Focus Group Meetings with members of the U.S. Defense Bar
on the Review of the World Bank Group Sanctions System
Consolidated Consultation Feedback Summary

Dates: September 12, 2013, 2.00p.m. – 4.00 p.m. and September 18, 2013, 2.00 p.m. – 4.00 p.m.
Venue: World Bank, Washington D.C.

Total Number of Participants: 11 members of the American Bar Association

FEEDBACK RECEIVED
General Comments
• Participants commended the Bank's involvement in the Governance and Anti-Corruption (GAC) agenda and praised the progress made since the establishment of the system in 1996; however, the Bank has not gone as far as it should go • The Bank should bear in mind the consequences of temporary suspension on a firm (e.g., the magnitude of ripple effect in national jurisdictions, impact on stock value, likelihood of shareholders derivative suits); suspension, even if not made public by the Bank, may be subject to disclosure obligations under national laws and may cause the collapse of the business, especially for SMEs • Participants stated that the Bank will need to strike the right balance between flexibility and due process, bearing in mind that an excessive degree of formality may make the system less accessible • Participants identified a need for a system that respondents can trust
Transparency and Disclosure Regime
• Need to increase awareness among the private sector about the implications of participating in a World Bank financed projects, in particular with regard to the applicability of the Sanctions Regime (with respect to investigations, sanctions, etc.) • The Bank should allow access to the full record so that respondents are able to prepare a meaningful response/explanation • Participants called for greater clarity in the treatment of corporate groups, including responsibility of joint venture partners
Fairness, Due Process, Proportionality, and Independence
• Participants strongly supported re-sequencing the first tier by allowing respondents to be heard before temporary suspension is imposed. Some participants suggested to look at the approach of the U.S. Securities and Exchange Commission (SEC) whereby the commission sends to respondents a letter (a "Wells Notice") giving respondents the opportunity to provide information as to

why the enforcement action should not be brought
- Respondents should be given the opportunity to cross-examine witnesses
- OSD was seen by participants as generally fulfilling its intended function. However, there is a need for more transparency about the process at the first tier and the reasoning behind SDO's determinations. Its work is also handicapped by lack of access to countervailing evidence
- Participants expressed concern about the idea of "lowering" the standard of evidence for Requests for Early Temporary Suspension as suggested in the 2012 Annual Report of the Independent Advisory Board
- Participants called for a more proportionate use of sanctions and broadly supported the review team's recommendation to revisit the 'baseline' sanction of 3 year debarment with conditional release. In addition, the baseline of 3 years debarment should be revisited, as it may be disproportionate, for example, for a minor fraud case. Participants stressed the importance of finding the right balance between positive and negative incentives in the system, possible introduction of 'present responsibility' concept into the system, or short of that, increased use of conditional non-debarment for companies that have effective integrity programs in place and have taken appropriate actions to avoid the future occurrence of misconducts
- Participants stressed the importance of ensuring both the independence and the appearance of independence of the Sanctions Board. In this regard, the presence of active Bank staff serving as members of the Sanctions was seen as potentially compromising full independence. The review team's preliminary recommendation of allowing retirees to join the Sanctions Board as external members was seen by some participants as equally problematic because of the retiree's proximity to the Bank
- The time that it currently takes for the Sanctions Board to issue a final decision—six to nine months—was seen as excessive, especially in light of the Respondent's ongoing suspension
- Participants called for greater adherence to due process

Investigations and Settlements

- A number of participants alleged that INT investigations were tainted by irregularities. Participants emphasized the importance of ensuring that the highest standards of conduct are met during investigations, including that relevant documents are made available to the respondent, the SDO, and the SB, that no exculpatory evidence is withheld, that proper notice is given to respondents and other interested parties, in particular regarding the scope of the investigation and the right to be assisted by legal counsel
- INT needs consistent and better training. Experience and adequate knowledge are crucial for INT's ability to proficiently handle cases. Sufficient oversight of the investigators needs to be consistently implemented.
- Need to find solutions to make the system more accessible to SMEs
- The prospect of automatic suspension makes sanctions proceedings a non-option for many clients. Participants expressed concern that this may allow INT to exert undue pressure during settlement negotiations
- Calls were made by participants for greater transparency in the settlements with INT. Lack of transparency may lead to a perception of subjectivity and possibly favoritism
- Participants emphasized a need of a formal appellate body and raised concerns about the equality of arms at the Sanctions Board stage of proceedings. Some suggested the use of panels in place of the SB to expedite the issuing of decisions in a timelier manner
- One participant suggested that INT should obtain affidavits (sworn statements) for any witness statements

- The Bank should issue rules/guidelines regarding respondents' right to counsel from the very beginning of any investigation

Integrity Compliance Officer and Use of Compliance Monitors

- The ICO should be fully independent and housed outside of INT. The ICO should be brought earlier in the discussions, both during negotiations and at the SDO stage
- Need for more clarity and rules on the criteria for the selection of monitors. The ICO's exercise of discretion in this area has been questionable in the absence of clear rules
- Participants also suggested that the Bank reconsider its excessive reliance on compliance monitors at a time when other jurisdictions are reducing the use of monitors to those cases where benefits are clear. Participants identified a need to provide the ICO with sufficient resources, which could be drawn from amounts paid following the imposition of restitution
- Participants suggested the drafting, adoption and implementation of a Code of Conduct for the INT. The Code could be created via a stakeholder consultation and could perhaps model that of the Investigative Guidelines used by the U.N.
- The Bank should allow a wide range of vendors as monitors in order to avoid creating a conflict of interest

Voluntary Disclosure Program

- Requirements to access the VDP were perceived as onerous. As a result, VDP is not considered a viable option by most clients. VDP terms and conditions should be simplified and made more flexible. Facilitating access to the VDP would also allow INT to receive information about serious instances of misconduct and broaden the scope and impact of its investigations. The U.S. Antitrust Amnesty Program and the self-reporting mechanism of the U.S. Foreign Corrupt Practices Act as possible alternative models

Other comments

- Participants expressed tentative support for the review team's preliminary recommendation about the need to 'right-size' the system. Participants' definition of right-sizing is applying proportionality to the penalties predicated on the respondents' behavior. This goes to the demand that the Sanctioning Guidelines be given greater granularity. Often, many sanctions cases involve relatively minor instances of misconduct where the respondent's costs for defending itself significantly outweigh the gravity of the misconduct and amount in controversy
- Need to revise the 'success metric' and identify the right incentives to select cases that are worthy of investigation (and to drop them, if necessary)
- Some participants suggested a move to one of present responsibility and rehabilitation away from punishment for historical acts. This would include giving greater credit to those respondent companies who implement robust compliance programs. Several participants referenced the U.S. Federal Acquisition Regulations (FAR) system and suggested that this would be a good model to emulate. The FAR system is administrative like the Bank's, but is more focused on rehabilitation. Participants suggested that the Bank amend the Sanctioning Guidelines to allow the SDO to ask the ICO for their opinion on the respondent's behavior