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SUBMISSION OF FRESHFIELDS BRUCKHAUS DERINGER LLP IN CONNECTION WITH REVIEW OF THE WORLD BANK GROUP SANCTIONS SYSTEM

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Freshfields Bruckhaus Deringer LLP (***Freshfields***) respectfully submits this paper in connection with the external consultation phase of the review of the World Bank Group's sanctions system. Freshfields' interest as a stakeholder is that we serve as legal counsel to current and former respondents in World Bank sanctions proceedings. We appreciate the opportunity to provide input and recommendations on the review of the sanctions system. As set forth herein, we recommend that the Bank:

- maintain the current two-tier sanctions system;
- apply principles of proportionality to sanctions determinations;
- enhance the settlement process;
- collect and release more detailed data on the sanctions process and its outcomes;
- create a pro bono panel to provide legal representation to respondents who cannot afford legal representation; and
- publish the authorities the Bank relies upon in the sanctions process.

We respectfully submit that these steps would result in a more effective, efficient and equitable sanctions system.

INTRODUCTION

Freshfields is an international law firm with approximately 2,500 lawyers in 27 offices around the world. Over the years, we have represented World Bank Group institutions in a variety of matters. In the past few years, we have represented several contractors in connection with investigations by the World Bank's Integrity Vice Presidency (***INT***). We recently published a report on the World Bank's anti-corruption efforts, and the increase in its sanctions and debarment activity.[1] Based on our experience, the sanctions system works well, and the reforms of the last

two decades have substantially improved the system. We commend the Bank's continuing efforts to reform the system.

Protecting the Bank's funds is a major goal of the sanctions regime. Equally important, however, is the Bank's role in championing development and promoting the rule of law. As President Jim Yong Kim stated recently, the Bank is "an institution whose existence is tied to the public trust." As such, the Bank is "committed to supporting good governance efforts" in the fight against corruption.[2] The Bank's commitment to due process in the sanctions system is fully consistent with its role as an advocate for and as an exemplar of the rule of law and good governance.

Today's sanctions system carries greater risks and consequences for contractors than ever before. That reflects increased financial and human resources available to INT; more INT investigations; a sharper focus by INT on larger and multinational corporate contractors; greater use of debarment; expansion of debarment to affiliates within corporate groups; the creation and application of cross-debarment; and an increase in referrals to national authorities for local enforcement, accompanied by INT's push to encourage authorities to follow through on referrals.[3] As a recent article by LEG officials observed:

> There is much more at stake in a sanctions case, both for the [Bank] and for Respondents, than in a "normal" business decision of the Bank. Respondents, in particular, do not simply lose a business opportunity with the Bank Group: the public nature of sanctions, whether *de jure* or *de facto*, affects their good will with the general public – a factor often cited as worse than the immediate effect of the sanction itself.[4]

Without further reforms to ensure due process, there is a risk that the system will make resources unavailable to member countries that need them, by unnecessarily debarring contractors. Unduly

aggressive debarment can reduce competition, in turn reducing options for development and increasing the costs of goods and services for Bank-financed projects.

Our recommendations are based on our practical experience as legal counsel, and on our interpretation of the sources of authority applied by the Bank. Although "the Bank, as an international organization, is not bound by any national law, it carefully considers broad rule of law values and principles, as evidenced by a benchmarking of major civil and common law legal systems, as well as international best practices."[5] Accordingly, we note where applicable relevant principles from numerous legal systems, including those of the US, the UK, France, Germany, and China.[6]

DISCUSSION AND RECOMMENDATIONS

The following discussion and recommendations address many of the topics identified in the Consultation Plan.

I. FAIRNESS

The World Bank has pledged to provide due process as part of the sanctions regime.[7] The Bank's commitment to due process is essential to its roles as both a public organization and an advocate for the rule of law.[8] Indeed, "the Bank has acknowledged that certain rule of law and due process considerations necessarily apply where it exercises quasi-public authority."[9] Moreover, "[i]nternational legal principles require that any sanctions and debarment decision must be subject to a strict rule of law approach that gives precedence to the principles of equal treatment, non-discrimination and proportionality."[10]

Overall, the system is evolving toward an appropriate level of due process as a result of recent reforms. Further reforms should provide additional protection for the rights of contractors, especially in light of the system's increased scale and impact. Such further reforms are essential,

not only to preserve the integrity of the sanctions system, but also to advance the Bank's mission as the leading proponent of the rule of law in the developing world. To borrow one of the most famous quotations in US law, in the context of international development, the World Bank Group is

> the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.[11]

We respectfully submit that further reforms of the sanctions system should accord no less importance to the rule of law than to protecting the Bank's funds and fulfilling its development mandate.

A. Notice of potential sanctions

INT often contacts multiple parties during an investigation to request information. These parties may include contractors, suppliers, employees, and other individuals and entities. Contractors are often unaware that the Bank rules apply to them, or that they could subject themselves to sanctions by furnishing information to INT. In some cases, the party contacted may already have been identified as a putative respondent based on a previous investigation. In such cases, fairness and due process warrant notifying the party of that fact. Moreover, a person or entity that is merely a source of information and does not face any realistic risk of sanctions would generally be more likely to cooperate and assist INT if it was informed of its status.

In the UK and other jurisdictions, by way of comparison, individuals and companies are usually advised as to whether they are under investigation, or are merely being asked to assist with an investigation. For example, the Securities & Futures Commission of Hong Kong (***SFC***) often informs interviewees as to whether or not they are the targets of investigations under the relevant Securities and Futures Ordinance, even though the Commission is not legally obligated to do so.[12] In the United States, the Department of Justice (***DOJ***) encourages prosecutors to provide notice to

targets of grand jury investigations.[13] A target is an individual for whom substantial evidence links him or her to the commission of a crime, and who is, in the prosecutor's view, a putative defendant.[14] In addition, apart from the federal process, many states mandate that grand jury witnesses be warned that they are targets or subjects of grand jury investigations.[15]

INT recently adopted the practice of sending "show cause" letters to respondents. Such letters set forth the basis of INT's allegations and request that respondents show cause as to why INT should not institute sanctions proceedings. It is unclear how consistently this procedure is followed. Similar processes used by public agencies have resulted in improved outcomes. For example, the US Securities and Exchange Commission (***SEC***) has a formal mechanism referred to as the "Wells process," in which a potential defendant may submit a statement and evidence to the SEC before a decision to proceed with an enforcement action is made.[16] This process gives prospective defendants a valuable opportunity to mitigate their liability and in some cases to resolve the investigation. Data released by the SEC earlier this month shows the effectiveness of this process for the agency. In 20 percent of cases involving individuals, the SEC received critical facts and arguments through the Wells process, which caused it to decide not to pursue the cases further. The Wells process benefits the SEC in two key ways. First, it allows the agency to conduct a more informed assessment of the facts and legal arguments prior to commencing an enforcement proceeding, should it decide to do so. Second, in those 20 percent of cases that do not proceed, the SEC can redirect its limited resources to other, more viable cases.[17]

Notifying potential respondents of their status and giving them an opportunity to be heard would benefit both the respondent and the Bank. A respondent could present evidence and arguments that might persuade INT that there is insufficient evidence to proceed, or that there are mitigating circumstances. INT could simultaneously gain a preview of the evidence and

arguments that a respondent would present in a Sanctions Board proceeding, and would then be able to address them in its Statement of Accusations and Evidence (***SAE***). Such exchanges of evidence and advocacy would, in some cases, naturally lead to settlements, or to fully informed decisions to drop investigations, thereby increasing the efficiency of the system. Similarly, the process would in some cases narrow the issues for determination by the Sanctions Board.

