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FROM ALLIANCE TO ALLEGIANCE: STRENGTHENING ANTI-CORRUPTION EFFORTS BETWEEN MULTILATERAL DEVELOPMENT BANKS AND BILATERAL AID AGENCIES

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INTRODUCTION

In the fight against corruption in foreign development aid projects, international cooperation is essential. In recognition of this, the international web of anti-corruption alliances is expanding. In particular, Multilateral Development Banks ("MDBs") and national bilateral aid agencies have taken steps to increase cooperation in investigating and preventing corruption, including through information sharing, training and monitoring activities. MDBs and national anti-corruption bodies have generally adopted what I term an 'alliance model' in forming international anti-corruption relationships. Under an alliance model, although the parties to the alliance work toward common goals, each participating party ultimately retains independence and control over decision-making.

An alternative to the 'alliance model' is an 'allegiance model' under which a party relinquishes a level of independence by agreeing to allow another party to make decisions on its behalf. On April 9, 2010, the World Bank Group[2] and four other MDBs moved from an alliance model to an allegiance model when they agreed to automatically recognize and enforce debarment decisions made by any participating MDB by entering into the Agreement for Mutual Enforcement of Debarment Decisions ("Cross-debarment Agreement").[3] Debarment is the key tool used by MDBs in sanctioning individual contractors or entities that have engaged in a 'sanctionable practice' such as corruption or fraud in relation to an MDB-funded project. A debarred

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[2] The World Bank Group comprises five institutions: the International Bank for Reconstruction and Development (IBRD); the International Development Agency (IDA); the International Financial Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for Settlement of Investment Disputes (ICSID). The term "World Bank" will be used in this paper to refer to the IBRD and the IDA.

[3] Agreement for Mutual Enforcement of Debarment Decisions (Apr. 9, 2010), *available at* http://www.ebrd.com/downloads/integrity/Debar.pdf [hereinafter "Cross-debarment Agreement"].

person or entity will not be awarded a contract for work on any future project during the period of debarment. The Cross-debarment Agreement is designed to leverage peer pressure to disincentivize contractors from committing corruption, fraud or other related misconduct in projects funded by one of these MDBs. This arrangement effectively closes a loophole that had previously allowed an entity that had been debarred by one MDB to continue obtaining contracts financed by other MDBs.[4]

Despite the existence of the Cross-debarment Agreement, there remains a gaping loophole in supply-side corruption[5] in foreign aid funded projects. Contractors may often still bid for and gain contracts funded by national aid agencies, even if they have been debarred by an MDB. I contend that national aid agencies should adopt an allegiance model by entering into formal agreements with MDBs to automatically recognize and apply debarment decisions made by these MDBs. Although there are several potential risks in entering this proposed arrangement, by incorporating appropriate control mechanisms, such as a limited opt-out clause, on balance, the benefits of this arrangment outweigh the risks.

Part I of this paper will map existing international anti-corruption efforts and show that they are largely based on the alliance model; part II will outline an example of the allegiance model at work—the Cross-debarment Agreement; and part III will outline my proposal for national bilateral aid agencies and MDBs to move to an allegiance model in anti-corruption efforts. By moving from alliance to allegiance, a stronger anti-corruption network is formed between MDBs and national aid agencies,

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[4] Press Release, World Bank, Cross-Debarment Accord Steps Up Fight Against Corruption, (Apr. 9, 2010), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535805~pagePK:64257043~piPK:437376~theSitePK:4607,00.html.

[5] 'Supply-side' corruption in this paper refers to the 'supply', by entities or individuals of anything of value to government officials with the purpose of influencing an act or decision. 'Demand-side' corruption refers to the other side of a corrupt deal, namely, the 'demand' for things of value by governmental officials for improper or illegal purposes.

closing the existing loophole and creating another weapon in the fight against international supply-side corruption in aid funded projects.

