The World Bank Group Sanctions Process and its Recent Reforms

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THE WORLD BANK GROUP SANCTIONS PROCESS
AND ITS RECENT REFORMS

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ABSTRACT

The Article contributes to a growing literature on the role of international organizations as lawmakers. It presents a detailed account of the evolution of the World Bank Group’s sanctions process, with particular focus on the most recent round of reforms over the past five years. As part of those reforms, the Bank adopted broader definitions of fraudulent and corrupt practices (addressing ‘loopholes’ that had previously existed), strengthened its infrastructure for the investigation of such practices, and coordinated its efforts to a greater extent with other international institutions. The Article analyzes the key legal and other normative considerations that have influenced these developments, and describes the processes of institutional design and benchmarking that are involved in the reforms. The Article concludes that it would be inaccurate to characterize these reforms simply as an effort to ‘get tough’ on corruption. For a variety of reasons,

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the sanctions process has moved closer to a judicial model, for example involving a two-tier review process by independent bodies, the publication of decisions, and development of a sanctions ‘jurisprudence’. This is not to be regretted. However, the sanctions process remains essentially administrative in nature. How much further it might evolve in the direction of a judicial model will be shaped by the Bank’s ongoing efforts to balance considerations relating to the rule of law (including principles of due process and natural justice) and standards of good governance, as well as efficiency and effectiveness in pursuing its development mandate.

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I. INTRODUCTION

The World Bank\(^3\) is one of the world’s premier international financial institutions. It provides low-interest loans, interest-free credits and grants to developing countries for a wide array of purposes that include investments in education, health, public administration, infrastructure, financial and private sector development, agriculture and environmental and natural resource management, with aggregate new lending commitments of approximately $60 billion and aggregate outstanding loans and credits of $230 billion in Fiscal Year 2010. With the financial support provided by the Bank, borrowers implement projects and

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\(^3\) The World Bank is a term used to refer collectively to two institutions, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). IBRD began operations in 1947, with the purpose of providing loans to developing countries, while IDA was founded much later, in 1960, to provide financing on concessional terms to the poorest and least credit-worthy developing countries. The World Bank is part of the World Bank Group, a constellation of institutions including, in addition to IBRD and IDA, the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Center for Settlement of Investment Disputes (ICSID).
programs, including the procurement of goods, works and services necessary to carry out the project or program activities.⁴

The World Bank’s Articles of Agreement require the institution to make arrangements to ensure that the proceeds of Bank financing are used for their intended purposes and with due attention to economy and efficiency.⁵ This fundamental requirement is often referred to as the ‘fiduciary duty’, which forms the legal and policy basis for much of the Bank’s fiduciary framework for its operations, including its project-level anti-corruption efforts. To this end, the

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⁴ The Bank also provides financing in the form of Development Policy Loans (DPLs), under which provides budget support and other unlinked financing against achievement of defined policy measures rather than to finance specific expenditures. The Bank’s sanctions regime does not extend to DPLs, since it is not possible to trace the use of loan proceeds. This approach (or the lack of one) has come under increasing criticism. See, e.g., INDEPENDENT ADVISORY BOARD (IAB), 2010 ANNUAL REPORT 11-12 (January 2011), available at http://go.worldbank.org/S262CF3KD0 (last visited July 14, 2011) (acknowledging the “significant challenges and difficulties concerning efforts to investigate the extent, if any, of corrupt behaviors that may arise in connection with the implementation of [DPLs]”, but encouraging Management “to consider ways and means of sharpening the criteria for [DPLs]”).

⁵ See IBRD ARTICLES OF AGREEMENT, art. III, §5(b) (“The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”); and IDA ARTICLES OF AGREEMENT, art. V, §6 (“The Association and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.”).
Bank Group has established a set of legal and other tools to help prevent and combat fraud and corruption in Bank Group projects and programs. Among other things, the Bank Group has established a formal process for sanctioning firms and individuals which have been found to have engaged in fraud and corruption in Bank Group-financed projects, primarily by declaring them ineligible to be awarded Bank Group-financed contracts, a step commonly known as ‘debarment’. Sanctions are intended to uphold its fiduciary duty by excluding corrupt actors from access to Bank financing, while serving as a deterrent both for the sanctioned firm and for others, and incentivizing rehabilitation.

6 While the sanctions regime is an internal administrative process designed to address fraud and corruption committed by contractors and other third-party firm and individuals, the Bank also developed anti-corruption tools aimed at borrowers and other recipients of loan proceeds with which it has direct contractual privity. These include Anti-Corruption Guidelines and other provisions included in, or incorporated by reference into, its legal agreements. See WORLD BANK, GUIDELINES ON PREVENTING AND COMBATING FRAUD AND CORRUPTION IN PROJECTS FINANCED BY IBRD LOANS AND IDA CREDITS AND GRANTS (dated October 15, 2006 and revised in January, 2011) [hereinafter the Anti-Corruption Guidelines], available at http://go.worldbank.org/G81DJ33HF0 (last visited July 14, 2011). Other such tools include ‘smart project design’, whereby anti-corruption mechanisms – including the direct participation of clients in selecting and implementing projects, public disclosure requirements, and improved supervision through community-based project facilitators who are linked to national networks – are embedded within the projects and programs the Bank supports.

The sanctions regime also contributes more broadly to the Bank’s governance and anti-corruption strategy (GAC Strategy) in the service of its development mandate. The Bank’s research and experience, reflecting a growing global consensus, have shown that the quality of governance, including control of corruption, has a significant impact on economic growth and poverty reduction. The GAC Strategy is far-ranging, calling for actions at the global, national and project levels. Sanctions play a dual role within the strategy: as mentioned above, they protect Bank projects, but they also have a broader objective at the global level. While Bank sanctions can only be relatively small part of the picture, the Bank aims to leverage its sanctions in order to help create an overall global disincentive structure for corrupt behavior.

