World Bank 2013 Phase I Sanctions Review Stakeholder Consultation

Comments of the U.S. Defense Bar

October 31, 2013

I. Introduction

At the request of the Audit Committee of the World Bank ("Audit Committee"), World Bank Group Management ("Management") was asked to review its sanctions system ("Sanctions Review"). The review is to be conducted in two phases, and is designed to assess and evaluate the implementation of the sanctions system thus far. The current Phase I is a stock-taking exercise undertaken to evaluate the implementation, efficiency and effectiveness of the Sanctions System and to identify possible areas for improvement. The World Bank ("Bank") has therefore tasked the Legal Vice Presidency of the Bank, led by a Sanctions Review Team ("Review Team"), to conduct consultations with external stakeholders to solicit feedback on the sanctions system. At the request of the Review Team, the Anti-Corruption Committee[1], of the Section of International Law, American Bar Association, coordinated with its members who have represented respondents in investigations, settlements, and sanctions proceedings, to facilitate these members' participation in the Consultation. These members hereby submit the following comments concerning the Sanctions Review.

II. General Overview

The contributors to these comments have extensive experience with the World Bank investigation and sanctions regime, in some cases dating back to the days of the first Sanctions Committee and the Operational Memorandum. At the outset, we want to note that we agree with the interim Sanctions Review assessment that over the last fifteen years, the World Bank has made significant progress in its development of a more fair and transparent sanctions system. Most notably, over the past decade the Bank has (1) instituted a measure of checks and balances through the institution of a two-tiered sanctions process; (2) through the publication of Sanctions Board decisions, significantly increased not only the transparency of the system but also the fairness of the process for respondents; (3) increased the quality and reasoning behind Sanctions Board decisions and the overall credibility of such decisions through the appointment of a majority external body and external chair; and (4) established a better balance between the concepts of punishment for past conduct and present responsibility. We applaud the Bank for taking these steps.

[1] This document is a committee working document and has been circulated for information only. Unless and until it has been formally approved or adopted by the House of Delegates or the Board of Governors of the American Bar Association, it does not represent the policy of the American Bar Association. The Section of International Law, through its Council, makes policy recommendations to the House of Delegates and the Board of Governors. No inference of a position or policy of the American Bar Association may be drawn from the circulation of this working document.

We do not agree that "the current [sanctions] system has reached an appropriate degree of balance between due process and efficiency."[2] We believe, in fact, that there is much more the Bank can and should do. As the impact of sanctions has grown, in terms of the number of cases, the nature of sanctions, the targets of sanctions, and the effect of sanctions (through cross-debarment and other collateral effects), the importance of a transparent and balanced process for investigation and sanctions which meets due process standards for those adversely affected also grows.

In our view, one of the highest priorities from the standpoint of due process and fundamental fairness should be for the Bank to create true "equality of arms" within its sanctions regime. The obligation to provide a fair and balanced process is well-established in both international and domestic laws and is derived from the fundamental right to a fair process and the principle of "equality of arms."[3] While World Bank sanctions cases are administrative rather than criminal in nature, that difference is immaterial to the issue of creating a fair process. In many jurisdictions where there is no corporate criminal liability, legal regimes establish comparable civil and administrative sanctions for juridical persons.[4] The line between criminal and civil/administrative sanctions is thus blurred when, as with determinations as to whether sanctionable practices have occurred, questions of corporate responsibility for conduct that in most jurisdictions has a core criminal character, are considered. The severity of the potential consequences of sanctions, including corporate death, also makes the distinction immaterial. Furthermore, the fact that the World Bank regularly makes referrals of matters to national authorities including criminal authorities, and the extent to which the World Bank regime is intertwined with national law enforcement, is further reason why categorizing the World Bank system as purely administrative fails to capture its true essence. Moreover, "equality of arms" is a principle applied in the international legal system not just to criminal matters, but also in civil matters, such as international arbitration.[5]

To create equality of arms, the Bank must do more, as discussed more fully below, to (1) prevent investigative overreaching and misconduct; (2) provide balance to the written and oral sanctions process which is currently fundamentally unbalanced in favor of the Integrity Vice-Presidency ("INT"); and (3) enhance the transparency of all aspects of the sanctions process.

In addition, we believe that the Bank should remedy what we find to be a lack of proportionality between certain misconduct and the resulting or recommended sanction and improve the credibility of the sanctions system by implementing an-all external Sanctions Board.

