporated anti-corruption language that targets the companies, as well. WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS BY WORLD BANK BORROWERS, §§ 1.17, 1.22 (2006 rev.) [hereinafter CONSULTANT GUIDELINES]; WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDIT, §§ 1.12, 1.14 (2006 rev.) [hereinafter PROCUREMENT GUIDELINES]; see also WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 30, 32-33 (1997) (identifying modifications made to the Procurement and Consultant Guidelines in 1996 and 1997, respectively, to punish bidders that have engaged in fraud or corruption); Frank Vogl, *The Supply Side of Global Bribery*, 35 FIN. & DEV. (1998), available at <http://www.imf.org/external/pubs/ft/fandd/1998/06/vogl.htm> (discussing efforts to target both sides of corruption in international financial institutions). The Procurement and Consultant Guidelines were each revised in 2011. The relevant language pertaining to misprocurement, fraud, and corruption remain substantially similar. The 2011 versions of the Procurement and Consultant Guidelines broaden the definition of agent to ensure that companies cannot engage in bribery using unofficial agents; explicitly state that a sanctioned firm or individual may not be hired as a subcontractor on a Bank-financed contract;

Certainly the costs of corporate corruption are minimal relative to the costs of grand, or “high-level,”²² corruption.²³ However, anti-corruption programs that focus solely on grand corruption risk overlooking the ways in which corporate corruption feeds into grand corruption. They also overlook the ways in which corporate corruption can cripple long-term development.²⁴ Once these relationships are taken into account, a new picture emerges – one in which corruption on development projects and the problem of bribe-offering companies moves into the foreground.

MNCs play an active role in subverting the development process, using bribes and fraud to circumvent bidding processes and operating regulations. This hinders the World Bank’s anti-corruption and economic development agendas in three ways. First, corruption negatively influences a country’s economic productivity,²⁵ the stability of its political institutions and democracy,²⁶ and its social development.²⁷ Second, corruption on large-scale infrastructure projects also creates an environment of impunity that may instill a public conception that corruption is acceptable. As Susan Rose-Ackerman has noted, “a policy of active tolerance [for bribery] will undermine the prospects for long-term reform” and “delegitimize government in the eyes of its citizens.”²⁸ Finally, corrupt deals made to win infrastructure development projects skew government spending and development agendas; such deals encourage officials to seek aid money for

and state that these provisions apply when a U.N. agency provides technical assistance to, or otherwise supports, a project. WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS UNDER IBRD LOANS AND IDA CREDITS & GRANTS BY WORLD BANK BORROWERS §§ 1.19, 1.23 (2011 rev.); WORLD BANK, GUIDELINES: PROCUREMENT OF GOODS, WORKS, AND NON-CONSULTING SERVICES UNDER IBRD LOANS AND IDA CREDITS & GRANTS BY WORLD BANK BORROWERS §§ 1.14, 1.16 (2011 rev.). The 2006 versions of the Procurement Guidelines and the Consultant Guidelines were in place when the World Bank conducted its second investigation into the LHWP, and therefore this Note relies on the content of that version of the Guidelines.

22. Susan Rose-Ackerman, “Grand Corruption and the Ethics of Global Business,” 26 J. OF BANKING & FIN. 1889, 1889 (2002); see also Adam Graycar, *Corruption*, in INTERNATIONAL CRIME AND JUSTICE 215, 216 (Mangai Natarajan ed., 2011).

23. Winters Statement, *supra* note 3, at 26 (noting that corporate corruption is minimal compared to the criminal debt that arises in the relationship between development banks and borrowing governments); *Combating Corruption in Multilateral Development Banks: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 32, 36 (2004) (statement of Manish Bapna, Executive Director, Bank Information Center) [hereinafter Bapna Statement] (“[T]he most systemic corruption is the pervasive, across the board corruption embedded in governments.”).

24. John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, 77 FOREIGN AFF. 17, 18 (1998).

25. SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 3 (1999); Derick W. Brinkerhoff, *Assessing Political Will for Anti-Corruption Efforts: An Analytic Framework*, 20 PUB. ADMIN. & DEV. 239, 240 (2000); Daniel Lederman et al., *Accountability and Corruption: Political Institutions Matter*, 17 ECON. & POL. 1, 1 (2005).

26. See United Nations Convention Against Corruption, G.A. Res. 58/4, pmbl., U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

27. See, e.g., Daniel Kaufman et al., *Governance Matters* 1 (World Bank Policy Research Policy Working Paper No. 2196, 1999) (finding that good governance may result in lower infant mortality and higher literacy rates).

28. ROSE-ACKERMAN, *supra* note 25, at 17.

projects that promise profits in the form of bribes and kick-backs, rather than for projects that are more beneficial but less profitable for the officials.²⁹

Scholars already have eloquently articulated the economic, political, and social ramifications of corruption.³⁰ It is sufficient here to focus on the fact that corporations that engage in corrupt practices exacerbate corruption's overall negative consequences for development. Corporate corruption increases the cost of development projects, leaving a greater burden of repayment on the impoverished communities in borrowing countries.³¹ A worst-case scenario is provided by the extreme example of the Bataan nuclear plant in the Philippines, constructed in the early 1970s. Westinghouse Electric Corporation allegedly gave President Ferdinand Marcos \$80 million in kickbacks on a project that ultimately cost \$2.3 billion, far more than the cost of a similar plant in South Korea. Taxpayers will be financing the debt until 2018, although the plant was never put into operation.³² In addition, even those projects that become fully efficient and profitable upon completion may not be able to generate enough profit to cover loans made more expensive because corporate corruption increased the cost of construction. The state also will have fewer resources to dedicate to infrastructure maintenance or new project development.³³ Either way, taxpayers bear the costs without seeing commensurate returns.³⁴

Corruption also vastly decreases the likelihood that a project will be successful. At best, corporations that land lucrative contracts as a result of bribery and fraud do so at the expense of superior competitors whose proposals would have better met the qualifications of the project. These corporations also are not bound by bidding requirements or operational duties, and have more incentive to cut corners.³⁵ As one World Bank task manager noted:

29. See Brinkerhoff, *supra* note 25, at 240; Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECON. 599, 614-15 (1993); Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth*, in *THE WELFARE STATE, PUBLIC INVESTMENT, AND GROWTH: SELECTED PAPERS FROM THE 53RD CONGRESS OF THE INTERNATIONAL INSTITUTE OF PUBLIC FINANCE* 41, 42 (Hirofumi Shibata & Toshihiro Ithori eds., 1999); Charles Kenny, *Measuring and Reducing the Impact of Corruption in Infrastructure* 18 (World Bank Policy Research Working Paper No. 4099, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952071; THE CORNER HOUSE, *EXPORTING CORRUPTION: PRIVATISATION, MULTINATIONALS AND BRIBERY* 3 (Briefing No. 19, 2000); WORLD COMMISSION ON DAMS, *DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING* 187 (2000).

30. See, e.g., ROSE-ACKERMAN, *supra* note 25; Brademas & Heimann, *supra* note 24; Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, 85(3) FOREIGN AFF. 75, 76 (2006); Shleifer & Vishny, *supra* note 29.

31. Winters Statement, *supra* note 3 at 25, 28; Bapna Statement, *supra* note 23, at 35.

32. THE CORNER HOUSE, *supra* note 29, at 6.

33. Tanzi & Davoodi, *supra* note 29, at 47.

34. Kenny, *supra* note 29, at 4.

35. See Tanzi & Davoodi, *supra* note 29, at 45; Kenny, *supra* note 29, at 17-18.

You cut corners and nobody cares. If you let out a contract for \$2 million, and you get the few civil servants at the top sharing \$600,000 or 30 percent, do they care if the contractor puts in concrete that is just sand and water? Do 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.³⁶

A lack of corporate accountability may contribute to project delays, postponing development benefits and increasing the number of years over which loan interest accrues. It may also lead to inefficiency and shoddier workmanship.³⁷ Dam projects, for example, require careful feasibility studies, design, and engineering. Mistakes during construction may require costly repairs and limit the dam's operational capacity.³⁸ The inferior projects then require maintenance that would not otherwise have been needed.³⁹ Yet as previously noted, the upfront costs of the corrupted project means that the state may not have the resources to pay for these repairs,⁴⁰ further jeopardizing development.

Corporations that were awarded dams due to corrupt dealings may not be as capable of meeting environmental standards as other firms, as bribe-receiving public officials likely will not hold the corporations to the mandated environmental standards or human rights regulations that World Bank contracts require. Many projects are complex and require careful planning to avoid an overly negative environmental impact – dams in particular often require massive community displacements – and environmental degradation and human rights abuses become more likely when the lead construction corporations and consultants are not bound by the standards meant to mitigate these damages.⁴¹

These dire consequences are made even more problematic by the high probability of corporate corruption on development projects. MNCs pay approximately \$80 billion per year in bribes⁴² in an attempt to gain access to

36. Winters, *supra* note 2, at 120 (quoting a World Bank task manager).

37. See, e.g., Brinkerhoff, *supra* note 25, at 240; Kenny, *supra* note 29, at 17-18; Tanzi & Davoodi, *supra* note 29, at 46.

38. WORLD COMMISSION ON DAMS, *supra* note 29, at 37-38.

39. Tanzi & Davoodi, *supra* note 29, at 45-46.

40. See *supra* text accompanying note 33.

41. See, e.g., Winters, *supra* note 2, at 120-21 (quoting a World Bank task manager); Thayer Scudder, *Hydropower Corruption and the Politics of Resettlement*, in GLOBAL CORRUPTION REPORT 2008 96, 97 (2008) ("Engineering and other firms have reneged on promises or otherwise cheated resettlers, as with India's Maheshwar Dam.").

42. THE CORNER HOUSE, *supra* note 29, at 2. Although this is a small amount relative to the \$1 trillion that the World Bank Institute estimates to be the total amount of money paid in

lucrative infrastructure development work that is an important component of economic development agendas.⁴³ In 2004, the Engineering News Record estimated that the top twenty-five firms in the field performed work worth \$98 billion annually.⁴⁴ There is a high incentive to win these contracts, and Transparency International's Bribe Payer's Index reveals that MNCs working in "public work contracts and construction" are perceived to be the most corrupt across two variables. They are the most likely to bribe government officials, and the most likely to engage in "state capture," or the "exert[ion of] undue influence on the policy process using financial or other means."⁴⁵ MNCs, therefore, are a part of the corruption narrative that hinders vital projects and saddles already-impooverished people with extra debt.

Finally, there are fewer companies capable of supplying bribes in order to get large-scale infrastructure project contracts than there are potential bribe-receiving government officials,⁴⁶ and these "[m]ultinational firms are central actors in many large-scale corrupt deals."⁴⁷ These corporations "approximate . . . rational economic actor[s]."⁴⁸ Therefore, it is more efficient to target these few companies than the potential bribe-receivers who are more difficult to identify or predict.⁴⁹ For these reasons, although the problem traditionally has been defined in terms of the demand side of bribes, and the attention has been given to the bribe-receivers,⁵⁰ an effective solution must consider both the supply and demand sides of corruption.⁵¹

B. The Importance of Investigation and Punishment

Corporate corruption on infrastructure projects obstructs anti-corruption and development agendas.⁵² Any solution to this problem must involve post-corruption investigation and punishment. Ben Heineman and Fritz Heimann have identified four measures required to tackle corruption.

bribes annually, it is substantial in absolute terms. As one practitioner noted, it is roughly the amount that the United Nations believes is required to eradicate global poverty. See *The Costs of Corruption*, WORLD BANK (Apr. 8, 2004), <http://go.worldbank.org/LJA29GHA80> (last visited June 23, 2011).

43. WORLD BANK, *supra* note 5.

44. Ashwin Mahalingam et al., *Cultural Clashes in International Infrastructure Development Projects: Which Cultures Matter?*, International Symposium on Procurement Systems: The Impact of Cultural Differences and Systems on Construction Performance 2 (Las Vegas, NV, Feb. 2005) (citing ENGINEERING NEWS RECORD SOURCEBOOK 2004).

