

SUBMISSION ON EIB ANTI-FRAUD POLICY

Fiona Darroch, Antonio Tricarico



**Campagna per
la riforma della
Banca Mondiale**



protimos

Lawyers challenging poverty

CONTENTS

Introduction	2
Corruption: A <i>Reactive/proactive approach?</i>	4
Lessons to be learned from Lesotho, and the Highlands Water Project	6
Recommendations	12
Covenant of Integrity	12
Debarment.....	14
EIB Database	18

Introduction

The purpose of this paper is twofold: first, to provide what is intended to be a useful set of observations on the issues which the EIB is currently addressing, as it attempts to extinguish corruption from the use of its funds; second, to make what are intended to be some helpful suggestions for consideration by EIB, as part of the consultation procedure which it is undergoing, during this current review of its anti corruption policy.

It is generally agreed that the EIB is a hybrid creature. Whilst it retains operational and institutional autonomy, aligning itself for financial purposes with its commercial competitors, it remains an institution which was created by the European Community, for the purpose of achieving Community objectives. In its performance of those functions, it adopts some of the characteristics of the Development banks (MDBs). In 2003, this dichotomy was clearly set out in *The Commission of the European Communities v EIB* [Case C 15/00], in which the Court observed as follows:

‘It is clear in particular from Article 267 EC that the Bank is intended to contribute towards the attainment of the European Community’s objectives and thus by virtue of the Treaty, forms part of the framework of the Community. It follows that the position of the EIB is ambivalent inasmuch as it is characterised, on the one hand by independence in the management of its affairs, in particular in the sphere of financial operations, and, on the other, by a close link with the European Community as regards its objectives.... The fact that a body, office or agency owes its existence to the Treaty suggests that it was intended to contribute towards the attainment of the European Community’s objectives and places it within the Community legal order, so that resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community. The EIB, pursuant to the Treaty, falls within the Community framework and its resources and their use are thus of evident financial interest to the European Community and its objectives’.

Accordingly, when it lends within the Community, the EIB is generally bound by Directive law, as are those to whom it provides financial support. Where a provision applies to members of the EC, or its institutions, bodies or agencies, provided that it is not capable of undermining EIB's operational autonomy or its reputation in the financial markets, then it should be incorporated into the internal procedures of the Bank in such a way as to satisfy the requirements laid down by that provision. The most recent instance of this has been EIB's expressed intention of compliance with the provisions of the Aarhus Convention, which provides a more stringent framework for accessibility of reliable environmental information, public participation in decision making, and the requirement for access to environmental justice, within states which are parties to the Convention.

Outside the ambit of the EC, and Directive or Regulatory law, matters are not as clear cut. In general, local laws and 'international good practice' will determine EIB's lending practices. It is this area of business where the corrupt use of its funds must be of particular concern to EIB, since there is potentially less legal scope for accountability and transparency. The Financial Regulation, as amended, deals stringently with transactions, corruption and publication *within* the EU. However, its application outside the EU is less certain.

Where evidence of corruption is more elusive, for example where it has been implemented in a complex, transboundary fashion, involving complicity amongst a number of parties, such corruption constitutes a greater challenge both to discover, and subsequently to address. Prosecutions for corruption, or lender sanctions, such as debarment, will depend upon the successful and simultaneous alignment of a wide range of factors for their success. The recent series of successful corruption trials which have taken place in Lesotho demonstrate the challenges which face the government of an emerging economy, where such an alignment is achieved, in the midst of a massive web of corruption, led by multi national companies largely registered within the EC, although not bound by their domestic laws when doing 'business' outside the jurisdiction.

EIB provided financial support for the Lesotho Highlands Water Project, and it is respectfully submitted that the trials provide, even if in retrospect, a series of helpful indications of the real obstacles which lie in the path of those who decide to tackle the problem. This paper sets out a range of suggestions which the writer submits should now be the subject of consideration by policy makers within the Bank, as part of the consultation and review procedure.