I. EXISTING ANTI-CORRUPTION EFFORTS:

THE ALLIANCE MODEL

In his speech to the UN General Assembly at the Millennium Development Goals Summit in September 2010, President Obama declared that in some places, corruption is the "single greatest barrier to prosperity".[6] There is broad consensus that corruption stymies economic development and undermines efforts by aid donors.[7] MDBs and national aid agencies together provide a significant percentage of foreign development aid. These agencies have recognized that cooperation is essential to overcome the unique challenges posed by transnational corruption that infects development aid funded projects.[8] Speaking at the first meeting of the International Corruption Hunters Alliance ("ICH Alliance"), World Bank Group President Robert B. Zoellick noted:

"As corruption becomes increasingly transnational, there needs to be a growing

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[6] President Barack Obama, remarks at the Millennium Development Goals Summit United Nations Headquarters New York, (Sept. 22, 2010).

[7] As noted by Parthapratim Chandra, "[c]orruption is widely considered the single most severe impediment to development and growth in developing countries", *see* Parthapratim Chandra, *The effectiveness of the World Bank's anti-corruption efforts: current legal and structural obstacles and uncertainties* 32 DENV. J. INT. L & POL'Y 315, 315 (2004). *See also*, J. Nolan McWilliams, *Tug of War: The World Bank's New Governance and Anticorruption Efforts* 17 KAN. J. L. & PUB. POL'Y 1 (2007); Ian Bannon, World Bank Report, *The Fight Against Corruption*, *A World Bank Perspective,* (May 25-28, 1999) *available at* http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop6.htm.

[8] Chandra, *id.* notes, "[c]orruption in developing countries is not simply a domestic problem, but often involves a variety of actors within and outside of developing countries. Curbing cross-border, or transnational, corruption through legal channels raises unique legal and administrative issues of jurisdiction, investigative cooperation and conflict of laws that may not exist in purely domestic anti-corruption efforts. These issues have led to numerous multilateral efforts to control transnational corruption …"

sense of shared responsibility among all stakeholders and a willingness to respond more boldly when confronted with the audacity of corruption."[9]

The ICH Alliance aims to "open new frontiers for cooperation in the fight against corruption at regional and international levels"[10] by bringing together anti-corruption entities from around the world. Representatives from 134 countries and from diverse organizations including NGOs such as Transparency International, national aid agencies such as the Australian Agency for International Development ("AusAID") and the United States Agency for International Development ("USAID"), and MDBs such as the World Bank attended the first ICH Alliance meeting. The ICH Alliance aims to achieve its anti-corruption goals through, for example, increased sharing of investigative information, coordinated training efforts and an agreed framework for performance measurement.[11] In addition to participating in initiatives such as the ICH Alliance, MDBs and national aid agencies have entered into Memoranda of Understanding ("MOUs") with each other that are designed to facilitate the flow of information to assist the parties in carrying out their corruption investigations into alleged supply-side corruption. For example, the World Bank has signed an MOU with a number of enforcement entities and national aid agencies, including AusAID and USAID. [12] The commitments under these MOUs are largely 'best endeavors' commitments to assist with investigations—the parties maintain independence when it

[9] Robert B. Zoellick, President, World Bank Group, address to the ICH Alliance meeting, (Dec. 7, 2010) reproduced in the World Bank Report, International Corruption Hunters Alliance Meeting December 7-8 2010, at 4, *available at* http://siteresources.worldbank.org/INTDOII/Resources/final_icha.pdf [hereinafter "ICH Alliance Report"].
[10] Leonard F. McCarty, Vice President for Integrity, World Bank Group, address to the ICH Alliance Meeting, (Dec. 7, 2010), reproduced in the ICH Alliance Report at 2.
[11] ICH Alliance Report at 16.
[12] ICH Alliance Report at 53.

comes to making decisions about initiating and conducting investigations and imposing sanctions.[13]

In order to implement these relationships, achieve stated goals and gain "derivative legitimacy"[14], I contend that MDBs and national aid agencies have generally adopted what I term an 'alliance model'. An alliance model involves the constituent parties to a relationship making efforts to cooperate and advance common interests, but ultimately maintaining control and independence in decision-making. In the context of anti-corruption efforts, these efforts include information sharing, dialogue and cooperation in particular areas such as training. Decisions to initiate, carry out and apply sanctions are left to the independent control and discretion of the individual anti-corruption agencies.