45. TRANSPARENCY INT'L, BRIBE PAYERS INDEX 2008 10-11 (2008), available at <http://www.transparency.org/content/download/39275/622457>.

46. See KIMBERLY ANN ELLIOTT, CORRUPTION AND THE GLOBAL ECONOMY 129 (1997).

47. ROSE-ACKERMAN, *supra* note 25, at 185.

48. William W. Bratton, *Never Trust a Corporation*, 70 GEO. WASH. L. REV. 867, 870 (2002).

49. See, e.g., Jeff Huther & Anwar Shah, *Anti-Corruption Policies and Programs: A Framework for Evaluation* 8 (World Bank, Policy Research Working Paper No. 2501, 2000) (identifying various reasons that individuals may be motivated to accept bribes).

50. Vogl, *supra* note 21.

51. ELLIOTT, *supra* note 46, at 148.

52. See *supra* Part I.A.

Three are preventative: prevention via legislation and regulations, prevention via long-term state building and institutional reform, and prevention via norm and value changes. The fourth is enforcement "to deter future misconduct by investigating and prosecuting existing corruption."⁵³ Prevention policies are less effective when they do not include such enforcement mechanisms, particularly when corruption is entrenched in a sector, country, or corporate culture.

Punishing project-based corruption can serve as a stop-gap measure in place of long-term prevention policies.⁵⁴ It takes time to implement anti-corruption regulations and oversight, and even longer to change a corporation or country's culture with regard to corruption. Once in place, preventative measures still must compete with the financial incentives of corruption. "A foreign company's quickest route to maximizing profits in developing and transitional nations may indeed be bribery of a public official . . . the potential for huge profits makes the violation of the law seem worth the risk of punishment."⁵⁵ When the investigations and punishments are sufficiently costly to the firm, they can be effective deterrence mechanisms that quickly change the firm's cost-benefit calculus.⁵⁶ However, if the institutions capable of conducting investigations into and punishing corrupt behavior opt not to do so, it sends a strong signal to corporations that bribery is acceptable. This undermines efforts to instill new norms or otherwise eradicate corruption. Preventative measures are therefore weakened when investigation and punishment mechanisms are lacking.

Practically, fining corporations may also enable the World Bank or the borrowing country to recoup financial losses suffered due to corruption. Sanctions may help the World Bank and borrowing countries choose non-corrupt bidding companies for future contracts. Fines and sanctions also limit a corporation's ability to financially benefit from corrupt deals.

II. RESPONDING TO CORRUPTION: CASE STUDY OF THE YACYRETÁ HYDROELECTRIC PROJECT AND LHWP

The World Bank has determined that hydroelectric dam projects are valuable to achieving development goals. "Since its founding, the Bank has supported more than 550 dams around the globe, with over US\$90 billion . . . in loans and guarantees."⁵⁷ Approximately \$30-45 billion is spent on large

53. Heineman & Heimann, *supra* note 30, at 77.

54. See THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 25 (1997).

55. Barbara Crutchfield George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L. J. 547, 557 (2000).

56. Susan Rose-Ackerman, *Corruption*, in READINGS IN PUBLIC CHOICE AND CONSTITUTIONAL POLITICAL ECONOMY 551, 553 (C.K. Rowley & F.G. Schneider eds., 2008).

57. INT'L RIVER NETWORK, THE WORLD BANK'S BIG DAM LEGACY 1 (2007).

dam projects annually.⁵⁸ Yet these projects are not without controversy. Although they promise to generate much-needed revenue for the host country and electricity for impoverished or industrializing communities, in practice dams also result in massive human displacement, substantial changes to the environment, and sometimes severe environmental degradation and human rights abuses.⁵⁹ Dam projects are also vulnerable to corrupt practices by government officials and contracting corporations.⁶⁰ In order to determine what factors contribute to the successful investigation and punishment of corrupt actors involved in World Bank projects, this section examines two dam projects plagued by corruption scandals that afflict many large-scale infrastructure projects.

A. The Yacyretá Hydroelectric Project

The Yacyretá Hydroelectric Project is a joint venture between Argentina and Paraguay, administered by a bilateral institution, the Entidad Binacional Yacyretá (EBY).⁶¹ The two countries signed a treaty in 1973, and construction on the dam began ten years later, in 1983.⁶² Yacyretá is a complex project to construct dams along sixty-seven kilometers of the Paraná River, which forms the border between the signatory countries. Paraguay was to bear the bulk of the environmental and social costs of the project, while Argentina would consume the large majority of the electricity produced and pay revenue to Paraguay for that electricity. Initial estimates suggested a final cost of \$1.35 billion, although the budget subsequently expanded to \$5.3 billion.⁶³ The actual costs far exceeded the initial budgets; final costs reached approximately \$11.5 billion.⁶⁴ The World Bank initially contributed \$460 million in loans.⁶⁵ By the project's end, the World Bank had lent \$895 million to the project, and the Inter-American Development Bank lent an additional \$840 million.⁶⁶ The project also experienced extreme delays. Construction began in 1983; as of 1991, the project was only 85% complete and running nine years behind schedule.⁶⁷ Although

58. Chris Hails, *Global Water Crisis*, in 3 U.N. ENV. PROGRAMME, FINANCING DAMS AND SUSTAINABLE DEVELOPMENT 34 (2004).

59. See THAYER SCUDDER, *THE FUTURE OF LARGE DAMS* 1 (2005).

60. *Id.* at 2; see also Janelle Plummer, *Water and Corruption: A Destructive Partnership*, in GLOBAL CORRUPTION REPORT 3, 9 (2008) (table identifying the types of corruption that emerge in water-related construction projects).

61. Kay Treacle & Elías Díaz Peña, *Accountability at the World Bank: What Does it Take? Lessons from the Yacyretá Hydroelectric Project, Argentina/Paraguay*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 69, 70 (Dana Clark, Jonathan Fox & Kay Treacle eds., 2003).

62. Treacle & Díaz Peña, *supra* note 61, at 70.

63. *Id.*; Hails, *supra* note 58, at 35.

64. Hails, *supra* note 58, at 35.

65. SAROJ KUMAR PAL, *LEXICON ON GEOGRAPHY OF DEVELOPMENT* 231 (2005).

66. Treacle & Díaz Peña, *supra* note 61, n.4.

67. *Id.*

the project began generating initial electricity in 1994,⁶⁸ the final turbine did not become operative until 1998.⁶⁹ As of 2006, it was operating at only 60% capacity and required additional work – 1,167 building projects over four years, costing an additional \$563 million – to reach full capacity.⁷⁰

Yacyretá also has been “fraught with corruption scandals [and] gross mismanagement” as well as construction delays and cost overruns,⁷¹ largely caused by corruption. In 1990, Argentine President Carlos Menem described the project as “a monument to corruption.”⁷² Evidence suggests that contracting firms won lucrative contracts through corrupt practices.

The first “complete technical and economic feasibility study” was conducted in 1971 by Harza y Asociados, a consortium that included Harza Engineering (USA), Lahmeyer International GmbH (Germany), Analisis y Desarrollo Economico S.A. (Argentina), Yacyretá S.A. (Paraguay), and Cuyum S.A.T.C. (Argentina).⁷³ The same consortium, renamed Harza y Consorcios, Consultores Internacionales de Yacyretá (CIDY) and reformulated to include Harza as the lead firm, Lahmeyer as its partner, a group of six Argentine engineering firms, and a group of six Paraguayan engineering firms, was again hired to prepare the final design and to supply the technical supervision of the project’s execution.⁷⁴ The contract was renewed in 1986; the ten-year contract netted the consortium an additional \$132 million.⁷⁵ CIDY won the design and oversight consultancy bid even though its feasibility study was not satisfactory and it did not achieve the highest score in the bidding process.⁷⁶ CIDY’s contract has been renewed most recently in 2002.⁷⁷ Experts in Argentina denounced this latest contract as inefficient.⁷⁸

The \$1 billion construction contract was granted to ERYDAY, an ad hoc and complex consortium comprised of the two final bidding consortiums: one group of thirteen firms led by Impregilo (Italy) and another group of nineteen firms led by Dumez (France), with Impregilo leading the whole.⁷⁹ The bidding process took seven years. Both final bidders were linked with political lobby groups in Paraguay and Argentina, and each accused the other of corruption.⁸⁰

In 2003, EBY renewed its health insurance policy with British Insurer

68. *Id.* at 72.

69. Juan Pablo Conti, *The Ten Billion Dollar Dam*, POWER ENGINEER, Feb./Mar. 2006 at 23, 24.

70. *Id.* at 26.

71. Treagle & Díaz Peña, *supra* note 61, at 70.

72. PAL, *supra* note 65, at 231; Hails, *supra* note 58, at 35.

73. GUSTAVO LINS RIBEIRO, TRANSNATIONAL CAPITALISM AND HYDROPOLITICS IN ARGENTINA: THE YACRETÁ HIGH DAM 35-36 (1994).

74. *Id.* at 37.

75. *Id.* at 38.

76. *Id.* at 36-37.

77. Conti, *supra* note 69, at 25.

78. *Id.*

79. RIBEIRO, *supra* note 73, at 39.

80. *Id.* at 38-39.

Health. There is evidence that the contract was made without a public bidding process and was overpriced by approximately \$1.5 billion per year.⁸¹ It also appears that \$17 million was “unduly paid to Italian generator supplier Ansaldo.”⁸² The borrowing states have brought a lawsuit to recover this money. ERYDAY has filed its own lawsuit against EBY for \$1.5 billion, arising from a dispute over the price paid for workers’ lunches.⁸³

Although the Yacyretá Dam was brought before the World Bank Inspection Panel, the panel’s investigation focused on the environmental and social failures of the project, not the financial corruption nor the connection between financial corruption and the environmental and social failures that followed.⁸⁴ Despite President Menem’s declaration, no substantive investigations or prosecutions appear to have been carried out by either country, any third-party country, or by the World Bank or Inter-American Development Bank.⁸⁵

B. The Lesotho Highlands Water Project

The LHWP is a multi-billion dollar civil engineering project agreed to by the governments of Lesotho and South Africa and administered by the Lesotho Highlands Development Authority (LHDA), a special Lesotho government agency specifically tasked with oversight of the project. Through the construction of five hydroelectric dams and a series of tunnels and pumping stations, the project was designed to control the flow of the Senqu and Orange Rivers in order to provide water for South Africa’s industrial Gauteng province.⁸⁶ The project was intended to provide Lesotho with much-needed electric power, and with revenue from the export of water to South Africa.⁸⁷ Lesotho is a small state that ranks 141st on the Human Development Index and is considered to be a Least Developed Country.⁸⁸

81. Conti, *supra* note 69, at 25.

82. *Id.*

83. *Id.*

84. WORLD BANK INSPECTION PANEL, REVIEW OF PROBLEMS AND ASSESSMENT OF ACTION PLANS: ARGENTINA/PARAGUAY YACYRETÁ HYDROELECTRIC PROJECT (1997). Although the Panel criticized the project for having insufficient financial resources to be properly completed, see Treake & Díaz Peña, *supra* note 61, at 77, it did not investigate or remark on corruption charges and remained focused on the environmental and social costs of the project. See generally *id.* (discussing the Inspection Panel claim and investigation).

85. *Yacyretá Dam*, INT’L RIVERS NETWORK, <http://www.internationalrivers.org/en/latin-america/paraguay-paran%C3%A1-basin/yacyret%C3%A1-dam> (last visited Mar. 1, 2010).

86. Horta, *supra* note 12, at 14-15; Fiona Darroch, *The Lesotho Highlands Water Project: Bribery on a Massive Scale* (prepared for Transparency Int’l), http://www.ipocafrika.org/index.php?option=com_content&view=article&id=71&Itemid=66 (last visited Jan. 9, 2011); *Overview of the Lesotho Highlands Water Project*, LESOTHO HIGHLANDS WATER PROJECT, <http://www.lhwp.org.ls/overview/default.htm> (last visited Mar. 1, 2010) [hereinafter *Project Overview*].