Corruption: A *Reactive/proactive approach?*

Corruption is now widely and generally accepted to be a social and economic carcinogen. A profusion of international instruments designed to combat corruption has emerged, in recent years: definitions of terms have been lengthily discussed and agreed; there is a general will being expressed, at all levels, that corrupt practices must now be eradicated, both at the *grand* level, as between multi national corporations, their agents and the governmental representatives with whom corrupt deals are struck, and at *administrative/bureaucratic* levels, where bribery and corruption seep into the daily existence of members of the public.

A seismic shift to a set of common approaches has yet to occur, within the international community. The *mutual* approaches which might be taken by the International Financial Institutions (IFIs), including EIB, in their use of such sanctions as cross debarment and blacklisting remain largely un-calibrated. Different banks take correspondingly diverse stances, both towards the detection of corruption within their own organisations and in their perceptions of lending without liability for the uses to which their funds or financial guarantees will be put, in the procurement and implementation of projects for financial support is being provided.

What nevertheless remains a common feature of these emerging sets of anti-corruption policies is the *reactive* quality of their underlying approach. In other words, the Banks respond, in a variety of different ways, to information on corruption which is provided to

them, rather than taking a proactive or a preventative approach to corruption in their due diligence procedures before providing financial support in the first place.

IFI anti-corruption policies generally contain provisions which permit wholesale institutional access to information, but they do not generally contain a requirement for detailed and comprehensive information about the tendering process to be provided from the very start, thereafter subject to a maintained monitoring procedure.

It is now widely accepted that genuine, wholesale transparency and accountability are the most powerful and effective tools/means by which corruption is excised from the procurement process. Within the EIB, the Covenant of Integrity is a perfect example of the EIB's laudable attempt to ensure that the tendering process does more than simply nod at the assumed integrity of the tenderer, and those associated with a project for which financial support is sought. However, it is not clear who is to be legally bound by the Covenant, and upon what basis the undertakings within the Covenant are to be given. That lack of definition, together with the wholesale absence of indication of any jurisdictional capacity to resolve matters, renders the Covenant a great deal less powerful an instrument than it might otherwise be.

The net result of this reactive approach is that financial institutions, *de facto*, place a large part of the responsibility for policing and revealing corruption upon the shoulders of those working **outside** the financial institution, whilst at the same time asserting that the policies themselves form stalwart defences against the encroachment of corruption. The key question remains: what is the extent to which a lending institution *truly* regards itself as being liable for the adverse illegal uses to which its moneys *may* be put? Those banks which have been constituted specifically for development purposes can justify placing a 'lender liability' for corruption at the heart of their anti-corruption agenda, in much the same way as they are now beginning to accept that there may be a similar liability for the environmental and social consequences of their financial activities, although a cross the board approach to any of these obligations remains both inconsistent, and confined to the aspirational. See, for example, Lahmeyer's and Alstom's responses to the UN Special

Rapporteur's criticisms of the consequences of their work on the Merowe Dam Project in the Sudan. [<http://www.business-humanrights.org/Links/Repository/695251>]

Commercial banks, of which EIB may be one, for these purposes, will maintain in general that there are commercial imperatives which render the inclusion or incorporation of such liability into their lending practices to be impractical, unachievable and economically unviable. There is clearly a considerable distance to be covered before this position alters, creating a correspondingly clear space for corruption to occupy, until genuine lines of precautionary accountability have drawn up, and a uniform framework put in place to ensure that corrupt practices are comprehensively investigated, and where they have occurred, addressed, in the appropriate forum, swiftly and effectively.

Lessons to be learned from the experience of Lesotho, and the Highlands Water Project

If one looks at the EIB's current anti-corruption policy, through the historical lens of the Lesotho Trials, which incorporated all the classic features of 'grand' corruption within an impoverished and emerging economy, a useful test of their effectiveness is to evaluate whether, in the same set of circumstances, EIB's revised position would now have a different impact.