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8 See generally IBRD ARTICLES OF AGREEMENT, art. I (setting out the purposes of the Bank).
9 See generally WORLD BANK GROUP, STRENGTHENING WORLD BANK GROUP ENGAGEMENT ON GOVERNANCE AND ANTICORRUPTION 3 (paragraph 5) (March 21, 2007) available at http://go.worldbank.org/32PINXVIJ0 (last visited July 22, 2011). See also Id. (paragraph 6) (“Poverty reduction is the main mission of the Bank’s work. With much evidence demonstrating the link between governance and poverty reduction, and between corruption, governance, and aid effectiveness, strengthening governance and fighting corruption are key to achieving this mission.” Footnotes omitted.)
10 The recent agreement among multilateral development banks on the mutual enforcement of debarment decisions has been particular significant in this regards. See generally Stephen S. Zimmermann and Frank A. Fariello, Jr., Coordinating the Fight Against Fraud and Corruption: Agreement on Cross-Debarment among Multilateral Development Banks, forthcoming in INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE (Hassane Cisse, Daniel D. Bradlow & Benedict Kingsbury eds., 2011).
This article contributes to a growing literature on the role of international organizations as law-makers.\textsuperscript{11} International institutions are increasingly recognized as key agents in creating and shaping new legal norms; no longer are they merely sites or facilitators in the process. Within the past two decades, international lawyers have expressed both enthusiasm and anxiety concerning the proliferation of international courts and tribunals,\textsuperscript{12} as well as a widely noted ‘turn to legislation’ by the United Nations (UN) Security Council.\textsuperscript{13} More relevantly, an important and expanding body of law and practice is generated as a result of the internal administrative processes of international organizations. Traditionally understood as the subject matter of international institutional law,\textsuperscript{14} this body of law and practice has more recently been reconceptualized in terms of global constitutionalism,\textsuperscript{15} the exercise of international public authority,\textsuperscript{16} and the

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\textsuperscript{11} See generally JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005).
\textsuperscript{15} See generally JAN KLABBERS, ANNE PETERS AND GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009).
\end{flushleft}
emergence of a new global administrative law. Rather than adopting any one of these perspectives over the others, this article offers an in-depth description and analysis of one particular instance of legal and institutional evolution within the World Bank. In doing so, it illuminates the kinds of circumstances that prompt, and normative considerations that influence, law-making by an international organization.

The article begins by outlining the principal features of the Bank Group’s sanctions process as it exists today (Part II) and sketches some the key

16 See generally Armin von Bogdandy, Philipp Dann and Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 GERMAN L. J. 1375, 1377 (2008) (“The legal framework of governance activities of international institutions should be conceived of as international institutional law, and enriched by a public law perspective, i.e. with constitutional sensibility and openness for comparative insights from administrative legal thinking.”), and the other articles in the same Special Issue on “Public Authority and International Institutions”.

17 See generally Benedict Kingsbury, Nico Krisch and Richard B. Stewart, The Emergence of Global Administrative Law, 16 L. & CONTEMPO. PROBS. 15, 17 (2005) (defining global administrative law “as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make”), and the other articles in the same symposium. Also see articles in the symposium on “Global Administrative Law in the Operations of International Organizations” in 6 INT’L ORG. L. REV. (2009).

18 At least one participant in the World Bank’s sanctions process has advocated basing its further development on global administrative law principles. Pascale Hélène Dubois and Aileen Elizabeth Nowlan, Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law, 36 YALE J. INT’L L. ONLINE 15 (2010).
consideration underlying reform of the Bank’s sanctions process (Part II). It then describes how those considerations have influenced the historical evolution of the sanctions process (Part IV), with particular focus on the recent changes that the Bank has adopted to improve the efficiency, effectiveness and procedural of that process (Part V). Finally, it concludes by reflecting on some of the longer-term implications of the reform process to date (Part VI).

II. THE CURRENT SANCTIONS PROCESS: AN OUTLINE

The Bank Group has adopted, in agreement with other multilateral development banks (MDBs), four standardized definitions relating to fraud and corruption that are subject to Bank Group sanction.19 These are: corrupt practice, fraudulent practice, collusive practice and coercive practice. In addition, the Bank Group may also sanction a firm or individual for having engaged in ‘obstructive practice’ in connection with an INT investigation. Collectively, the Bank refers to all five as ‘sanctionable practices’.20

20 These definitions may be found in Sanctions Procedures, supra note 7, at Annex A; the Anti-Corruption Guidelines, supra note 6, at paragraph 7; WORLD BANK, GUIDELINES: PROCUREMENT OF GOODS, WORKS, AND NON-CONSULTING SERVICES UNDER IBRD LOANS AND IDA CREDITS & GRANTS (January 2011), available at http://go.worldbank.org/RPHUY0RFI0 (last visited July 14,
The Bank Group maintains a quasi-judicial administrative process for sanctioning firms and individuals accused of having engaged in one or more of these sanctionable practices in connection with Bank Group financing. This is intended to provide the accused party, designated as the ‘Respondent’, with an appropriate level of due process before it is decided whether the Respondent will be sanctioned and, if so, which sanction will be imposed.

A. **Key Components**

The Bank Group’s sanctions process, as it exists today, consists of the following principal components:

*Investigation and Preparation of a Statement of Accusations and Evidence.* The Bank’s Integrity Vice-Presidency (INT) is charged with, among other things, investigating allegations and other indications that sanctionable practices have occurred in connection with Bank Group financing. If, after investigation, INT believes that there is sufficient evidence that a firm or individual has engaged in a sanctionable practice, it launches a sanctions case by submitting a Statement of Accusations and Evidence.