87. Horta, *supra* note 12, at 15; *Project Overview*, *supra* note 86.

88. *Human Development Report 2010: Lesotho*, UNITED NATIONS DEV. PROGRAMME,

Early feasibility surveys initially were conducted in the 1950s.⁸⁹ Lahmeyer International formed part of the consortium that carried out a joint detailed feasibility study of the project between 1983 and 1986.⁹⁰ The governments of Lesotho and South Africa signed the Lesotho Highlands Water Project Treaty on October 24, 1986,⁹¹ and the World Bank began providing "critical support for the technical design of the project" the same year.⁹² Further engineering studies were conducted in subsequent years, and construction on the first phase of the project began in 1989.⁹³ The construction is taking place in several different places. As of 2010, Phase 1A – the construction of the Katse Dam and related work – and Phase 1B – the construction of Mohale Dam and related work – have been completed.⁹⁴ Work on the remaining dams is ongoing. The entire project is expected to cost an estimated \$8 billion. The World Bank provided over \$110 million in funding for project design and for Phase 1A construction, and coordinated the financial program, which assisted Lesotho in securing additional backers for the project.⁹⁵

The LHWP was plagued by reports of environmental degradation, human rights violations, mismanagement, and corruption.⁹⁶ Lesotho's efforts to root out corruption on the project began in 1993, when military rule in Lesotho ended and a newly elected government ordered an audit of the LHDA. The audit revealed several types of corrupt activity by government officials, including the LHDA's Chief Executive Officer, Masupha Ephraim Sole. As chief executive of the LHDA, Sole had control over the award of construction and consultancy contracts. It was in this capacity that he received bribes, often via middlemen operating in or around Lesotho.⁹⁷ The MNCs paid extravagant fees to their agents, made conditional upon the company being awarded the contract; the agent, upon receiving the fees, immediately transferred substantial portions of that fee to Sole.⁹⁸ Twelve firms ultimately were implicated in the bribery and fraud schemes.⁹⁹

<http://hdrstats.undp.org/en/countries/profiles/LSO.html> (last visited Feb. 20, 2011).

89. *Project Overview*, *supra* note 86.

90. *Id.*

91. *The Treaty, LESOTHO HIGHLANDS WATER PROJECT*, <http://www.lhwp.org.ls/overview/treaty.htm> (last visited Mar. 1, 2010).

92. Horta, *supra* note 12, at 15.

93. *Project Overview*, *supra* note 86; *A Brief History of Africa's Largest Water Project*, INT'L RIVERS NETWORK, <http://www.internationalrivers.org/en/node/931> (last visited Mar. 1, 2010).

94. INT'L RIVERS NETWORK, *supra* note 93.

95. Horta, *supra* note 12, at 15; INT'L RIVERS NETWORK, *supra* note 93.

96. Pottinger, *supra* note 13.

97. A. Earle, *The Role of Governance in Countering Corruption: An African Case Study*, 9 WATER POL'Y 69, 76 (2007).

98. *Id.*

99. Lori Ann Warlin, *The Gap Between Promise and Practice in the Global Fight Against Corruption*, 6 ASPER REV. INT'L BUS. & TRADE L. 209, 222 (2006); *see also* Pottinger, *supra* note 13 (identifying the twelve companies implicated in the bribery scandal).

In 1996, the government of Lesotho initiated civil proceedings against Sole and the investigation revealed financial transfers for which Sole provided no explanation. Judgment was entered against Sole in 1999, a decision upheld on appeal in 2001.¹⁰⁰ Soon after the civil judgment was rendered, the government of Lesotho initiated criminal proceedings against Sole and eighteen corporations, consortia members, and individual intermediaries. The court ordered that the defendants be tried separately, and in 2001 the first criminal case against Sole began.¹⁰¹ In consideration of the sensitive nature of the trial, Lesotho brought Judge Brendan Cullinan, an experienced and respected former chief justice of the country, out of retirement for the LHWP corruption cases.¹⁰² In 2002, Sole was convicted on criminal charges of bribery and sentenced to eighteen years in prison for accepting more than \$6 million in bribes,¹⁰³ which was shortened to fifteen years on appeal.¹⁰⁴ The decision by the government of Switzerland to grant the prosecution access to Sole's Swiss bank accounts proved to be an important aspect of the case,¹⁰⁵ as this access provided irrefutable evidence of corruption and implicated several firms.

Utilizing the information that emerged during early investigations of LHDA corruption and during its prosecution of Sole, the Lesotho government then criminally tried Acres International and Lahmeyer International.¹⁰⁶ Acres International was convicted of bribery in 2002 and ordered to pay a fine of C\$3.8 million, reduced to C\$2.6 million on appeal.¹⁰⁷ Lahmeyer International was convicted of bribery in 2003 and ordered to pay a fine of C\$2.2 million, increased to C\$2.5 million on appeal.¹⁰⁸ Spie Batignolles,¹⁰⁹ a French firm, and the Italian firm Impregilo have both pled guilty to bribery and have been ordered to pay fines.¹¹⁰

The World Bank initially opposed Lesotho's decision to remove Sole from his position at the LHDA while its audit was ongoing because the Bank was concerned that his removal "would interfere with project construction timetables and could lead to costly overruns."¹¹¹ In 2002, after Sole had been convicted of bribery, the World Bank initiated investigations into the behavior of Lahmeyer International and Acres, and cleared both corporations of any wrongdoing. After Lesotho's successful prosecutions,

100. Darroch, *supra* note 86, at 1.

101. *Id.*

102. Wanlin, *supra* note 99, at 223.

103. Kristen Lewis & Roberto Lenton, *Corruption and Water Resources Management: Threats to Quality, Equitable Access and Environmental Sustainability*, in GLOBAL CORRUPTION REPORT 2008 18, 24 (2008)

104. *Sole v. Crown* (CRI/T/111/91) [2003] C. of A. (Apr. 14, 2003).

105. Wanlin, *supra* note 99, at 224.

106. THE CORNER HOUSE, DAMS INC. 2: LAHMEYER INTERNATIONAL (2003), <http://www.internationalrivers.org/files/LahmeyerCornerhouse.02.28.03.pdf>.

107. *Acres Int'l Ltd. v. Crown* (CRI/T/144/02) [2003] C. of A. (Aug. 15, 2003).

108. *Lahmeyer Int'l GmbH v. Crown* (CRI 6) [2003] C. of A. (Mar. 26, 2004).

109. Spie Batignolles is now Schneider Electric S.A. Wanlin, *supra* note 99, at 223.

110. Wanlin, *supra* note 99, at 223.

111. Pottinger, *supra* note 13.

however, the World Bank responded with more substantial investigations into the involved corporations. In 2004 and 2006, the World Bank Sanctions Committee temporarily debarred Acres International and Lahmeyer International, respectively, for bribery and fraud in relation to their contracts on the LHWP.¹¹²

C. Similar Histories, Different Consequences

Both the Yacyretá Hydroelectric Project and the LHWP have been plagued by accusations of corruption, but in only the latter case did the World Bank investigate these claims. Although a variety of factors influenced the trajectory of the projects and corruption claims, the willingness and ability of Lesotho to pursue domestic criminal claims was an important impetus for the World Bank to conduct its own investigation.

The similarities between the two dams are striking. Both dam projects were bilateral, and in each case the more impoverished country – Paraguay and Lesotho, respectively – was to bear the environmental and social burdens and reap the largest profit, while the relatively more developed country – Argentina and South Africa, respectively – would reap the benefits of increased resources (electricity and water) and pay revenue in return. Both dam projects were conceived of and formalized via bilateral treaties. At the time that the treaties were signed and construction began, final authority and control over project financing rested with undemocratic governments; Paraguay, Argentina, and Lesotho all were military dictatorships,¹¹³ and the apartheid government controlled South Africa.

Despite these political concerns, the World Bank provided financial and technical support for the projects and supported their development.¹¹⁴ Indeed, it “provided critical support for the technical design” of LHWP in 1986, as international sanctions against South Africa’s apartheid government hindered the project’s progress.¹¹⁵ The Bank’s financial support, though essential to the projects’ success, was modest in comparison to the projects’ total costs, although the Bank did contribute a much larger amount of funding to the Yacyretá Hydroelectric Project than it has thus far contributed to the LHWP. In 1996, the year that the World

112. Acres International, a private Canadian firm, was debarred in 2004 for a period of three years, and Lahmeyer International, a private German firm, was debarred on November 3, 2006, for seven years. *World Bank Listing of Ineligible Firms: Fraud and Corruption*, WORLD BANK, <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984> (last visited Feb. 5, 2011); see also Wanlin, *supra* note 99, at 227.

113. Cinnamon Carlarne & John Carlarne, *In-Credible Government: Legitimacy, Democracy, and Non-Governmental Organizations*, 6 PUB. ORG. REV. 347, 360 (2006).

114. This was in keeping with the World Bank’s non-political, economics-based approach to development aid at the time. Until the mid-1990s, “if there was an economic case for lending to a corrupt and abusive regime, then the Bank was obligated to do so.” HEATHER MARQUETTE, *CORRUPTION, POLITICS AND DEVELOPMENT: THE ROLE OF THE WORLD BANK I* (2003).

115. Horta, *supra* note 12, at 15.

Bank first developed a debarment process for corporations found to have engaged in corrupt activities while bidding or working on World Bank projects, construction on the Yacyretá Hydroelectric Project and the LHWP had been ongoing for fifteen years and nine years respectively.

In addition, there is overlap between the two dam projects with regard to the MNCs that were hired as lead or partner firms in the consultancy and contractor consortia. Lahmeyer International, Impregilio, and Dumez, three firms that were prosecuted for corruption in Lesotho, have lucrative contracts in the Yacyretá Hydroelectric Project.¹¹⁶ Regional similarities emerge as well: the lead and partner firms on the major contracts on both dams are MNCs based in North America or Europe.

There are significant differences between the two dams, however. For example, although all four countries have transitioned to democracy since the projects began, the governments have had remarkably different responses to project corruption. While Lesotho's newly elected government immediately initiated an audit of the project, neither Paraguay nor Argentina have taken this type of active stance against corruption on the Yacretá Hydroelectric Project, and some evidence suggests that corporations were able to cultivate suspect relationships with politicians in order to win contracts on the project.¹¹⁷ In addition, LHDA controlled the bidding process for LHWP contracts. Lesotho was able to focus its investigation on a single bureaucrat without affecting members of the newly elected government. The corrupt practices were more diffuse in Paraguay and Argentina and involved legislators, making domestic investigations more complex and less likely to occur at all. However, while these differences may help explain the failure of Argentina and Paraguay to initiate investigations, they do not adequately explain why the World Bank failed to investigate the corruption on the Yacyretá Hydroelectric Project.

It is possible that the World Bank's decision not to investigate or act upon corporate corruption claims with regard to the Yacyretá Hydroelectric Project rests upon variables not yet discussed. This Note cannot hope to exhaust all the variables that distinguish Yacyretá and LHWP; regional and political differences are enormous. Nuanced bilateral relationships between the borrower countries, the World Bank's donors, and the corporations' home countries certainly may influence the World Bank's response to allegations against the dams. However, these variables have not completely prevented the World Bank from taking action with regard to Yacretá; in 1996, the World Bank Independent Inspection Panel recommended that the World Bank authorize a full investigation of the dam project's environmental and resettlement policies.¹¹⁸ Therefore, political variables alone cannot account for the World Bank's complacency with regard to the financial corruption of the Yacyretá but not the LHWP.

116. Pottinger, *supra* note 13.

117. See, e.g., RIBEIRO, *supra* note 73, at 37-38.

118. Treakle & Díaz Peña, *supra* note 61.

That Lesotho was willing and had the means to pursue criminal charges against the offending companies was clearly an important impetus for the World Bank in reopening its own investigations.

