

**THE WORLD BANK GROUP**



**INITIATING DISCUSSION BRIEF**

**REVIEW OF THE WORLD BANK GROUP  
SANCTIONS REGIME 2011- 2014**

**PHASE I REVIEW: STOCK-TAKING**

## **ABBREVIATIONS AND ACRONYMS**

AfDB	African Development Bank
AsDB	Asian Development Bank
EBRD	European Bank for Reconstruction and Development
ETS	Early Temporary Suspension
EXT	External Affairs Vice Presidency
F&C	Fraud and Corruption
FY	Fiscal Year
GAL	Global Administrative Law
IAB	Independent Advisory Board
IAD	Internal Audit Vice Presidency
IBRD	International Bank for Reconstruction and Development
ICB	International Competitive Bidding
ICO	Integrity Compliance Office
IDA	International Development Association
IDB	Inter-American Development Bank
IFC	International Finance Corporation
INT	Integrity Vice Presidency
INTSC	Strategy and Core Services Division (INT)
LEG	Legal Vice Presidency
MD	Managing Director
MDB	Multilateral Development Bank
MIGA	Multilateral Investment Guarantee Agency
NCB	National Competitive Bidding
NRA	Negotiated Resolution Agreement
OSD	IBRD/IDA Office of Suspension and Debarment
OPCS	Operations Policy and Country Services Vice Presidency
PforR	Program for Results
SAE	Statement of Accusations and Evidence
SB	Sanctions Board
SBS	Sanctions Board Secretariat
SC	Sanctions Committee
SDO	IBRD/IDA Suspension and Evaluation Officer
SME	Small and Medium Enterprise
UN	United Nations
VDP	Voluntary Disclosure Program

## I. INTRODUCTION AND METHODOLOGY

1. At the request of the Audit Committee, World Bank Group Management is undertaking a review of its sanctions system. The sanctions system is an administrative process for sanctioning firms and individuals found to have engaged in corrupt, fraudulent, collusive, coercive and obstructive practices. This process provides accused parties an appropriate level of due process before a decision on sanctions is made.

2. As agreed with the Committee, the Review is being conducted in two phases. Phase I is a stocktaking phase and focuses on the implementation of the various reforms that have been realized since the newly configured sanctions process began operations, the impact of the regime on World Bank operations, and the legal adequacy of the system in light of current developments in national and international law. Phase II will address the larger, first-principles issues of the overall efficiency and effectiveness of the system—i.e., whether the system as a whole is meeting its objectives of excluding corrupt actors and deterring fraud and corruption in World Bank Group operations, at an appropriate cost to the World Bank Group. The timing of Phase II is yet to be determined.

3. **Organization and Management.** Phase I of the review is undertaken principally by a small team within the World Bank’s Legal Vice Presidency (LEG) and was overseen by a Steering Committee, chaired by the World Bank Group General Counsel and including a Managing Director (MD), the Vice President, Operational Policies and Country Services (OPCS), the General Counsel, International Finance Corporation (IFC), and the Deputy General Counsel for Operations, IBRD/IDA.

4. **Methodology.** The Review employs a range of methods and resources to identify and analyze issues. These include the collection of ‘hard’ (i.e., quantitative) data provided by IBRD/IDA Office of Suspension and Debarment (OSD), Sanctions Board Secretariat (SBS) and Institutional Integrity Vice Presidency (INT) from the establishment of the two-tiered system to the end of Fiscal Year (FY) 12 on the key success indicators included in the terms of reference for Phase I as well as ‘soft’ (i.e., qualitative) data on perceptions and issues identification gathered through a series of internal qualitative interviews with INT, OSD and SBS staff, as well as all members of the Sanction Board (SB), which were conducted on a confidential basis by a public opinion expert, working with the World Bank’s External Affairs Vice Presidency (EXT), on behalf of the World Bank’s Legal Vice Presidency. The review team also conducted a number of consultations, both written and oral, with INT, OSD and SBS staff, the IFC and MIGA legal focal points for sanctions, as well as World Bank Group policy and operational staff whose work is impacted by the sanctions regime.

5. This paper summarizes the preliminary, indicative findings and recommendations of Phase I of the Review and constitutes the background information for consultations with external stakeholders in Phase I.