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[2] Review of the World Bank Group Sanctions System Consultation Plan, page 5.

[3] *See* The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure, Stefania Negri (2005); *see also Brandstetter v Austria* (1991) 15 EHRR 378 at 413-414 (paras 66-67)) and *Rowe v United Kingdom*, (App no 28901/95), Eurpoean Court of Human Rights, 8 BHRC 325 (20 OCTOBER 1999).

[4] Indeed, the OECD Convention on Combatting the Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (hereinafter, OECD Bribery Convention), requires this. *See* Article 3. To that end, numerous countries whose legal systems do not recognize corporate criminal liability, e.g., Germany, have adopted laws that create comparable civil and administrative penalties for legal persons.

[5] *See, e.g,*. United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, Section 17 (2010).

We also recommend that the Integrity Compliance Officer function be made completely independent of INT.

These issues are discussed below.

III. INT Investigations

INT has many committed and talented individuals and we applaud them for the preventive, investigative, and prosecutorial work they do to promote the World Bank's anti-corruption agenda. However, our collective experiences with INT suggests there are some areas for improvement. Of particular note, we have observed (1) extensive variations in the quality of investigations and approaches to investigations by INT personnel; (2) problematic conduct on the part of INT in witness interviews and document collection, especially concerning their attitude toward defense counsel; (3) misleading statements to companies during the interview process, particularly with respect to their overreaching interpretation of the audit clause; and (4) instances of conduct which raised ethical issues under relevant standards of conduct or significant questions about INT's compliance with its obligations under the Sanctions Procedures. Given these issues, mechanisms for periodic assessments of INT's work to ensure that international standards for professional investigators are being met may be warranted. In addition, we would be highly concerned with the Review Team's suggestion that there "is room" to expand INT's "tool kit".[6] While we do not know what specific ideas are contemplated, as these are not detailed in any documents made publicly available in connection with this Review, we urge the Review Team to look skeptically at INT's assertions that its investigative tools are too limited for it to be effective.

A. Investigations Quality

Our collective experiences evidence highly varied differences in the quality and approach by INT to investigations. We note that some INT investigators make serious efforts to understand the full range of facts and circumstances surrounding potential misconduct. Others, however, seem to barely scratch the factual surface before leaping to unsupported conclusions and submitting a Statement of Accusations and Evidence ("SAE") to the Suspension and Debarment Officer ("SDO").

INT investigators should, at a minimum, make a good faith effort to understand the full set of facts and circumstances behind a potential violation, and not solely those that the investigator concludes may lead to a sanction. The mere initiation of sanctions proceedings is highly damaging to respondents, and often results in costly, and sometimes crippling, temporary suspensions as well as substantial legal fees. The Bank must do more to prevent insufficient, poor, incomplete, or careless fact finding, as well as investigations that are rushed to meet an arbitrary deadline. Further, we would encourage INT investigators to act as independent fact-finders, as opposed to how they are currently perceived, which is as an investigative body for a prosecuting authority that often ignores, dismisses, or minimizes exculpatory evidence.

[6] *See Initiating Discussion Brief* at 17.

The fact that the SDO returns at least 40% of sanctions referrals from INT for further development is an indicator of some of these problems.[7]

We encourage the Review Team to consider ways in which the Bank can ensure INT investigations are completed thoroughly and fairly. At a minimum, we believe there should be greater supervisory oversight to ensure all investigations use a rigorous process of fact gathering and fact testing. Without such a process, we believe we will continue to see a substantial number of SAE's submitted with serious factual gaps with prejudice to the respondent(s). INT investigative policies, protocols and guidance for investigations should be reviewed by outside bodies to ensure that they conform with international standards.

B. Witness Interviews

We have seen multiple instances of problematic conduct on the part of INT investigators during witness interviews, particularly concerning their attitude toward defense counsel. In particular we have seen: (1) INT investigators refuse to allow legal counsel to participate in interviews; and (2) INT investigators advise witnesses and respondents not to involve counsel.

We believe such conduct is fundamentally unfair, and to the extent information gathered through such interviews is referred to national authorities, improper as well. Any request for legal representation should be respected by INT out of basic fairness and due process. INT is composed of professional investigators, and/or professionally trained lawyers. Witnesses may or may not understand the sanctions process and/or their rights. To deny a request for legal representation is wrong. And to advise a witness not to retain counsel is improper. To contact witnesses who are known to be represented by counsel without going through counsel is simply unethical.