(i). 'Red flags'

In 1993, seven years after the Treaty establishing the Lesotho Highlands Water Project, ('LHWP') had been signed by representatives of the Lesotho and South African governments, the Minister for Water and Energy in an incoming Lesotho government became aware of corruption throughout the LHWP, beginning at the top, with its Chief Executive, Sole, whose conduct exhibited a classic set of 'red flags'. The LHWP is an enormous infrastructure project, in which all the major multi national construction and consultancy corporations ('MNCs') have sought work, through a wide variety of combinations: partnerships, joint ventures, consortia and as individual MNCs. Red flags

of the classic variety began to appear early in the life of the project, with its chief executive taking foreign holidays, giving family members jobs, and latterly failing to observe the appropriate procedures in his awards of projects to certain companies. The prevailing attitude within the management of many of the construction and consultancy companies was that in order to get the business in a small, developing African country, corrupt payments inevitably had to be made to the right people.

(ii) Representation agreements

In the late 1990's, the Chief Executive of the Project, Sole, was investigated, as were other officials in the LHWP. Initially, a civil trial took place, in which the Lesotho Highlands Development Authority sued Sole for the recovery of moneys which he had misappropriated. During the civil trial, it emerged that Sole had opened a number of Swiss bank accounts, assisted by representatives, who later alleged that they were working on behalf of their clients, the MNCs, in various combinations, but who were later proved to have been taking payments themselves, passing on the remaining portions of those payments to Sole himself, which in turn were deposited in secret bank accounts established in Switzerland for the purpose. It is now becoming good financial practice for companies to disclose the identity of their 'agents' to lenders: whilst these should, where public funds are engaged, be disclosable information, appropriate procedures can be put in place to deal with any issues concerning commercial confidentiality.

(iii) Criminal trials

Sole was tried for corruption, found guilty and sentenced to a lengthy period in prison. In his judgment, Acting Chief Justice Brendan Cullinan made findings that many of the MNCs involved in the LHWP had made corrupt payments through the three main representatives at work securing contracts for such companies. Acres and Lahmeyer were tried for the same criminal offences of corruption in the Lesotho High Court; Spie Batignolles and Impregilo subsequently pleaded guilty to committing similar or related offences. The trial of Mochebele, a top LHWP official, is about to conclude.

(iv) Sanctions and debarment

By 1999, the World Bank, deeply engaged in funding for the LHWP, was appraised of the levels of corruption in which the LHWP was mired. It began its own investigations of the MNCs to whom World Bank funding had been provided. Other banks involved in the LHWP, of which EIB was one, conducted their own investigations, which were not made public, and which have produced no further action in the matter, for reasons which have yet to be made public.

The World Bank re-opened its internal investigation after the first criminal conviction, that of Acres, had been concluded. It subsequently debarred the two MNCs (Acres and Lahmeyer) who had used Bank funds, after they had been prosecuted and found guilty, in Lesotho. The Bank took considerable pains to retain a procedural distance between the sanctions procedure and the criminal process, although there was mutual assistance between the Bank's investigative team and the Lesotho prosecuting team. No other bank, commercial or development, has taken any steps to reclaim funds used corruptly on this project.

The questions which I respectfully submit *remain* unanswered, both by EIB and other financial institutions, both commercial and developmentally focussed, in the wake of these trials, are as follows:

1. **At what point in the procurement process will a representation agreement, allegedly essential to the award of a contract, be properly examined for its integrity?**

In Lesotho, the representation agreements were central to the prosecution and defence cases. They were generally found to be sham, in some instances drafted after contracts had been awarded, indicating that they were simply vehicles for corrupt payments to be made, forming a major contribution to the body of circumstantial evidence which led to the convictions, in both corporate trials

The EIB may take the view that the Covenant of Integrity which now forms part of its financial contracts procedure includes a term by which a borrower impliedly vouches for the behaviour of its agents, but there is no explicit reference therein to representation agreements. The Lesotho Trials show that these devices can be one of the most effective channels of corruption by which an MNC can ensure the award of a contract from a public official who cannot resist the offer of a substantial bribe. The representation agreement can be drawn up long after a contract has been awarded, when an investigation looks possible. In Lesotho, the court found that this was likely to have been what had actually happened.