III. EVALUATING THE OPTIONS

Allegations of corruption may be brought before the World Bank via its Sanctions Board, or before the administrative or judicial mechanisms available in the host country. In addition, third-party states, multilateral organizations, and non-government actors have utilized their own formal and informal investigatory and punishment methods. In this Part, I review each party's methods and determine that none are singularly capable of investigating and punishing large-scale infrastructure corruption within their respective jurisdictions.

A. The World Bank Sanctions Board

The World Bank Sanctions Board governs the investigation and punishment of corruption on World Bank infrastructure projects. The Articles of Agreement of the International Bank for Reconstruction and Development (IBRD) and the Articles of Agreement of the International Development Agency (IDA) provided the World Bank with an early mandate against corruption. The IBRD Articles of Agreement requires that "[t]he Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted."¹¹⁹ The IDA Articles place identical stipulations upon its financing.¹²⁰ In 1995, the World Bank revised and expanded its *Guidelines: Procurement Under IBRD Loans and IDA Credits* (Procurement Guidelines) and in 1997, it produced a second set of guidelines for borrowers, *Guidelines: Selection and Employment of Consultants by World Bank Borrowers* (Consultant Guidelines), both of which included clauses regarding corruption. The Procurement Guidelines stipulate that the World Bank will reject proposals of bidding corporations that engage in "corrupt, fraudulent, collusive, or coercive practices," cancel portions of a loan if the borrower engages in corrupt practices and fails to take corrective measures, sanction firms that have engaged in corrupt practices on a Bank-financed contract, and reserve the right to contractually require firms to permit the Bank to inspect their accounts.¹²¹ Similar clauses are included in the Consultant Guidelines.¹²²

The World Bank developed a debarment process in 1996, and in 1998

119. INT'L BANK FOR RECONSTRUCTION & DEV. [IBRD], ARTICLES OF AGREEMENT, art. 3, § 5(b) (as amended Feb. 16, 1989).

120. INT'L DEV. ASS'N [IDA], ARTICLES OF AGREEMENT, art. 5, § 1(g) (1960).

121. PROCUREMENT GUIDELINES, *supra* note 21, § 1.14(b)-(e); see also WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS, § 1.15(b)-(e) (1995).

122. CONSULTANT GUIDELINES, *supra* note 21, § 1.22(b)-(e); see also WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS BY WORLD BANK BORROWERS 1.25(b)-(e) (1997).

created a Sanctions Committee to review allegations and recommend decisions to the World Bank President.¹²³ In 2002, it engaged Richard Thornburgh to evaluate the committee and recommend changes,¹²⁴ many of which it subsequently implemented.¹²⁵ In 2007, the sanctioning process began operating according to a new set of procedures, which were again revised in 2010.¹²⁶ The Bank adopted a two-tier sanctioning process consisting of the Sanctions Board and Evaluation Officers.¹²⁷ To initiate procedures, the Integrity Vice Presidency of the World Bank (INT) submits a Statement of Accusations and Evidence to the Evaluation Officer.¹²⁸ If the Evaluation Officer determines that the accusations are sufficiently supported, INT will issue a Notice of Sanctions Proceedings to the Respondent.¹²⁹ The Respondent may contest the allegations by making a written submission to the Sanctions Board, which will then hear and make a ruling on the case.¹³⁰ In the case of either conditional non-debarment or debarment with conditional release, the INT appoints an Integrity Compliance Officer to notify the parties of the conditions they must meet in order to be released from or avoid debarment, and to monitor compliance with any sanctions.¹³¹ The INT may temporarily debar a company during the INT's investigation or pending the outcome of the hearing.¹³²

The World Bank has the ability to sanction firms for engaging in corrupt behavior on any Bank-funded project, regardless of whether the firm's contract involved a part of the project funded by the World Bank.¹³³ If the World Bank provided any financing to the project, it may consider allegations of corrupt behaviors and sanction offending corporations.

This system offers several advantages. Both the new and old procedures allow for notice, hearing, and opportunity to be heard,

123. World Bank, Sanctions Committee, <http://go.worldbank.org/BJ9P6TARY1> (last visited Mar. 10, 2010).

124. REPORT CONCERNING THE DEBARMENT PROCESSES OF THE WORLD BANK, WORLD BANK, <http://go.worldbank.org/BJ9P6TARY1> (last visited Feb. 20, 2011).

125. World Bank, Sanctions Committee, *supra* note 123.

126. WORLD BANK, SANCTIONS PROCEDURES (2010), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/SanctionsProcedures_9_15_2010.pdf. Under the system in place between 1998 and 2007, the committee was made up of World Bank staff members appointed by the World Bank President. The Department of Institutional Integrity investigated allegations of fraud and, if warranted, referred the case to the Sanctions Committee. The Sanctions Committee reviewed the evidence, notified the Respondent, received its written submissions, and held a hearing. If evidence of corruption was sufficient, the Committee recommended reprimand, debarment, or other sanctions to the World Bank President, who had final authorization. *See generally* WORLD BANK, REFORM OF THE WORLD BANK'S SANCTIONS PROCESS, http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/06/29/000160016_20040629112806/Rendered/PDF/295270rev.pdf.

127. WORLD BANK, SANCTIONS PROCEDURES, *supra* note 126, § 1.01(b).

128. *Id.* § 3.01(b).

129. *Id.* § 4.01(a).

130. *Id.* § 5.01(a).

131. *Id.* § 9.03.

132. *Id.* §§ 2.01, 4.02.

133. *See id.* § 1.01(c).

mirroring the rights afforded to defendants in U.S. criminal court. These safeguards legitimize the process and serve a practical purpose. As Thornburgh noted in his report, “[a]n inaccurate or unjust determination can be costly” to the debarred firm or consultant as well as the Bank itself.¹³⁴ Debarment may “eliminat[e] from future contention one of the very few firms” with the expertise or size required for complex development projects that the bank considers important.¹³⁵ All corporations or consultants alleged to have engaged in corrupt practices will be brought before the same Board and subject to the same procedures, which enables corporations to develop expectations about the sanctions that corrupt behavior will incur. Additionally, due to the specialized nature of the sanctions proceedings, Evaluation Officers and Board members will be able to develop expertise in the area. While this initially creates a steep learning curve and may require the offices to dedicate substantial amounts of time to developing this expertise,¹³⁶ it may prove to be an asset for the Board in future investigations. The World Bank’s decision to include external, independent legal experts on the Board in addition to World Bank officers will assist expertise development. The resources available to the INT, the Evaluation Officer, and the Sanctions Board buoy the process’s legitimacy. These resources include financial assets and access to the records and data that firms may be contractually obligated to reveal.¹³⁷

The sanctioning process also enables the World Bank to mete out punishments that sufficiently deter corruption. While domestic jurisdictions may be bound by sentencing or fine restrictions, the Sanctions Board has far more flexibility in determining the appropriate sanction. In the case of Lesotho, the fines were paltry in comparison to the contracts that the guilty companies won on the Lesotho project; this punishment is unlikely to deter future corrupt behavior. Sanctions, on the other hand, bar corporations or consultants from winning bids for work on any project that receives financing, however limited, from the World Bank. These losses come in the form of future earnings, but they may nevertheless be sufficient to deter corruption. The losses are compounded by the cross-debarment agreement reached in 2010 by the World Bank and four regional development banks. Under this agreement, if one of the banks debar a corporation for more than one year for having engaged in corrupt practices, the other four banks will debar the company as well.¹³⁸

134. WORLD BANK, *supra* note 124, at 6.

135. *Id.*

136. *See id.* at 21-22.

137. PROCUREMENT GUIDELINES, *supra* note 21, art. 1.14(e).

138. FRESHFIELDS BRUCKHAUS DERINGER US LLP, *Sanctions Investigations by the World Bank and Other Multilateral Development Banks* 1-2 (July 2010), available at www.freshfields.com/publications/pdfs/2010/July10/28402.pdf; *Cross-Debarment Accord Steps Up Fight Against Corruption*, WORLD BANK (Apr. 9, 2010), <http://go.worldbank.org/B699B73Q00>.

Sanctions are an administrative remedy and the World Bank is not a criminal court, which can be beneficial to its efforts to hold corporations accountable. The World Bank's ability to claim 'jurisdiction' over any project to which it provides even minimal funding gives it enormous flexibility in its investigative and sanctioning capacity. The World Bank funded more than 190 projects in 2010 in most regions of the world,¹³⁹ and can investigate and sanction any firm contracted to those projects. The Sanctions Board is not limited by non-retroactivity rules or statutes of limitations. It may investigate corruption allegations regarding completed projects and contracts signed before the debarment process began – though it is not obligated to do so.

The sanctions process now authorizes the Evaluation Officer to temporarily suspend firms while investigations into alleged corrupt practices are ongoing, rendering them ineligible to win new bank contracts or participate in new activities on continuing projects.¹⁴⁰ This closes a loophole in the World Bank's original sanctions process, which enabled Lahmeyer and other subsequently sanctioned firms to receive lucrative World Bank-funded projects while they were under investigation.¹⁴¹ Most recently, China Road and Bridge, a Chinese state-owned firm that was debarred for eight years by the Sanctions Board, won \$318 million in Bank-funded contracts between 2006 and 2008, while a corruption investigation was underway.¹⁴² The loophole allowed these and other debarred corporations to work on long-term Bank projects during their periods of debarment because they signed the contract before being sanctioned. Closing it has strengthened debarment as a deterrent and punishment mechanism.

Flaws accompany the system's strengths, however. First, although the World Bank considered Thornburgh's criticisms when reconstituting the Sanctions Board, several of his concerns remain valid. He noted that the sanctioning process quickly became "in essence an adjudicatory exercise, rather than an exercise of business discretion, with serious repercussions for respondent firms and for the Bank."¹⁴³ The new Sanctions Board attempted to eliminate concerns about the Board's ability to handle adjudicatory responsibilities by expanding Board membership to include external legal experts and changing the process by which sanctions were granted. While these changes strengthened the Board's adjudicatory purpose, they have not necessarily dampened its business purpose. The World Bank ultimately is an economic organization; as discussed in Part I, its bottom-line focus may overshadow anti-corruption goals. If the World Bank believes that a corporation will be essential to a planned project's

139. WORLD BANK, WORLD BANK ANNUAL REPORT 2010 front cover (2010). The IDA funded 190 new projects in 2010, and the IBRD funded 164 new projects.

140. WORLD BANK, SANCTIONS PROCEDURES, *supra* note 126, § 2.01 (2010).

141. Horta, *supra* note 12, at 17-18; Pottinger, *supra* note 13.

142. Editorial, *World Bank Responsibility*, WALL ST. J., Mar. 28, 2009, at A10.

143. WORLD BANK, *supra* note 124, at 21-22.

success, it may be hesitant to sanction it. It is not clear if the Sanctions Board will honor its anti-corruption commitment over the Bank's economic development agenda; the Bank in the past has favored the latter over the former.¹⁴⁴

The system is still vulnerable to real or perceived conflicts of interest.¹⁴⁵ Although it has some external members, several members of the Board are still current World Bank staffers with managerial and professional positions that may cause conflicts of interest.¹⁴⁶ In addition, the World Bank maintains close ties with several MNCs. For example, The Corner House reported that Lahmeyer staff members participated in the World Bank's Staff Exchange Programme, which "allow[ed] them an insider's view of how the Bank works, as well as allowing them to get to know Bank staff personally"¹⁴⁷ These relationships may call into question the neutrality of any investigations into these same companies. Individuals who have experienced the consequences of corruption – tax-payers or affected communities, for example – do not have a right to be heard in the hearings, and the Sanctions Board's decision to close a case is not subject to objection. As a result, there are few safeguards against incomplete or falsely closed investigations.