## II. SANCTIONS PROCESS AND ITS CONSTITUENT PHASES

6. *Overall Caseload; Number of Sanctions and Suspensions.* The new two-tiered sanctions system got off to a rather slow start in FY07 and FY08, with no sanctions imposed in the first fiscal year of operation and only 2 sanctions imposed in the second. Since then, the system has seen a large rise in cases, to 13 sanctions imposed in FY09, 45 in FY10, to 34 in FY11 and 83 in FY12. Almost all the sanctions imposed by the SDO and the SB have been one of the ‘baseline’ sanctions of either fixed-term or debarment with conditional release. Of the 177 sanctions imposed through 06/30/12, five deviated from the baseline: three conditional non-debarments (one of which was accompanied by a letter of reprimand) and two letters of reprimand; all of these were imposed in the context of a negotiated resolution of the case (also referred to as a ‘settlement’). Similarly, restitution has only been imposed five times, in the context of settlements in four cases and by the Sanctions Board in one recent (post-FY12) case.

7. Overall, the current two-tiered system appears to be functioning as intended. One of the principal purposes of the first tier review by OSD was to allow for early disposition of cases, and this is indeed happening. Importantly, however, the majority of cases resolved at the first tier (92%) have resulted not from an exchange of views at the first tier but by a ‘default’ by Respondents failing to engage the system in any way, either by providing an Explanation to OSD or to appeal the case to the SB. Most of these defaults involve small and medium-sized enterprises (SMEs) and form part of a larger pattern of non-engagement by SMEs in the system.

8. There have been 139 cases investigated and submitted by INT to OSD under the current sanctions process, of which 84 cases had progressed all the way through the system to completion (57 finishing at the first tier; 27 finishing at the second tier) as of 06/30/12. On average, a completed sanctions case takes approximately three years from the commencement of the investigation to the final disposition of the case at the SDO or SB stage. This figure is well within due process requirements and compare favorably with the corresponding timeframes for the process as it existed before the 2004 reforms.

9. This average, however, obscures wide variations from case to case. An examination of the timeline also shows a significant recent trend of improvement over time where, on average, the time for the initial INT phase has been cut in more than half

when looking at the processing times for the first 25 cases processed under the two-tiered sanctions system as opposed to the most recent 25 cases that were completed as of June 30, 2012. The data also shows general improvement, albeit less dramatic, in the other phases of the sanctions process.

10. In examining this data, one is struck by a number of phenomena, including the fact that the longest time in the sanctions process is taken up by OSD and INT activities prior to the issuance of a Notice of Sanctions Proceedings.

11. ***INT Case Processing:*** Overall, as noted above, INT activity has accounted for the largest share of the time it takes to process sanctions cases. This, of course, is not at all surprising, since the tasks with which INT is charged—notably, investigation of the case and preparation of the SAE—are the most time- and resource- consuming tasks in the system. Indeed, investigation times have fallen sharply and compare quite favorably to those of national systems. On average, the investigation/SAE preparation phase takes a little more than two years. Although the review team did not study the issue in detail, it may be that we have reached an optimal overall level for investigation times. Attempting to shorten them further may prove counter-productive, as it would tend to incentivize smaller, less impactful cases.

12. ***OSD Case Processing:*** OSD phases—initial and follow-up reviews of SAEs and determinations—have usually taken the least time of the various phases in the sanctions process. The average time for OSD’ initial determination has taken, on average, 63 days, with subsequent second and third reviews (when they occur) taking 34 and 12 days, respectively. Nevertheless, there have been a handful of cases where the initial OSD review has taken an inordinate length of time. These have, nevertheless, been outliers in a generally positive track record.

13. ***Sanctions Board Case Processing:*** The track record for the SB phase of sanctions proceedings has shown the least variation among the three units. When cases are appealed, the SB phase takes, on average, 184 days. Nevertheless, at this stage, too, we see some variation and a number of ‘outliers’. These variations appear to be largely due to the timing of Sanctions Board sessions and the increasing resort to motions practice by more sophisticated Respondents.

14. ***Comparisons with the pre-2004 Sanctions Committee System.*** Despite the fact that the current two-tiered process is somewhat more elaborate and far more formal than the SC process, timeframes under the old and new processes are quite comparable. In fact, the average time to dispose of recent sanctions cases is less than the average for the SC process. Moreover, the output of the system has dramatically increased from an

average of 9 cases per annum reviewed by the SC to an average of 34 per annum under the current system.