> **RECOMMENDATION: In the investigative phase of a sanctions case, INT should provide basic information to individuals and entities with whom it engages, including the fact that INT is conducting an investigation of potential violations of the Bank rules; that any information provided could be used in a sanctions proceeding; an indication as to whether INT presently views the person or entity as a witness or a potential respondent; and the potential need for, and the possible availability and provision of, legal representation.**
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> **RECOMMENDATION: Prior to deciding to seek sanctions, INT should notify a potential respondent that it is planning to initiate a sanctions proceeding and give that party an opportunity to be heard.**

B. Temporary suspension based on mere suspicion

Under the World Bank's Sanctions Procedures, an Early Temporary Suspension (***ETS***) may be issued before INT completes its investigation if enough evidence exists to conclude that a sanctionable practice has occurred which would result in debarment for at least two years. An ETS prohibits a contractor from being awarded new contracts for six months, subject to possible

extension for an additional six months, pending the completion of INT's investigation and the commencement of sanctions proceedings.[18] ETS was intended to be an extraordinary remedy. A preliminary recommendation in the Bank's review working papers suggests studying "ways to mainstream" and increase the frequency of ETS.[19] We understand that there is also a suggestion to relax the standard to obtain an ETS by, for example, allowing an ETS to issue on the mere commencement of an INT investigation.

We respectfully submit that suspending a contractor based solely on INT's opening of an investigation would be fundamentally unfair and would deprive contractors of the most basic due process. It would unnecessarily deprive member countries of the benefits of competition and hinder efficient development efforts. The recommendation is inconsistent with fundamental principles of due process observed throughout the world.

For example, in the EU public procurement system, exclusions and debarments are unavailable as interim measures. They are outcomes employed in the event of a final and binding conviction or a judicial or administrative decision. Judicial review, or an appeal, generally suspends the immediate effect of an exclusion or debarment. Interim measures by government agencies may only be ordered if additional requirements are met, such as demonstrating that, absent the measure, the public will be placed in immediate danger. Interim measures imposed for reasons such as this are subject to judicial review.

Similarly, in the United States, a federal agency may temporarily suspend a contractor prior to debarment only in limited circumstances, and only after following procedures that reflect "principles of fundamental fairness."[20] Specifically, US regulations recognize that suspension is a "serious action" which requires adequate evidence of an offense, and a determination that "immediate action is necessary to protect the Government's interest." Contractors and any

specifically named affiliates must be provided with an opportunity to submit information and arguments in opposition to the suspension. The suspending official also considers the seriousness of the contractor's acts or omissions. In certain instances, suspended or debarred contractors may still be awarded contracts if a compelling reason can be shown.[21]

Outside the procurement system, US courts impose the functional equivalent of suspensions and debarments: preliminary injunctions and temporary restraining orders. In doing so, courts observe strong due process protections. Generally speaking, a preliminary injunction (i.e., a court order requiring a party to do or refrain from doing something until a trial on the merits concludes) issues only if the requesting party demonstrates that it will likely succeed with its claim, that it will suffer irreparable harm if the preliminary injunction is not imposed, and that issuing a preliminary injunction is in the public interest. For a court to grant a temporary restraining order (i.e., a short-term, pre-trial temporary injunction), a court must generally find that an individual will be immediately and irreparably harmed if the order is not issued.[22] In both procedures, the affected party is afforded a full opportunity to argue its case.

Other jurisdictions have similar requirements. In the UK and Hong Kong, for example, injunctions will not be granted unless they are necessary to do justice between parties, there is a serious issue to be tried, damages will not suffice as a remedy, and the balance of convenience favors granting the injunction.[23]

> **<u>RECOMMENDATION</u>: The Bank should not temporarily suspend a contractor based on the mere opening of an investigation by INT. ETS should remain an extraordinary remedy. The Bank should ensure that there is a sufficient basis upon which to employ it in a particular case, and provide**

a contractor with prompt notice and an opportunity to be heard to contest the proposed suspension.

II. TRANSPARENCY AND CERTAINTY

Another preliminary recommendation is to publish SDO determinations and to make public the Sanctions Manual and LEG Advisory Opinions. We strongly support these initiatives because they are essential to the World Bank Group's efforts to encourage its member governments "to become more transparent, more accountable . . . and better at delivering services."[24]

A. Publication of authority

LEG has stated that it is inappropriate for the sanctions system to have a system of "secret" rules.[25] Reliance on such materials by the Bank is inconsistent with fundamental principles of due process, which demand that persons have notice of rules that regulate their conduct. In December 2011, the Sanctions Board published its Law Digest. Certain Sanctions Board decisions were made public beginning in May 2013. However, according to the LEG Advisory Opinion of November 2010, which was made public in late 2013, the internal Sanctions Manual was also due to be published, but that and other sources cited in the opinion still form a collection of "secret" sanctions materials.[26]

The materials published to date provide an essential source of information to contractors and their advisors. They enable parties to understand how the evolving sanctions system works, and to assess their options. For example, as noted in Freshfields' report on the Bank's debarment activity, in most cases, entities are debarred for three years, and settlements tend to be in the range of two to three years. In the reported Sanctions Board decisions, the term of debarment averages

1.6 years.[27] Such knowledge enables contractors to assess the risks and rewards of the sanctions system, and it can facilitate the efficient resolution of investigations.

It is common for enforcement agencies in the UK, the EU, Hong Kong, and the US to publish materials related to their enforcement policies and procedures.[28] Making such materials available causes those systems to be more transparent and more efficient, since parties that engage with them possess more accurate expectations of how the various processes operate.

As for the right to a fair and just proceeding, understanding the rules of the relevant legal system is a fundamental right in all countries that uphold the rule of law.[29] Provisions protecting the right to a fair trial can be found in the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the European Convention on Human Rights, the African (Banjul) Charter on Human and Peoples' Rights, and the United Nations Convention on the Rights of the Child.[30] Both the Inter-American Court of Human Rights and the European Court of Human Rights have clarified that the right to a fair trial applies not just to judicial proceedings but also in administrative proceedings.[31] The right to a fair trial is recognized in numerous declarations, resolutions and minimum standards which reflect customary international law because of their widespread acceptance, such as the Universal Declaration of Human Rights.[32] Finally, GAL recognizes an individual or entity's right to have its views and relevant information considered prior to a decision being issued, which presumes one knows about the process and procedures used to determine one's case.[33]

B. Guidance on corporate groups

The World Bank issued guidance on corporate groups in 2010.[34] That guidance has provided welcome clarification of the standards for imposing sanctions on a respondent's parent company, affiliates, successors, and assigns. The preliminary recommendations suggest that the

Bank should consider revising its guidance on corporate groups in the Sanctions Manual to provide greater clarity. We agree that this issue is challenging and that further guidance is needed.

Section 9.04 of the Sanctions Procedures ("Scope of Sanctions") in regard to corporate groups is broadly worded. Together with the definition of "affiliate" in Section 1.02(a), Section 9.04 authorizes the imposition of sanctions on any affiliate of a respondent, including parents, subsidiaries, sister entities, and potentially joint venture partners and individuals associated with the respondent. Under those provisions, the Sanctions Board has discretion to debar an entire large multinational corporate group based on the misconduct of a single rogue employee acting within the scope of his duties in an isolated location, without any knowledge or participation of other persons or entities within the group.

The guidance on corporate groups provides some helpful, limiting principles. It requires some evidence of involvement or participation by a corporate entity, which necessarily requires a degree of knowledge. But in practice, questions of knowledge and content have presented challenges.