II. CROSS-DEBARMENT BETWEEN MULTILATERAL DEVELOPMENT BANKS: THE ALLEGIANCE MODEL

An alternative approach to the alliance model in implementing anti-corruption relationships between MDBs and national aid agencies is to adopt what I term an 'allegiance model'. In contrast with the alliance model, an allegiance model involves a participating party ceding some control and independence by allowing another party to make decisions on its behalf. In the anti-corruption context this may include a party making a commitment to formally recognize, endorse and enforce sanction decisions

[13] *See, e.g.,* Press Release, World Bank and OLAF step up efforts to jointly combat fraud and corruption in development aid, (Nov. 8, 2011) *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=OLAF/11/14&format=HTML&aged=0&language=EN&guiLanguage=en.

[14] Claire R. Kelly highlights that international organizations "use linkage and accommodation . . . to allow international organizations to partner, coordinate, endorse, and share expertise in order to answer the challenges of globalization and improve their legitimacy claims." The legitimacy gained through linkage and accommodation is "derivative" and is sourced from the legitimacy that each constituent member organization brings to the table, and is amplified by the very act of coming together. *See* Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy* 29 MICH. J. INT'L L. 605, 607 (2008).

made by other parties.

An example of an alliance model at work is the Cross-debarment Agreement. On April 9, 2010, five MDBs[15] signed an agreement to cross-debar firms and individuals found to have engaged in corrupt, fraudulent, coercive or collusive practices (each a "Sanctionable Practice") in any development project partially or fully financed by one of the MDBs. Under the Cross-debarment Agreement, if an entity or person is debarred by one MDB, each other signatory MDB must also enforce the debarment decision in relation to its own development projects. Zoellick declared that the Cross-debarment Agreement sends a clear anti-corruption message: "[s]teal and cheat from one, get punished by all."[16]

The Cross-debarment Agreement was negotiated as part of the commitment made by these MDBs and other institutions as part of the International Finance Institutions Anti-Corruption Task Force ("IFI Task Force") to work toward a harmonized approach to combat corruption in the activities and operations of the member institutions.[17] In September 2006, members of the IFI Task Force agreed on the *Uniform Framework for Preventing and Combating Fraud and Corruption* ("Uniform Framework") which provides for the adoption of a specific standard of

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[15] The World Bank Group, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group are all signatories to the Cross-debarment Agreement.

[16] Press Release, World Bank, Cross-Debarment Accord Steps Up Fight Against Corruption (Apr. 9, 2010), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535805~pagePK:64257043~piPK:437376~theSitePK:4607,00.html.

[17] The African Development Bank Group; Asian Development Bank; European Bank for Reconstruction and Development; European Investment Bank Group; International Monetary Fund; Inter-American Development Bank Group and the World Bank Group are all part of the IFI Task Force established on Feb. 18, 2006, *see* http://siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf.

proof and harmonized definitions of Sanctionable Practices.[18] The Uniform Framework also provides that "[t]he member institutions will explore further how compliance and enforcement actions taken by one institution can be supported by the others."[19]

Under the Cross-debarment Agreement, each MDB will continue to conduct its own investigations and impose sanctions in accordance with its own procedures. These procedures must generally comply with the core principles in the Cross-debarment Agreement and the Uniform Framework, which include the obligation to conduct "fair, impartial and thorough investigations".[20] In order to get a sense of how the internal investigation and sanctioning processes are conducted by these MDBs, I will provide a brief overview of the process adopted by the World Bank.[21] Although procurement for World Bank funded projects is managed by the borrower state, the World Bank requires that all World Bank financed contracts for goods and services are subject to the World Bank's procurement guidelines.[22] These procurement guidelines provide that the World Bank may investigate and sanction contractors (both entities and

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[18] *Uniform Framework for Preventing and Combating Fraud and Corruption dated Sept. 2006, available at* http://siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf [hereinafter "Uniform Framework"].