2. What institutional conduits for the detailed exchange of information between financial institutions, either development or commercial banks, have now been put in place to ensure that the levels of cooperation between within financial institutions now correspond to those which clearly operate within the MNC community itself?

In the Lesotho trials, a group of MNCs successfully persuaded the judge, in a preliminary ruling, that they should be tried individually, not in the combinations in which they had worked on the LHWP. The effect of this ruling was to lengthen the course of the trials, and to allow many of the MNCs who were found, in evidence accepted at Sole's trial, to have made corrupt payments, to go unpunished and unsanctioned for doing so.

Various financial institutions, including EIB, involved in financing the LHWP, appeared to confine their own investigations to the narrowest of areas, generally solely to the segments of contracts for the project where their own funds were directly engaged. EIB at that time appeared to take an early view, for reasons which remain unknown, that it had no justification for extending its investigation. It subsequently distanced itself from the sanctions processes, both criminally and administratively. Once more, this reactive approach, not unique to EIB, lends little support to the requirement for a seismic shift of approach which is referred to earlier in this paper. It is probably inevitable that cross, or mutual debarment will be adopted as a policy by the IFIs, at some point in the future.

That policy is likely to translate into the sort of reputational risk which may deter commercial banks from lending to a debarred corporation. In the mean time, whilst such a policy germinates at an uncertain pace, amongst the IFIs, it is difficult to see any justification for a refusal on the part of members of the international financial community as a whole, or EIB in particular, to harmonise the mutual exchange of detailed information which may emerge from a particular group of institutional investigations, in particular where financial institutions have cooperated with each other in the funding of a project in the first place.

In Lesotho, OLAF's assistance to the prosecuting team proved to be vital in the successful apprehension of corrupt MDBs. The EIB's recent establishment of a far closer level of cooperation with OLAF provides it with a real opportunity to consolidate the initiatives set out in the 'Uniform Framework for Preventing and Combating Fraud and Corruption' agreed in September 2006 by the leaders of seven major IFIs, deriving its justification for doing so, from the Financial Regulation.[see below]

3. If such an example of systemic corporate corruption were to come to light in the future, in what ways have the IFIs, and specifically, the EIB modified their responses to its discovery and prosecution?

The prevailing view of the prosecuting team in the Lesotho Trials remains one of disappointment that the international community, save for the World Bank, the Swiss authorities, and latterly OLAF, has preferred to ignore a series of substantial legal efforts to eradicate corporate corruption from Lesotho. This view derives from the series of lip-services which have been paid to the trials by international institutions and governments, and from the fact that requests for cooperation with the EU itself, and its member states have gone unheard. For example, the most egregious of the three main representatives charged with corruption remains at large in France, as the French government remains obdurate in its refusal to extradite him for trial in Lesotho. The Attorney General of Lesotho has been credited with sustaining the progress of these trials over the last ten years, which, despite the absence of support from

the international community, have been conducted entirely free from political influence. In the main, the international community does not appear to have acknowledged the extensive transboundary nature of corruption, where it involves MNCs and the use of secret bank accounts, either off shore or in Switzerland or other countries where banking laws are amenable for this purpose. What remains probably the greatest disappointment is that the international community, including EIB, met with the Lesotho prosecuting team in 1999, and indicated that support would be forthcoming, whereupon it transpired that no such support was under consideration.

The transboundary nature of corruption remains to be addressed, it seems. For example: where it emerges that the tendering process has been corrupted, involving loans to an EU based contractor, for a project in a non EU country, with incriminating information emerging as part of a reactive investigative procedure either by OLAF or EIB, then it is unclear to what extent, if at all, EIB will be concerned by the end uses to which such information will be put.

