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Transparency International's Submission to the Consultation Process on the World Bank's Sanctions System

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The World Bank's sanctions system is one of the cornerstones of the Bank's anti-corruption efforts. The Bank's sanctions system also plays an essential role in advancing the Bank's core development goal of ending poverty by helping to ensure that Bank funds flow to their intended beneficiaries. Furthermore, the Bank's sanctions system serves as an example to countries in which the Bank does business of the importance of the rule of law, the fight against corruption, and transparent, effective, and fair sanctions processes.

Transparency International (TI) commends the Bank on its commitment to the fight against corruption through the continued development and improvement of its sanctions system. As a movement devoted to the fight against corruption, TI has a long-standing interest in ensuring that the Bank, as one of the world's largest public providers of development assistance, maintains rigorous anti-corruption measures in all of its activities.

In July 2013, the World Bank launched a consultation with external stakeholders on its sanctions system. As part of the consultation process, the Bank released an Initiating Discussion Brief[1] which summarized the findings and recommendations made in an internal report provided to the Bank's audit committee. TI would like to begin by underscoring the importance of providing adequate resources to all parts of the sanctions system, of keeping separate and distinct the system's adjudicatory and investigatory functions, and of maintaining the system's two-tiered structure. In addition to these general points, TI makes **five main recommendations** regarding the Bank's sanctions system:

1. **Increase the system's transparency,**
2. **Improve the effectiveness of investigations,**
3. **Institute a compliance program prerequisite to bid,**
4. **Increase the flexibility of the sanctions guidelines, and**
5. **Promote greater participation by small and medium-sized enterprises (SMEs).**

A sanctions system that is transparent, effective, and fair will be one that will best fulfill its corruption fighting role[2].

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[1] http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23438083~pagePK:148956~piPK:216618~theSitePK:445634,00.html

[2] In addition to the five main recommendations, TI notes that it opposes any lowering of the standard of proof below more probable than not for Early Temporary Suspension (ETS). More probable than not is the lowest standard of proof applied by legal systems and any lower standard of proof would undermine the fairness of the system. As the Bank does business in many countries that are struggling to establish the rule of law, it should be cognizant that the

1. Increase Transparency

Transparency is an essential ingredient of legal and administrative law systems, and the sanctions system is no exception. A sanctions system where procedures, opinions, guidelines, settlements, and sanction decisions are fully transparent will deter corruption by making it clear to all that corrupt practices and actors will be publically identified and sanctioned, while simultaneously instilling confidence in the fairness of the system. In a fully transparent sanctions system, respondents, Bank project teams, client countries, and project beneficiaries will all be able to assure themselves that they have been treated fairly and equitably, and will be able to look to past cases for guidance as to how their case may be handled.

TI commends the Bank for the numerous steps that it has taken over the last few years to make the sanctions system more transparent. The decision to publish a law digest summarizing Sanctions Board (SB) decisions was an important first step, and the more recent decisions to publish SB decisions as well as final Suspension and Debarment Office (SDO) decisions and the General Counsel's Advisory Opinion No. 2010/1[3] have resulted in a system that is far more transparent than it was before.

However, there are still additional steps that the Bank should take in order to create a more transparent sanctions system.

- **The Bank should make publically available the full legal and policy framework of the sanctions system, including the Sanctions Manual and those Advisory Opinions of the General Counsel that relate to the sanctions system.**

- **The Bank should publish final SDO decisions containing a finding of fact and conclusion of law.** Including a finding of fact and conclusion of law in SDO decisions would be particularly beneficial towards increasing transparency and providing guidance, as the SDO decision is not appealed and is therefore the final decision in 68% of cases.[4]

- **The Bank should identify by name in SB decisions those respondents found culpable.** The details of the corrupt, collusive, and/or fraudulent practices for which respondents have been found culpable should be clearly attributed to the responsible parties. Furthermore, the naming of culpable respondents in SB decisions would in and of itself act as an additional deterrent to corruption, as firms would be less likely to risk the potentially enormous reputational damage entailed by being named in a SB decision (and thereby linked to specific corrupt, collusive, and/or fraudulent acts).