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Accusations and Evidence (SAE) to one of the Bank Group’s Evaluation and Suspension Officers (EOs).\textsuperscript{21}

\textit{Early Temporary Suspension}. The Bank Group has a special mechanism for suspending firms and individuals from eligibility during the investigation phase. The EO, upon request by INT, may impose a temporary suspension on the subject of an INT investigation prior to the commencement of formal sanctions proceedings, if the EO finds that there is already sufficient evidence that the subject has engaged in at least one sanctionable practice. Firms may provide rebutting evidence and petition the EO to lift the suspension. Early temporary suspension is a new feature of the Bank Group’s sanctions process and is discussed in more detail below.

\textit{Sanctions Proceedings}. The core of the sanctions process lies in formal sanctions proceedings, which consist of the following two tiers:

\begin{itemize}
  \item A first tier review of the SAE by the EO for sufficiency of the evidence. If the EO finds that the accusations are supported by “sufficient evidence”,\textsuperscript{22} he/she
\end{itemize}

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\textsuperscript{21} The Bank Group has four separate EOs for cases relating to IBRD or IDA operations, IFC operations, MIGA operations and Bank Guarantee operations. To date, sanctions cases have been heard exclusively by the IBRD/IDA EO.

\textsuperscript{22} The term “sufficient evidence” is defined as evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that it is more likely than not that
issues a Notice of Sanctions Proceedings to the Respondent, appending the Statement of Accusations and Evidence and recommending an appropriate sanction and temporarily suspending the Respondent from eligibility for Bank-financed contracts. The Respondent is temporarily suspended from eligibility to be awarded Bank financed contracts upon issuance of the Notice. The Respondent may file an ‘Explanation’ with the EO seeking either dismissal of the case or a reduction in the recommended sanction. If the Respondent does not contest the EO’s final determination, the recommended sanction (if any) is then imposed on the Respondent.

- In cases where the Respondent wishes to contest the EO’s final determination, it may trigger a second tier review by filing a ‘Response’ with the World Bank Group’s Sanctions Board, a body composed of three Bank staff and four non-Bank staff, and chaired by one of its non-Bank staff members. The Sanctions Board then considers the case de novo and takes the final decision on the sanction to be imposed, if any. While the first tier of proceedings is conducted exclusively on the basis of written pleadings, this phase of the proceedings may include hearings if either the Respondent or INT requests them. The

the Respondent has engaged in a Sanctionable Practice. Sanctions Procedures, supra note 7, at §1.02(a).
name(s) of the sanctioned party(ies) and the sanction(s) imposed are made public.\textsuperscript{23}

In these proceedings, the initial burden of proof is on INT to establish that it was ‘more likely than not’ that the Respondent engaged in a sanctionable practice. This standard of proof is equivalent to the usual civil standard of ‘preponderance of the evidence’ or ‘balance of probabilities’, translated into terms understandable to non-lawyers.\textsuperscript{24} If the EO consider that INT has made out a \textit{prima facie} case against the Respondent, however, the burden shifts to the Respondent. As befits an administrative proceeding,\textsuperscript{25} flexible rules of evidence apply: in making their determinations, the EO and Sanctions Board may both consider any form of evidence, including circumstantial evidence, and draw any inferences they deem reasonable therefrom.\textsuperscript{26}

\textsuperscript{23} The same basic procedures apply to cases relating to IFC, MIGA and Bank Guarantee operations, with adjustments appropriate to their different business models: in particular, these cases involve separate EOs, with more expansive standards of review, and alternate members of the Sanctions Board are appointed to hear cases relating to private sector operations.


\textsuperscript{25} The principal goal of World Bank Group sanctions proceedings is to protect the Group’s funds, not to ‘punish’ respondents; the sanctions imposed do not entail any form of physical coercion, nor even an obligation to repay money to the Bank. The requirements of due process are accordingly less stringent than in criminal or even civil proceedings.

\textsuperscript{26} \textit{See generally} Sanctions Procedures, \textit{supra} note 7, at art. VII.
Negotiated Resolutions. In appropriate circumstances, sanctions may also be imposed on a Respondent through a negotiated resolution of the case. Under this mechanism, INT may enter into negotiations with a Respondent at any stage of the sanctions process up to the issuance of a decision by the Sanctions Board, or with a potential Respondent during the investigation stage prior to the commencement of sanctions proceedings. Negotiated resolutions are subject to a number of procedural and substantive safeguards within the Bank to ensure fairness, transparency and credibility, including clearance by the Bank’s General Counsel and review by the EO. Negotiated resolutions are a new feature of the sanctions process and are discussed in more detail below.27

B. Types of Sanctions

The Sanctions Procedures provide for a range of five possible sanctions:

Debarment with Conditional Release: The ‘baseline’ or default sanction28 is to impose a minimum period of debarment (i.e., ineligibility to be awarded a Bank Group financed contract or otherwise participate in Bank Group financed

27 See infra, notes 86-88 and accompanying text.
28 The term ‘baseline’ sanction means the sanction that would normally be imposed for a sanctionable practice before giving effect to any aggravating or mitigating factors.
activities) of three years, after which the sanctioned party may be released if it has complied with certain defined conditions. The conditions normally include the debarred party putting in place, and implementing for an adequate period, an integrity compliance program satisfactory to the World Bank Group. This sanction is discussed in more detail below.29

‘Plain vanilla’ debarment. In cases where no appreciable purpose would be served by imposing conditions for release but deterrence requires some period of debarment, sanctioned parties may be debarred for a specified period of time, after which they are automatically released from debarment. This would occur, for example, in cases where a sanctioned firm has already in place a robust corporate compliance program, the sanctionable practice involved the isolated acts of an employee or employees who have already been terminated, and the proposed debarment is for a relative short period of time (e.g., one year or less). At the opposite extreme, in exceptional cases where there is no realistic prospect that the Respondent can be rehabilitated, it may also be sanctioned permanently.