- Will it be satisfied, after incriminating information is handed to the any of the relevant national authorities, if no action is taken, either in the country where the project is being implemented, or in the country where the contractor is registered?
- When a breach of the Covenant of Integrity has been alleged/proved, to be dealt with ‘in accordance with national law’, how does EIB perceive its obligations in competing jurisdictions, where it is not, and cannot be clear in which jurisdiction the offence has actually occurred?
- As a matter of law, will EIB insert a term within the financial contract which indicates in which jurisdiction a dispute of this sort should be addressed?
- Where an investigation has revealed the existence of corruption, and no action is taken by the national authorities in any relevant country, what view will the EIB

take? Will it institute debarment proceedings in any event? Will it publish that information?

Recommendations

Covenant of Integrity

1. Legal status

The legal status of this covenant is currently unclear. It would appear to be an aspirational undertaking, rather than a binding term of the contract. On one interpretation, it is a ‘red flag’ by definition. On another, it amounts to an undertaking by the lead contractor which will be found to be too widely cast, if a breach of such a Covenant becomes the subject of litigation, in which the signing contractors’ legal liability for others’ behaviour is tested. Where there is a joint venture, partnership, or a consortium, in a major infrastructure project, the Covenant of Integrity is unlikely to bind all its members, unless each of them has signed it. At the least, it is recommended that *contracting partners* should be required to sign the Covenant, which is otherwise unlikely to be legally binding, in any form.

If the EIB were to require a Covenant of Integrity to be signed by all parties, including partners, sub-contractors, agents and all others referred to, in the model covenant set out in the EIB’s Guide to procurement, then a greater sense of integrity might be derived from such undertakings.

2. Conflict of interest, and of laws.

In common law jurisdictions, there remains a requirement that the Attorney General, a political appointee, must give his consent for a corruption trial to take place. This requirement, which can amount to a political obstacle, rather than a formality, does not apply in civil code jurisdictions.

In some jurisdictions, such as South Africa, the doctrine of criminal corporate liability is well established in the jurisprudence. In others, such as Germany, it is in its infancy. Since the Lesotho Trials began, the OECD Convention Combating Corruption has required parties to enact, where necessary, the appropriate domestic laws under which a company alleged to have corrupted a public official in a foreign country can face prosecution for a criminal offence. This largely reflects the provisions of the US Foreign and Corrupt Practices Act.

If Acres' corrupt practices had come to light *after* Canada had become a party to the OECD Convention, the indications are that a prosecution of Acres would not, in any event, have taken place in Canada, whose government lobbied the World Bank fiercely, in spite of the evidence gathered for the criminal proceedings in Lesotho, in a failed attempt to ensure that Acres should not be debarred. Pragmatically, the burden of prosecuting corruption seems likely to remain where the impact of corruption has been most acutely felt, when the interests of governments and MNCs are closely aligned.

If the Covenant of Integrity contained an express term, agreed with the contracting partner, determining which jurisdiction would apply, in the event of an investigation culminating in legal proceedings, either for breach of contract or for the criminal offence of corruption, then

- existing concerns over the burden of prosecution, conflict of laws, or *res judicata* would thus be pre-empted, and
- the Covenant would undoubtedly carry greater weight as a legally binding undertaking.
- Agreed pre-determination of jurisdiction as a term, would strengthen the Covenant,
- Such pre-determination would address any difficulties faced by the Development Banks based in jurisdictions where the writ of the OECD Convention Combating Corruption does not run,

- Clarification of the procedure following an investigation for the benefit of all involved.

Debarment

1. Relationship of debarment to criminal prosecution

Whilst debarment is essentially an administrative sanction used by Development Banks, its procedural relationship to criminal prosecutions remains unfortunately opaque. One of the principal arguments used to perpetuate this uncertainty is that where criminal prosecutions occur in jurisdictions where the judiciary has a reputation for corruption, then an unfair or corrupt conviction should not give rise to automatic debarment. However, there is a distinct lack of credibility to this argument, where the judiciary is above reproach, and a conviction properly occurs following a trial which has been conducted in an unimpeachable manner: the disjuncture between the administrative and criminal sanctions at the least creates the possibility that an MNC properly convicted of corruption will not be correspondingly debarred by a Development Bank. The OECD Convention encourages and monitors parties to the Convention in their prosecution of MNC's for corruption, and this procedural lacuna undoubtedly will have to be addressed.