Although evidence of corrupt behaviors may emerge from audits and project reviews, the World Bank largely focuses on early project reviews related to determinations of project legitimacy. Once loans have been released to the borrower, the World Bank rarely engages in subsequent reviews or audits, "allowing all sorts of procurement wrongdoing to go undetected."¹⁴⁸ Third parties may bring allegations to trigger the sanctions process, but they may not have access to the information they need to proffer a credible claim. Therefore, the sanctions policy may not consistently identify corruption. In addition, the World Bank's investigators are not criminal investigators. They "do not possess the traditional powers of investigators in a national police agency – including, at least after court approval, the power to compel testimony and compel the production of documentary evidence."¹⁴⁹ Even their ability to access the records of a respondent firm may be contingent on the World Bank having included such a clause in the initial contract.¹⁵⁰ This limits the World Bank's ability to gather sufficient evidence of corruption.

144. See *supra* Part I.A.

145. WORLD BANK, *supra* note 124, at 23-24.

146. *Id.*

147. THE CORNER HOUSE, *supra* note 106, at 3.

148. AGUILAR ET AL., *supra* note 15, at 15.

149. *Id.* at 17.

150. PROCUREMENT GUIDELINES, *supra* note 21, § 1.14(e); CONSULTANT GUIDELINES, *supra* note 21, § 1.22(e).

B. Domestic Law

Due to the fact that a wide range of legal and political systems are in place in different developing countries, it is difficult to evaluate the strengths and weaknesses of investigation, prosecution, and punishment in domestic courts. This section will therefore examine the strengths and weaknesses of an effective process, using Lesotho's LHWP corruption trials as a case study, and will acknowledge the practical reality that many countries lack either the political will or capability to thoroughly investigate and prosecute corporations for corrupt practices.

Domestic methods of investigating and punishing corruption have some benefits. First, when a borrower country sues or prosecutes corrupt contracting corporations, it is able to recoup financial losses that it suffered because of the corrupt transactions,¹⁵¹ or avoid future losses to corruption.¹⁵² Remedies are not the only comparative strength of this process. Because the investigators are government employees with the right to access information and conduct interviews in the state, they can gather information available only on the ground and share information between government agencies and the courts. This increases the effectiveness and decreases the cost of investigations. In Lesotho, for example, when the government uncovered initial wrongdoing via an audit, it utilized the information in an administrative proceeding and then shared the information with criminal prosecutors, who used the information to prosecute the bribe-receiving official and the bribe-giving corporations. Thus, the initial project audit and subsequent administrative investigation laid the groundwork for the criminal case against Sole.¹⁵³ The investigation into Sole also provided the initial evidence of corruption by the corporations;¹⁵⁴ a single investigation uncovered information about multiple corrupt actors. Finally, the borrower country may investigate charges relating to infrastructure not funded by the Bank.¹⁵⁵

Corruption prosecutions also benefit the borrower country's broad anti-corruption and development agendas. A well-organized, objective process legitimizes the judiciary and regulatory agencies in the eyes of the public,

151. This funding goes directly to the government, and the government is not required to feed the funds back to affected communities.

152. See, e.g., Augustine Nwabuzor, *Corruption and Development: New Initiatives in Economic Openness and Strengthened Rule of Law*, 59 J. BUS. ETHICS 121, 131 (2005) (Nigeria has saved half a billion dollars by targeting "bloated contracts" and blacklisting foreign suppliers that overcharge the state).

153. See *supra* Part II.B.

154. *Id.*

155. Corruption cases stemming from non-Bank projects may affect Bank-funded projects. Corrupt government officials may be involved in both types of projects, so investigating corruption on any project may uncover corruption on Bank-funded projects. Corporations may be less likely to engage in corrupt practices if the courts have demonstrated a willingness to prosecute. In addition, any corruption case will build expertise and institutional knowledge about combating corruption in infrastructure development.

which can be important for emerging democracies and judiciaries attempting to establish themselves as legitimate and independent.¹⁵⁶ It indicates “the existence of the rule of law,” which in turn is an important component of economic development.¹⁵⁷ An objective adjudicatory process signals to the public that the government is capable of investigating and trying corrupt actors, despite their station in the government itself (in the case of the government officials) or their wealth, influence, and relationship with developed nation allies (in the case of the corporations). It also signals to corporations that they may be prosecuted for corrupt practices, which may deter corrupt behavior.

There are several disadvantages to the domestic intervention approach, however. Laws, including statutes of limitation and fine limits, may block the state from handing down punishments commensurate with the crime. Fines that would be prohibitive for domestic firms may not deter MNCs that conduct business in strong currencies and win lucrative contracts worth more than the potential fine. Domestic courts may also face jurisdictional limitations. The Lesotho prosecution relied heavily on information gleaned from Sole’s bank account in Switzerland.¹⁵⁸ Had Switzerland not granted prosecutors access to this information, Lesotho would have had no authority to demand it. Jurisdiction also may limit the prosecuting country’s ability to enforce payment of a fine that has been handed down. In Lesotho, several corporations have not yet paid their fines.¹⁵⁹

The prosecuting country must have the capability, the actual and perceived legitimacy, and the political will to try corruption cases. Trials are costly, and many developing countries have finite resources to allocate to the judiciary. Lesotho attempted to secure funding or technical assistance from donor countries, but despite the international community’s vocal support for Lesotho’s LHWP trials and several countries’ promises to provide financial assistance, Lesotho ultimately received little funding and had to carry the costs itself.¹⁶⁰ Although fines offset some of these costs, fines used to fund the trials are no longer available to make up the losses from the original corruption. The expected costs may prevent a country from initiating thorough investigations in the first place. Many developing judiciaries also are undergoing periods of reform to increase judicial

156. J. MARK PAYNE ET AL., *DEMOCRACIES IN DEVELOPMENT: POLITICS IN LATIN AMERICA* 222 (Inter-American Dev. Bank 2007); Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 699, 703 (2006) (“support for courts comes . . . from perceptions of the fairness of procedures employed there”); Jost Delbruck, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 34 (2003) (transparency, efficiency, and accountability contribute to “the legitimacy of the exercise of public authority”).

157. Nwabuzor, *supra* note 152, at 128, 126-28.

158. Wanlin, *supra* note 99, at 224.

159. *Id.* at 228.

160. *Id.* at 228, 237.

independence and professionalism.¹⁶¹ Corporate corruption cases may help a judiciary or related investigative agencies build expertise, but they also may be difficult for reforming judiciaries to tackle.

The judiciary also must have real and perceived legitimacy. At stake is the judiciary's interest and ability to be objective in making determinations about a corporation or government official's culpability. It is also important that the World Bank, multilateral donors, and the international community perceive the process to be a legitimate one; if there is concern regarding the investigation methods, the government's motives, or the judiciary's independence, donors may not support the borrower's attempts to root out corruption and may balk at future loans and investments. Selective prosecutions also may give rise to questions about objectivity. A judiciary that is vulnerable to influence due to its structure or relationship with political figures may call into question even those trials that have not been improperly influenced. Real or perceived illegitimacy strengthens the claims of impropriety by accused corporations and their home states, even if the corruption allegations are valid.

Some countries also may not have the political will to tackle corruption cases. Infrastructure development projects are vulnerable to grand corruption by high-level government officials,¹⁶² who likely would not support audits and investigations. The judiciary, prosecutors, and other government agencies may be vulnerable to influence and corruption.¹⁶³ Governments may also use anti-corruption efforts as a façade to prosecute corporations and officials selectively or falsely in order to achieve other political goals, such as punishing government officials of opposition parties or pressuring corporations. This raises the classic "boy who cried wolf" problem; in a system in which the judiciary is used for political or corrupt ends, the country's population and the international community will not trust the actions of a corrupt judiciary, even when the acts – a corruption prosecution, for example – are meritorious.¹⁶⁴

The borrower state's willingness to try corporations for infrastructure development project corruption may also be influenced by the development project's financiers.¹⁶⁵ MNCs contracted to work on the

161. See Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 118-19 (1999).

162. See Kenny, *supra* note 29, at 5-6; Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT'L LAW. 717, 723 (2005); Tanzi & Davoodi, *supra* note 29, at 42.

163. See Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences* 8 (Stanford Univ. Hoover Inst. Working Paper No. 95, 1999) ("specific organizational structures and behavioral patterns within the courts in developing countries make them prone to . . . systemic corrupt practices").

164. See Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 358-59 (2000); see also WORLD BANK, THE WORLD BANK'S ANTI-CORRUPTION GUIDELINES AND SANCTIONS REFORM: A USER'S GUIDE 2 (2007), available at <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/RevisedPMNDFinaluserGuideline031607.pdf>.

165. See, e.g., Sarah Bracking, *The Lesotho Highlands Corruption Trial: Who Has Been Airbrushed from the Dock?*, 28 REV. AFR. POL. ECON. 302, 305 (2001) (reviewing the relationship

project often are based in donor countries, the governments of which may wish to avoid corruption scandals involving their companies.¹⁶⁶ The donor governments may be pressured by the corporations to intercede on their behalf with the borrower state, and the borrower state may fear the loss of future development aid and loans.

The government therefore must have the political will to carry out the investigations and prosecution in an objective and reliable manner. Government agencies and the judiciary must be independent and generally free of internal corruption. Those developing countries that do possess the requisite political will often face resource constraints. As a result, it is unlikely that Lesotho's approach will become the norm for prosecuting infrastructure project-related corruption in the near future. This is particularly true if the international community is not willing to expend the resources and political capital to assist these endeavors, and if they doubt the legitimacy of the borrower country's anti-corruption efforts.

C. Third Party States, Multilateral Actors, and Non-Government Organizations

Although I have limited my discussion thus far to two parties, the borrower state and the World Bank, other actors can affect the relationship between the primary parties and influence corruption investigations and prosecutions.

1. Third-Party States

Third-party states may exert a negative or positive influence upon corruption investigations stemming from infrastructure development projects. As discussed above, donor states may negatively influence corruption investigations by protecting their MNCs from such investigations or withholding funding from anti-corruption efforts.¹⁶⁷ Conversely, third-party states may have a positive influence over corruption proceedings. A third-party state may financially or politically support corruption proceedings, or it may opt to share relevant financial information with the prosecuting state. Switzerland's decision to give the Lesotho government access to Sole's banking records, for example, was crucial to the success of the LHWP investigation.¹⁶⁸ Finally, third-party states that have jurisdiction over offending corporations or other actors

between the United Kingdom, Lesotho, and British firms contracted on the LHWP).

166. Countries may be particularly interested in protecting the interests of their corporations if they have specific financial interests in the firms' overseas contracts. For example, the British Export Credit and Guarantee Department "underwrites the export contracts and investments of UK companies working abroad"; it therefore has a direct incentive to support British companies that are implicated in corruption scandals. *Id.* at 303.

167. See *supra* text accompanying notes 165-166.

168. See *supra* text accompanying note 105.

involved in corruption may be willing to criminalize the corrupt practices its corporations undertake in foreign territories. For example, the United States has passed the Foreign Corrupt Practices Act, which criminalizes the bribery of foreign officials.¹⁶⁹ If these laws are judiciously applied, they may further deter corporations from engaging in corrupt practices and assuage the concerns of a borrower country that fears losing future funding if it prosecutes a corporation from the donor country.

2. Multilateral Actors

Several international organizations have become involved in efforts to stem corruption, and have passed multilateral instruments aimed at improving domestic anti-corruption laws and increasing international cooperation. The United Nations Convention Against Corruption requires its signatories to criminalize bribery, money laundering, and other forms of corruption,¹⁷⁰ and to take measures to prevent corruption and to ensure the independence and integrity of judiciaries and relevant government institutions.¹⁷¹ It also mandates international cooperation among signatories:

States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations and proceedings in civil and administrative matters relating to corruption.¹⁷²

The Convention also requires “States Parties . . . [to] afford one another the widest measure of mutual legal assistance . . . in relation to the offences covered by this Convention.”¹⁷³ Foreign states may be requested to execute searches, take statements, provide bank records and other evidence, and identify proceeds of corruption.¹⁷⁴ The Convention also allows foreign states to “transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings” without prior request.¹⁷⁵

Other international instruments, including the Organization for Economic Cooperation and Development Convention on Combating

169. The Foreign Corrupt Practices Act, Pub. L. 105-366, 15 U.S.C. § 78dd-1 (Dec. 19, 1977, amended Nov. 10, 1998).

170. U.N. Convention Against Corruption, *supra* note 26, arts. 15-24.

171. *Id.* arts. 7, 11.