Conditional Non-Debarment. Under this sanction, the sanctioned party is not debarred, provided the party complies with certain defined conditions within a set time frame. If the conditions are not met, the party is debarred. Conditional non-debarment is normally applied in cases where the Respondent has already taken

29 See infra, notes 70-79 and accompanying text.
comprehensive voluntary corrective measures and the circumstances otherwise indicate that it need not be debarred. It is also applied to parents and other affiliates of Respondents in cases where they were not engaged in misconduct but a systemic failure to supervise made the misconduct possible.

Letter of Reprimand. In cases of truly minor misconduct or peripheral involvement, debarment or even conditional non-debarment may be disproportionate to the offense. In such cases, the Bank issues a letter of reprimand to the sanctioned party. Examples include cases where an affiliate of the Respondent has been found to have some shared responsibility for misconduct because of an isolated lapse in supervision, but the affiliate was not in any way complicit in the misconduct.

Restitution. In appropriate cases, the sanctioned party may be required to make restitution or provide other financial remedies to the Borrower or to any other party, or to take other actions to remedy the harm done by its misconduct.  

The choice of the appropriate sanction by the EO or the Sanctions Board is guided by the Sanctioning Guidelines, a public document that seeks to enhance

30 Appropriate cases may include those where the damage caused by the misconduct is clear and quantifiable. Restitution has not been imposed to date, largely due to lack of clear criteria to how to calculate the quantum to be restituted and how to determine the appropriate recipient. The Bank is currently considering ways in which restitution may be mainstreamed into its sanctions regime.
predictability, while maintaining sufficient room for the exercise of discretion by
the EOs and the Sanctions Board in order to reflect the unique circumstances of
each particular case.\textsuperscript{31} The Guidelines include detailed treatment of aggravating
and mitigating factors, with indicative ranges for increases (in the case of
aggravating factors) and reductions (in the case of mitigating factors). Except
when permanent debarment is imposed, parties debarred for a period in excess of
10 years may petition for a reduction of the period of debarment after 10 years
have elapsed.

\textbf{C. Application of Sanctions to Affiliated Companies}

The Sanctions Procedures provide that affiliates of Respondents may also be
sanctioned, and that sanctions may be applied to the successors and assigns of
sanctioned parties. Bank Group Management has developed guidance, discussed
in more detail below,\textsuperscript{32} for dealing with sanctioning of corporate groups, as well
as the application of sanctions to successors and assigns of Respondents, typically
in the wake of corporate restructurings which may occur after a firm is

\textsuperscript{31} See generally WORLD BANK GROUP SANCTIONING GUIDELINES (January 1, 2011) [hereinafter
the Sanctioning Guidelines], available at http://go.worldbank.org/CVUUIS7HZ0 (last visited July
13, 2011). The Sanctioning Guidelines set out the various sanctions, the circumstances under
which each should be imposed, and the various aggravating and mitigating factors that impinge on
both the choice of sanction and on the length of debarment, when debarment or debarment with
conditional release is imposed.

\textsuperscript{32} See infra, notes 80-83 and accompanying text.
sanctioned. The guidance provides flexible principles for the application of sanctions to affiliates of the Respondent(s) and successors and assigns. The guidance also allows targeted sanctions in cases where the sanctionable practice is shown to have been limited to a particular division within a firm. The Bank Group’s sanctions procedures afford parent or ‘sister’ entities due process, so they may defend themselves against charges of culpability or responsibility for the Respondent’s wrongdoing, with substantially the same procedural rights as Respondents themselves.

III. KEY CONSIDERATIONS IN REFORMING THE WORLD BANK’S SANCTIONS PROCESS

At each stage in the evolution of its sanctions process, the World Bank has been concerned to ensure that that process reflects certain key legal considerations. In this part of the article, we outline some of the most important considerations underlying and guiding the reform process.

A. Effectiveness and Efficiency

As already noted, the underlying legal bases for the sanctions process are to be found in the Bank’s broad purposes and the ‘fiduciary duty’ to protect the use of
its financing, both established in its Articles of Agreement.33 Since the sanctions process was first established in the late 1990s, it has faced a more or less steady stream fraud and corruption cases. At the same time, the complexity of these cases has grown – at least in part as a result of the increasingly sophisticated legal thinking of those working within the sanctions regime, who have (among other things) sought to introduce more refined theories of liability, and as Respondents have adopted more aggressive legal approaches. Together, these developments have had the general effect of drawing out the time taken to complete the process and reach a final determination. The Bank has been continuously concerned, therefore, to ensure that its sanctions process remains both effective and efficient in identifying, excluding and deterring fraudulent and corrupt practices in Bank-financed and Bank-executed projects.

B. Principles, Values, and Standards

In pursuing that overall objective, however, the World Bank is equally concerned that the sanctions process should reflect certain fundamental principles and values associated with the rule of law. In doing so, it is particularly mindful of the varied – and evolving – legal, philosophical and religious traditions of its members. Elements of the rule of law are deeply embedded in the writings of modern and

33 See supra note 5, and accompanying text.
western political philosophers such as Locke, Montesquieu, Ricardo and Weber. More broadly, a concept of the rule of law is inherent in natural law ideals as expressed by Aristotle and Aquinas, as well as in religiously-inspired legal systems such as Islamic *shari’ah*. As far back as the third century B.C.E., the Chinese legal thinker Han Fei promoted the view that laws had to be predictable, public, and consistent. The World Bank seeks to ensure, to the extent possible and practicable, that the norms guiding each stage of the sanctions process are consistent with the highest expressions of legality in these various traditions.