[19] Uniform Framework, § 5 provides: "Each of the member institutions of the IFI Task Force has a distinct mechanism for addressing and sanctioning violations of its respective anti-corruption policies. The Task Force recognizes that mutual recognition of these enforcement actions would substantially assist in deterring and preventing corrupt practices. The member institutions will explore further how compliance and enforcement actions taken by one institution can be supported by the others."

[20] Cross-debarment Agreement, § 2(b).

[21] The investigation and sanctions procedures of other MDBs adopt some similar characteristics as the those adopted by the World Bank, *see e.g.*, Press Release, Inter-American Development Bank, IDB strengthens anti-corruption framework, expands investigative and sanctioning capacity (Mar. 23, 2011), *available at* http://www.iadb.org/en/news/news-releases/2011-03-23/idb-launches-new-anti-corruption-framework,9170.html.

[22] *See*, World Bank, Guidelines: Procurement of Goods, Works, and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers, (Jan. 2011), available at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLs_English_Final_Jan2011.pdf.

individuals) that have directly or indirectly engaged in a Sanctionable Practice while competing for, or executing, a World Bank financed contract.[23]

The World Bank has adopted an administrative process under which a sanctions investigation is to be conducted. This process involves a series of steps including investigation by the Integrity Vice Presidency; the preparation of a Statement of Accusations and Evidence which is provided to the Evaluation Officer; review by the Evaluation Officer who decides whether a Sanctionable Practice has been committed and whether a sanction should be imposed; and, in the event a decision by the Evaluation Officer is contested, review by a Sanctions Board which is composed of a mix of internal World Bank staff and external members.[24] The respondent has an opportunity to respond to allegations and may appear at any hearing before the Sanctions Board.[25] The Sanctions Board's decision is final and not subject to appeal.[26] The respondent may also choose to enter into a settlement agreement with the World Bank.[27] The World Bank may impose a range of possible sanctions, including: a letter of reprimand; conditional non-debarment; debarment with conditional release; temporary or permanent debarment or restitution.[28] A debarred person or entity is ineligible to participate in the preparation or implementation of a World Bank financed project for the period of the debarment.[29] The period of debarment will depend on the nature of the misconduct, including specific mitigating and aggravating factors.[30] The

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[23] *Id,* at § 1.16.
[24] *See*, World Bank Sanctions Procedures, as adopted by the World Bank as of January 1, 2011 [hereinafter "Sanctions Procedures"], available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf.
[25] *Id.*
[26] Sanctions Procedures, § 8.03(a).
[27] Sanctions Procedures, Article XI.
[28] Sanctions Procedures, Article IX.
[29] Sanctions Procedures, § 9.01(c)(i).
[30] Sanctions Procedures, § 9.02.

World Bank also publishes the names of entities or individuals that have been debarred on its website.[31]

Under the Cross-debarment Agreement, once an MDB has completed its sanctions procedure and a decision to debar has been made, that MDB sends a Notice of Debarment Decision to the other participating MDBs.[32] Following receipt of this notice, all other MDBs must enforce a debarment decision of the sanctioning MDB if the following criteria are satisfied: the decision was based on a finding of a commission of a Sanctionable Practice; the sanction decision is public; the initial period of debarment exceeds one year; the decision was made after the Cross-debarment Agreement came into force; the sanctioning decision was made within ten years of the offending conduct; and the decision is not based on a decision of a national or other international authority.[33] The period of debarment and any subsequent modifications are determined solely by the sanctioning MDB and other MDBs must comply with these determinations.[34] The Cross-debarment Agreement also includes an 'opt-out' clause under which an MDB can choose not to enforce a sanctioning decision where enforcement is "inconsistent with its legal or other institutional considerations".[35]