The Bank's reported sanctions decisions, which address corporate liability, have generally involved egregious conduct, and shed little light on the appropriate treatment of ordinary cases. For example, the Sanctions Board has applied the doctrine of conscious avoidance or willful blindness as a substitute for knowledge, but it did so in an outlier case where the respondent had been aware of past problems and failed to even attempt to monitor or enact *any* controls over its subsidiary.[35] The application of concepts such as conscious avoidance in national law systems has generated much controversy and litigation in a variety of contexts.[36] In the same case just referenced, the Sanctions Board considered a failure to supervise as sufficient to show involvement

or participation.[37] Again, that conclusion was based on egregious conduct. That decision is generally in accord with US law on failure to supervise.[38]

In our experience, INT has sometimes sought to hold parent entities liable for the acts of their subsidiaries based on a failure to supervise theory. Yet it is important to distinguish between culpability, which is based on knowing and deliberate participation in wrongdoing, and responsibility, which "may arise simply from a failure to supervise or to maintain adequate controls or ethical culture within the corporate group such that the wrongdoing is made possible."[39] Mere responsibility should not normally lead to debarment, but instead to conditional non-debarment or a lesser sanction.[40]

Concepts such as willful blindness and failure to supervise should be applied sparingly. In most cases, the Bank's sanctions determinations should respect the doctrine of corporate separateness, which is observed in civil and common law systems worldwide.[41] In the United States, this bedrock principle of corporate law has served as the default presumption when numerous legal entities are involved.[42] US courts generally recognize that each corporate entity possesses a separate legal personality and they refuse to hold a corporate parent liable for the wrongful acts of its parent, subsidiary, or affiliates.[43] "Piercing the corporate veil" and ignoring the separateness of a company as a distinct entity is permitted only in exceptional circumstances, and typically requires a showing of fraudulent abuse of the corporate form.[44]

Respect for corporate entity separateness has been demonstrated throughout the world and throughout history. In the 1897 UK decision *Salomon v. Salomon & Co.*, the House of Lords affirmed the legal principle that, upon incorporation, a company is generally considered to be a new legal entity distinct from its shareholders.[45] UK courts have upheld *Salomon* and proven reluctant to pierce the corporate veil.[46] In the 1970 case *Barcelona Traction, Light and Power*

Company, Ltd., the International Court of Justice noted that piercing the veil was an exceptional step and one it was not, under the circumstances, willing to take.[47] Under traditional European Company Law, a parent corporation cannot be reached to satisfy the obligations of its subsidiary.[48] The same holds true of many legal systems in Latin America.[49] For these reasons, we strongly support the issuance of additional guidance on the application of sanctions proceedings to corporate groups.

Finally, there are a number of straightforward data transparency issues to note. First, referring to the Bank's list of debarred entities and individuals, because an entity is removed from the list once a term of debarment ends, it is difficult to track and discern debarment trends. Second, there is a lack of public data available on the level of sanctions recommended by INT, or the levels imposed by the EO. Third, there is no data detailing the effect that particular mitigating or aggravating factors have had on a term of debarment. Such data would assist contractors in better assessing the risks and rewards of the sanctions system.

RECOMMENDATION: The Bank should publish all rules, regulations, manuals, guidance, precedents and any other authority that it uses or relies upon at any phase of the sanctions system.

RECOMMENDATION: The Bank should consider amending the Sanctions Procedures to tighten the broad language of Section 9.04, as well as the bases for determining an affiliate under Section 1.02(a).

RECOMMENDATION: The Bank should provide additional guidance with respect to corporate groups

based on widely accepted principles of corporate separateness that are recognized in international business.

RECOMMENDATION: The Bank should collect and report more data on INT investigations and the sanctions process.

III. INDEPENDENCE AND CREDIBILITY

The Evaluation and Suspension Officer (***EO***) reviews evidence submitted by INT and determines whether the evidence supports a finding that alleged sanctionable practices have occurred. The preliminary recommendation in the Initiating Discussion Brief proposes re-sequencing the first tier of the sanctions proceedings (i.e., the SDO stage) so as to allow a respondent to be heard before the SDO's determination.[50]

The role of the Evaluation Officer (***EO***) has provided a critical level of independence and credibility to the sanctions system. The EO has served as a neutral filter between INT and the Sanctions Board. Although we are not aware of any public information regarding the extent to which the EO rejects or seeks modification of cases referred by INT, anecdotal reports suggest that the EO has provided unbiased and objective protection for contractors against inappropriate charges. In particular, it appears that the EO often recommends shorter terms of debarment than those sought by INT and sometimes rejects INT's requests for sanctions. This has increased confidence in the sanctions system, in that cases brought before the Sanctions Board are understood to have been carefully screened.

At the same time, the EO has not been partisan or an advocate for contractors. Publicly available data shows that the EO has typically sought more severe sanctions than those ultimately

approved by the Sanctions Board. For example, in the vast majority of published Sanctions Board decisions, the Board has imposed a term of debarment substantially lower than that which the EO recommended. In 12 of the 14 cases in which a Sanctions Board decision has been published, the Sanctions Board imposed a lower term than the EO had recommended.

The EO is a Bank employee and therefore could not reasonably be considered to be independent. Moreover, a single official should not hear cases in the first instance. Such determinations, if appealable to the Sanctions Board, would likely be subject to a limited scope of review. Instead, we support the recommendation for the Sanctions Board to hear cases in panels for cases that do not present novel issues. This would ensure credible and more independent determinations and would streamline the system.

Based on the nature and seriousness of sanctions proceedings, the effect of their collateral consequences, the economic stakes, and the World Bank's role as an advocate for the rule of law, we respectfully submit that the screening function the EO provides is an essential and successful element of the current system. It should, therefore, be retained.

By way of comparison, some US administrative agencies use processes analogous to the EO's screening function. Enforcement action by the US Securities & Exchange Commission (***SEC***), which enforces violations of US securities laws, begins with the Commission's Division of Enforcement. The Division must make a recommendation to an independent panel of Commissioners, which decides whether or not to proceed.[51] The US Federal Trade Commission (***FTC***), another quasi-judicial, independent regulatory agency, enforces US antitrust laws. The FTC may pursue administrative litigation on the antitrust merits of mergers in so-called "Part III" proceedings before an administrative law judge, with review of that decision by the full panel of five FTC Commissioners, which is also subject to independent judicial review.

RECOMMENDATION: The Bank should continue with the present role of the EO, but consider additional safeguards to ensure that the EO's independence from INT is institutionalized.

RECOMMENDATION: The Bank should not re-sequence its two-tier sanctions system in the manner that has been proposed. The Sanctions Board should, however, be able to hear cases that raise no novel issues in a panel.

IV. ACCESSIBILITY

The new review produced a preliminary recommendation to study ways to make the system more accessible for small and medium enterprises (***SMEs***). We commend the Bank's attention to this matter. For the same reasons that the Bank developed a level of due process for the sanctions system, we submit that contractors which face potential sanctions should have access to legal advice and representation.

In many cases, individuals or entities who are contacted by INT or other parts of the Bank have no knowledge of the World Bank Group or its sanctions system. They may regard engagement with the Bank as intimidating, or even dangerous. For many such individuals, engagement could involve unfamiliar proceedings in another country, conducted in a foreign language which they do not understand. Individuals and contractors, especially SMEs, would be more likely to engage with the system if they had an opportunity to seek advice and representation — even if they could not afford it.

The World Bank Sanctions Procedures contemplate that a respondent will be represented by counsel in sanctions proceedings.[52] Recently, the Sanctions Board made clear that the fairness of an INT investigation involves a respondent's (or a witness's) ability to consult a lawyer.[53]

Therefore, it is only fair to notify individuals and companies that they may become respondents, and also that they have the right to legal counsel.