15. **Conclusions.** It is clear from this analysis that the sanctions system is capable of handling cases expeditiously. The good news is that the system as a whole has been heading in a positive direction since early 2010, with cases since then generally taking considerably less time overall. This trend has accelerated since early 2011. So, after a rather slow start, the overall performance of the system is increasingly positive. The picture is one of steady improvement in processing times, coupled with increasing output in terms of sanctions imposed.

16. **Preliminary recommendations.** Notwithstanding this overall positive picture, the review team would recommend that some further steps be considered to further improve the overall performance of the system and eliminate some of the most remaining issues it faces. These recommendations will be revisited after consultations with external stakeholders. Preliminary recommendations include:

- continued efforts to reduce investigation times when appropriate (but not at the expense of quality or pursuing promising but complex cases);
- acceleration of the rollout of an automated case management system already used by OSD to INT and the SB;
- a study of quality controls across the system;
- guidance on one lingering legal issue, concerning the liability of corporate officers, that continues to hinder certain cases;
- the adoption of performance standards for all actors in the system;
- possible use of panels by the SB rather than plenary sessions for cases that do not pose novel issues;
- expansion of SB membership to include additional alternates to facilitate quorums; and
- formalizing the opportunities of the respondent to be heard in the first tier of sanctions proceedings, i.e. the use of interviews and show cause letters before a case is submitted to OSD to expedite the resolution of the case.

### III. IMPLEMENTATION OF OTHER 2004 REFORMS AND THE 2006 REFORMS

17. *Use of Expanded Forms of Sanction.* As part of the 2004 reforms, the possible sanctions were expanded beyond debarment to the current range of five possible sanctions: (1) indefinite or fixed-term debarment, (2) debarment with conditional release, (3) conditional non-debarment, (4) reprimand and (5) restitution. In practice, however, the SDO and SB have almost exclusively imposed the ‘baseline’ or default sanction, either fixed-term debarment or, after its adoption as the default sanction in 2009, debarment with conditional release. One of these two sanctions was imposed by either the SDO or by SB, as applicable, in all cases decided by these units since the new sanctions process was implemented in 2007.

18. There is no particular percentage of cases that *should* result in a particular sanction or another; indeed, it would be disturbing if the bulk of cases resulted in sanctions other than the ‘baseline’ determined by World Bank Group sanctions policy. Neither OSD nor the SB see the current pattern for sanctions as a serious issue, although they appreciate the flexibility that the expanded options provide. Nevertheless, the use of sanctions may merit further study as we would logically expect to see at least some more than marginal percentage of cases resulting in sanctions other than debarment or debarment with conditional release. Moreover, while some variance as between sanctions agreed in the course of settlements and those imposed by the SDO or by the SB is to be expected, the degree of variance that we have seen so far may exacerbate some of the concerns and negative perceptions about settlements that have been expressed by some (see below).

19. *Expansion of Sanctions beyond Procurement; Expansion of Sanctions to Private Sector Operations.* The 2006 reforms saw two major expansions of the reach of the sanctions system, to (i) cases in IBRD/IDA operations outside the procurement context to cover more generally fraud and corruption that may occur in connection with the use of World Bank loan proceeds, and to (ii) the operations of IFC, MIGA and World Bank Guarantees. In the six years since these reforms, however, there have been no cases outside the traditional IBRD/IDA procurement context, although we are seeing a small but welcome shift in focus within the IBRD/IDA procurement context from bidding towards contract implementation, and INT advises that we are now beginning to see allegations outside the procurement context and some investigations have been launched.

20. Operational World Bank staff has expressed concern that the lack of attention to fraud and corruption outside procurement has left a major ‘loophole’ in the system, with particular areas of vulnerability including cash transfers, pensions and certain health

sector case studies. These concerns find even more relevance as the World Bank embarks on the implementation of the new PforR instrument and increases reliance on country systems.

21. *Use of Expanded Grounds for Sanctions.* The 2006 reforms also included a major expansion of the grounds for sanction through the adoption of the current five sanctionable practices, beyond the traditional grounds of corrupt practice and of fraudulent practice to include collusive, coercive and obstructive practices. Since then, over 86% of sanctions cases have involved fraudulent practice, of which the vast majority has involved forgery or other forms of misrepresentation in bidding documents. Only 12% of cases have involved corruption (i.e., bribes and kickbacks), 8% collusive practice, and 1% obstructive practice. So far, there have been no cases of coercive practice.