Further, INT has a policy and practice of referring information gleaned from its investigations to national authorities. Such referrals may implicate different rights: those of the State to which the information is being referred. National laws provide protections to witnesses, such as constitutional protections against self-incrimination. The fact that INT regularly attempts to restrict legal representation under these circumstances is troubling.

C. Misinterpretation of the Concept of Obstruction

In our experience, INT personnel sometimes misconstrue the concept of obstruction. There have been numerous instances in which INT personnel have told a potential respondent that any failure to cooperate is obstruction and subject to either sanction or cause for aggravating credit, even when the potential respondent has no duty to provide the requested information under the terms of the World Bank contract. This construction is even more troubling when viewed in conjunction with INT's refusal to allow, or advise against, the use of counsel. There have also been instances where witnesses are threatened by INT with increased risks of criminal prosecution by national authorities if they fail to cooperate.

[7] *Initiating Discussion Brief* at 4. To the extent submissions are rejected more than once, which the article suggests is the case, something as to which we have no public information, this is even more troubling.

D. Concerns with INT Conduct

Many of our clients have had concerns with INT conduct. Of particular note, we have seen (1) instances of INT's failure to abide by its obligations to disclose exculpatory and/or mitigating evidence, (2) instances of INT personnel disclosing confidential information to parties not authorized to receive the information and (3) use of settlements to deprive respondents of their right under the Sanctions Procedures to information in related cases.

1. Failure to Disclose Mitigating and Exculpatory Evidence

INT is required by Section 3.02 of the Sanctions Procedures to disclose all relevant evidence in its possession that could reasonably be considered exculpatory or mitigating. Section 3.02 states:

> *In submitting a Statement of Accusations and Evidence to the Evaluation Officer, INT shall present all relevant evidence in INT's possession that would reasonably tend to exculpate the Respondent or mitigate the Respondent's culpability. If any such evidence comes into INT's possession subsequently, such evidence shall be disclosed by written submission to the Evaluation Officer or Sanctions Board, as the case may be.*

Further, the obligation to disclose mitigating and exculpatory evidence to the defense is well-established in international law and is essential to fundamental fairness and due process and the goal of achieving equality of arms.[8]

However, it has been the experience of numerous defense counsel that INT sometimes fails to live up to these obligations, thus frustrating respondents' right to a fair process. Disclosures are not made at all, are made too late in the process to be helpful, or are over- or under-inclusive. The Sanctions Board thus far has not effectively addressed these inadequacies. Until INT is required to abide by the rules set forth in the Sanctions Procedures (as well as international norms), the Bank will never achieve equality of arms and thus a fair and just sanctions process. We urge that the role of the SDO be expanded to include oversight of compliance with this requirement, and that INT be required to develop a protocol for the identification and tracking of potentially responsive information to aid in the management and oversight of this process.

2. Disclosure of Confidential Information

[8] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2690-Red2, Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', 7 March 2011, TC I, at 198; *Prosecutor v. Tadic*, International Tribunal for Yugoslavia, Case No. IT-94-T, 1996 WL 33339828; *R v. Stinchcombe*, 3 S.C.R. 326 (1991); *Lemay v. The King*, 1 S.C.R. 232, 257 (1952); *R v.* Carosella, 1997 Can.Sup.Ct. Lexis 11 (1997); *see also Stinchcombe*, 3 S.C.R. 326; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009); *United States v. Noriega, et al*, CR 10-01031(A)-AHM; *R v. O*, 2007 EWCA Crim 3483, 2007 WL 4610678 (2007).

A number of our clients have been the victim of INT disclosures of confidential information to parties not entitled to receive such information. In some cases, as discussed below in Section IV, such disclosures have resulted in unofficial, or "shadow", but nonetheless crippling *de facto* sanctions. Whether or not such consequences occur, however, such disclosures are improper. We call on the Bank to enforce its own confidentiality provisions and require INT to play by the same set of rules it demands of our clients.