The value of the attorney-client relationship is recognized throughout the world. In many countries, the state provides legal representation if an individual cannot afford it. In Germany, for example, financial aid is available to individuals to hire an attorney, even in administrative or civil proceedings.[54] In administrative penalty proceedings, the suspect or accused must be afforded legal counsel if severe consequences may follow, and at the government's expense if the individual cannot pay, or if he or she is acquitted.[55] In criminal proceedings other than cases involving minor offenses, an attorney must generally be provided to the suspect or accused.[56]

In Hong Kong, the right to legal representation in disciplinary proceedings is a matter to be dealt with at the tribunal's discretion, in accordance with principles of fairness and on a case-by-case basis.[57] In the United States, it is a deeply rooted principle that persons or entities subject to government investigations, litigation, or prosecution may hire an attorney of their choosing, a right arising from the English common law.[58] Under the common law, the client's right to choose an attorney is considered necessary to guarantee zealous representation.[59]

Freshfields would be prepared to provide support for a pro bono panel of attorneys that could assist indigent or low-income individuals and entities in sanctions proceedings. Such a panel could help develop a defense bar with a high degree of competence in sanctions matters. This would be consistent with the Bank's interest in supporting the rule of law, protecting the rights of persons, and developing a credible sanctions system with a robust body of jurisprudence.

<u>RECOMMENDATION</u>: The Bank should consider creating a pro bono panel to provide representation to individuals and

SMEs that cannot afford to hire a lawyer, at no cost or at a reduced cost, and to inform respondents of said panel.

V. EFFICIENCY AND EFFECTIVENESS

The Initiating Discussion Brief recommends that the Bank revisit the "baseline" sanction of a three-year debarment with conditional release. We respectfully submit that a more proportionate and flexible approach to the determination of appropriate sanctions would improve the Bank's ability to process cases, and also provide more effective deterrence.

A. Determination of appropriate sanctions

We commend the issuance of the Sanctioning Guidelines, which provide some level of objective criteria for determining the type or level of sanctions to impose. Aggravating or mitigating factors are broadly defined and result in adjustments of up to 50 percent from the baseline sanction. These criteria create a more transparent, consistent and equitable system. We respectfully submit that further changes would improve the system's efficiency and effectiveness.

Guidelines based upon the loss amount associated with the sanctionable practice would produce better outcomes in most instances. Because one of the fundamental goals of the sanctions system is to protect the Bank's funds, it stands to reason that the amount of Bank funds at risk would be a reasonable and appropriate basis for the determination of sanctions. For example, a fraudulent practice which resulted in the diversion of millions of dollars in Bank funds should result in a more severe sanction than a corrupt practice where a contractor paid a few hundred dollars to a government official, in a manner that did not materially affect the award of the contract. By comparison, the US Sentencing Guidelines, used to determine the length of a defendant's sentence, provide for sentences in fraud cases which depend upon the amount of money involved. For a loss of less than $5,000, no change is made to the guideline level of

sentencing; incremental adjustments are made at levels including $10,000, $30,000, $70,000, $120,000, and all the way up to more than US$400 million.[60]

In other cases, economic criteria will be unsuitable. For example, in the case of a coercive practice that resulted in physical harm to an individual, less granular criteria would be preferable. Overall, we submit that the baseline sanction of three years for all sanctionable practices is simply too severe.

A three-year term of debarment has been imposed in most cases that have reached the Sanctions Board, or otherwise, despite the wide range of circumstances in those cases. In contrast, the use of debarment with conditional release has only recently increased. The letter of reprimand sanction has been used rarely. Finally, there have been only a few cases involving restitution payments.

We urge the Bank to consider a range of sanctions that is not so biased towards debarment. A more extensive toolkit for sanctions would result in a more effective system of incentives and disincentives for sanctionable practices, and would enable the Bank to communicate a clearer and more consistent message to the public and the development business community.

Finally, under the current system, we understand that INT has, in some cases, taken the position that sanctions for multiple acts related to the same transaction or occurrence should be "stacked." For example, in a case in which a respondent submitted three false documents in connection with a single prequalification application, INT argued that the respondent committed three separate instances of fraudulent practice and was subjected to a baseline sanction of nine years.

In the interest of proportionality and consistency, multiple practices involving the same contract or project should be treated as a single group of closely related actions for the purpose of

determining the appropriate sanction. We note that the US Sentencing Guidelines include such a grouping system, which has worked well in practice. The guidelines require that where a case involves multiple counts, the court must "group" related counts.[61]

In the UK, the sentencing guidelines published by the Sentencing Council for England and Wales provides that consecutive sentences are only appropriate where (1) offenses arise out of unrelated facts or incidents; (2) offenses are of the same or similar kind but overall criminality is not sufficiently reflected by concurrent sentences; or (3) where one or more offense(s) qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum. Even where consecutive sentences are impossed, a court is directed to add the sentences for each offense and consider if the aggregate length is just and proportionate and make adjustments if it is not so.[62] The principle of proportionality is also recognized in GAL.[63]

RECOMMENDATION: The Bank should use more objective and quantitative criteria to determine the term of debarment, including consideration of the amount of loss associated with the sanctionable practice. Additionally, the Bank should collect and make public data on the actual amount of mitigation or aggravation attributed to particular factors in sanctions decisions.

RECOMMENDATION: The Bank should make greater use of non-debarment sanctions, including conditional non-debarment and letters of reprimand.

RECOMMENDATION: The sanctioning guidelines and/or sanctions procedures should be amended to provide for the grouping of closely-related counts.

B. ICO resources

Numerous contractors are now subject to review by the recently established Integrity Compliance Office (***ICO***). Concern has been expressed that the ICO's office lacks sufficient resources to conduct effective monitoring of the significant number of contractors that are subject to its supervision. It is unrealistic to expect that a small cadre of professionals in the ICO's office can monitor a large volume of organizations around the world and evaluate them continuously on the complex criteria contained in the Bank's Integrity Compliance Guidelines.

A mismatch between the scope of the ICO's responsibilities and the available resources may have resulted in undue reliance on independent monitors. Such monitors pose inherent risks and threaten negative externalities. First, widespread use of monitors that are independent of the Bank could encourage the inconsistent implementation of integrity and compliance measures by contractors. Second, monitors are expensive for contractors and may provide only minimal added value. Third, monitors pose a reputational risk to the Bank, as the use of monitors in US enforcement matters has generated controversy around the abuse of such arrangements in terms of political patronage and economic exploitation of contractors.[64]

As an alternative, the Bank might consider introducing a limited verification service that supports the ICO by ensuring that contractors have implemented compliance programs. This need not be limited to contractors that have been sanctioned. Indeed, as a systemic matter, it would be more appropriate to expand such a regime to cover organizations that the Bank has substantial exposure to, so that potential problems can be identified and resolved before they result in

sanctionable practices. Such a risk-based system would provide better protection for the Bank's funds and likely prove less expensive as well. By way of an example, and as a potential model, we suggest that the Bank consider the Office of Compliance Inspections and Examinations (***OCIE***) of the Securities and Exchange Commission. OCIE administers the SEC's nationwide program, conducting examinations of US-registered entities for the purpose of protecting investors and ensuring market integrity.[65]

In regard to the cost of such a verification system, the Bank might consider assessing fees as part of the bidding and contracting process, so that the cost of the system is borne proportionately by all Bank contractors, rather than imposed only on those that are subject to sanctions. This distributes the burden across the broadest base, as even compliant contractors benefit from the enforcement of sanctions against the non-compliant entity. Alternatively, a basic fee could be imposed by the ICO against conditionally debarred entities.