As noted by Zoellick, in forming this allegiance, the cross-debarment arrangement creates:

> "a strong new tool to hold accountable firms that are engaging in fraudulent and corrupt practices in development projects, as well as a powerful incentive to

[31] Sanctions Procedures, § 10.01(a).
[32] Cross-debarment Agreement, § 3.
[33] Cross-debarment Agreement, § 4.
[34] *Id.*
[35] Cross-debarment Agreement, § 7.

companies to clean up their operations. The rules of the road have gotten tougher."[36]

In entering into the Cross-debarment Agreement, the participating MDBs have adopted an allegiance model. Each MDB is under an obligation to enforce a debarment decision made by another MDB. To this extent, a degree of independence and control in making enforcement decisions is relinquished by each of the MDBs, thereby moving beyond the traditional alliance model. Although there is an opt-out provision in the Cross-debarment Agreement, according to the World Bank, this is intended to be "limited" in recognition of the fact that, "[a]nything other than exceptional use of the opt-out clause would endanger the credibility of the system as a whole."[37] Despite this limited opt-out provision, the parties have effectively handed over independent decision-making power to other members of the cross-debarment allegiance.

III. BILATERAL AID AGENCIES AND MDBS: MOVING FROM ALLIANCE TO ALLEGIANCE

The Cross-debarment Agreement effectively closes a loophole in the fight against supply side corruption in development projects funded by MDBs by ensuring that persons and entities found to have committed a Sanctionable Practice by one MDB are not eligible to receive contracts in projects funded by other signatory MDBs. Despite this, a significant loophole remains. In many cases, sanctioned entities and individuals may still bid for contracts for projects funded by national bilateral aid

[36] Press Release, World Bank, Multilateral Development Banks (MDBs) step up their fight against corruption with joint sanction accord (Apr. 9, 2010), *available at* http://go.worldbank.org/5C0LII7SM0.

[37] *See* World Bank Group Report, Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks, (Mar. 3, 2010).

agencies. Although a number of bilateral aid agencies may have a policy of not awarding contracts to entities on the debarment list of MDBs, such policies may not necessarily be made public by the agency meaning the deterrent effect is significantly muted. AusAID has publicly adopted a policy that firms on the World Bank debarment list are also ineligible to bid for AusAID work.[38] AusAID enforces this by including a standard obligation in its grant deeds that contractors must notify AusAID if they are listed on the World Bank's debarment list. AusAID has highlighted that "no other bilateral donor has as strong a position on this issue".[39] This policy approach carries many of the hallmarks of an allegiance model and therefore carries many of the benefits. However, by making this decision a matter of policy rather than a binding obligation, the deterrent effect may be somewhat undermined as the policy can be changed (for example on the change of government), and the government has a larger degree of discretion not to enforce the debarment decision.

In its report on harmonization between aid agencies to the OECD Working Party on Aid Effectiveness, the Overseas Development Institute notes that often there is a "disconnection" between high-level declarations and commitments between aid agencies and the implementation of these goals.[40] As discussed, the arrangements between national aid agencies and MDBs are largely based on an alliance model. Although these arrangements represent important actions in the fight against corruption, because commitments are made at the level of cooperation or best endeavors only, loopholes still exist. In order to close one of these loopholes and address this 'disconnection' problem, I argue that national aid agencies should move

[38] AusAID, Independent Review of Aid Effectiveness, (Apr. 2011) at 281, *available at* http://www.aidreview.gov.au/publications/aidreview.pdf.
[39] *Id.*
[40] Overseas Development Institute Report, Incentives for Harmonisation in Aid Agencies, available at http://www.oecd.org/dataoecd/61/32/34609836.pdf.

from the existing alliance model to an allegiance model in relation to preventing corruption and fraud in their own project procurement processes by entering into formal agreements with MDBs to automatically recognize and enforce debarment decisions made by these MDBs.