22. The lack of corruption and collusion cases, as well as the apparent prevalence of minor forms of fraud, may be a cause for concern. In this connection, however, we are encouraged by some recent high-impact cases, including cases against major firms, and other cases that are still in train, that seem to be changing the picture. It is also worth noting that fraud, which often involves the misrepresentation of a key competence or selection criterion, may even have serious implications for a project.

23. *Conclusions and preliminary recommendations.* The implementation of these reforms has produced decidedly mixed results. There has been limited use of the expanded authorities and jurisdiction that the 2004 and 2006 reforms provided for. While the causes and solutions for this are not entirely self-evident, we would recommend some steps to try to improve the track record in these areas. Recommendations will be revisited after consultation with external stakeholders. At this stage of the review, preliminary recommendations include:

- development of clear criteria for the use of restitution/remedy and other steps to explore ways to make more flexible use of a broader range of sanctions to enhance proportionality;
- further study to identify the reasons for and solutions to the lack of cases outside IBRD/IDA procurement, including more extensive use of proactive tools such as DIRs, forensic audits and spot audits, using a risk-based approach; and
- continued efforts by INT to seek alliances with national authorities to leverage its limited investigatory tools. There also may be some room for expanding INT's investigatory tool set.



#### IV. IMPLEMENTATION OF THE 2009-2010 REFORMS

24. The 2009-2010 period brought a further set of reforms to the sanctions regime designed to address some vulnerabilities that World Bank Group staff had identified both at the front and back ends of the sanctions process, as well as to enhance the transparency and effectiveness of the system. These reforms included the introduction of Early Temporary Suspension, the publication of SDO determinations and SB decisions, the adoption of debarment with conditional release as the ‘baseline’ sanction and the related establishment of an integrity compliance function, and the development of enhanced guidance on the treatment of corporate groups. Also during this period, following a recommendation by a panel led by Paul Volcker, the SB transitioned from internal to an external chairpersonship. These reforms were definitively incorporated into the sanctions process through the issuance of new Sanctions Procedures and related internal guidance in January 2011. While it is arguably still too early to reach any definitive conclusions about the success of these reforms, the review team did endeavor to take stock of the progress made so far.

25. *Use of Temporary Suspension and Early Temporary Suspension.* Early Temporary Suspension (ETS) has been used infrequently in the three years since its adoption in 2009. In the period from 2009-2011, ETS was requested only twice. However, in response to increasing calls from World Bank operations to address ongoing ‘window of vulnerability’ between the time that evidence was uncovered and the time that a suspension could be imposed—a period that could be considerable since the completion of INT’s investigation may take several months or over a year, often including inquiries into related allegations—we have seen a recent uptick in the use of ETS with four cases in FY12. Even given it was agreed with EDs in 2009 that ETS would be used exceptionally, it is still fair to say that ETS has been underutilized.

26. *Guidance on Corporate Groups.* World Bank staff indicates that the new guidance on the treatment of corporate groups has proven helpful. One caveat, however, is that the guidance is geared largely towards larger, multinational corporate groups and provides less guidance on how to handle the same issues in the context of SMEs and individuals, which appear much more frequently in the cases brought by INT. In this and a few other areas, such as the application of ‘targeted’ debarment of offices and subdivisions, staff has asked that further guidance be developed.

27. *Settlements.* The settlement mechanism has been increasingly used as a means of resolving sanctions cases since it was enshrined as formal feature of the sanctions system. As noted above, the number of settlements is on the rise, with settlements accounting for about one-third of sanctions in FY12 (32.65%: 16 cases settled versus 33 OSD

sanctions). The settlements mechanism was established with two main objectives in mind: to increase efficiency and to provide greater certainty of outcome for the parties.

28. While it would be premature at this early stage of implementation to draw any definitive conclusions, the track record so far indicates that, on the whole, the mechanism is indeed serving the purposes for which it was created. Since the institution of a formal settlement mechanism, the average timeframe for resolving a sanctions case through negotiation is 34% the time it has taken, in average since June 2010, for cases to be resolved at the SDO stage, and 10% of the time typically required for full, two-tiered sanctions proceedings. Certainty of outcome is served by definition through mutual agreement of the parties on the sanction to be imposed. In addition, settlements have brought benefits that are not typically realized otherwise, including more extensive cooperation by Respondents, payments in restitution or other financial remedies, and more consistent responses to the ICO on compliance with conditions for release from debarment.