> **RECOMMENDATION: The Bank should consider allocating more resources to the ICO to enable it to fulfill its mission.**
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> **RECOMMENDATION: The Bank should consider creating a limited verification service to support the ICO in ensuring that contractors have implemented effective compliance programs.**[66]

VI. SETTLEMENTS

A number of recommendations have been put forward regarding settlements, including the need to reinforce the procedural safeguards for settlements and to enhance their transparency. In our experience, the availability of settlements has resulted in more efficient case processing and better overall outcomes. We regard the adoption of settlement procedures as a major improvement in the system.[67] However, further reforms in the procedures for settlements could lead to more

effective incentives for compliance. As INT stated in its FY13 update: "the private sector needs stronger incentives to run their businesses cleanly" and INT needs to "better communicate the incentives that do exist."[68] There are three areas in which the settlement process could be improved.

First, a requirement that a contractor makes a formal and public admission of a sanctionable practice is a deterrent to settlement. In most cases, such admissions are unnecessary. Where a contractor is sanctioned and subject to conditional release or to conditional non-debarment, the sanction itself provides a sufficient deterrent, both generally and specifically.

At the same time, the potential cost of making such an admission is disproportionate to the benefit to the Bank. Although requiring such an admission may provide a moral benefit, and possibly result in a marginal reduction in the risk of recidivism, the benefits are speculative. Moreover, the potential economic harm to a contractor is far greater than any benefit received by the Bank. Such an admission could be used against a contractor in a legal proceeding, which could result in substantial economic and reputational costs for the contractor. The Bank could be embroiled in such a proceeding as a party to the agreement.

Although the Bank's current practice provides that settlement agreements are confidential and non-public, that does not eliminate the risk of discovery pursuant to a court order or other compulsory process. In most cases, there is no need for the Bank to expose a contractor to such a disproportionate risk as a condition of settlement. We note that so-called "no-admit settlements" have been used in US enforcement actions for many years. Some critics have suggested that any settlement must require an admission of the underlying facts or proof of those facts by the enforcement agency. However, the courts have so far rejected that critique.[69] At least one US agency has resolved to decide on a case-by-case basis whether such admissions are required.

Allowing no-admit settlements in appropriate cases would encourage more efficient resolution of cases and reduce the overall cost of the system, and with little downside risk for the Bank.

Second, coercing contractors to voluntarily refrain from bidding on World Bank projects as a condition of entering into settlement discussions would be counterproductive. Such a requirement would discourage some contractors from considering settlements altogether. It is also unfair to discriminate between contractors that have ongoing World Bank business from those that do not. That is to say, a contractor with no plans to bid on future Bank contracts would be more inclined to accept such a condition, but such cases pose less risk to the Bank. Moreover, as discussed above, it is both illogical and unfair to presume that any contractor which is prepared to discuss settlement of a sanctions matter presents a risk to the Bank, such that it should be required to refrain from bidding entirely. It is certainly possible that the contractor would choose to settle such a case, even if it honestly believed that it did not commit any sanctionable practice, and even if there was no risk of any such future practice.

Third, although the Bank has successfully maintained the confidentiality of the Bank's Voluntary Disclosure Program (***VDP***) participants, it is widely believed that the program is not producing the results envisioned. Discussions with clients who have participated in the program, or who have contemplated doing so, lead us to conclude that there are substantial disincentives to participation. Specifically: (a) the five-year term is almost twice as long as the typical debarment period and approximately three times as long as the typical settled case; (b) the compulsory independent monitor requirement subjects participants to enormous costs and burdens; and (c) the draconian provision that any future violation will result in a mandatory, 10-year debarment poses an unacceptable level of risk to a contractor, despite any assurances that the provision will not be strictly applied.

By contrast, recent settlements have provided a more balanced opportunity for contractors to voluntarily disclose their sanctionable practices. For example, in the July 2013 settlement with Sinclair Knight Mertz Pty, the respondent self-reported its misconduct, took corrective action, and negotiated a settlement with the Bank on more favorable and less burdensome terms than would have been possible under the VDP. We encourage the Bank to encourage parties to voluntarily disclose sanctionable practices on a confidential, non-public basis subject to terms comparable to a Negotiated Resolution Agreement, rather than the standard VDP terms.

RECOMMENDATION: The Bank should consider further incentives to increase the frequency of settlements, which would result in a more streamlined and effective system in which parties can make rational decisions about the benefits and risks of proceeding.

RECOMMENDATION: The Bank should consider accepting "no admit" settlements in the contect of Negotiated Resolution Agreements.

RECOMMENDATION: The Bank should not require contractors to "voluntarily" refrain from bidding as a condition of settlement.

RECOMMENDATION: The Bank should revisit the design of its Voluntary Disclosure Program.

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CONCLUSION

The recent reforms to the World Bank sanctions system have improved the system. However, further reforms are warranted. The recommendations described above would help to foster a more efficient, effective and equitable system.

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[1] Freshfields Bruckhaus Deringer LLP, *The War on Corruption: World Bank Fights Back as Debarments Reach Record Levels* (2013) [hereinafter, ***Freshfields Report***], http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/World%20Bank%20sanctions%20-%20blacklist%20revisted.pdf. For global coverage of the analysis, please see: Caroline Binham, *World Bank sanctions at seven-year high*, Financial Times, Sept. 15, 2013, http://www.ft.com/intl/cms/s/0/7b08e5a2-1c9d-11e3-8894-00144feab7de.html; Samuel Rubenfeld, *Research finds World Bank escalates fight against corruption*, Wall Street Journal, Sept. 15, 2013, http://blogs.wsj.com/riskandcompliance/2013/09/15/embargoresearch-finds-world-bank-escalates-fight-against-corruption/; Toh Han Shih, *World Bank blacklist over graft soars*, South China Morning Post, Sept. 16, 2013, http://www.scmp.com/business/banking-finance/article/1310555/world-bank-blacklist-over-graft-soars; Tim Webb, *Blacklisting threat as bank gets tough on corruption*, The Times (UK), Sept. 16, 2013, http://www.thetimes.co.uk/tto/business/economics/article3869915.ece; Sue Reisinger, *World Bank goes big with corporate debarment*, Corporate Counsel, Sept. 16, 2013, http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202619246380; R.L.W. and L.P., *World Bank robbers*, The Economist, Sept. 17, 2013, http://www.economist.com/node/21586475; Armina Ligaya, *Canada now dominates World Bank corruption list, thanks to SNC-Lavalin*, Financial Post (Canada), Sept. 18, 2013, http://business.financialpost.com/2013/09/18/canada-now-dominates-world-bank-corruption-list-thanks-to-snc-lavalin/; Tim Coleman, *The World Bank fights back on corruption*, FCPA Blog, (Sept. 18, 2013, 12:18 AM), http://www.fcpablog.com/blog/2013/9/18/the-world-bank-fights-back-on-corruption.html.

[2] Integrity Vice Presidency, FY13 Annual Update [hereinafter, ***FY13 Annual Update***] 1 (Oct. 2013).

[3] As of the date of publication, we found that the World Bank had blacklisted 250 entities and individuals in the first seven months of 2013, four times the amount over the whole of 2012, and more than the total number of debarments of the previous seven years combined. *See* Freshfields Report, *supra* note 1.

[4] Anne-Marie Leroy and Frank Fariello, The World Bank Group Sanctions Process and Its Recent Reforms, The World Bank 74-75 (2012) (citations omitted).

[5] *Id*. at 72.

[6] *See* Advisory Opinion on Certain Issues Arising in Connection With Recent Sanctions Cases, No. 2010/1 at n. 16 (Nov. 15, 2010) [hereinafter, ***2010 Advisory Opinion***], http://siteresources.worldbank.org/INTLAWJUSTICE/214574-1300377840517/23440937/AdvisoryOpinion.pdf.