Consistent with the deep values of those traditions, reform of the World Bank’s sanctions process is guided by both formal and procedural principles of the rule of law. Thus the Bank is careful to ensure that the Sanctions Procedures are well publicized, intelligible, internally consistent, and practicable; and that the sanctions process is applied generally, prospectively and in congruence with those


In the course of various reforms, the Bank has similarly sought to apply certain procedural principles of the rule of law, such as the conduct of hearings by an impartial tribunal that provides reasons for its decisions; and the rights of Respondents to representation, to present evidence in their own behalf, and to appeal. These latter principles are also understood to comprise the basic requirements of natural justice and due process, and have been enshrined as rights in the constitutional law of some countries and in international human rights instruments. The same principles are frequently considered by international lawyers as being among the “general principles of law”.

In addition to these principles and values associated with the rule of law, the World Bank also seeks to reflect and incorporate within its sanctions process what might more generally be termed standards of good governance and administration. Through a variety of programs, the Bank assists borrowers and

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38 Lon Fuller famously prescribed eight formal principles of the “inner morality of law”: generality; publicity; prospectivity; intelligibility; consistency; practicability; stability; and congruence. Lon Fuller, The Morality of Law 39 (rev. ed., 1969).
39 See generally Waldron, supra note 37, at 4. The nature of the sanctions process, and certain aspects of the World Bank’s business model, make it inappropriate to apply all procedural elements of the rule of law as adumbrated by Waldron.
40 See, e.g., Universal Declaration of Human Rights (1948), Art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”).
41 See generally Ian Brownlie, Principles of Public International Law 17-18 (7th ed., 2008) (summarizing references to general principles of law in the jurisprudence of the Permanent Court of International Justice and International Court of Justice).
other client countries to implement good governance standards of transparency, accountability, participation, and the like. In this connection, the Bank Group has recognized “the strong desirability of demonstrating, through its own practices, the standards of governance that it would hope to have take root in the developing areas of the world”.42 The past two decades have thus witnessed the creation of new organs and divisions within the World Bank – an Independent Evaluation Group, an Internal Auditing department, a vice presidency of Institutional Integrity (INT), and an independent Inspection Panel – all charged with ensuring, in different ways, that the Bank itself meets the appropriate standards of governance. These same standards are considered carefully in every review and benchmarking process of the sanctions process undertaken by the World Bank.

C. Institutional Design and Benchmarking

In a more concrete way, various aspects of the World Bank’s sanctions process may be compared to a variety of related processes in both national and international institutions. The principles, values and standards outlined above take form and are embodied in a particular institutional design, entailing specific legal rules, structures, processes and techniques. For example, as an essentially administrative process that does not purport to “punish” or find Respondents criminally liable, the sanctions process is not required to uphold the strictest

standards of due process, such as may be found in criminal court proceedings: accordingly, formal rules of evidence are excluded and an explicit *mens rea* requirement is omitted from most of the definitions of fraudulent and corrupt practices.\(^4\) Indeed, the sanctions process is closer in essence to a sanctions regime under national administrative law\(^5\) although it also borrows elements from civil and criminal law processes. These and other national regulatory regimes therefore provide useful models against which the Bank’s sanctions process can be benchmarked as it evolves.

However, the World Bank’s sanctions process is not identical with any single corresponding administrative or judicial process in domestic or national law. Thus, for example, the Bank’s sanctions process is considerably more elaborate than most administrative schemes, vesting as it does a quasi-investigative function in INT, placing the ‘burden of proof’ on INT (rather than requiring Respondents to demonstrate that they are ‘presently responsible’), and conferring quasi-judicial functions upon the EO and SB. The fact that it is concerned with activities that are

\(^4\) The 2006 definitions of Sanctionable Practices, for example, define “Coercive practice” as “impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party”. Sanctions Procedures, *supra* note 7, at Appendix 1. The words “to influence improperly…” imply an intention, but do not explicitly require a particular degree of *mens rea*.

\(^5\) One example being the US Federal Acquisition Regulations (FAR), which regulates the process through which the federal government purchases goods and services. The FAR appears to have heavily influenced the proposals in the Thornburgh Report, which informed the basic structure of the Bank’s current system. *See Second Thornburgh Report, supra* note 24, at 4 (footnote 2).
criminal in most countries also inevitably ‘colors’ the way in which the Bank, Respondents and stakeholders alike view the sanctions process. For these reasons, internal reviews and audits of the sanctions process have tended to benchmark it, among other things, against criminal law systems.

From yet another perspective, the sanctions process may be described as being based on a quasi-contractual model. The Bank’s jurisdiction and the legal standards that apply under the Sanctions Procedures are established contractually, by one of the Procurement, Consultant or Anti-Corruption Guidelines being incorporated into an agreement between the Bank and the relevant borrower. Tort law concepts are also relevant to the Bank’s determination of what level of knowledge and intent should be necessary under the various definitions of sanctionable practices. In contemplating reforms to its sanctions process, then, the Bank is required to consider and keep in appropriate balance a wide range of concepts and techniques drawn from administrative, criminal, contract and tort law. Moreover, the Bank’s Legal Department strives to approach each of these legal subject areas from an international perspective, for example by considering the degrees of mens rea in both common law and civil law traditions.

Finally, looking beyond national law regimes, the Bank’s sanctions regime has evolved in tandem with the practices and norms of other international bodies. As already noted, there is a significant, ongoing process of harmonization and
coordination between all MDBs on this issue. Among other things, in formulating its own policies and practices in the sanctions space, the Bank considers the sanctions regimes established by other MDBs such as the Asian Development Bank (AsDB), the Inter-American Development Bank (IDB), the European Bank for Reconstruction and Development (EBRD), and the African Development Bank (AfDB), the sanctions practices instituted by various UN bodies and specialized agencies, as well as the standards, guidelines and best practice models promulgated by other international organizations such as the Organization for Economic Co-operation and Development (OECD).

The next two parts of this Article illustrate how the multifaceted considerations outlined above have shaped the historical development of the World Bank’s sanctions regime, as well as specific features of that regime as it exists and operates today.