Under the proposed debarment arrangement, if an MDB makes a decision to debar an entity or contractor, following notification to the relevant national aid agency, and assuming key criteria are met, the national aid agency would also automatically debar that person or entity making them ineligible to bid for or be awarded contracts for projects funded by that aid agency.[41] Some of the mechanisms and criteria set out in the Cross-debarment Agreement could provide a basis for an allegiance model between national aid agencies and MDBs. For example, the notification procedure and some of the criteria for when debarment is triggered could be adopted, such as a minimum debarment period, a time limitation for making debarment decisions and a requirement for public publication. In order to implement this proposed arrangement, each national aid agency will need to assess whether it is consistent with domestic laws and the debarment agreement or the national laws may need to be amended accordingly. In some jurisdictions, the required change may simply take the form of an amendment to the eligibility criteria set by the relevant aid agency for procurement. I will now outline the key benefits of this allegiance model arrangement and the associated risks and mitigation strategies.

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[41] This paper will only consider the merits of a one-way debarment arrangement where the national government recognized debarment decisions by the MDBs as opposed to a cross-debarment arrangement. Note that there are some indications that a cross-debarment arrangement may be feasible. For example, following a request by the Japanese government, the World Bank debarred five Japanese firms that were guilty of corruption outside of the Bank context. *See* Sope Williams*, Debarment of Corrupt Contractors from World Bank-Financed Contracts* 36 PUB. CONT. L.J. 277, 305 (2007). One of the key issues with this approach is under what conditions an MDB would decide to automatically adopt sanction decisions by its members and whether an MDB could feasibly make distinctions between its members in deciding whether to accept some sanction decisions and not others.

A. Key Benefits

1) *Enhancing Deterrence*

Firstly, and most importantly, this arrangement would enhance deterrence against corrupt or fraudulent actions committed by contractors involved in development aid funded projects. By raising the stakes in this way, contractors are faced with the prospect of the foreign aid tap being almost completely shut off, which, for many contractors, could result in serious harm to their business and reputation. When the costs are so high, contractors will be more reluctant to commit a Sanctionable Practice. The ultimate benefits of a reduction in the instances of corruption and fraud would flow not only to the aid donors in increasing the likelihood that they will achieve their development goals, but importantly to the recipient communities that will receive the full suite of intended benefits of the development projects.

2) *Increasing Efficiency*

Bilateral aid agencies could save significant time and resources under this arrangement as they would not be required to conduct a separate investigation to justify a decision to debar a contractor. Instead, bilateral aid agencies would rely on the investigation and sanction procedure of the relevant MDB. Also, if contractors are automatically debarred, this may save the bilateral aid agency due diligence costs associated with procurement processes.

3) *Ensuring Consistency*

This arrangement would promote consistency and decrease the risk of any reputational impacts for bilateral aid agencies that grant contracts to entities that have been debarred by MDBs.

4) *Strengthening Frameworks*

Given a decision to debar an entity by an MDB will affect bilateral aid agencies under this arrangement, bilateral aid agencies may have increased incentives to share information and cooperate in investigations where possible. This will strengthen existing cooperation frameworks between these entities.