[7] *See* The World Bank Group, The World Bank Group's Sanctions Regime: Information Note [hereinafter, ***World Bank Information Note***] 3, http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf ("The Bank Group maintains a formal process for sanctioning firms and individuals … intended to provide the accused party … with basic due process before any decision is made as to whether the Respondent will be sanctioned and, if so, which sanction is appropriate."); *see also* The World Bank Group, Initiating Discussion Brief, Review of the World Bank Group Sanctions Regime 2011-14, Phase I Review: Stock-Taking [hereinafter, ***Initiating Discussion Brief***] at 3, http://siteresources.worldbank.org/INTLAWJUSTICE/214574-1300377840517/23440420/SanctionsReview_InitiatingDiscussionBrief.pdf ("The sanctions system … provides accused parties an appropriate level of due process before a decision on sanctions is made."); The World Bank Group, Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks 8-9 (2010), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/13/000333038_20100614000033/Rendered/PDF/550000BR0SecM2101Official0Use0Only1.pdf (delineating the core due process principles that underlie the sanctions system of each of the MDBs in the cross-debarment agreement).

[8] World Bank Group President Jim Yong Kim has referenced a stronger rule of law as critical to ending poverty. *See* The World Bank Group, World Bank Group President Calls for a World Free of Poverty (April 2, 2013), http://www.worldbank.org/en/news/press-release/2013/04/02/world-bank-group-president-calls-world-free-poverty.

Former World Bank Group President Robert B. Zoellick regularly opined on the importance of building the rule of law. *See, e.g.*, Robert B. Zoellick, Foreword, The World Bank Legal Review, International Bank for Reconstruction and Development/International Development Association or The World Bank (2012), http://issuu.com/world.bank.publications/docs/9780821388631/1 ("The global financial crisis … reminded us that effective rule of law, including respect for property rights and access to justice, remains fundamental for inclusive and sustainable globalization.") The US Supreme court has, in various cases, held that it is imposing the rule of law not simply to affect a particular case but to prevent misconduct by law enforcement. *See, e.g., Mapp v. Ohio*, 367 US 643 (1961) (establishing the "exclusionary rule" to uphold due process and deter police misbehavior in search-and-seizure cases).

[9] *See* Leroy and Fariello, *supra* note 4, at 74.

[10] Hans-Joachim Priess, *Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Bank*, 45 Geo. Wash. Int'l L. Rev. 271, 274 (2013).

[11] *Olmstead v. United States*, 277 US 438, 485 (1928) (Brandeis, J., dissenting).

[12] H.K., Sec. and Futures Ordinance, §§ 182-83 (Cap 571).

[13] *See* DOJ, United States Attorneys' Manual [hereinafter, ***USAM***] § 9-11.150-151 (1997) (recognizing that "in the context of particular cases", subpoenas "may carry the appearance of unfairness", and that because "the potential for misunderstanding is great, before a known 'target' … is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target's voluntary appearance.") *See also* American Bar Association, Standards on Prosecutorial Investigations, Standard 1.4(b) (Feb. 2008), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html#1.4 ("Upon request and if known, the prosecutor should inform a person or the person's counsel, whether the person is considered to be a target, subject, witness or victim, including whether their status has changed, unless doing so would compromise a continuing investigation.")

[14] USAM, *supra* note 13, at § 9-11.151.

[15] *See* John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L. Rev. 341, 377-80 (2005).

[16] *See* Sec. and Exch. Comm'n Div. of Enforcement, Office of Chief Counsel, Enforcement Manual [hereinafter, ***SEC Enforcement Manual***] 22-25 (Oct. 9, 2013).

[17] Jean Eaglesham, *SEC Drops 20% of Probes After 'Wells Notice'*, Wall Street Journal, Oct. 9, 2013, http://online.wsj.com/news/articles/SB10001424052702304500404579125633137423664.

[18] *See* World Bank Sanctions Procedures at art. II (Apr. 15, 2012), http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctions_Procedures_April2012_Final.pdf.

[19] *See* The World Bank Group, Review of the World Bank Group Sanctions System, Multi-Stakeholder Consultation July-September 2013 [hereinafter, ***Multi-Stakeholder Consultation***], http://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctions_system_review_consultation_overview_2013.pdf.

[20] FAR 9.406-9.407 (2012).

[21] *See* Christopher R. Yukins, *Suspension and Debarment: Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int'l L. Rev. 219, 230 (2013) ("The US debarment system takes an open-ended approach to address performance risk and will, under appropriate circumstances, tolerate wayward contractors so long as those contractors have undertaken

strong remedial measures.") *See also* Suspension and Debarment: DOD Has Active Referral Processes, but Action Needed to Promote Transparency, US Government Accountability Office at 15-18 (Sept. 9, 2012), *available at* http://www.gao.gov/assets/650/648577.pdf (outlining contractor suspension and debarment processes used by the US Department of Defense and the myriad ways a suspension or debarment may be amended or terminated).

[22] *See, e.g., Pope v. County of Albany*, 687 F.3d 565, 570 (2d Cir. 2012) (articulating preliminary injunction standard); *LaRouche v. Kezer*, 20 F.3d 68, 74 (2d Cir. 1994) (articulating standard for granting a TRO); Fed. R. Civ. P. 65.

[23] *See American Cyanamid Co v. Ethicon Ltd* (1975) A.C. 396 (House of Lords); *Fellowes & Son v. Fisher* (1976) Q.B. 122; Hong Kong Civil Procedure 2014, Part A, Section 1 (Sweet & Maxwell eds., 2013).

[24] 2013 World Bank Group Ann. Rep. 23 (2013).

[25] 2010 Advisory Opinion, *supra* note 6, at 8. The Opinion also emphasizes the underlying legal basis for the sanctions regime, "often overlooked in the context of specific cases … the 'fiduciary duty' to protect the use of Bank financing in the Articles of Agreement." It states that the provision "not only provides the legal basis for the regime but it also delimits its scope." *Id.* at 1-2. *See also* Pascale Hélène Dubois and Aileen Elizabeth Nowlan, *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 Yale J. of Int'l L. Online 15, 16 (2010) (suggesting that the "outputs of a GAL-based approach to sanctions, such as a public record of jurisprudence, should help stakeholders hold the institution accountable for the sanctions system it creates.")

[26] 2010 Advisory Opinion, *supra* note 6, at n. 19 (stating it would "shortly issue a manual [hereinafter the 'Sanctions Manual'] consolidating and codifying all guidance materials on the sanctions process.")

[27] *See* Freshfields Report, *supra* note 1.

[28] The UK Serious Fraud Office (***SFO***) makes numerous publications available on its website, including the SFO Operational Handbook, the Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office, and The Director of Public Prosecutions and Guidance on Corporate Prosecutions. *See* UK Serious Fraud Office, Our policies and publications, *available at* http://www.sfo.gov.uk/about-us/our-policies-and-publications.aspx. In addition, the Crown Prosecution Service, responsible for prosecuting criminal cases investigated by the police in England and Wales, publishes detailed legal guidance related to its decision-making processes. *See* The Crown Prosecution Service, Legal Guidance, *available at* https://www.cps.gov.uk/legal/. The European Commission (***EC***) publishes on its website a variety of guidance materials in all areas of its expertise, in addition to several guidance documents in the field of public procurement law. *See* The European Commission, Public Procurement, *available at* http://ec.europa.eu/internal_market/publicprocurement/index_en.htm. The Securities and Futures Commission (***SFC***) of Hong Kong publishes on its website the results of its investigations in the form of new releases and statements of disciplinary actions, and also official guidelines on specific legal topics. *See* Securities and Futures Commission, News and Announcements, *available at* http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/. The SEC Enforcement Manual was referenced at n. 16. The DOJ and SEC recently published guidance on the Foreign Corrupt Practices Act. *See* DOJ, Criminal Division and SEC, Enforcement Division, A Resource Guide to the US Foreign Corrupt Practices Act (Nov. 14, 2012), http://www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml. Finally, the US Commodity Futures Trading Commission (***CFTC***) has published guidance on the Dodd-Frank Act. *See* US Commodity Futures Trading Comm'n, Dodd-Frank Staff Guidance, Questions and Answers, Memoranda, and Letters, http://www.cftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/index.htm.