IV. EVOLUTION OF THE WORLD BANK GROUP SANCTIONS PROCESS

The World Bank has had a formal sanctions regime since 1996. The establishment of the system coincided with an increased focus on corruption as a development issue. Although the Bank had always taken some steps to prevent ‘leakage’ in Bank-financed projects in line with the fiduciary duty, the Bank had

\[45\] Id. at 12.
traditionally shied away from a focus on corruption *per se*. For many years, corruption was seen as primarily, if not exclusively, a political problem with little or no relevance to economic development. Moreover, work on corruption was felt to contravene the so-called ‘political prohibition’ that is hard-wired into the constituent documents of most (but not all) MDBs, barring them from interfering in the political affairs of their members. More recently, however, the close nexus between corruption and other governance issues, on the one hand, and development, including economic development, on the other, have become clear. And it has also become clear that, if done right, many governance issues

46 The Articles of Agreement of the IBRD, for example, contain a provision that states that “[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.” See The Articles of Agreement of the IBRD, art. IV, sec. 10 (as amended Feb. 18, 1989). IDA Articles of Agreement contain an identical provision. See The IDA Articles of Agreement, art. V, sec. 6 (Sep. 24, 1960). Almost identical provisions are contained in the Agreement Establishing the Inter-American Development Bank, art. VIII, sec. 5(f) (last amended July 31, 1995); the Articles of Agreement of the Asian Development Bank ch. VI, art. 36 (Aug. 22, 1966); and the Agreement Establishing the African Development Bank, ch. V, art. 38 (July, 2002). In contrast, the constituent documents of EBRD and EIB do not contain any such restriction. See also Hassane Cisse, *Should the “Political Prohibition” in Charters of International Financial Institutions be Revisited? The Case of the World Bank*, forthcoming in *INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE* (Hassane Cisse, Daniel D. Bradlow & Benedict Kingsbury eds., 2011).

47 Ibrahim Shihata, *Corruption – A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INTL. L. 451, 454-455 (1997) (noting that “the vested interests established through corrupt practices tend to weaken public institutions and delay attempts to reform the system, thus inhibiting the development of new activities and reducing economic growth”); Claes...
may be addressed without violating the political prohibition.\textsuperscript{48} The decisive turning point in this debate was marked by then President Wolfensohn’s landmark ‘cancer of corruption’ speech in 1996, in which he declared that, for developing countries to achieve growth and poverty reduction, “we need to deal with the cancer of corruption”.\textsuperscript{49} This clear statement by the head of the Bank broke the long-standing taboo, and it was [soon thereafter] that a formal mechanism for debarring corrupt actors from Bank projects was established.\textsuperscript{50}

\textsuperscript{48} See generally IBRAHIM SHIHATA, THE WORLD BANK LEGAL PAPERS 219-244 (ch 9) (2000) (‘Political Activity Prohibited’). This chapter sets out points made earlier in the Legal Opinion from Ibrahim Shihata, Senior Vice President and General Counsel, Prohibition of Political Activities in the Bank’s Work, July 12, 1995 (internal doc. SecM95-707).


\textsuperscript{50} Along with the establishment of a sanctions mechanism, in 1997 a contractual remedy specifically allowing for the cancellation of Bank financing for contracts tainted by corruption was also added to the General Conditions for World Bank loans. International Bank for Reconstruction and Development, General Conditions Applicable to Loan and Guarantee Agreements for Currency Pool Loans (Dated January 1, 1985 as amended through December 2, 1997), §6.03 Cancellation by the Bank (providing, \textit{inter alia}, that “[i]f… at any time, the Bank determines, with respect to any contract to be financed out of the proceeds of the Loan, that corrupt or fraudulent practices were engaged in by representatives of the Borrower or of a beneficiary of the Loan during the procurement or execution of such contract… the Bank may, by notice to the Borrower and the Guarantor, terminate the right of the Borrower to make withdrawals with respect to such amount”).
Since then, the sanctions regime has been the subject of several reform efforts over time intended to fill in ‘loopholes’ in its coverage and otherwise adapt the regime to evolving needs.

A. The Early History of World Bank Sanctions

The Bank’s sanctions process was first formulated in a paper presented to the Executive Directors in July 1996 and implemented in a January 1998 Operational Memorandum. The original process included a Sanctions Committee, composed of senior Bank staff, which reviewed allegations of fraud and corruption by bidders, contractors, suppliers and consultants in IBRD-financed projects and recommended an appropriate sanction to the President of the Bank, who took the final decision on any sanction, usually a debarment but, in cases of minor misconduct, a letter of reprimand.

The first major reform to the Bank’s sanctions regime was the establishment of INT in 2001 with a mandate to investigate allegations of fraud and corruption in

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Bank-financed projects and present its findings to the Sanctions Committee.53 Prior to INT’s establishment, allegations had been investigated by a variety of means, including by outside law firms, the Bank’s internal auditors, and a Corruption and Fraud Investigations Unit (CFIU). A review by a panel led by former UN Under-Secretary General and US Attorney General, Mr. Dick Thornburgh, in 2000 found that the Bank’s anti-corruption efforts would be better served by consolidating the Bank’s investigatory responsibility within a single department.54

B. The 2004 Reforms

The Thornburgh panel was again commissioned in 2002 to review the sanctions process, resulting in a major overhaul of the process in 2004 which established the basic two-tiered structure that still operates today.55 It was at this point that a first tier review by the EO was introduced, which was intended to allow for the

53 INT was also charged with investigating allegations of misconduct by Bank staff; this function (except with respect to misconduct amounting to significant fraud or corruption) has been transferred to the Office of Ethics and Business Conduct (EBC).
55 See generally Second Thornburgh Report, supra note 24.
relatively quick disposition of cases.\textsuperscript{56} The EO was also authorized to impose temporary suspensions, which under the procedures later adopted, took place 90 days after the commencement of formal proceedings. The Sanctions Committee was replaced with the current autonomous Sanctions Board including a majority of external members, which would take final decisions in sanctions cases, in order to enhance the credibility of the process and help insulate it from political pressures.\textsuperscript{57} The 2004 reforms also included the expansion of possible sanctions to include the current range of different sanctions, albeit under guidance later developed by Management, the ‘baseline’ or default sanction was initially ‘plain vanilla’ debarment.