172. *Id.* art. 43.

173. *Id.* art. 46(1).

174. *Id.* art. 46(3).

175. *Id.* art. 46(4).

Bribery of Foreign Public Officials in International Business Transactions,¹⁷⁶ the Inter-American Convention Against Corruption,¹⁷⁷ the European Union Criminal Law Convention on Corruption,¹⁷⁸ and the African Union Convention on Combating and Preventing Corruption,¹⁷⁹ address similar anti-corruption efforts. If parties to these instruments implement them, borrower countries will have stronger anti-corruption laws and better access to the resources they need to properly investigate violations.

3. Non-Government Actors

Non-government actors – including the media, non-governmental organizations (NGOs), and local civil society organizations and activists – may also play a part in anti-corruption endeavors.¹⁸⁰ As agenda-setters,¹⁸¹ non-governmental actors focus attention on corruption as a problem, pressure borrower governments and the World Bank to initiate investigations into corrupt practices, and influence the agendas of other, more powerful non-government actors. NGOs already have successfully lobbied on the local and international level to mobilize public opinion against dam construction.¹⁸² They can help demonstrate the link between corrupt practices and the environmental degradation and rights abuses felt by communities affected by these projects.¹⁸³ Establishing this link will place corruption on the agenda of powerful activists that focus primarily on environmental and human rights issues. This in turn will increase the pressure that non-government actors are able to place on the World Bank and the borrower states that investigate corruption and on the third-party states that can assist those investigations.

Non-government actors also may fulfill a “watchdog” function.¹⁸⁴ The informal oversight mechanisms of community organizing, political

176. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1.

177. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, O.A.S.T.S. No. B-58, 35 I.L.M. 724.

178. European Union Criminal Law Convention on Corruption, Jan. 27, 1999, Eur. T. S. No. 173.

179. African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003.

180. Civil society at the local and international level plays an important role in demanding accountability and transparency, information sharing, and good governance. See Brinkerhoff, *supra* note 25, at 239.

181. See generally DOUG MCADAM ET AL., COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 308-09 (1996) (introducing the media, political, and electoral agendas that non-state actors seek to shape and frame).

182. Aart van de Laar, *Water Development for Power and Irrigation, the Environment and Sustainable Development* 5 (Inst. Soc. Stud., Working Paper Series No. 141, 1993).

183. Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL, *supra* note 61, at 1, 2.

184. JUDE HOWELL & JENNY PEARCE, CIVIL SOCIETY AND DEVELOPMENT: A CRITICAL EXPLORATION 68 (2001).

lobbying, and media coverage may encourage investigative and prosecutorial integrity and transparency.¹⁸⁵ For a variety of reasons, non-government actors may or may not engage in agenda-setting or watchdog activities, or be successful at doing so.¹⁸⁶ They may not support corruption investigations or may favor other issues over corruption. Ultimately, their presence, absence, and motives may inform how and if investigations proceed. This is particularly true given the increased space for engagement that civil society has carved out for itself in the World Bank and in many countries.¹⁸⁷

IV. A NEW WAY FORWARD

Large-scale infrastructure projects will continue to be an important component in the development agenda of borrower countries and the World Bank. I have demonstrated that these projects are vulnerable to corruption.¹⁸⁸ Corruption decreases project effectiveness, increases price, financially burdens a borrower country's population, and increases the risk of environmental degradation and human rights abuses relating to the project.¹⁸⁹ Preventative programs are necessary but not sufficient to eradicate this problem, particularly in the short term given corruption's prevalence and the financial incentives of winning bids on infrastructure development projects.¹⁹⁰ The investigation, prosecution, and punishment of corruption are integral parts of the solution. The Bank's Sanctions Board and domestic prosecutions are promising but ultimately unsatisfactory. Neither individual option is enough

185. See Pilar Domingo, *Judicial Independence and Judicial Reform in Latin America*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 151, 164 (Andreas Schedler, Larry Jay Diamond & Marc F. Plattner eds., 1999) (suggesting that NGO pressure has led to legal reforms in Latin America); see also DAVID DE FERRANTI ET AL., *THE BROOKINGS INSTITUTION, ENHANCING DEVELOPMENT THROUGH BETTER USE OF PUBLIC RESOURCES: HOW INDEPENDENT WATCHDOG GROUPS CAN HELP* (Policy Brief 157, 2006) (arguing that NGOs, civil society, and the media can play a role in demanding budgetary transparency).

186. See JAMES M. JASPER, *THE ART OF MORAL PROTEST: CULTURE, BIOGRAPHY, AND CREATIVITY IN SOCIAL MOVEMENTS* 332 (1997); DOUG MCADAM, SIDNEY G. TARROW & CHARLES TILLY, *DYNAMICS OF CONTENTION* 14-16 (2001) (introducing theories as to why social movements form and succeed).

187. See Robert Fatton, Jr., *Africa in the Age of Democratization: The Civic Limitations of Civil Society*, 38 *AFR. STUD. REV.* 67, 68 (1995); Jonathan Fox, *Introduction to DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL*, *supra* note 61, at xi, xiii; Jamie Elizabeth Jacobs & Martín Maldonado, *Civil Society in Argentina: Opportunities and Challenges for National and Transnational Organisation*, 37 *J. LAT. AM. STUD.* 141, 144 (2005); Catherine Weaver & Susan Park, *The Role of the World Bank in Poverty Alleviation and Human Development in the Twenty-First Century: An Introduction*, 13 *GLOBAL GOVERNANCE* 461, 462-63 (2007). See generally Michael Bratton, *Civil Society and Political Transitions in Africa*, in *CIVIL SOCIETY AND THE STATE IN AFRICA* 51 (John W. Harbeson, Naomi Chazan & Donald Rothchild eds., 1994).

188. See *supra* Part I.A.

189. *Id.*

190. See, e.g., Buscaglia, *supra* note 163, at 12 (noting the difficulty of implementing reform because corruption benefits tend to be short-term and reform benefits are long-term).

to help eradicate corruption from World Bank development projects.

In this section, I propose an alternative solution, comprised of three related elements. First, host countries and the World Bank should include in their procurement project contracts a "trigger clause" that would require each party to instigate an investigation into allegations of corrupt behaviors if the other one does. Second, the "trigger clause" should mandate information sharing between domestic and World Bank investigators. Third, the World Bank should create a support fund to provide monetary assistance to domestic governments for the prosecution of corruption. The three elements of the proposed policy will make effective investigations and prosecutions more likely. It therefore increases the risk of engaging in corrupt practices to procure development project contracts, such that the risks outweigh the benefits. After I review the details and goals of the proposed policy, I consider challenges that would face the policy but ultimately conclude that it still represents a more effective means for combating corruption than the present systems of investigation and punishment.

A. Provisions of the New System

The first element of the proposed system requires the World Bank and each borrower country to include a "trigger clause" in their mandates or contracts. The parties' individual investigation and punishment processes will remain mutually exclusive and each party will retain independent power over its own process. The trigger clause will pertain only to corruption investigations into Bank-funded infrastructure projects located in the borrower country. The clause will stipulate that when one actor has initiated a formal investigation into allegations of corruption and can certify that the investigation has revealed compelling evidence of corruption, the other actor must initiate its own formal investigation into the corrupt behaviors. Language accompanying the clause will confirm both parties' commitment to objective, rigorously conducted investigations and fairly decided outcomes, and will require that the investigations focus both on bribe-receiving officials and bribe-giving corporations.

The Sanctions Board will include the trigger clause as part of its official World Bank mandate. Borrower countries can pass legislation about the trigger clause, or they can opt to write the clause into each Bank-funded project's Terms of Reference (TOR) or in their loan agreements. Although the outcomes of each investigation need not mirror one another, any conflict between the final findings will act as a second trigger for the World Bank Sanctions Board, requiring it to review investigations whose outcome differ substantially from the borrower country's outcome. The World Bank's outcome will trigger a second investigation by the borrower state as well, unless issues of double jeopardy or resource limitations prevent it.

The trigger clause formalizes the steps taken in the LHWP scandal: the World Bank initiated inadequate investigations into Acres International and Lahmeyer when Lesotho convicted the LHDA's Chief Executive Officer of

corruption and announced its plans to prosecute Acres, Lahmeyer, and other firms. The World Bank later reopened the investigations in response to the guilty verdicts handed down against the MNCs, in part due to negative political, media, and NGO pressure. The clause, however, would trigger a World Bank investigation automatically and would not be dependent on sufficient public outcry.

The clause also would require the borrower country to respond to a World Bank investigation into Bank-funded project corruption by initiating its own investigation. The borrower will have enormous flexibility to determine the appropriate scope of the investigation and the correct venue for post-investigation stages.¹⁹¹ The language of the Procurement Guidelines may also enable the government to bring contractual breach suits against corrupt contractors.¹⁹²

Investigations and subsequent administrative, criminal, or civil proceedings are time consuming. Firms have taken advantage of this by winning additional contracts after credible evidence of corruption has emerged, but before they are sanctioned. The trigger clause will disallow this, a step already taken by the World Bank Sanctions Board. Currently, the Sanctions Board may temporarily suspend firms – block them from receiving any World Bank contract – if the World Bank INT recommends a suspension and if the Executive Officer agrees that the evidence justifies such a suspension while the formal investigation or hearing is ongoing.¹⁹³

I propose that a borrower country also temporarily bar firms under investigation from receiving new contracts on publicly funded projects in that country. Suspensions should trigger when one party certifies that there is credible evidence that the corporation engaged in corrupt practices.¹⁹⁴ Exceptions should be authorized if it can be shown both that the contract requires specialization or expertise that the corporation in question is able to perform better than other bidders, and that the award was made based upon a fair and transparent bidding process. The contract should be made contingent upon the corporation being cleared of wrongdoing.

The efficacy of the trigger clause depends on the two other elements of my proposal: information sharing and a support fund. These elements

191. The borrower country may pursue administrative sanctions, criminal prosecutions, or a civil case to recoup financial losses.

192. The Procurement Guidelines allow a borrower country to contractually require bidding firms to “observe . . . the country’s laws against fraud and corruption.” *PROCUREMENT GUIDELINES*, *supra* note 21, § 1.15; *see also* *CONSULTANT GUIDELINES*, *supra* note 21, § 1.23 (providing a similar rule regarding the observation of the country’s domestic laws). A contractor that signs the bidding agreement and then engages in corruption may be in breach.

193. *WORLD BANK, SANCTIONS PROCEDURES*, *supra* note 126, §§ 2.01, 4.02.

194. This does not implicate due process or presumption of innocence. The Sanctions Board is not a court of law. Due process in international or domestic law would not afford a corporation the right to future contracts. It is valid for a borrower to consider whether a corporation has been implicated in previous corruption incidents. *See World Bank Responsibility*, *supra* note 142.

ensure that the trigger clause is maximally effective by equipping both parties with the tools to properly investigate corruption charges. Mandatory information sharing (with limited rights of non-disclosure for sensitive or legally confidential materials) between the World Bank and domestic investigators will enable both parties to conduct thorough investigations, given that both parties are limited in their ability to collect information. The Sanctions Committee currently cannot access government records or interview people in the borrower country. Borrower government investigators often lack the resources or legal power to access corporate records, foreign financial records, or other evidence outside its borders. Each party needs access to all relevant information, although each set of investigators should independently evaluate this information. The investigations themselves must remain independent to avoid – in appearance or reality – the possibility of one party inappropriately influencing the outcome of the other party's investigation.