B. Key Risks and Mitigation Strategies

1) *Ceding Control*

A key element of moving to an allegiance model in this context is that the relevant bilateral aid agency will cede some control over the sanction decision-making process. This creates risks for the bilateral aid agency as there may be some instances where it is not in its interests to impose debarment, for example, for political reasons or reasons of shortage of supply. By entering into a formal agreement with the MDBs, the national aid agency loses flexibility. I suggest that one way to maintain some flexibility for national governments under a binding agreement arrangement is include an opt-out clause, similar to that in the Cross-debarment Agreement, where in certain limited circumstances the national aid agency can opt not to enforce the debarment decision. To prevent abuse, the opt-out clause could be tightly worded and could include the requirement, as in the Cross-debarment Agreement, that the agency wishing to use the opt-out clause must give written notice including reasons for its use. Another

mechanism would be to tailor the criteria for when the debarment obligation applies to include some flexibility, for example, the Cross-debarment Agreement provides that cross-debarment only applies where the debarment period is greater than one year.[42] These mechanisms can effectively balance the need for national aid agencies to maintain some flexibility without significantly undermining the deterrent benefits of the formal debarment arrangement.

2) *Relying on an External Process*

Tied in with having to cede control, the bilateral aid agency will also need to place a significant degree of trust in the integrity of the sanctions decision-making processes of the MDBs. As these processes are internally managed administrative processes, they may be perceived as being insufficiently rigorous and unfair to contractors. To address this perception, the World Bank and other MDBs have incorporated a number of procedural fairness elements into its sanctions process.[43] For example, the World Bank has recently increased transparency in its process by requiring that decisions of Sanctions Board are to be published in a digest.[44] Also, as described above, under the World Bank process, the respondent is provided with a

[42] For example, the U.S. Federal Acquisitions Register ("FAR"), which authorizes administrative debarment and suspension of contractors by U.S. federal agencies, includes an exception for "compelling reasons". The FAR does not define "compelling reasons," but several agency-specific regulations list examples including where goods or services are available only from the excluded contractor; an urgent need dictates dealing with the excluded contractor; or reasons relating to national security require dealings with the excluded contractor. *See* Kate M. Manuel, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (Aug. 16, 2010) 10.

[43] In a report on the World Bank's sanctions process, it was recognized that even though the World Bank could make the debarment decision as a matter of internal policy, it should "employ a debarment process that exceeds the minimal standards that an ordinary contracting organization would be expected to adopt". Due to the special role of the World Bank, the report recognized "an inaccurate or unjust determination can be costly" to both contractors and the Bank. *See* Dick Thornburgh, Ronald L. Gainer, Cuyler H. Walker, *Report Concerning the Debarment Processes of the World Bank* (Aug. 14, 2002) available at http://siteresources.worldbank.org/INTDOII/Resources/thornburghreport.pdf.

[44] Sanctions Procedures, § 10.01(b) and § 10.01(c).

series of due process rights and is given an opportunity to respond to allegations including at any Sanctions Board hearing. This risk is also mitigated by the fact that bilateral aid agencies are part of governments that are often members of the relevant MDB and so will be able to exercise some influence through its representatives on the board to ensure the process is being run fairly.

3) *Ignoring Demand-side Corruption*

By focusing on the supply side of corruption, it could be argued that this proposed arrangement does not address the other half of the problem: the corrupt officials or institutions that make up the demand side of corruption. According to Blake Pluckett, international anti-corruption efforts suffer from the "individual actor paradigm" where the focus is on the prosecution or sanctioning of individuals.[45] These approaches "misdiagnose . . . the dynamics in highly corrupt countries and so fail to adequately address many of the dimensions of corruption."[46] Although it is true that this proposed approach focuses on the supply side of corruption, it may have consequential positive effects in curbing demand side corruption. Firstly, investigations resulting in the public debarment of individual entities by key aid agencies in specific countries or projects are likely to put increased pressure on the relevant government to take action. Evidence uncovered during the investigation implicating a government official can also be passed on to the national authorities for investigation. Importantly, this approach is not intended to be used to the exclusion of other efforts at fighting corruption, including capacity building activities—this approach would be an additional weapon in the broader fight against corruption.