In the following year, the sanctions process was expanded to include the Bank Group’s private sector operations in MIGA and IFC, as well as Bank partial risk guarantee operations.\textsuperscript{58} Similar procedures were adopted for these entities, with adjustments appropriate to their different business models, in particular separate EOs with more expansive standards of review and the appointment of alternate

\textsuperscript{56} See President’s Memorandum together with a report entitled “Reform of the World Bank’s Sanctions Process”, dated February 19, 2004), para. 16 et seq., (World Bank Board Papers R2004-0025 (Rev.1)).

\textsuperscript{57} Id.

\textsuperscript{58} See generally Supplemental Note (Anti-Fraud and Anti-Corruption Measures in IFC and MIGA Operations) to the President’s Memorandum and report entitled “Reform of the World Bank’s Sanctions Process” (World Bank Board Papers R2004-0025/1).
members of the Sanctions Board to hear cases relating to private sector operations.

C. The 2006 and 2007 Reforms

At the same time as the 2004 reforms were being finalized, work began to address a significant lingering ‘loophole’ in the regime. While the early emphasis on Bank financed procurement may have been justified by the particular vulnerability of public procurement to fraud and corruption, experience had shown that fraud and corruption could also occur outside procurement, for example, in the case of implementing agencies such as NGOs or financial intermediaries which are identified in the course of project design rather than selected through procurement.

At the same time, there was a growing realization that anti-corruption efforts would be far more effective if undertaken in collaboration with the Bank’s partners. As a result, the Bank had begun to work with other MDBs to harmonize approaches to fraud and corruption in projects, culminating with the formation of an IFI Task Force, which developed a uniform framework for preventing and
combating fraud and corruption, including harmonized definitions for corrupt, fraudulent, collusive and coercive practices.\textsuperscript{59}

These efforts bore fruit in 2006, when the Bank Group adopted further improvements to its sanctions regime, including (1) the expansion of the regime beyond procurement to cover \textit{all} fraud and corruption that may occur in connection with the use of Bank financing in the preparation and/or implementation of Bank-financed projects through, among other things, the adoption of new IFI Task Force harmonized definitions; and (2) adoption by the Bank of \textquote{obstructive practice} as a separate sanctionable offense, covering both non-compliance with the Bank’s third-party audit rights and deliberate obstruction of Bank investigations into fraud and corruption.\textsuperscript{60}

In September of the following year, a panel led by former US Federal Reserve Chair, Mr. Paul Volcker, recommended a number of measures to strengthen INT and the Bank Group’s approach to anti-corruption more generally, which Bank Management adopted in January 2008. Among these was a proposal that INT be upgraded to a Vice Presidency, which was implemented in 2008. The panel also

\textsuperscript{59} \textit{See generally} Uniform Framework, \textit{supra} note 19.

\textsuperscript{60} \textit{See} \textquote{Sanctions Reform: Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices"}, President’s Memorandum to the Executive Directors dated June 12, 2006. Concurrently, amended Sanctions Procedures were adopted, reflecting both the 2004 and 2006 rounds of sanctions reform.
recommended that the Chair of the Sanctions Board should be one of its external members, in order to enhance the effectiveness and independence of the sanctions process. That proposal was adopted by the Bank in February 2009.

V. SPECIFIC ISSUES IN THE RECENT REFORMS

Although the current sanctions process was authorized by the Bank Group’s Executive Directors in 2004 and its legal framework finalized in 2006, the new sanctions process only began operations in earnest in the spring of 2007. As the various actors in the system—in particular the EO and INT, as well as LEG, which advises both offices—gained experience with the new process, it quickly


63 The initial Sanctions Board members and the Evaluation and Suspension Officers were appointed in or around March 2007. The first proposed Notice of Sanctions Proceedings was submitted by INT to the EO in June 2007; the first Notice was issued by the EO in December 2007; and the first sanction imposed by the Sanctions Board in June 2008.
became obvious that many of the more granular aspects of the process still remained to be worked out.

At the same time, experience had also shown that there were inefficiencies and lingering vulnerabilities that undermined the effectiveness of the system, both at the ‘front end’ (e.g. firms under investigation remain eligible to bid for Bank financed contracts) and at the ‘back end’ (e.g., sanctioned firms were normally released from debarment without any demonstration of rehabilitation). The drive for greater efficiency also led the Bank to consider and then pilot negotiated resolutions to sanctions cases (aka settlements) in lieu of full-blown sanctions proceedings. Finally, momentum was building for greater transparency and accountability in the system, which led to calls for publication of Sanctions Board decisions and, later, to calls for publication of EO determinations as well.

While these reforms did not alter the basic structure of the Bank Group’s sanctions process, they were wide-ranging and significant, resulting in a comprehensive overhaul of the system. The main components of this round of reforms, outlined above, are discussed in greater detail below.
A. *Early Temporary Suspension*

Typical of the ‘front end’ vulnerabilities that the Bank was concerned to address, the Bank Group had faced fiduciary and reputational risks when it had in its possession credible evidence that a firm or individual had engaged in fraud and corruption, and yet under the Bank’s ‘open eligibility’ principles, the firm or individual remained eligible to bid on Bank Group-financed projects up until the time it is formally sanctioned by the Bank Group.  