The third element of the proposed policy requires the World Bank to develop a fund specifically to help developing countries prosecute corruption cases stemming from Bank-funded infrastructure development projects. Disbursement of funds may be at the discretion of the Sanctions Board, based upon the level of judicial reform in the country, and contingent upon the transparency and legitimacy of the proceedings. These requirements will allow the World Bank to prevent its funds from being used to further prosecutorial misconduct or politically motivated indictments while giving the borrower state access to the resources it needs to exact proper penalties for corruption.¹⁹⁵

The proposed policy will expand the influence of non-government actors and, in turn, be assisted by these actors. With the trigger clause in place, non-government actors will be able to pressure either the borrower government or the World Bank and affect the agendas of both. Actors may at times have more or less influence over one of these parties. "Influencing an institution like the World Bank is not a short-term, low-investment process. Making a difference requires a sustained, cohesive coalition capable of mobilizing and analyzing information relevant to Bank activities, making that information available to key actors, and mobilizing many sources of influence."¹⁹⁶ Actors without the resources to influence the World Bank may have better access to their local governments,¹⁹⁷ particularly because the democratization of developing countries means that their governments have to answer to affected communities, activists,

195. Huther & Shah, *supra* note 49, at 4.

196. L. David Brown & Jonathan Fox, *Transnational Civil Society Coalitions and the World Bank: Lessons from Project and Policy Influence Campaigns*, 16 IDR REPORTS 1, 2 (2000).

197. See, e.g., Jonathan A. Fox & L. David Brown, *Introduction to THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* 1, 2 (Jonathan A. Fox & L. David Brown eds., 1998) (noting that NGOs have "pressur[ed] donor governments to encourage the World Bank to adopt more rigorous environmental and social policies" rather than going directly through the World Bank).

and organizations.¹⁹⁸ Alternately, non-government actors can turn to the World Bank when they lack influence over their own government. Under the proposed policies, either avenue will trigger investigations by both government and Bank.

The proposed policies also will give developing countries increased influence over the World Bank's sanctioning process. Borrower countries cannot dictate Sanctions Board outcomes, but they can prompt Bank investigations and provide incentive for the Bank to investigate properly. The developing countries then may benefit from the resources and findings of the World Bank. In circumstances where the national government is the reluctant party, the multilateral bank can propel investigations. Neither party need be the tail trying to wag the dog; both would have the ability to spur the other to tackle corruption cases.

Ultimately, in the wake of the Lesotho scandal – and the negative media and NGO attention that the World Bank received for its initial failed investigation – the proposed policy and trigger clause may result in a 'race to the top' between the World Bank and the host countries. The information-sharing provision of the proposed policy will ensure that resource deficits will not thwart any party's investigation. A poorly executed investigation by one party will be apparent when compared to the other. This will encourage the state and the World Bank to conduct the thorough investigations that ultimately must occur if the proposed policy is to succeed at stopping corruption on Bank-funded infrastructure projects.

B. Goals of the Proposed Provisions

The World Bank and borrower countries should have two goals with relation to their infrastructure projects: to eradicate project-related corruption, and to improve the cost efficiency, construction soundness, and environmental and human rights standards of infrastructure projects so that the benefits outweigh the costs to developing countries and affected communities. The proposed policy can play a substantive role in achieving these goals by improving investigation and punishment methods.

The proposed policy will create disincentives for corruption on Bank-funded projects by increasing the risk for bidding corporations of being caught and punished and by changing the cost-benefit analysis of corrupt behavior such that corruption is no longer a financially sound choice. Non-government actors seeking accountability will be able to concentrate lobbying efforts on either the World Bank or borrower country and trigger investigations by both. The information-sharing provision and assistance funds will improve the quality of the investigations. If a borrower country

198. See Larry J. Diamond & Leonardo Morlino, *The Quality of Democracy: An Overview*, 15 J. OF DEMOCRACY 20, 21, 23-25 (2004) (having a strong democracy means that citizens have the freedom to "articulate and organize around their political beliefs and interests," access multiple forms of information, and hold leaders accountable).

and relevant third parties are signatories to the United Nations Convention Against Corruption or other anti-corruption instruments, the borrower country may access evidence housed in foreign banks and corporate headquarters, further improving investigation effectiveness and possibly prompting additional trials in the corporation's home country.

The proposed policy also will improve infrastructure development projects. Successful prosecutions will strip corrupt corporations of bidding privileges and remove bribe-receiving officials from their offices, and may help the borrower country recoup corruption-related losses. The policy makes corrupt behavior riskier for corporations and officials and increases the likelihood of corruption-free bidding. Transparent, legitimate bidding processes will ensure that the best corporations will be contracted on projects, in part because they make corporations and officials more accountable to external investigative bodies and less likely to cut corners or ignore construction, environmental, or human rights standards. The proposed policy will therefore decrease corruption on World Bank-funded infrastructure projects and improve the infrastructure projects themselves.

C. Early Steps in the Current System

The proposed policy adheres closely to commitments already affirmed by the World Bank and in instruments such as the United Nations Convention Against Corruption. The provisions of the current system suggest that the elements of the proposed policy would be feasible additions. For instance, Sanction Board decisions are already disseminated to the borrowing country and the firm's home country and released publicly.¹⁹⁹ The Bank currently also has broad discretion to share non-sensitive evidence submitted to the Sanctions Board with other multilateral development banks, international or multinational organizations, national development agencies, and investigating or prosecuting authorities of member countries, if it determines that doing so is in the best interests of the Bank and if the receiving party agrees to confidentiality terms acceptable to the Bank.²⁰⁰ The World Bank Sanctions Procedures further confirm that nothing – including the sensitive materials restrictions – limits the Bank's ability to share investigative materials with parties “if such information sharing is permitted by its policies and procedures.”²⁰¹ My proposed information-sharing provision would expand rather than reinvent the existing disclosure regulations. The new provisions would make disclosing non-sensitive information mandatory rather than discretionary. It also would enable the Sanctions Board to disclose information to criminal investigators and to receive information in return.

199. WORLD BANK, SANCTIONS PROCEDURES, *supra* note 126, §§ 8.03(b), 10.01(a).

200. *Id.* § 10.02.

201. *Id.* § 10.03.

Second, the World Bank already funds judicial reform efforts;²⁰² the proposed provision asks only that the Bank direct some of these resources specifically toward corruption investigations and prosecutions stemming from Bank-funded projects. Third, the World Bank Evaluation Officer currently has the authority to bar corporations found guilty of corrupt behaviors and temporarily suspend corporations while the investigation is pending.²⁰³ My proposal would expand this power to apply also to a borrower state. Finally and most practically, the LHWP scandal exemplifies the realistic interaction between the two systems; transparent, legitimate domestic investigations can influence the World Bank. The proposed provisions only formalize this process.

D. Challenges Facing the Proposed Regime

In this section, I review the challenges facing the proposed policy. First, the proposed provisions likely will not immediately eradicate corruption on large-scale infrastructure projects. There are several procedural complications involved in amending the Sanctions Board bylaws, TOR Agreements, and contracts between World Bank and borrower countries and between the borrower countries and corporations. It may take time to accrue a sustainable source of funding in the World Bank to support domestic prosecutions. In order to put these changes into motion, the World Bank will have to hold multilateral and bilateral talks with donor and borrower countries in order to coordinate implementation and determine appropriate rules for investigative cooperation. Putting aside these procedural issues, there remain three major concerns that may limit support and affect how successful the proposed changes ultimately are in achieving their stated goals.

1. Legitimacy

The first concern is that the investigation itself may be susceptible to corruption or inappropriate influence. Corporations and foreign countries may bribe or inappropriately influence government officials in charge of initial administrative investigations. A borrower country may use corruption investigations to make a political statement against a corporation's home country, to extract kickbacks, as a bargaining chip in other negotiations with the corporation or its home country, or to achieve other financial or political ends. Many borrower countries struggle with institutional corruption, and critics of the proposed policy may argue that the Bank's investigation agenda should not be dictated by countries

202. See WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM (2002), available at <http://siteresources.worldbank.org/BRAZILINPOREXTN/Resources/3817166-1185895645304/4044168-1186409169154/18initiativesFinal.pdf>.

203. WORLD BANK, SANCTIONS PROCEDURES, *supra* note 126, §§ 2.01, 4.02, 9.01.

plagued by internal corruption. Finally, the World Bank or a borrower government may face pressure from donors or may act out of fear of imagined donor disapproval, resulting in selective investigations.

The perception of illegitimacy may be just as destructive to my proposed system. If borrower countries do not trust the legitimacy of World Bank investigations or vice versa, cooperation and mutual respect of process and outcomes will be unlikely. If third-party states do not trust the legitimacy of either system, they will not cooperate under the terms of the multilateral anti-corruption instruments or as donors. They also may support their MNCs in corruption cases against what they perceive to be spurious accusations.

While these are valid concerns, I argue that they are less of a concern in my proposed system than they are under the current system. First, false prosecutions against innocent parties will be less likely under the dual system that I propose. The first investigating party will be less likely to pursue improper prosecutions if it knows that a second investigation by an independent party will follow, as the second investigation will reveal improprieties of the first. Indeed, each investigation will act as a check on the other one. A second investigation will not be triggered until investigators can show that a certain threshold of evidence has been met, which will prevent corporations or officials from having to endure more than one investigation into false accusations of corruption. This system also will curtail false negatives – incidents of corruption that are not investigated or prosecuted.

2. Political Will

Anti-corruption endeavors will not evolve beyond rhetoric unless political actors have the “demonstrated credible intent . . . to attack perceived causes or effects of corruption.”²⁰⁴ This system hinges on the political will of the actors. Either the World Bank or a borrower country must initially choose to investigate corruption on infrastructure projects, and be willing to prioritize this agenda over other, conflicting goals, including project completion and future funding. Donor states, particularly a MNC’s home state, must be willing to prioritize the anti-corruption agenda over the welfare of their MNCs and to maintain aid pledges to the World Bank or the borrower country. Non-government actors will have to prioritize corruption with or above other concerns, including the environment, resettlement, and human rights issues.

As evidenced by the Yacyretá Hydroelectric Project, corruption will go unpunished despite public availability of evidence when the parties lack incentive or capacity to combat corrupt practices. Corruption is an entrenched problem, and it has been a characteristic of many large-scale

204. Sahr J. Kpundeh, *Political Will in Fighting Corruption*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 91, 92 (Irene Hora ed., 1998).

infrastructure projects;²⁰⁵ there traditionally has been little political will to challenge this system. However, the anti-corruption agenda has gained traction in recent decades, and the World Bank's willingness to reconstitute its sanctions process illustrates its increased willingness to improve its administrative methods of investigation and prosecution. The Bank also has shown a willingness to examine its infrastructure projects with a more critical eye toward efficiency, corruption, the environment, and human costs.

My proposed policy will not create political will, but it will change the current prosecution mechanisms so that less political will is required to achieve more and improved investigations, prosecutions, and punishments as compared with the current system. If the proposed policy is implemented, only one actor needs to have the political will to engage with corruption on a Bank-funded project in order to trigger investigations from both the World Bank and the borrower. In addition, the policy will dismantle several financial and political capital costs of investigations. Once there is enough political will to move forward, I argue that my policy creates a more effective means of investigation and prosecution than the means currently available to the strong willed.

3. Sovereignty

The proposed policy also implicates the sovereignty of the countries involved. It gives the World Bank the authority to require states to initiate investigations, which involves policymaking and judicial discretion, powers traditionally asserted by the nation-state. In addition, for those projects that are jointly owned by more than one country, like the LHWP and the Yacyretá Hydroelectric Project, either country effectively would be empowered to dictate the executive or judicial decisions of its co-owner state. One country could investigate allegations of corruption, triggering a World Bank inquiry, which then would trigger an investigation by the co-owning country.

Neither problem is insurmountable. Countries may voluntarily cede sovereign rights over lawmaking or judicial decision-making to intergovernmental bodies; several international treaties require such agreements.²⁰⁶ For example, the Hague Convention on the Civil Aspect of International Child Abduction includes articles requiring a signatory country take action in response to submissions of child abduction by other

205. Masood Ahmed, *Votes and Voice: Reforming Governance at the World Bank*, in *RESCUING THE WORLD BANK: A CGD WORKING GROUP REPORT & SELECTED ESSAYS* 87, 99 (Nancy Birdsall ed., 2006).