Earlier in this paper, it has been recommended that EIB should consider the merits of a proactive, rather than a reactive approach to corruption. As part of this proactive approach, and as a consequence of its increased cooperation with OLAF, the EIB should perhaps consider adding to its policy statement a clause in which it sets out a cooperative approach to the criminal prosecution of corruption, together with a clarification of its position on the debarment of a contracting company found guilty of such an offence. Part of such clarification might be the compilation of a set of criteria by which EIB could be satisfied that the criminal proceedings were unimpeachable, and which, where met, accordingly triggered the sanction of automatic debarment by the EIB. Such a sanction would of course be subject to an appeals procedure which would be equally automatically be available to the company concerned. This recommendation has the following merits:

- It would validate, and thus strengthen and support the integrity of the judiciary where a corruption trial took place, where such criteria had been met.
- It would address the current lacuna which exists between procedures concerning administrative penalties and criminal sanctions for corrupt activities
- It would serve as a formal means of engagement between the Development Banks, of which EIB strictly speaking is not one, the commercial banks, which EIB considers itself to be, in some respects, and the prosecuting wings of governments mounting offensives against the corrupt behaviour of contracting companies.
- It would create a set of proactive opportunities for EIB to address the absence of accountability in its Global Loan lending arm, which is widely perceived as a current area of concern.
- Where the criteria are not met, this will highlight inadequacies within the judiciary, and areas where future improvements can be made, without excluding any sanctions available to EIB.

2. Cross debarment and other sanctions

International

Over the last decade, the World Bank has developed an articulated debarment procedure which, despite its discrete nature, has formed a precedent which other development banks have used in the development of their own corresponding procedures. Debarment itself has historically been an isolated and sporadic sanction used by IFIs against corrupt companies and contractors. In the wake of a profusion of anti corruption legal instruments, it is now seen as a vital weapon against corruption. Cross debarment between the IFIs, the final crippling sanction for an MNC engaged in corrupt activities, remains a measure to be adopted by the IFI community. Different regional hurdles have to be overcome before this is likely to happen throughout the IFI community, notwithstanding the express consideration of this tool in the Uniform Framework of September 2006. The EBRD has already debarred Lahmeyer, following the World Banks

decision to debar the company, but this example has not been followed by other financial institutions. Questions remain, concerning the debarment process.

- For example, to what extent should an MNC be debarred? Who decides this, and to whom is the decision maker accountable?
- Should a parent company be held wholly liable for the acts of its subsidiary? In Lesotho, both Spie Batignolles and Impregilo attempted, unsuccessfully, to argue that the wrong company had been charged with the offences.
- What is the true effect of debarment as a sanction, when the debarred company simply disappears following its debarment, subsumed within another larger corporation? After Acres' debarment by the World Bank, which it regarded as being a greater penalty than its criminal conviction, (which it publicly scorned at the time), the company was immediately subsumed by Hatch, a larger Canadian company. Likewise, Spie Batignolles was purchased by AMEC, immediately after its guilty plea had been taken in Lesotho.

European

EIB appears to have no formal exclusion procedure in place, at present. After the first stage of the consultation process, consultees were informed that EIB intends to establish such a system, taking into account the EU Framework. In its capacities as an institution formed by the EU, as the lending agent of the European Development Fund, and as a member of the International Financial Institutions group, it is respectfully submitted that the starting point for such a framework may be found within four of the articles set out in the Financial Regulation, as amended:

- Article 93 of the Regulation sets out the classes of contractors/tenderers/candidates who shall be excluded from participation in the procurement procedure. Each of these six classes describes *ex post facto* reasons to exclude the contractor from the procurement process: bankruptcy, conviction of an offence concerning their professional conduct, or guilty of the same offence in any event, failure to fulfil obligations concerning tax or social security contributions, a judgment against the contractor for fraud etc, or 'serious' breach

of contract for failure to comply with contractual obligations in another procurement procedure.