- **The Bank should also make the settlement process more transparent by issuing public statements for all settlements rather than selectively disclosing them as is currently the case.** These public statements should consistently cover salient details including the respondents' names (companies and individuals), the nature of the wrongdoing, the sanction imposed, mitigating and aggravating circumstances, and any other terms of the settlement.

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fairness and procedural due process guarantees in its sanctions system may be used to promote rule-of-law and good governance best practices around the globe, thereby further advancing its development goals.

[3] http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23440937~pagePK:148956~piPK:216618~theSitePK:445634,00.html

[4] *See*, Initiating Discussion Brief, page 4.

2. Improve the Effectiveness of Investigations

TI is concerned that the relative paucity of large corruption cases is undermining the sanction system's effectiveness at deterring corruption in Bank-financed projects and at protecting the Bank's development goals. While the Bank has had some recent successes investigating large corruption cases, 86% of sanction cases have involved allegations of fraudulent practices and only 12% of cases have involved allegations of corruption.[5] Of the fraudulent practice cases, the "vast majority" has involved forgery of bidding documents.[6]

TI is also concerned about the time being spent on investigations of small fraud and forgery cases. Deterrence theory states that the effectiveness of a legal regime at deterring prohibited conduct is determined by the certainty, severity, and swiftness of punishment. And yet on average, the Integrity Vice Presidency (INT) takes slightly more than two years to complete an investigation and present a case to the SDO.[7] Moreover, a review of published SB decisions also reveals that many INT investigations begin several years after the fraudulent and/or corrupt practices are alleged to have occurred. Indeed, the SB has considered the delay in investigation as a mitigating factor in several cases.[8] While TI recognizes that large corruption investigations often require lengthy investigations, it is concerned that the long investigations of simple forgery cases combined with frequent delays in initiating investigations are undermining the effectiveness of the sanctions system at deterring corruption and fraud.

There are several ways in which the Bank could improve the effectiveness of INT's investigations.

- **INT should prioritize investigations of cases where significant Bank funds have been stolen or wasted, where corruption or fraud pose a threat to the project's quality or completion, where there is significant reputational risk to the Bank, or where large corruption or collusion schemes indicate weak governance in the project country.** In order for the sanctions system to fulfill its role of protecting Bank funds and deterring corruption, investigations must be carefully prioritized for maximum impact.

- **The Bank should incentivize such a prioritization through the adoption of appropriate performance standards**, as mentioned in the Initiating Discussion Brief.[9] Such performance standards should be finely calibrated to measure INT's performance not simply as a function of the number of cases investigated, but as a function of the types of cases investigated and their development impact.

- **INT should develop a risk-based, proactive means of identifying and evaluating high-value projects that are likely to fall victim to corruption and/or fraud** rather than exclusively relying on tips or complaints. A risk-based investigatory approach would often allow the Bank to uncover fraud and corruption at an earlier stage of the project, thereby enabling more rapid interventions in order to protect the Bank's interests. Such a proactive approach would also bring to light possible indicators and other red flags of corruption that might allow the Bank to mitigate specific corruption risks in all of its projects.

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[5] *See*, id. at 8.
[6] *See*, id.
[7] *See*, id.
[8] *See*, Sanctions Board Decisions 46, 47, 48, 50, and 53.
[9] *See*, Initiating Discussion Brief, page 6.

- **The Bank should develop performance standards that set strict time limits for smaller fraud and forgery investigations while providing INT with the time and resources necessary to carry out lengthier, proactive, risk-based investigations** of the types of larger corruption cases that significantly undermine the Bank's developmental goals.