3. Use of Settlements to Subvert Information Rights

The Sanctions Procedures give respondents the right to secure information about related cases. Specifically, Section 5.04(b) provides that:

> *The Secretary may, at any time and upon approval of the Sanctions Board, make materials relating to sanctions proceedings against a particular Respondent available to other Respondents in sanctions proceedings involving related accusations, facts, or matters….*

While we generally favor the use of settlements, in cases involving multiple independent parties, settlement with some parties has been used by INT as the basis for frustrating these information rights. While it may be appropriate for the terms of settlements themselves to be confidential, there is no justification for confidentiality of the underlying facts, particularly when this flies in the face of the clear requirements of the Sanctions Procedures. We urge that the role of the SDO be expanded so that in settlements with respect to projects or contracts where there may be sanctions referrals, the rights of respondents in such proceedings are not frustrated. Specifically, the SDO should have the authority to examine the file and to determine what information should be kept confidential and what information should be shared with respondents.

Generally, there appear to be very few checks on INT's conduct, and even when raised up the INT and/or Bank chains of command, very little appears to be done to prevent or mitigate INT's improper actions. INT's conduct has prejudiced the rights of our clients and tainted the credibility of the Bank's program. It also puts the Bank's privileges and immunities at risk. It is only a matter of time before the Bank will face litigation in this area.

We urge that the World Bank Institute External Advisory Council ("Advisory Council") be asked to include within its scope of activities a review of INT's conduct and that an anonymous complaint mechanism be established so that counsel and others concerned by the conduct of INT personnel can report such conduct for investigation. We further urge the Bank to require INT investigators to inform all witnesses at the start of an interview of their rights to raise issues to the Advisory Council or a similar body. We also urge all INT policies, procedures, protocols, and guidelines to be made public, consistent with the World Bank's commitment to transparency. We also urge the Bank to adopt a Code of Conduct for INT with respect to the conduct of investigations. Such a Code should be developed through external consultation and overseen by the Advisory Council or a similar body.

An anonymous reporting mechanism is critical as INT currently seeks to retaliate against counsel who oppose it. Prospective clients have reported to us a punitive attitude on the part of

INT, for example, seeking to deny companies their choice of monitors who are experienced and knowledgeable about the World Bank's standards and system, simply because such counsel or his or her firm has opposed INT in the past.

Given that INT investigators come from many jurisdictions, other complaint tools, such as complaints to national bar authorities, will not be universally available. Existing complaint mechanisms regarding World Bank staff in general may not be adequate, either, given the specialized nature of INT's activity.

E. "Room for Additional Tools"?

The Sanctions Review suggests that there may be room for additional tools that can be provided to INT. We do not understand what this means, but are concerned that any additional "tool" or authority given to INT may lead to further room for abuse. We urge that any additional tools be the subject of careful deliberation and external consultation.

F. **Investigatory Versus Prosecutorial Function**

Currently, INT acts as both investigator and prosecutor. While different teams within INT have been developed for these different functions, having both housed within INT can result in lesser objectivity about the merits of a case and may contribute to some of the issues identified above. One solution could be to separate those functions, and move the prosecutorial function out of INT. At least some members of the bar favor this approach.

II. Sanctions Referrals

A. First Stage (SDO)

In general, we believe that the SDO stage is working as intended. We do not favor any dilution of the standard used by the SDO to determine whether a sanctions proceeding should be initiated and a notice issued. Given the concerns raised above regarding INT, we believe that the SDO is an important check on prosecutorial discretion. Any reduction in the burden of proof at this stage would likely result in additional respondents receiving unwarranted temporary suspensions based on flawed and incomplete investigations.

We also call on the Bank to track and regularly publicize the number of INT SAE referrals returned one or more times on an annual basis. We understand that currently, nearly 40% of all SAE's are returned without action to INT. We believe that publication of this figure would pressure INT to conduct more thorough and proper investigations and to submit SAE's only when they have sufficient evidence of misconduct. Over time, we would expect the number of returned referrals to decrease.[9] Just as the World Bank has focused on the time required for INT to conduct an investigation and the time consumed in the sanctions process, so too should it spotlight (and evaluate INT performance on the basis of) the quality of the submissions it makes.

[9] We would expect there would inevitably be some cases that would not pass the SDO screening, so zero percent is probably not realistic.

We also agree that respondents should be provided notice and an opportunity to be heard prior to the issuance of a Notice by the SDO. Such an opportunity would bring the Bank closer to providing equality of arms in this first stage of the process and would provide respondents the ability to challenge potentially flawed INT investigations prior to the issuance of a temporary suspension and its resulting hardships. We also urge establishment of a mechanism for consideration of requests for modifications of early temporary suspension orders of the SDO for good cause. Decisions of the SDO on requested modifications should be at least as reasoned as the initial Notice.

