October 31, 2013

Comments for World Bank Group Sanctions System Review

Comments of Whitney Debevoise, Partner, Arnold & Porter LLP, Washington, DC:

I submit the following comments in connection with the World Bank Group's assessment of its Sanctions System in my individual capacity, as a person with an interest in the affairs of the Bank, heightened during my tenure as U.S. Executive Director, 2007 - 2010, and not on behalf of any client, present or past, of my law firm Arnold & Porter LLP.

The World Bank has long identified fraud and corruption as two of the greatest obstacles to economic development. In the last decade, the Bank has taken significant steps to create a more sophisticated system to prevent and combat fraud and corruption in connection with the use of Bank funds. Notably, in 2007, the World Bank implemented a two-tier review system to create a process to review conduct by firms and individuals who may have engaged in wrongdoing in World Bank-financed projects, and to impose sanctions where appropriate. This system has succeeded in many important cases in tackling fraud and corruption in World Bank projects by punishing contractors that have engaged in improper actions and also ensuring that countries, companies and individuals benefiting from World Bank projects are held to the highest ethical standards.

As a result of the Bank's increased vigor in enforcement, firms and individuals have been called to account for misuse of World Bank funds, particularly in the areas of fraud and corruption. The World Bank's 2012 decision to publish decisions of the Sanctions Board marked an important step in increasing public awareness of the Sanctions System and providing additional guidance to the public as to what conduct the World Bank considers sanctionable. I encourage the Bank to continue this effort and look for others ways to be sure the public fully understands the Bank's Sanctions System and the way it handles investigations and penalties. The Bank's various publications, including INT's annual report, facts and figures and on-line guidance, and public discussion by the Sanctions and Debarment Officer all contribute toward this goal.

I appreciate the manner in which the World Bank is conducting the current review of its Sanctions System. Inviting stakeholders to attend public consultations—as well as extending the period for comment—allows private entities to provide important feedback on how they perceive the Sanctions System, which can only serve to improve the process. I have no doubt that the World Bank will continue to work hard to develop its Sanctions System in the best possible manner.

I understand that the current review addresses implementation of the reformed and reconfigured sanctions process, the impact of the sanctions regime on World Bank operations, and the legal adequacy of the system in light of current developments in national and international law.

The Initiating Discussion Brief indicates that most sanctions imposed today involve debarment (for three years) with conditional release in accordance with the Sanctions Guidelines. There is also discussion of a concern by staff with lengthy INT investigation periods, which expose Bank

operations to risk while a party is under investigation but formally not debarred (so-called "window of vulnerability"). One answer in this area, particularly involving larger contractors, may be to take better advantage of the publication of sanctions decisions and the Voluntary Disclosure Program, a subject not addressed in any depth in the Initiating Discussion Brief. At present, even with credit for cooperation, a large company respondent that has expended considerable time and treasure conducting a thorough internal investigation of potential misconduct, typically ends up with a three year debarment with conditional release, and possibly with a several year compliance monitoring obligation. Internal investigations and ongoing compliance monitoring cost a company money, which might be seen as an indirect economic fine. Frequently, a part of the investigation process includes a company's "voluntary" undertaking not to bid on Bank projects during the conduct of an internal investigation. When this occurs, the staff concern about the risk of c**o**ntracting with a potential bad actor is mitigated, but for the company, the period of voluntary abstention from contracting essentially becomes an additional period of debarment. (The review might attempt to measure the extent and economic cost for companies of voluntary agreements pending an investigation.) If large companies engage in large scale violations, particularly persistent violations resulting from a serious lack of adequate controls, they should appropriately be sanctioned with the accumulation of voluntary absence from the market and formal debarment, including cross-debarment. On the other hand, companies with a compliance program and a sincere commitment to preventing corruption should have incentives to report early and to obtain credit for any period of voluntary withdrawal from the World Bank market when settlement agreements are negotiated or sanctions are imposed. Further, in such cases, INT investigators should not automatically hold back waiting for national authorities to investigate, thereby extending the period of uncertainty for companies and for Bank staff. Instead, the system should create incentives for companies to investigate, confess, settle and remediate quickly, particularly when the signals are that a company is the victim of a bad actor as opposed to a systematic flouting of the rules. More generally, now that the penalties associated with certain recurring fact patterns are being published, the Bank should seek ways to increase the frequency with which contractors use the Voluntary Disclosure Program.

Some of the delay in processing cases may relate to defects in referrals to the Office of Suspension and Debarment. Although the quality of charging documents has improved over time, it is important that INT have the budget needed to hire personnel experienced in the drafting of debarment and other complaints.

With respect to the suggestion that the Sanctions Board sit in three-member panels instead of a full seven-person Board, it is important to recall the recent reform involving the naming of a Board chair who is independent of the Bank. If the proposed reform is adopted, the same principle should hold true for smaller benches, namely that the head of any three-person panel also be a Sanctions Board member independent of the Bank.

The Initiating Discussion Brief indicates that an increasing number of cases may arise outside the procurement system. This phenomenon should be encouraged as it is consistent with the mandate of the Bank in the Articles of Agreement concerning the protection of Bank resources. Unfortunately, project supervision has not always been viewed on a par in importance with project design and approval, and project supervision budgets typically reflect this fact. Project

supervision is not glamorous but it is fundamental in the integrity agenda. It can also be also expensive; one round-trip ticket and a week's lodging and ground expenses for a project supervision mission halfway around the world from the Washington headquarters can easily run $10,000-$15,000, which might be a quarter of a project supervision budget. But if the anti-corruption mission is to be taken seriously, supervision budgets will need to increase.

I am grateful for the opportunity to comment, applaud the Bank for continuous progress in fighting fraud and corruption, and look forward to following the development of the World Bank Sanctions System.

Sincerely,

Whitney Debevoise