3. Institute a Compliance Program Prerequisite to Bid

The Bank should adopt a policy requiring that firms who bid on Bank-financed contracts over a certain monetary threshold already possess a robust compliance program. Indeed, making a compliance program a prerequisite for bidding on certain contracts is already a feature of other procurement systems.[10]

The advantages of such a prerequisite for bidding would be numerous. **First**, a compliance program prerequisite has the potential to prevent corrupt and/or fraudulent practices before they happen. **Second**, by making a compliance program a prerequisite for bidding, the Bank would be sending a strong signal about the importance of ethics and compliance in international business. The Bank would serve as a vector of best practices, incentivizing the development of compliance programs in industries and geographies where compliance may have been previously a foreign concept. **Third**, firms that have already developed robust compliance programs are more likely to self-report should they internally uncover fraudulent or corrupt practices, thereby reducing the Bank's fiduciary risk. **Fourth**, firms that have already developed compliance programs will be more likely to engage with the Integrity Compliance Office (ICO)[11] should their sanction be conditioned on specific rehabilitative actions.[12]

4. Increase the Flexibility of the Sanctions Guidelines

The Bank should develop flexible and transparent guidelines for the imposition of all five possible sanctions[13] much as it has already done for debarment with conditional release. Under the current system, a three-year period of debarment with conditional release is the baseline sanction. This baseline sanction may be increased or reduced based on aggravating and mitigating factors.[14] While debarment with conditional release has the laudatory quality of requiring debarred firms to engage in rehabilitative efforts, usually in the form of the development of a compliance program, in order to be removed from the Bank's debarment list, it may not be the appropriate sanction in all cases. The Bank should move beyond the notion of a baseline sanction and instead utilize the full panoply of available sanctions in order to more closely tailor the sanction to the wrongdoing.

5. Promote Greater Participation by SMEs

As noted in the Initiating Discussion Brief, the sanctions system has had trouble engaging with and obtaining responses from SMEs.[15] Indeed, lack of SME participation presents the risk that large numbers of SMEs will be *de facto* indefinitely debarred. The indefinite debarment of large numbers

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[10] *See*, *e.g.,* United States Federal Acquisition Regulation 52.203-13.
[11] The Bank should make the ICO fully independent of INT. Notions of fairness and separation of powers suggest that the body charged with seeing that respondents fulfill any requirements as part of their sanction be independent from the investigatory/prosecutorial body that sought the sanction in the first place.
[12] Instituting such a compliance program prerequisite to bid touches directly upon the Bank's procurement procedures. This connection highlights the fact that many of the reviews that the Bank is currently undertaking cover policies that are linked to one another. TI urges the Bank to coordinate its ongoing review processes so that these linkages may be better addressed.
[13] Indefinite or fixed-term debarment, debarment with conditional release, conditional non-debarment, reprimand, and restitution.
[14] *See*, http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf
[15] *See*, Initiating Discussion Brief, page 11.

of SMEs by the World Bank risks decreasing competition and permanently damaging businesses in client countries.

There are concrete steps that the Bank should take to increase participation by SMEs.

- **The ICO, INT, the SDO, and the SB should develop standard documents in all of the major world languages used in the countries in which the Bank does business that explain the sanctions system and the role of these bodies in the system.**

- **The Bank should draw on staff members which are able to answer questions from respondents in the major world languages used where the Bank does business.**

- **The Bank should "re-sequence" the first tier proceeding**, as recommended in the Initiating Discussion Brief.[16] This would give respondents the opportunity to file a response to INT's statement of accusations and evidence (SAE) prior to the SDO making a decision. As the system currently works, the first communication that respondents receive from the SDO is a notice of temporary suspension informing them of the imposed sanction and their ability to contest the decision. Such a notice may be perceived as a *fait accompli*, particularly by SMEs who are not as well-informed of the process, and may discourage them from engaging with the sanctions system. More broadly, it should also be noted that allowing respondents to provide pleadings before the SDO makes a decision is consistent with notions of fairness and due process.

6. Conclusion

The Bank has made great strides in developing a sanctions system that is transparent, effective, and fair. However, as noted above, there are several additional steps that the Bank should take to further improve its sanctions system. TI would like to conclude by again stressing the centrality of the Bank's anti-corruption policies, including the sanctions system, to the realization of its goal of ending extreme poverty. The sanctions system protects the Bank's funds from fraud and corruption through its deterrent effect and also serves as a mechanism for the implementation and demonstration of anti-corruption and good governance best practices. TI strongly supports the sanctions system and urges the Bank to continue making it more transparent, effective, and fair. TI looks forward to continued engagement with the Bank during this review process.

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[16] *See*, Initiating Discussion Brief, page 16.