[29] *See* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 Eur. J. of Int'l L. 187, 195 (2006), http://www.ejil.org/pdfs/17/1/68.pdf ("In classical administrative law systems, then, the rule of law normally requires that the government acts always within its powers; follows the proper procedures; and provides equality of access to courts and other machinery for adjudication.")

[30] *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 at arts. 14, 15, and 16; American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 at arts. 2, 18, and 26 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1; American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143 at arts. 3, 7-10, 24, and 25; European Convention on Human Rights, November 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 at arts. 5-7; African Charter on Human and Peoples' Rights, November 21, 1986, 21 I.L.M. 58 at arts. 3 and 7; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 at arts. 37 and 40.

[31] *See, e.g.*, Case of the Constitutional Court v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 69-70 (Jan. 31, 2001).

[32] *See* Universal Declaration of Human Rights, Dec. 10, 1948, GA res. 217A (III), UN Doc A/810 at 71 (1948) at arts. 10 and 11.

[33] *See generally* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005) (describing the field of GAL, including the emergence of global institutions that have adopted key principles employed in the decision-making of modern administrative states, including transparency, deliberation, reason-giving and participation). *See also* Global Administrative Law: The Casebook (Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald eds., 3d ed. 2012).

[34] *See* World Bank Information Note, *supra* note 7. *See also* Leroy and Fariello, *supra* note 6, at 17-19.

[35] Law Digest 40 at ¶ 34 (citing Sanctions Board Decision No. 45 ¶ 44 (2011)) ("Where the record showed the respondent had been aware of past problems and potential conflicts of interest involving its authorized representative and subsidiary, the Sanctions Board found the respondent's failure to even attempt to monitor or enact any controls over its authorized representative and subsidiary with regard to the bid at issue could be considered 'willful blindness.'")

[36] In the United States, a conscious avoidance instruction "permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact." *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000); *see also United States v. Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997) ("A conscious-avoidance instruction is appropriate when a defendant claims to lack some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate indifference.") (internal quotation marks omitted). In *United States v. Kaiser*, 609 F.3d 556, 566-67 (2d Cir. 2010), the court held that vacating a conviction was appropriate where "there is a reasonable probability that the jury convicted [defendant] on a conscious avoidance theory and that the jury would not have done so but for the instructional error." For commentary on the confusion the instruction has generated, *see* Fletcher N. Baldwin Jr. and Daniel Ryan Koslosky, *Mission Creep in National Security Law*, 114 W. Va. L. Rev. 669, 689 (2012) ("The doctrine of willful blindness, or as it may be termed, 'deliberate ignorance' or 'conscious avoidance,' is not new … Jurisdictions are varied on how loose or tight they are regarding what information the jury may use to infer guilt. Thus, prosecutions resting on a theory of willful blindness risk doctrinal overbreath and an inconsistent application of justice. … Willful blindness prosecutions often permit an inconsistent introduction of evidence that may otherwise have been barred as extrinsic to the crime charged."); *see also* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 Geo. J. Legal Ethics 187, 194 (2011) ("Federal courts have subsequently formulated the test slightly differently and disagreed over how readily judges ought to issue the conscious avoidance jury instruction, but they have universally adopted some version of the doctrine.") In the UK, in *Westminster CC v. Croyalgrange Ltd* [1986] 2 All ER 353, 359, Lord Bridge defined willful blindness as "the defendant … deliberately shut his eyes to the obvious or refrained from enquiring because he suspected the truth but did not want to have his suspicions confirmed". This willful blindness test has been confirmed by the Court of First Instance in Hong Kong in *Akai Holdings Ltd (In Liquidation) v. Thanakharn Kasikorn Thai Chamkat (Mahachon)* (2008) HKCFI 431.

[37] Law Digest 40 at ¶ 34.

[38] US courts have examined a much broader spectrum of this type of liability and tend to follow a landmark 1996 case called *In re Caremark International Inc. Derivative Litigation*. There, the Delaware Court of Chancery held that a corporate board has "a duty to attempt in good faith to assure that a corporation's information and reporting system, which the board concludes is adequate, exists," and that failure to do so "may … render a director liable for losses caused by non-compliance with applicable legal standards." *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996). Actual failure to prevent misconduct would not, the court held, render the system a total failure. Instead, in order to find a duty violation, the board must have failed to provide reasonable oversight in a "sustained or systematic" fashion, and the information reporting system on which the board relied must have been an "utter failure." *Id.* at 971.

[39] *See* Leroy and Fariello, *supra* note 4, at 50.

[40] *See* id.

[41] *See generally* Stephen B. Presser, Piercing the Corporate Veil 1439-1469 (Thomson Reuters ed. 2013) (discussing and comparing the veil piercing doctrine in Argentina, the UK, France, Germany, Japan); *see also* Karen Vandekerckhove, Piercing the Corporate Veil: A Transnational Approach (Kluwer Law International 2007).

[42] *See, e.g., On-Line Servs. Ltd. v. Bradley & Riley PC (In re Internet Navigator Inc.),* 301 B.R. 1, 6 (B.A.P. 8th Cir. 2003) ("[T]his Court is unwilling on this record to capsize the fundamental bulwark of corporate law that he corporate entity is separate and distinct from its individual members.")

[43] "It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods,* 524 U.S. 51, 61 (1998) (citing William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L.J. 193 (1929)). *See also Dole Food Co. v. Patrickson,* 538 U.S. 468, 474 (2003) (It is "[a] basic tenet of American corporate law…that the corporation and its shareholders are distinct entities" over which jurisdiction must be individually established); *Anderson v. Abbott,* 321 U.S. 349, 362 (1944) ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.")

[44] *See Bestfoods,* 524 US at 70 (holding that the common law allows veil piercing when 'the corporate form [was used] to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf"). We note that the well-established principle of corporate separateness is currently being discussed at the pinnacle of the United States legal system, the US Supreme Court. The question before the Court, in *Daimler AG v. Bauman*, is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that its indirect corporate subsidiary performs services on its behalf in the forum state. Numerous entities have submitted amicus curiae briefs on the behalf of petitioner Daimler AG. In the matter, the US Solicitor General has stated that the "principle of separate corporate personality pervades our legal system," and "forms the backdrop for the operation of other legal norms … and … molds the expectations of the corporations themselves and those with whom they interact." *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 19, *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (2013) (No. 11-965). The US Chamber of Commerce has described the presumption of corporate separateness as "a principle of great importance to companies, both foreign and domestic, that promotes, among other salutary goals, capital formation, credit extension, and regulatory compliance." *See* Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner at 4, *DaimlerChrysler AG*, 133 S. Ct. 1995. Similar views have been expressed by companies and legal foundations and in oral argument before the Court. *See* Brief for Viega GmbH & Co. KG and Viega International GmbH as Amici Curiae Supporting Petitioner at 7, *DaimlerChrysler AG*, 133 S. Ct. 1995 ("By providing a degree of assurance that corporate separateness will isolate a parent company from the legal risks associated with an American subsidiary, US corporate law has encouraged business growth and diverse investment by foreign companies.") *See also* Brief for New England Legal Foundation and Associated Industries of Massachusetts as Amici Curiae Supporting Petitioner at 6, *DaimlerChrysler AG*, 133 S. Ct. 1995 (describing the Supreme Court's "clear precedent honoring corporate separateness); Oral Argument of Thomas H. Dupree, Jr. on Behalf of Petitioner at 06:48, *DaimlerChrysler AG*, 133 S. Ct. 1995 ("By and large … most

other countries respect the corporate forum and that includes parent/subsidiary relations."); Oral Argument of Edwin S. Kneedler on Behalf of Petitioner at 22:49 ("In … our view, it's proper for the – for the Court to look to background principles of corporate law at least as a starting point or as a presumptive matter. And in this country, corporate separateness, under which a parent is not liable for the acts of a subsidiary, is the general rule.") To access the latter, *see* http://holmes.oyez.org/cases/2010-2019/2013/2013_11_965#argument