We strongly disagree, however, with the proposal that INT be given the right to appeal decisions of the SDO, whether in relation to early temporary suspension or otherwise. INT already has the unlimited right to resubmit sanctions referrals that are returned by the SDO. In our collective experience, the fact that 40% of sanctions referrals are returned to INT without action is a symptom of INT's often overly aggressive approach to submitting SAEs, which far too frequently is done without the proper evidentiary support. INT should not be given additional appellate rights at this stage.

B. Second Stage (Appeal to SB)

Currently, there is no equality of arms at the second stage of the sanctions process (appeal to the Sanctions Board). This stage is fundamentally unbalanced, at both the written and hearing stages.

1. Pleadings

As the Sanctions process is currently structured, INT is granted more submissions than the respondent. Following a respondent's receipt of the Notice of Sanctions Proceedings received from the SDO, a respondent has 90 days to submit a Response. This is its one and only opportunity at the second stage to make a submission. The Sanctions Procedures give INT a right of Reply, but there is no right of Rejoinder for a respondent. To achieve a balanced process, respondents must be given the right of rejoinder after the INT Reply. Providing INT with the first and last word in written submissions is fundamentally unfair and provides INT with a heavy advantage. In fact, INT often uses its Reply to introduce new arguments and evidence into the record, which the respondent then has no means to address.[10] In order to balance the scales to achieve the international norm of a fair process, respondents must be provided the right of rejoinder.

Further, INT should be prohibited from amending their pleadings following its submission (and the lapse of deadline or limitation period) unless it has written authorization to do so from the SDO or Sanctions Board, as appropriate. The introduction of new evidence by INT after termination of the written phase should also be limited to situations where it is demonstrated that the evidence is material and was not previously available, or other compelling reasons are present.

[10] We also recommend that the procedures explicitly prohibit this tactic and that the Sanctions Board adopt a policy and practice of rejecting such information.

2. Hearings

Rights at hearings should also be balanced to achieve a fair and just process. At present, INT has the right to provide the first and last word at all hearings. This should be modified to provide respondents with the right to rebut INT's arguments made during a Sanctions Board hearing.

In addition, we believe that there is currently insufficient time granted to both INT and respondents to present arguments in complex, highly contested cases. Often times, our clients have come away from a Sanctions Board hearing frustrated that they have been granted insufficient opportunity to make a full presentation to the Board.

3. Sanctions Board Composition

We agree with the Review Team's proposal that a panel of the Sanctions Board (as opposed to plenary) can be used for less complex cases. We also believe that panels could be used to address issues that arise prior to the hearing, such as INT's failure to comply with its disclosure requirements, investigator misconduct, deprivation of key rights, or other serious pre-hearing concerns.

We strongly agree with the Review Team's proposal to make the Sanctions Board an all-external body. Such a move will greatly increase the credibility of the sanctions process. In addition, we would suggest expanding the Sanctions Board to nine external members so that when panels are required, the Sanctions Board can sit in panels of three.

If the Bank determines to go with an all external Sanctions Board, as we suggest, we believe that appointing at least some members with prior Bank experience is essential to retaining some degree of institutional knowledge. If the Bank determines to keep some internal members, we would recommend having six external and three internal members, so that each panel can have a majority of external members. Each Panel should have an external chair. One of the external chairs could be designated the overall Board Chairman, while the other two could be designated Vice-Chairmen.

We agree that Sanctions Board members should have staggered terms to preserve institutional knowledge and continuity. Experience of Sanctions Board members in law, procurement, and/or contracting is essential.

4. Procedural Protections

We strongly disagree that "minor instances of misconduct…may not merit the full panoply of procedural protections afforded by the current system."[11] Procedural protections are essential in all cases to ensure a fair process and equality of arms. As noted above, the current

[11] Review of the World Bank Group Sanctions System Consultation Plan, page 17.

system is not fully balanced or developed, nor are current protections fully observed, so it is hardly time to start derogating from those limited protections that do exist.[12]

Additionally, what the Bank may determine to be "relatively minor" cases may be significant to a respondent. Therefore, all respondents should be afforded the full set of rights conferred by the sanctions system. Whether or not the Bank provides incentives for a respondent to choose not to avail itself of such rights is a separate question. The large number of uncontested cases in fact suggests that there is no need to try to devise a "sanctions light" regime. Moreover, if the first tier of the sanctions process becomes more balanced, we would expect there to be less need for matters to go to the second tier. Those matters that do will likely be highly significant and complex cases, or cases where the stakes for a respondent are very high.