206. See, e.g., Hague Convention on the Civil Aspect of International Child Abduction, S. Treaty Doc. 11, 99th Cong., 1st Sess. 9 (1980) reprinted in 19 I.L.M. 1501 (1981), arts. 2, 7 (requiring that signatory states cooperate with other signatory nations and take measures to prevent the wrongful removal or secure the return of children); U.N. Convention Against Corruption, *supra* note 26 (requiring signatory states to implement anti-corruption policies).

countries,²⁰⁷ which suggests that countries may be willing to enter into trigger agreements.

The issue of sovereignty is fraught. The Convention Against Corruption expressly states that its provisions, which require that signatory nations enact domestic anti-corruption policies and engage in cross-border cooperation, respect the internationally recognized principle of “non-intervention in the domestic affairs of other States.”²⁰⁸ The proposed trigger policy will not dictate specific policies, however. It requires only that investigative steps be taken, which aligns with the type of requirements encompassed in multilateral conventions.²⁰⁹ Moreover, states are free to enter into contractual obligations with other states. Should the World Bank opt to incorporate these policies into its contracts, sovereignty becomes even less of a concern because states will be able to decide, on a case by case basis, whether they wish to contract with the World Bank, given the trigger policy.

4. World Bank Future Relevance

The proposed policy will punish ongoing corruption, deter future corruption on Bank-funded infrastructure projects, and improve the sustainability and effectiveness of these projects. Although the policy will have spill-over effects, its primary goals, like the analysis of this paper, are limited to projects funded by the World Bank. The “global economy and . . . the relative power and needs of [the World Bank’s] shareholders” have changed dramatically since the Bank’s inception.²¹⁰ Private lending has increased, as has lending from other multinational, regional, and bilateral development banks.²¹¹ “[T]he Bank is providing a reducing proportion of official funds, and a very small proportion of the developing world’s investment. Only in Africa . . . does official aid still play an important part, exceeding the amount of private finance.”²¹²

Despite these changes, I argue that the World Bank remains relevant in the field of infrastructure development, and that it is still important to tackle corruption on Bank-funded projects. The Bank still doles out huge amounts of development funding to large-scale infrastructure projects. It has a responsibility to its donors to be fiscally responsible with this

207. Hague Convention on the Civil Aspect of International Child Abduction, *supra* note 206, arts. 8-10.

208. U.N. Convention Against Corruption, *supra* note 26, art. 4.

209. See, e.g., The Hague Convention on the Civil Aspect of International Child Abduction, *supra* note 206; U.N. Convention Against Corruption, *supra* note 26.

210. Nancy Birdsall & Devesh Kapur, Center for Global Development Working Group, *The Hardest Job in the World: Five Crucial Tasks for the New President of the World Bank*, in *RESCUING THE WORLD BANK*, *supra* note 205, at 13, 13.

211. Devesh Kapur, *The Changing Anatomy of Governance of the World Bank*, in *REINVENTING THE WORLD BANK*, *supra* note 2, at 54, 71.

212. DAVID A. PHILLIPS, *REFORMING THE WORLD BANK: TWENTY YEARS OF TRIAL – AND ERROR* 11 (2009).

funding, and a responsibility to borrower countries to support projects that will benefit and not burden that country's population. This responsibility is not mitigated by the existence of other donor agencies or private financiers.

The World Bank remains a leader of development lending. Its support of infrastructure projects signals to other lenders that the projects are credit-worthy,²¹³ which allows the World Bank to spread its money further. It can fund small parts of many projects that are then capable of raising the additional necessary funds. This system will also help the World Bank play an important role in corruption investigations and prosecutions. The Bank has jurisdiction over any project to which it has contributed funds,²¹⁴ thereby giving it oversight of many projects that have different primary donors.

Moreover, in April 2010, the World Bank signed a cross-debarment agreement with the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group.²¹⁵ Under the agreement, each bank is able to debar a corporation that has been sanctioned by another participating bank. These corporations will no longer be able to obtain contracts on projects financed by any of the five banks.²¹⁶ This further extends the World Bank's reach, and makes it more difficult for unwilling states to simply seek loans from other multilateral lending institutions.

The issue of political will again emerges. If a borrower country does not wish to abide by World Bank regulations or be subject to the Bank's anti-corruption provisions, it likely will be able to attract different funding – though it may be more difficult to do so. The World Bank's comparative advantage is not its cash, but rather its oversight mechanism and interest in supporting successful projects. Mark Stoleson has argued that “efforts to improve the Bank's competitive advantage must start with the creation of independent governance mechanisms and objective measures of success

213. Scholars continue to debate whether World Bank loans catalyze private investment in a country. See Graham Bird, Antonella Mori & Dane Rowlands, *Do the Multilaterals Catalyze Other Capital Flows? A Case Study Analysis*, 21 *THIRD WORLD Q.* 483 (2000). However, anecdotal evidence suggests that World Bank investment in a specific project may encourage private investment in that project. For example, Chad-Cameroon pipeline investors conditioned their investment on the World Bank's involvement. Genoveva Hernández Uriz, *The Application of the World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility?*, 28 *BROOK. J. INT'L L.* 77, 93 (2002).

214. WORLD BANK, *SANCTIONS PROCEDURES*, *supra* note 126, § 1.01(c).

215. *Cross-Debarment Accord Steps Up Fight Against Corruption*, *supra* note 138.

216. *Id.* This agreement builds upon a 2006 agreement by the five participating banks, the European Investment Bank, and the International Monetary Fund to “work towards a consistent and harmonized approach to combat corruption in the activities and operations of the member institutions.” The member institutions agreed to harmonize their definition of corrupt practices, exchange information, and recognize one another's enforcement actions. INTERNATIONAL FINANCIAL INSTITUTIONS ANTI-CORRUPTION TASK FORCE, *UNIFORM FRAMEWORK FOR PREVENTING AND COMBATING FRAUD AND CORRUPTION* 1-3 (2006), <http://siteresources.worldbank.org/INTDOI/Resources/FinalIFITaskForceFramework&Gdlines.pdf>.

and failure.”²¹⁷ The proposed policy would provide such objective measures and independent mechanisms.

Moreover, it is not a coincidence that Lesotho initiated an audit of the project soon after democratizing. The country had a stake in the accountability of the project, and the audit demonstrated the new government’s commitment to project integrity. Although democracies may harbor corrupt institutions and officers, global anti-corruption and good-governance agendas are gaining ground. If a borrower country has the political will to prefer effective, non-corrupt bidding, planning, and construction processes for large-scale infrastructure projects, the World Bank would be well positioned in its lending agency capacity.

E. Theoretically Applying the Provisions to Yacyretá and the LHWP

Despite the similarities between the Yacyretá Hydroelectric Project and the LHWP and the overlap between the actors involved, the outcomes of corruption allegations were vastly different. Allegations of corrupt behaviors on Yacyretá never developed into an investigation, despite evidence of corrupt bidding practices, cost increases that could not be fully explained by inefficiency, and a statement from the Argentine president that the project was corrupt. Allegations of corrupt behaviors on LHWP, by contrast, resulted in an administrative investigation and criminal prosecutions, and culminated with World Bank sanctions against several MNCs. A confluence of circumstances, including Lesotho’s democratic transition, Lesotho’s uncovering of additional corruption when Sole challenged his suspension, Switzerland’s banking laws, and the World Bank’s willingness to reconsider its investigation in the wake of Lesotho’s public corruption trials, set into motion the trials and World Bank investigation that ultimately led to criminal penalties and World Bank administrative sanctions against several powerful MNCs.

Had the proposed policy been in place, the Lesotho procedure likely would have proceeded similarly, but more efficiently. The World Bank may have had incentive to conduct a more thorough initial investigation in 2002, knowing that its results would be checked against the results of the Lesotho trials. In addition, the World Bank might have had funds available to assist Lesotho in paying the costs of the trials, and each party would have shared information with each other.

This raises the question of whether the proposed policy would have changed the outcome of the Yacyretá Hydroelectric Project corruption scandal. Considering only the procedural mechanisms, it would appear that the trigger clause would not have changed the outcome. The trigger would have remained dormant because Paraguay, Argentina, and the World Bank all failed to investigate allegations of corrupt practices. The

217. Mark Stoleson, *The World Bank: Buy, Sell, or Hold?*, in *RESCUING THE WORLD BANK: A CGD WORKING GROUP REPORT AND SELECTED ESSAYS*, *supra* note 205, at 195, 198.

proposed policy might otherwise have changed these parties' decision-making processes, however. For example, the availability of funds might have lowered the cost of investigations and prosecutions for the borrower states. In addition, the trigger mechanism would have lowered the political costs of initiating proceedings against government officials or corporations because the World Bank would have borne part of these costs. By investigating corruption, the borrower countries – or even individual politicians within these countries – could have used the trigger clause to transfer the burden onto the World Bank, which has the capacity to see an investigation through to its conclusion. This might have encouraged Paraguay or Argentina's new democracies to initiate investigations into the dam project. Finally, non-government actors might have been more active in pressing for corruption investigations had the proposal been in place, because the investigations would have been more likely to be transparent and result in prosecutions by at least one of the parties.

The proposed policy might have changed the outcome for the Yacyretá Hydroelectric Project. More importantly, the LHWP scandal has alerted corporations to the risk posed by dual investigations and prosecutions. By formalizing this process and combining it with information-sharing and funding provisions, borrower countries and the World Bank will signal to corporations their seriousness about corruption. The process will also signal to the Bank and borrower countries themselves that they will face negative consequences if they do not fully investigate corruption claims, and help develop a stronger anti-corruption culture if they do.

CONCLUSION

This Note demonstrates that corporate corruption in infrastructure projects is a serious problem that hinders the achievement of broad anti-corruption and development goals, and threatens the success of each specific project. It argues that the World Bank can limit corporate corruption on procurement projects by making three changes to its anti-corruption practices: inserting a trigger clause into its contracts with borrower countries; ensuring that each trigger clause also contains an information-sharing provision; and providing financial assistance to borrower countries for the investigation and prosecution of corporate corruption on procurement projects. The Note does not argue that the World Bank should reconstruct its anti-corruption strategy or shift its prioritization of development over anti-corruption concerns or its prioritization of grand corruption prevention over corporate corruption prosecution. Rather, it argues that the World Bank can substantially prosecute and deter corporate corruption without shifting substantial resources away from its current priorities, and, furthermore, that deterring corporate corruption will actually aid its development goals. The Note posits that an approach to investigations and punishment of corporate corruption that combines the relative strengths of World Bank administrative proceedings and a borrower country's administrative, civil, or criminal procedures will be

more successful than either individual process.

My proposed strategy focuses as much on practical sustainable development as it does on eradicating corruption. Large-scale infrastructure projects, including hydroelectric dam projects, are often riddled with corruption and controversy. Although they are scrutinized and subject to criticism, their detractors grudgingly recognize their importance and continued relevance to the development agenda:

Yet, in spite of [their] flaws, large dams remain a necessary development option to deal with the needs of a human population that is expanding beyond the carrying capacity of the world's life support systems. That is the tragedy. . . . Large dams will be needed to store and transfer water to rapidly expanding urban populations; to provide electricity to those populations and to the industries that must employ them if poverty is to be alleviated; to increase irrigation in countries such as India where small reservoirs dry up during periods of drought; and, in countries such as Laos and Nepal with few other natural resources, to provide foreign exchange for development purposes by exporting hydropower.²¹⁸

A mutual triggering and assistance agreement between the World Bank and the countries in which it invests will increase the likelihood that allegations of corruption will instigate appropriate investigations. It will improve the financial return of World Bank-financed projects, increase oversight, and decrease the likelihood that corporations will engage in corner-cutting practices that negatively affect the environment and local communities. It also will complement the World Bank's existing anti-corruption strategies. Currently, the LHWP scandal is viewed as an illustration of the World Bank's failure. It should instead be viewed as a prototype of an improved anti-corruption and development policy.

218. SCUDDER, *supra* note 59, at 2.