[45] *Salomon v. Salomon & Co., Ltd.*, [1897] A.C. 22. Reaffirmed in *Re.: International Tin Council*, [1897] 1 All E.R. 890, [1987] BCLC272, [1987] 3 All E.R. 257, [1988] 3 W.L.R. 1159, [1989] Ch. 309, C.A and *Maclaine Watson & Co. v. Department of Trade and Industry*, [1989] 2 A.C. 418, 3 All E.R. 523, 549 (H.L. 1989). In *Adams v. Cape Industries Plc*, considered to be a leading case on corporate separateness and limited liability, the court held that it "is not free to disregard the principle of *Salomon v. Salomon & Co Ltd.* merely because it considers that justice so requires." *Adams v. Cape Industries Plc.*, [1990] 2 W.L.R. 657, 753 (C.A.)

[46] *See, e.g., Wates Building Group Ltd. v. Jones*, Transcript of Hearing, Feb. 5, 1996 (C.A.) ("As to the doctrine of piercing the corporate veil, on which much argument was addressed to us, it must be borne in mind that this is a doctrine of very limited application in very special circumstances"); *Galmerrow Securities Ltd. v. National Westminster Bank*, Transcript of Hearing, December 20, 1993 (Ch.) (indicating that in some special cases the Court may look through the company and see its wholly controlling shareholder but that the cases in which the Court has done so are rare). *See also* Thomas K. Cheng, *The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the US Corporate Veil Doctrines*, 34 B.C. Int'l & Comp. L. Rev. 329 (2011).

[47] *Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain, 1970)* (merits stage) 1970 I.C.J. 3 at ¶¶ 45, 56 (Feb. 5).

[48] *See generally* Nora Wouters and Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal and Economic Developments*, 29 Emory Bankr. Dev. J. 387 (2013) and Robert R. Pennington, Company Law (6th ed. 1990) and Erik Werlauff, EC Company Law – The Common Denominator for Business Undertakings in 12 States (1993).

[49] *See generally* Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 Duq. L. Rev. 683 (2012).

[50] *See* Initiating Discussion Brief, *supra* note 7, at 16.

[51] *See* SEC Enforcement Manual, *supra* note 16, at 25-26.

[52] The World Bank Group, World Bank Sanctions Procedures § 13.06 (April 15, 2012) (referring multiple times to legal counsel engaged for the purpose of representing or advising a respondent in a World Bank sanctions proceeding).

[53] World Bank Sanctions Board Decision No. 60 at ¶ 60 (2013) ("Any suggestion that an interviewee's request to consult a lawyer in itself demonstrates non-cooperation or hinders INT's investigation may also raise concern as to the fairness of the investigation and consequently the reliability or weight of the evidence…")

[54] Code of Civil Procedure (ZPO), sec. 116 (Ger.) (also applying to administrative proceedings).

[55] Code on Administrative Penalties sec. 60 (Ger.).

[56] Code of Criminal Procedure (Strafprozessordnung), sec. 140 (Ger.); Code on Administrative Penalties sec. 60 (Ger.).

[57] Article 10 of the Hong Kong Bill of Rights provides: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…" Hong Kong Bill of Rights Ordinance, Laws of Hong Kong ch. 383, art. 10 (1991). In *The Stock Exchange of Hong Kong Ltd*

v New World Development Co Ltd (2006) 9 HKCFAR 234, the court discussed numerous factors to be considered in deciding whether fairness required representation and recognizing that no list of factors could be exhaustive and that the common law principles operated flexibly.

[58] *Echlin v. Superior Court of San Mateo County*, 13 Cal. 2d 368, 372 (Cal. 1939) ("[T]he right to change attorneys, with or without cause, has been characterized as 'universal'" and originates in English common law) (internal citations omitted).

[59] "It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client, and is intended to save him from representation by an attorney whose services he no longer desires…" *Gordon v. Mankoff*, 261 N.Y.S. 888, 89-90 (1931). *See also Sohn v. Brockington*, 371 So.2d 1089, 1093 (Fla. App. 1 Dist., Jun 13, 1979); *Herman v. Prudence Mut. Cas. Co.*, 235 N.E.2d 346 (Ill. App. 1 Dist., Feb 19, 1968); *MacLeod v. Vest Transp. Co.*, 235 F. Supp. 369 (N.D. Miss., Sep 25, 1964); *State ex rel. Seifert, Johnson & Hand v. Smith*, 110 N.W.2d 159 (Minn., Jul 07, 1961); *De Korwin v. First Nat. Bank of Chicago*, 155 F. Supp. 302 (N.D. Ill., Aug 23, 1957); *In re Lachmund's Estate*, 170 P.2d 748 (Or., Jul 02, 1946).

[60] *See* US Sentencing Comm'n, Federal Sentencing Guidelines Manual, § 2B1.1 (2012).

[61] *Id.* at § 3D1.1-5.

[62] *See, generally,* Offences Taken Into Consideration and Totality Definitive Guideline, Sentencing Council (effective June 11, 2012), http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs__totality_Final_web.pdf.

[63] *See* Kingsbury, *supra* note 33, at 40-41. *See also* Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* 4 (N.Y. Univ. Inst. for Int'l Law & Justice, Working Paper No. 2009/6, 2009); Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison 69 (Edoardo Chiti and Bernardo Giorgio Mattarella eds. 2011) (discussing the principle of proportionality in World Trade Organization dispute settlement).

[64] *See, e.g.*, Jacqueline Bell, *DOJ Faces Scrutiny Over Corporate Monitor Guidelines*, Law360.com, Mar. 13, 2008, http://www.law360.com/articles/50053/doj-faces-scrutiny-over-corporate-monitor-guidelines; Emma Schwartz, *Questions About Corporate Monitors*, US News & World Report, Mar. 12, 2008, http://www.usnews.com/news/national/articles/2008/03/12/questions-about-corporate-monitors; Associated Press, *Ashcroft: No conflict on monitoring deal*, NBCNews.com, Mar. 11, 2008, http://www.nbcnews.com/id/23578534/ns/politics-capitol_hill/t/ashcroft-no-conflict-monitoring-deal/.

[65] *See* SEC, National Exam Program (last modified Sept. 19, 2013), *available at* http://www.sec.gov/about/offices/ocie.shtml.

[66] For instance, in anti-dumping and countervailing duty investigations conducted before the US International Trade Commission and the Department of Commerce, the Department of Commerce will often travel to respondents' offices in a process known as "verification." Respondents' books and records are audited and facts successfully authenticated during verification and other findings form part of the evidence of record upon which the Department ultimately makes a determination.

[67] Memorandum from US Department of Justice Acting Deputy Attorney General Craig S. Morford to Heads of Department Components, United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008) *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[68] FY13 Annual Update, *supra* note 2, at 10.

[69] *See, e.g.*, *United States SEC v. Citigroup Global Mkts, Inc.*, 673 F.3d 158 (2d Cir. 2012); *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754 (4th Cir. 2011); *United States v. GE*, 397 Fed. Appx. 144 (6th Cir. 2010).