We do believe that the current system defaults disproportionately to punish relatively minor misconduct, as discussed below.

5. Nature of Sanctions and Proportionality

We agree that minor issues of misconduct deserve to be treated differently by the Bank than more serious issues. Currently, we find a lack of proportionality between many penalties and the underlying conduct. For example, a baseline sanction of three years for one instance of non-egregious conduct (such as documentation errors) is too harsh, especially for a respondent with a clean record. This is even more the case when there is no clear and convincing proof of intent. The line in many cases, especially fraud cases, between simple mistakes on the part of one individual, and intentional misconduct implicating the culpability or responsibility of an entire organization, or part of an organization, is not sufficiently clear.

The Bank should also consider relying more heavily on letters of reprimand and conditional non-debarment, especially in minor cases or where the respondent demonstrates that it has and will continue to take corrective actions to remediate the sanctionable conduct.[13] In such cases, it is likely that a respondent's exposure to the sanctions process will cause it to pay closer attention to compliance issues while immediately giving the Bank a more reliable partner.

Given that cross-debarment is triggered with sanctions in excess of one year, consideration should also be given to resolving the default sanction for first offenses (particular of an isolated character) to one year or less.

We also agree that the Bank should consider articulating principles for when restitution is appropriate and criteria for the amount of restitution to be paid. We find that many of our clients are willing to make restitution payments, but a lack of clarity in this area makes determining when to make such a payment, and in what amount, extraordinarily difficult.

[12] Indeed, to the extent that these "minor" cases involve smaller entities or individuals, the Bank should be concerned about creating a perception that these categories of respondents are receiving less due process.

[13] As discussed below, we recommend that the ICO review be available earlier in the process to evaluate a respondent's compliance program in connection with conditional non-debarment and letter of reprimand situations.

6. Collateral Consequences

We encourage the Bank formally to take collateral consequences into consideration throughout the entirety of the investigative and sanctioning process as a factor in the sanctioning process.[14] In addition to cross-debarment under the current cross-debarment agreement, a World Bank sanction can have an impact on procurement eligibility from a variety of authorities beyond the MDBs. These may include other international organizations (the United Nations, and the EU), domestic government entities, and even private persons. For many respondents, the collateral consequence of even a minor debarment is debilitating, and in some cases, forces a respondent to permanently cease all operations. The Bank should strive to take such factors into account when determining what is the most appropriate resolution of a case, including the sanction, whether the matter is resolved by negotiation or through the sanctions process.

7. Application to Corporate Groups

For sanctions involving large corporate groups, the Bank needs to be more nuanced in its application of sanctions. Except in egregious cases where there is incontrovertible evidence of parent responsibility by commission or deliberate omission, sanctions should be levied only on the part of the group directly responsible for the misconduct. If a business unit is responsible for the misconduct, there are many circumstances in which only that unit and its downstream affiliates, and not the entire entity, need be sanctioned.

Additionally, in addition to our suggestion about modifications of Early Temporary Suspension orders, we encourage the Bank to develop an efficient process for releasing entities from Early Temporary Suspension ("ETS") and temporary suspension that were not involved in the misconduct, but are covered by the ETS or temporary suspension because they happen to be downstream to a sanctioned entity. Due to the way many corporate groups are structured, it is not necessary or appropriate to temporarily suspend all such entities. This is particularly important in the mergers & acquisitions context. There should be automatic release upon a merger or acquisition to an unrelated entity which was subject to sanction merely by virtue of having been controlled by a sanctioned entity. Release should also be possible in the case of corporate reorganizations where, again, the only reason an entity was subject to sanction was by virtue of its having been controlled by an entity involved in misconduct. Such provisions carry no risk of circumvention or avoidance of a sanction, but simply promote fairness and efficiency.

III. Post-Sanction

A. ICO and Release Generally

We applaud the creation of the ICO and believe it should play an important role in the Bank's compliance efforts. We do believe, however, that the ICO should be completely

[14] While the current Sanctions Procedures permit the Sanctions Board to consider any other relevant factor in making a sanctions determination (Section 9.02(i)), they do not explicitly mention collateral consequences. This omission can lead to a refusal to recognize this factor or inconsistent treatment of this factor, which as noted above, can have the gravest of consequences.

independent of INT to reduce the perception that the ICO is simply another arm of INT, the prosecuting body. This is especially true given the issues with INT raised above.