29. There have been a handful of cases in which settlement negotiations undertaken prior to the start of sanctions proceedings (which represent the vast majority of all settlements so far) have been protracted. There appear to be various reasons for this, including the fact that, unlike settlements undertaken during proceedings, there is no particular deadline attached to negotiations before proceedings are commenced. Not surprisingly, these instances have typically been cases where the Respondent is a large firm represented by sophisticated legal counsel who engage in intense negotiation of the agreed sanction as well as the provisions of the Negotiated Resolution Agreement (NRA). These cases, while relatively few in number, have created difficulties for operational staff, as lengthy settlement negotiations serve to re-open the ‘window of vulnerability’ for the World Bank by delaying the commencement of sanctions proceedings and the imposition of a suspension by the SDO. In order to ensure that settlements serve the purposes for which they were created, we would recommend that incentives be built into the system for the speedy disposition of all settlements, including those with larger firms before commencement of proceedings.

30. Questions have also been raised about the reputational risks that may attach to settlements. In the early days, when most settlements were with larger firms, it was said that settlements only favored the ‘big’ players (especially those that are willing to make payments in restitution) who get special deals. Now that settlements with SMEs and individuals are happening, there are fears that advantage may be taken of these Respondents. Both concerns are exacerbated by a perception that settlements lack transparency. These concerns come at a time when settlements are, in fact, under increased scrutiny internationally.

31. In fact, the system already has safeguards against both of these concerns. Settlements policy provides all agreed sanctions must fall within the parameters set out in the Sanctioning Guidelines, and this is confirmed by OSD review. An analysis of the outcomes of settlements confirms that, after accounting for settlement as cooperation as a mitigating factor, the agreed sanctions have been broadly in line with the Sanctioning Guidelines, as required by policy, with larger firms actually incurring heavier penalties (above the baseline of three years) and individuals and smaller firms incurring lesser sanctions. These outcomes dispel the perception that the system favors the former or takes undue advantage of the latter. The system also has safeguards to ensure that all Respondents enter into settlements fully informed and without duress. Moreover, in practice additional safeguards that were not explicitly foreseen by the policy have been put into place.

32. These concerns are exacerbated by the perception, both among external stakeholders as well as some internal stakeholders, that settlements are not transparent. World Bank Group policy already calls for some degree of transparency, for example, through the posting of summaries of the terms of NRAs, but we believe that there is room for enhancing the transparency around settlements without creating an undue ‘chilling effect’.

33. ***Designation of Debarment with Conditional Release as the ‘Baseline’ Sanction; Establishment of the ICO Function.*** The Integrity Compliance Office (ICO) function was established within INT’s Strategy and Core Services unit (INTSC) in September 2010. The ICO’s main task under the Sanctions Procedures is to determine whether a debarred party has met the conditions for release from debarment, typically the establishment (or improvement) and maintenance of an integrity compliance program, under the new ‘baseline’ sanction of debarment with conditional release. This requires a careful assessment of whether the program is sufficiently robust in preventing future misconduct as to be ‘acceptable to the World Bank.’

34. The ICO has seen very limited engagement by Respondents, in particular SMEs. Only two Respondents have responded to ICO notices under the current procedures in response to a sanction imposed by the SDO or the SB, raising the prospect that, contrary to intentions, debarment with conditional release will become, *de facto*, a road to indefinite debarment.

35. Until recently, limited resources were provided for the ICO function and, although we are not experts in compliance, it seems clear to the review team that current resources will soon prove inadequate, assuming that more cases become active over time. We note with satisfaction that INT has already taken steps in this regard. Nevertheless, it

is not clear to us whether, in a flat budget environment, INT will ever have adequate resources to dedicate to this function.

36. The above experience raises fundamental questions about this aspect of the 2009-2010 reforms. Significant incremental resources would likely be needed to reach out to Respondents to convince them to engage and, if these efforts are successful, to engage them in a meaningful dialogue about compliance with conditions. Given these challenges, and the unlikelihood that the needed resources will be forthcoming in any event, we would recommend revisiting the designation of debarment with conditional release as the ‘baseline’ sanction. The World Bank could consider other ways to address the vulnerabilities that this reform was intended to address, for example, by imposing more severe sanctions for repeat offenses.