- Article 94 rules that candidates or tenderers may not be awarded contracts where they are subject to a conflict of interest, or where they misrepresent information supplied during the process of participating in the contracts procedure, or fail to supply such information.
- Article 95 requires each institution to set up a database containing full information concerning those who fall into the categories set out in Articles 93 and 94, and for there to be mutual disclosure between such institutions.
- Article 96 sets out a power under which the contracting authority may impose administrative or financial penalties which may be imposed upon those who are excluded through the provisions of Articles 93 and 94.

Likewise, in its proposal for a Council Regulation on the Financial Regulation applicable to the 10th European Development Fund, the Council recommended that as far as possible, 'Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities should, *as the cornerstone of the reform* of the Commission's internal management, be taken into account in this Regulation, for reasons of efficiency and simplification. If appropriate, Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities should be applied *mutatis mutandis* in certain cases.

Articles 93 – 96 of the Financial Regulation form the greater part of the cornerstone of the reform. They create powers for the identification of ineligible contractors, and for the collation of those identified within a database which EIB now suggests, during the

consultation process, should become available for use by the EIB itself, as a determinant for the eligibility of contractors.

EIB Database

The writer understands, following her attendance at the consultation meeting in Luxembourg on 4th September 2007, that the database referred to within the Regulation is not available, neither is it likely to become so, to the EIB. The Review Panel will undoubtedly be considering the implications of this refusal to share information on the part of the EU, not least because the Bank, now bound by the Aarhus Convention, is likely to be in receipt of a substantial number of legitimate requests for information, under the first main provision of the Convention, which creates an obligation for a public body to respond to a wide range of such requests.

The Uniform Agreement reached between the IFIs, with the great assistance of EIB, in late 2006, forms a perfect foil for this difficulty, within the wider, international lending community: it provides an agreed basis upon which the IFI community could now proceed towards a mutually effective and co-ordinated approach towards meaningful accountability amongst the global lending community, for which the first step would be the compilation of a data base to which all lending institutions with public responsibilities would contribute relevant information about those to whom money is being lent.

If such a data-base had been in place, with information passing freely amongst lenders, it is doubtful whether the web of corruption around the Lesotho Highlands Water Project could have been woven so effectively in the first place. It could certainly not have survived as long as it did, had mutual, prompt and reliable accountability been the norm amongst the IFIs which supported the project.

Cotonou: it is submitted that the EIB is uniquely placed, as an institution with standing in both the commercial financial organisations, development financial institutions, and as a member of the Cotonou Agreement, to implement this mutual exchange of information to a far greater level of effectiveness, as it works to combat corruption without compromising its position in any of these sectors.

A question which, as part of the consultation process, remains unanswered, is the degree to which the EIB carries responsibility for the administration and or implementation of funds used outside the EU under the provisions of the Cotonou Agreement. Without a clear definition of EIB's role under the Agreement, (which remains lacking,) there is a real risk for the Bank that a conflict of interest will arise, or that the Bank will find itself unable to account for the integrity of a financial transaction under the Agreement, when it is requested or required to do so.

Once more, one makes the point that transparency in such matters offers the protection of a formal framework, defining the limits of the obligations and liabilities of the Bank, at the same time creating a sense of accountability and integrity amongst its members, and in the best world, within the civil society organisations with whom it has chosen to consult, both to hear suggestions such as these, and to lend authenticity to its reviewing process.

It must be axiomatic, simply as a matter of good banking practice, that EIB collates its own data base of contractors, subject to appropriate EU controls and procedures, if it has not done so already. Such a database will then be available, and eminently useful, in the mutual exchange of information which is prioritised in the framework set out by the IFI group in September 2006.