In addition, as noted earlier, we encourage the Bank to bring in the ICO at an earlier stage of the sanctions process. For example, it could be useful for the Sanctions Board to have an ICO assessment of a respondent's compliance program before issuing a sanctions decision. This could promote the use of conditional non-debarment or letters of reprimand and help focus resources on those cases where post-sanction reform is truly needed. Many companies subject to World Bank investigations will have been on a journey of compliance enhancement to meet World Bank standards dating to the time of their investigation by INT, if not earlier. By the time a matter reaches the Sanctions Board, there will often be years of effort to be measured.

Additionally, with the creation of the ICO, we encourage the Bank to review its criteria for determining the need for external monitors. To the extent the Bank finds monitors to be required in certain instances, we encourage the Bank to articulate the standards by which it will make this determination.

We also encourage the Bank to establish criteria for the selection of monitors and independent investigators, pursuant to resolution agreements with the Bank. We understand that under the current system, INT has veto power over both a company's choice of an independent investigator and a monitor. The Bank generally will not allow an otherwise qualified monitor or investigator to be appointed if his or her firm has or is currently interacting in any way with INT on behalf of a client (e.g., through a sanctions proceeding, voluntarily cooperating with an investigation, assisting with compliance with an executed NRA, etc.). We are aware of no other agency or enforcement authority that views representation of an entirely separate client in an enforcement proceeding as a conflict vis-à-vis the enforcement agency, such that this lawyer or law firm could not also serve as a monitor or independent investigator with regard to an entirely different company. The logic of this approach eludes us, and it excludes from the pool of potential monitors and investigators those in the World Bank enforcement bar who themselves are most familiar with the nature of sanctionable practices and the Bank's Integrity Compliance Guidelines. Further, given that it is an entirely unpublished and unarticulated rule, it opens the door for potential abuse and even selective waiver, based on inappropriate factors.

We further call on the Bank to make public the list of monitors it appoints to oversee sanctioned entities and their contact information. Publicizing this information will not only enhance the credibility of the Bank's selection process and reduce perceptions of favoritism, but will also provide a mechanism for the public to report concerns about possible conduct of a company under monitorship directly to a monitor.

Finally, we also note that the Bank seems to have increased its use of external monitors at the same time other enforcement authorities have cut back on their use, limiting them to the most egregious cases and using self-monitoring with much greater frequency. External monitors are costly and intrusive, and in our view should only be used when it is clear a corporate respondent lacks the political will to implement necessary compliance measures. Where monitors are necessary, standard criteria of independence of the monitored entity should be applied and

knowledge of the Bank's standards and procedures should be a qualifying, not a disqualifying, factor.

B. Settlements

The emergence of settlements has generally been a helpful alternative tool and we applaud the Bank for this development. While helpful, the settlement process can be improved. In order for there to be meaningful dialogue about the conduct at issue and the sanction it warrants, INT should provide respondents with the underlying factual information supporting their position that misconduct has occurred. Most importantly, the conditions required for settlement are currently too rigid. Many of our clients have wished to settle with the Bank but ultimately failed to do so due to the requirement that any settlement include an admission. Admissions may cause collateral consequences in other forums (such as national courts), and thus often prevent a well-intentioned respondent from entering into settlement. Settlement should be permitted on a "no contest" basis.

We do not believe that strict time limits for settlement discussions is warranted. Such limits would be arbitrary and, given the variety of cases, would simply serve to put unwarranted pressure on the settlement process. We would, however, consider it fair for INT to require a voluntary restraint from seeking new World Bank business from a company that seeks to engage in settlement discussions. We do not believe this should rise to the level of a formal temporary suspension, unless the standards for ETS have been determined by the SDO to have been met. Moreover, we believe that voluntary restraint should be credited one-for-one against any debarment term that may be ultimately imposed, whether through a settlement or a sanctions determination. This will appropriately incentivize both the settlement process and protect the Bank's interests.

As noted earlier, in cases where more than one party is involved, steps should be taken to prevent a settlement from frustrating the disclosure of mitigating and exculpatory evidence to another party.