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[45] Blake Pluckett, *Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption*, 41 GEORGETOWN J INT'L L 815, 815 (2010).
[46] *Id.*

4) *Impeding Development Goals*

One of the recurrent criticisms raised as regards the debarment of contractors, and anti-corruption efforts generally, is that these efforts potentially interrupt the implementation of aid programs and impede the achievement of development goals. For example, if a large road contractor is debarred by all of the key MDBs and bilateral aid agencies, and there is no alternative contractor that has the capability or expertise to carry out road projects of the same scale, the road won't get built. A road project infected by some corruption, so the argument goes, is better than no road at all.[47] Drury D. Stevenson and Nicholas J. Wagoner have termed this the "too big to debar" problem, where, in the context of the U.S. Foreign Corrupt Practices Act:

> "Enforcement officials shy away from debarring entities that violate the FCPA due to the short-term inconvenience of an agency's inability to transact business with its favorite contractor, its inability to demand favorable bids from contractors when the field of potential bidders has thinned, the resulting job loss, and the risk of overdeterring companies that might otherwise pursue lucrative opportunities in emerging markets."[48]

The view that anti-corruption efforts should not be pursued because they potentially impede development goals is shortsighted. Not punishing these companies for their bad behavior will have more significant negative development impacts in the

[47] As noted by Steven L. Schooner, this behavior may be described as "cutting off one's nose to spite one's face". *See* Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 13 PUB. PROCUREMENT L REV. 211, 214 (2004).
[48] Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?* 80 FORDHAM L. REV. 775, 775 (2011).

long run. Without incentives to clean up their operations, contractors are likely to continue to engage in fraud or corruption. Although some projects, such as a road project, may still be implemented in a deal tainted by corruption, the need to recover the money paid as a bribe means contractors are likely to compromise on the quality of the work. This in turn leaves communities with poor quality, or even dangerous, infrastructure or products. Further, allowing contractors to continue this behavior further entrenches the systemic corruption of the country. By consistently enforcing sanctions against contractors, combined with the implementation of various risk mitigation strategies such as diversification in the portfolio of contractors, Stevenson and Wagoner note, the 'too big to debar' problem would "diminish over time".[49]

As Phoebe Bolton notes, "[t]he adverse consequences of debarment to the government need to be balanced against the desire to combat and punish corruption."[50] In order to achieve this balance, the proposed debarment agreement could include certain exceptions for automatic debarment. For example, in the event that there is a risk that a current project would be threatened due to the debarment of the contractor, the debarment could be applied prospectively—the debarred contractor could complete the existing contract, but not bid for future contracts. Also, where necessary, debarments could be limited to apply to the contractor to the extent it operates in a specific geographic region or industry.

CONCLUSION

Speaking at the first meeting of the ICH Alliance, U.S. Acting Deputy Attorney General Gary G. Grinder acknowledged, "corruption is . . . a common enemy that we

[49] *Id.*, at 776.
[50] *See* Phoebe Bolton, *The exclusion of contractors from government contract awards* 10 L. DEM'CY & DEV'T 25 (2006).

must face together."[51] Through initiatives such as the ICH Alliance and bilateral MOUs, MDBs and national aid agencies have largely adopted an 'alliance model' in structuring joint cooperation efforts to address the insidious problem of corruption and fraud in development aid funded programs. In order to close existing loopholes in the prevention of supply side corruption, I have argued that national bilateral aid agencies should move to an 'allegiance model' by entering into formal agreements with MDBs to recognize and implement the debarment decisions of these MDBs. Because an allegiance model necessitates bilateral aid agencies ceding of some control over the decision-making process, they will face some risks in adopting this model. However, by incorporating appropriate risk mitigation strategies, the benefits of this approach outweigh the risks. Adopting this approach sends a strong and united message that corruption and fraud in development aid projects will not be tolerated.

[51] See *Highlights From The International Corruption Hunters Alliance Conference At The World Bank,* FINANCIAL TASKFORCE BLOG, (Dec. 9, 2010), http://www.financialtaskforce.org/2010/12/09/highlights-from-the-international-corruption-hunters-alliance-conference-at-the-world-bank/.