However, this recommendation goes further than to advocate the systematic compilation and exchange of existing information. Richard Thornburgh, in his invaluable report on the World Bank Debarment Process alludes repeatedly to a preference for a proactive, as opposed to reactive approach to be taken to the excision of corruption within the

procurement processes of the financial community at large. Such an approach must encompass wholesale transparency and accountability, if it is to have any meaningful effect. Whilst acknowledging that EIB is in fact a bank, with a commercial agenda, and a correspondingly limited capacity to conduct the levels of due diligence which can provide the level of accountability which is required to make a meaningful impact upon corruption, the *obligation* to provide far higher levels of accountability has begun to emerge. Members of the EIB are entitled to impose an increased obligation upon the bank, in the current climate of hostility towards corruption. Other actors are already clamouring for an increased level of accountability in the EIB's lending practices. In anticipation of that requirement, and the EIB's lack of capacity to meet it, it is recommended that EIB, as part of a proactive approach to the issue, now consider the use of a dedicated entity or agency, to whom responsibility can be given, for the proper certification of the 'paper trails' which are created during in the procurement process for major projects where huge sums of money are involved.

A precedent within the EU for the engagement of the services of such an agency is to be found at Article 142,(4):

'The task of establishing that the revenue has been received and the expenditure incurred in a lawful and proper manner, and that the financial management has been sound shall extend to the utilisation, by bodies outside the institutions, of Community funds received by way of grants'

- Such certification would provide the assurances of integrity which EIB requires, which, it is respectfully submitted, are not to be found in the existing Covenant of Integrity, which is at best, a self serving declaration.
- Such investigation and subsequent certifications, had they been the norm, during the procurement of the early stages of the LHWP would have swiftly revealed the phoney nature of the representation agreements which were later relied on, during the Lesotho Trials.

- Had such certification been a requirement for the financial support of all lending institutions involved in the LHWP, the levels of corruption in which the LHWP gradually became mired would never have risen as high as they did.

- Certification processes are widely used in other parts of the commercial world: for example, they are a well established feature of the oil and gas industries. Informally, they exist in the form of sophisticated tracking software used by many of those private and commercial banks who are inclined take a necessarily stringent view of the integrity of those to whom they are considering lending, or to those to whom they have lent, but who later provoke misgivings in the Bank. Monitoring is considered to be axiomatic in the commercial banking community, of which EIB considers itself to be a member, an ongoing requirement of responsible lending.

- Such processes would follow naturally from the commitment by a borrower to permit EIB to examine all relevant documentation, (as set out in the current Covenant of Integrity, but more pertinently, within the procurement directives).

- If such a process were to be used by the EIB, it would produce a large number of benefits to the Bank, as it led the way towards accountability within the global commercial community as a whole: it would
 - provide an opportunity for those borrowers whose integrity is unchallengeable, to gain a rightful advantage over others who currently benefit from the successful concealment of their corrupt practices.
 - generate a discrete body of information which could and should be shared amongst the MDBs, from within the suggested mutually accessible database, which would provide a measurable, injunctive tool to ensure that funds were not used corruptly.
 - effectively outsource accountability and monitoring during the tendering process, thus minimising the task for the EIB, to provide assurance for the

process, yet ensuring that such essential accountability and monitoring occurs, implemented albeit from outside the Bank, by experts.

- the Bank would thus be relieved of criticisms of partiality, or corruption within the lending process, or conflict of roles within the organisation, to which it is currently correctly subjected, by reason of the close organisational connection between the officers of the Bank.

- Such procedures, once established, would be an uncontentious way in which commercial lending arms could engage in similar procedures, and begin to take responsibility, if not yet liability, for the uses to which their funds were being put.

- A model certification procedure, successfully trialled within a small group of major tendering processes would reveal its advantages and limitations; if it were found to be effective, it would be transferable by EIB as a bench mark, not only to other lending institutions, but also to other governments to whom the EIB customarily makes loans.

- The cost of certification may be used as an argument for declining the use of this procedure. However, conservative estimates of the costs of corruption which would be saved put such expenses into small relief. It is recommended that, in the event of the Bank suggesting that the expense of this exercise is prohibitive, then a cost benefit analysis of this exercise should be compiled, in the same way as environmental and social impacts are measured, before this initiative is dismissed.

September 17th, 2007

Fiona Darroch
The Protimos Foundation
London