37. ***Publication of SDO Determinations and SB Decisions; Law Digest.*** While a full assessment of whether these changes to the system are having their intended effects would be premature at this early stage and we can say that we are pleased by the quality and professionalism that are evident in the decisions and determinations of the Sanctions Board and SDO, as well as in the Law Digest. Early feedback from actors in the system confirms that legal certainty, at least internally to the system, has indeed been considerably enhanced. The decisions of the Sanctions Board are now fully reasoned and include a recitation of the facts of the case, applicable standards of review, the contentions of the parties, and the Board’s analysis, conclusions and determinations of appropriate sanctions.

38. ***MDB Cross-Debarment.*** In April 2010, the World Bank entered into an agreement with four other MDBs (AfDB, AsDB, EBRD and IDB) for the mutual recognition of their debarment decisions. While no major implementation issue has emerged, cross-debarment has effectively raised the stakes attached to the sanctions system, both for Respondents and for the World Bank and the other MDBs. Respondents and their counsel have responded in a variety of ways, including a trend toward more aggressive defense in sanctions proceedings and in calls by the defense Bar for greater harmonization among the MDBs.

39. ***Conclusions and preliminary recommendations.*** The overall track record so far for the implementation of the 2009-2010 reforms is positive, with the notable exceptions of ETS and debarment with conditional release. At this stage of the review and pending input from external stakeholders, the review team would recommend that a number of steps be considered to improve this track record, including:

- a concerted effort to identify ways to mainstream the use of ETS;

- revision of the corporate groups guidance in the Sanctions Manual to provide greater clarity on a number of points, in particular to provide specific guidance on the treatment of SMEs and ‘targeted’ debarments of offices and subdivisions;
- reinforcing the procedural safeguards and enhancing transparency of settlements, subjecting settlement negotiations before commencement of sanctions proceedings to a notional timeframe, and giving consideration to making voluntary undertaking or ETS a condition to entering into major settlement negotiations; and
- revisiting the designation of debarment with conditional release as the ‘baseline’ sanction.

## V. OPERATIONAL ISSUES

40. Consultations with World Bank operational staff have highlighted a number of ways in which the sanctions regime creates issues for their work, particularly procurement operations. Perhaps the key issue, raised repeatedly in our internal consultations, is the inability of cofinanciers to mutually and fully recognize their respective debarment lists as a basis for ineligibility. Several staff also stated as an issue the World Bank’s inability to permit borrowers to apply their national debarments as a basis for ineligibility, indicating that this issue is being raised increasingly frequently by borrowers. Operational staff also strongly expressed the view that the ETS tool is not being used in such a way as to help close the ‘window of vulnerability’ that exists while a firm is under investigation. There also remains a risk that debarred and suspended firms still may be receiving contract awards, a risk that is particularly acute in the post-review context.

41. *Debarments by Cofinanciers.* The World Bank’s inability to recognize the debarment and suspension lists of joint co-financiers other than the MDBs (and vice-versa) as a basis for ineligibility is creating much ‘churning’ and inefficiency in the preparation of certain World Bank operations, leading to negative consequences for borrowers and the development effectiveness of the affected operations. In the medium to long term, this growing problem could be addressed by expanding the reach of the current cross-debarment arrangements to bilateral donors and other IOs. In the shorter term, a more practical path may lie in the application of debarments for eligibility purposes on a project-by-project or a case-by-case basis. Yet another approach, probably the most practical in the short term, would be to allow for ‘cross-ineligibility’ of expenditures. Under this concept, any expenditure under a particular project that is ineligible under the financing of a joint co-financier would be deemed ineligible for World Bank financing as well. This would not constitute cross-debarment but simple recognition of the practical reality that a jointly financed expenditure cannot be made

unless all sources of financing are available. This model would have the advantage of not requiring the World Bank to ‘endorse’ the other debarment in any way, sparing it the need to either evaluate the other debarment system or to inquire into the grounds for ineligibility.