C. Early Temporary Suspension (ETS)

We strongly disagree with the Review Team's view that the standard for ETS should be lowered. We believe this view to be contrary to legal norms which provide respondents with enhanced procedural protections where an authority seeks to strip away rights at an early stage of the process before the facts are fully developed.[15] We therefore believe that the standard for the implementation of ETS should if anything be raised, not lowered.

IV. Additional Issues

A. Informal Blacklisting

[15] *See Sampson v. Murray*, 415 US 61 (1974) in which the United States Supreme Court held that the application of an injunction prior to the administration of due process is an extraordinary measure only appropriate to prevent irreparable harm; *see also Criminal Code of Canada*, Part XII.2; Proceeds of Crime Act, 1996 S.3(1) (Ireland).

Many of our clients have experienced instances of actual or attempted "informal blacklisting." Under such circumstances, INT or other Bank personnel take the view that although conduct may not be sanctionable (for example, due to the running of the statute of limitations or the lack of conclusive evidence from an investigation), the Bank may still "informally" blacklist a company. The imposition of penalties tantamount to sanctions outside of the Bank's sanctions system is inappropriate and a violation of due process. While due diligence on potential contractors or consultants is appropriate, the due diligence process should not be abused by having it cross a line into a sanctions system. This is the case whenever Bank personnel call for measures akin to sanctions, including compliance monitoring, ineligibility of personnel, and the like. We recommend that there be a mechanism for appeal to the SDO and a review process should a potential contractor or consultant believe this is occurring.

B. Incentivizing Voluntary Disclosure and Cooperation

The Bank has sought to incentivize voluntary disclosure through its Voluntary Disclosure Program ("VDP"). Despite efforts to make it more attractive, the VDP program has not attracted significant interest. This is likely because its conditions are too burdensome, especially in cases of minor misconduct. Specifically, we find the required investigation and compliance monitor costs to be cost prohibitive in many cases. We encourage the Bank, and particularly INT, to incentivize voluntary disclosure through more targeted and flexible mechanisms. For example, in specific cases, respondents could be awarded significant mitigating credit where they have promptly and voluntarily disclosed misconduct previously unknown to INT, cooperated with INT in further investigation and disclosure, and remediated any misconduct on their own. INT may also wish to consider a formal leniency program, particularly for the first party to come in and make a disclosure that allows INT to leverage its resources and investigate project-wide misconduct involving multiple parties.[16]

C. Demand Side

The World Bank is in a unique position to address issues of demand side corruption, which we view as a critical issue in the effort of corruption prevention. We believe that the Bank must work harder with its member countries to prevent corruption at its source, and not simply punish people after the fact. This includes considering lesser sanctions on respondents when the conduct is the result of demand-side pressures.

D. Structural Conditions

[16] Many national programs contain such leniency programs. They are a particular feature of many competition law enforcement programs. See, e.g., United States Department of Justice, Antitrust Division, Leniency Program; European Commission of the European Union, Commission notice on immunity from lines and reduction of fines in cartel cases (2006lC 2(8111); Brazilian Competition Law, Article 35-B (2000). Given that the harmonized definitions of misconduct include two types of activities--collusion and coercion—that are considered anti-competitive, a leniency program makes particular sense here. Moreover, given how and where World Bank projects are typically implemented, there is a strong possibility that other forms of misconduct may not be limited to a particular respondent, but could be project-wide.

We encourage the Bank to study recurring types of misconduct to see if there are patterns that arise from structural conditions in the field. We have found that many instances of misconduct occur due to recurring industry-wide issues associated with the tender process, such as personnel becoming unavailable due to the long lapse of time between tendering and selection or otherwise due to project delays, and the difficulties in substitution. We encourage the Bank to work with its members to address these issues. Conduct that is even in part the consequence of poor contract award processes or faulty project structuring and implementation should not be judged as harshly as conduct that is purely voluntary. This is simple fairness—consultant firms should not bear all of the burden of poor planning and execution of projects over which they have no control.

E. External Consultation

We applaud and appreciate the Bank's willingness to seek external consultation on the matter of sanctions reforms. As practitioners committed to the rule of law, transparency, and due process, we are interested in continuing to work with the Bank to help develop a robust but fair process that works for the Bank, its member countries, and potential and current respondents. The Bank has come a long way towards achieving these goals, and we look forward to partnering with the Bank to help make additional progress in the future.

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