42. ***Debarments by Borrowers.*** The World Bank’s inability to permit borrowers to apply their own debarment lists to World Bank financed operations is another growing issue as borrower countries become increasingly proactive and sophisticated in their approaches to procurement. While the latest version of the World Bank’s Procurement Guidelines allow borrowers to apply their own debarment lists for national competitive bidding (NCB) with the agreement of the World Bank, the same does not apply for international competitive bidding (ICB), potentially leading to some anomalous results. The policy also requires the World Bank to determine that the debarred party has been debarred for fraud and corruption (as opposed to other grounds), and that the debarment system is ‘judicial’ in nature and has provided the debarred party with adequate due process; these requirements have proven restrictive, and it is not yet entirely clear who should make this determination or on what specific criteria.

43. At this stage of the review, we would recommend that the current limited ability to permit a borrower to apply national debarments for loans made to that borrower be extended to all procurement methods, recognizing that the implications of such a move, including on harmonization of procurement policies with other MDBs, would need to be studied. We would also recommend revisiting the requirement that debarment system be ‘judicial’ in nature. In the alternative, or pending the amendment of the current Procurement Guidelines, the requirement could be interpreted as satisfied so long as the initial administrative decision is subject to some level of judicial review, which is often the case in national systems.

44. ***Risk of Debarred and Suspended Firms Being Awarded Contracts or Receiving Payments from the World Bank.*** The World Bank has a number of *ex ante* controls in place to ensure that contracts are not awarded and payments are not made to debarred and suspended firms when the contracts are subject to prior review. The overall risk of prior review contracts being awarded or paid appears to be low, although the system remains vulnerable to human error, misjudgment and malfeasance. There is a non-trivial degree of risk that debarred and suspended firms may be awarded or paid under contracts subject to post-review because there is no prior check of such contracts by World Bank staff against debarment and suspension lists as is done for prior review contracts, and the post-review is done only on a sampling basis and does not extend to all such contracts or non-procurable items, some of can represent significant portions of World Bank financing. The use of Designated Accounts is similarly subject to *ex post* reviews. We would

recommend a number of measures to mitigate these risks, mainly by reinforcing the borrower's awareness of its own obligations in this area, enhancing contract management and financial management assessments, as well as tightening some internal controls.

45. The case of suspended firms is of particular concern. Borrowers are put on notice exclusively through Client Connection, an extranet site open to borrower staff using a password. However, we are advised that many clients do not use Client Connection or do not do so on a consistent basis, which means they have sporadic or no access to the suspension list. Clearly, this loophole needs to be filled, and we would recommend that the World Bank consider either making Client Connection mandatory for (most) borrowers or making the suspension list public.

46. *Conclusions and preliminary recommendations.* The World Bank's sanctions system has created a set of operational issues that require attention. To address these issues, the review team would recommend a number of measures that will be discussed further during consultations with external stakeholders. These issues include:

- permitting the World Bank to refer to third-party debarments as a basis for ineligibility;
- adding ineligibility for joint co-financing as a basis for ineligibility of expenditure under World Bank financing;
- reviving discussions with UN and other IOs, as well as bilateral donors, on cross-debarment arrangements similar to those already in place with other MDBs;
- extending the reach of current application of borrower debarment systems to ICB and removing and/or reinterpreting the current requirement that the system be "judicial" in nature;
- exploring ways to further strengthen internal controls to prevent disbursements to or on account of suspended or debarred parties.

## **VI. LEGAL ADEQUACY**

47. The review team found that the World Bank's sanctions regime appears to meet, and in some cases exceed, fundamental principles under general notions of due process and the emerging doctrine of global administrative law (GAL). The fairness and transparency of the system has been considerably enhanced over the years through reforms like the transition to external chairpersonship of the SB, publication of SB and SDO decisions and the issuance of public information notes about the system, including publicly available Sanctioning Guidelines.

48. Nevertheless, there remain some areas for improvement in procedure, and GAL principles would call for more transparency and participation in the World Bank's process for making sanctions policy. At this stage of the review, the review team has recommended that the World Bank Group consider the following measures to further strengthen the fairness and transparency of the sanctions system:

- the first tier of sanctions proceedings (i.e., the 'SDO Stage') should be re-sequenced so that OSD review constitutes a decision-making process that allows Respondents to provide their pleading prior to the SDO taking a decision;
- SDO decisions, including ETS determinations, should be subject to review by the SB, at the request of either Respondents or INT;
- the independence of all SB members and of the SDO should be enhanced by providing them with six-year, non-renewable terms with prior removal only on the grounds now applicable to external SB members. The terms of SB members should be staggered so that turnover is more gradual than at present;
- the World Bank Group should make the SB an all-external body, with appropriate measures to mitigate the loss of expertise currently provided by its internal members, for example, by naming MDB retirees to the SB and providing the SB with access to World Bank staff for expert advice;
- future changes in sanctions policy should be subject to external consultation in the same manner as the World Bank undertakes when making changes to operational policy, including through posting on the external website and, if resources allow, face-to-face consultation with key stakeholders; and
- for the sake of fairness and to create more 'equality of arms' among contending parties, the system should strive for the maximum transparency possible. Among other things, the full legal and policy framework for the sanctions system, including the Sanctions Manual and Advisory Opinions of the General Counsel, should be publicly disclosed, as should the reasoning behind SDO determinations if/when they become final decisions.

## VII. OTHER ISSUES

49. ***'Right-Sizing' the World Bank Group's Approach to F&C Issues in Operations.*** The sanctions process has been through a series of iterations and reforms aimed at providing the World Bank with a variety of ways to approach fraud and corruption in World Bank projects. Aside from formal sanctions proceedings, the World Bank now has alternative tools in its Voluntary Disclosure Program (VDP) and settlements. Experience



suggests that there may be a need to expand this ‘tool kit’ further and—equally important—develop a coherent policy framework for the use of the tools at the World Bank’s disposal. The sanctions process has, over time, become increasingly sophisticated and formal in nature. This is, overall, a positive step, providing more fairness to Respondents, but many sanctions cases involve relatively minor instances of misconduct which, as a matter of pure efficiency, may not merit the full panoply of procedural protections afforded by the current system.

50. ***Non-engagement of SMEs.*** The review team was struck by a pattern of non-engagement by SMEs in the system. As noted above, more than half of Respondents, most of them SMEs, are sanctioned ‘by default’ because they do not respond in any way to Notices of Sanctions Proceedings. There appears to be a fairly clear correlation between the size of firm and the likelihood it will appeal a case. Also as noted above, there are indications that some SMEs may be agreeing to settlements without a proper understanding of the implications of the responsibilities that they are agreeing to take on. Moreover, only a fraction of debarred parties have responded to overtures from the ICO concerning the conditions for their release from debarment outside the context of settlements. Without reaching out to actual Respondents, we can only really make educated guesses at the reasons behind this pattern of non-engagement. It does seem apparent, however, that the system has an ‘SME issue’ that merits further study and concern.

51. ***Preliminary recommendations.*** To address these issues, the review team would recommend a number of measures. These measures will be revisited on the grounds of the outcome of consultations with external stakeholders. At this stage of the review, suggested measures include:

- studying ways to make the system more accessible to small and medium-sized enterprises (SMEs) and individuals who lack the means to engage legal counsel, without incurring undue cost. Among options to consider would be the creation of ‘know your rights’ literature for Respondents, increased use of ‘plain English’ in sanctions proceedings, providing for Respondent participation in hearings by videoconference or other virtual means. A simplified procedure and rules for smaller cases would be more manageable for less sophisticated Respondents, as well as providing for greater efficiency; and
- expanding the ‘toolkit’ of approaches to deal with F&C issues in its operations that go beyond the current choice of sanctions proceedings, settlements or the VDP. Available options would range from informal, operational approaches to deal with minor infractions in real-time all the way to full-blown, formal sanctions proceedings with robust due process to deal with major cases that are likely to be heavily litigated. A clear framework—both in terms of criteria and

decision-making—would need to be developed to inform the choice of approach according to the nature of the problem, the need for immediate action and other relevant factors.

## VIII. NEXT STEPS

52. This initiating discussion brief will be made available [online](#) and will serve as the basis for consultations with external stakeholders. A consultation website will go live on July 3, 2013, and will provide information about the World Bank Group sanctions system, the review process, and channels for providing input into the first phase of the review. In the event that external stakeholders wish to submit questions and comments on this paper, or any matter related to the review and update process, they can do so using a dedicated email address: [sanctionsreview@worldbank.org](mailto:sanctionsreview@worldbank.org). A set of guiding questions for stakeholder input will be available [online](#).
53. Based on the outcome of consultations with external stakeholders, a final report for Phase I of the review will be presented to the Audit Committee in late 2013 (date TBC).