Those risks had been partially addressed by the introduction of temporary suspension in the Sanctions Procedures as part of the 2004 reforms, in order to “protect the funds entrusted to [the Bank] from further misuse at the hands of a contractor who has been shown by credible evidence to have engaged in fraudulent or corrupt practices”. But temporary suspension occurred only after formal proceedings commenced, leaving a ‘window of vulnerability’ between the

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64 Bank procurement policy, like those of other MDBs, provides that any qualified firm or individual is eligible to bid on and be awarded Bank financed contracts unless there are specific grounds for ineligibility such as debarment or temporary suspension. Other grounds for ineligibility include where the vendor has been identified as ineligible by any Bank Group member government or other international organization. WORLD BANK VENDOR ELIGIBILITY POLICY, available at http://go.worldbank.org/W40WJB5AA0 (last visited July 13, 2011), §3.2. Neither the Bank, nor its borrowers, may exclude bidders on a case-by-case basis based on information they have in their possession unless that information has ‘ripened’ into an official action such as debarment or temporary suspension.

65 See Second Thornburgh Report, supra note 24, at 38.
time that evidence was uncovered and the time that a suspension could be imposed—a period that could be considerable, up to many months or over a year, since INT still needed to complete its investigation (often including inquiries into related allegations) and subsequently prepare its case for submission to the relevant EO.

Still more recent experience had confirmed that the risk was not merely theoretical, but in fact had materialized in practice. The Bank had been faced with situations, for example, where bidders under investigation by the Bank continued to bid on multiple Bank-financed contracts across regions. Complex cases also had arisen where INT was able relatively quickly to find evidence of a particular sanctionable practice (e.g. a fraudulent bid security), but this practice appeared to be only the ‘tip of the iceberg’, and additional time was required to follow up on other, harder to prove aspects of the case (e.g. collusion). The Bank needed a formal mechanism to remove such firms and individuals from eligibility during this ‘window of vulnerability’. The situation also produced a perverse incentive for the subject of INT investigations to engage in dilatory tactics to stave off temporary suspension and therefore prolong their eligibility for Bank-financed contracts. In the absence of this mechanism, the Bank was confronted with severe
challenges in finding ways to mitigate the fiduciary and reputational risks it faced.66

The problem had become acute enough in 2008 that Bank management decided that it should prioritize its solution before tackling any of the other issues that the sanctions regime was facing. In May 2009, the Bank Group adopted a reform that allows INT to request that the EO impose a temporary suspension on the subject of an INT investigation prior to the commencement of formal sanctions proceedings, if INT believes it has sufficient evidence that the subject has engaged in at least one sanctionable practice.

In order to impose a temporary suspension, the EO is required to determine that there is ‘sufficient evidence’ that the firm or individual in question has engaged in a sanctionable practice for which the EO would recommend a debarment for a period not less than two years. The minimum two year period is intended to help ensure that the eventual period of debarment is not less than the period of temporary suspension, thereby preserving the principle of proportionality. This period assumes a maximum of one year for the investigation and a further maximum of one year for the sanctions proceedings. The ‘sufficient evidence’

standard of proof is the same standard as currently applies to Notices of Sanctions Proceedings, but when applied to early temporary suspension other factors must be considered to take into account the uncertainty inherent in a case when the investigation is not yet complete. Whether there is “sufficient evidence” in a particular case depends on a number of factors, such as the strength, amount and completeness of the evidence under the circumstances, including the existence or absence of corroborating evidence, and the inferences that may reasonably be drawn from the evidence. The evidence should be either reasonably complete (e.g., most or all known and available witnesses have been interviewed) as to the particular allegation that forms the basis for the Notice of Temporary Suspension, or, though fragmentary, sufficiently compelling to justify the presumption that additional evidence is unlikely to significantly alter the inferences that may be drawn from it (e.g., proof positive of a forgery, admission by the Respondent). As a general rule, the earlier in the investigation a temporary suspension is requested, the stronger the evidence required would be.

Preliminary protective measures analogous to early temporary suspension are a common feature of judicial processes across legal systems. In civil cases, preliminary injunctions and similar measures such as temporary restraining orders
are nearly universal across legal systems.\textsuperscript{67} In administrative law, the US Federal
Acquisition Regulations (FAR) allows for the temporary disqualification of firms
and individuals from contracting pending completion of investigations or legal
proceedings.\textsuperscript{68} Like these analogous measures, early temporary suspension is
initially imposed \textit{ex parte}. The Respondent, however, is afforded an opportunity
to contest, after which the EO is empowered to lift the suspension.\textsuperscript{69}

B. \textit{Debarment with Conditional Release as the ‘Baseline’ Sanction}

As mentioned above, the 2004 reforms introduced a range of sanctions besides
‘plain vanilla’ debarment, including debarment with release conditioned on the
fulfillment of certain conditions, notably improvements in corporate governance.

\textsuperscript{67} See, \textit{e.g.}, \textsc{New Civil Procedure Code (Nouveau Code de Procédure Civile)} (France), Arts. 17, 808, 809-1; \textsc{Civil Procedure Code (Zivilprozessordnung)} (Germany), §§935, 917(1) ; and \textsc{Federal Rules of Civil Procedure} (United States), Rule 65.

\textsuperscript{68} While the FAR requires a finding of “necessity” and injunctive relief often requires a finding of
“irreparable harm”, these are not explicit requirements of early temporary suspension. The Bank
opted to dispense with these requirements, since under the Bank’s open eligibility policies there is
always a risk that Respondents will bid on Bank-financed projects and thus, these requirements
would almost invariably be met.

\textsuperscript{69} Specific criteria for lifting the suspension are not stipulated in the Sanctions Procedures, only
that the Respondent may argue “why it believes that, notwithstanding the evidence [presented by
INT], the Respondent should remain eligible to be awarded contracts for Bank Projects”. Sanctions Procedures, \textit{supra} note 7, at §2.02.
Under the sanctioning guidelines adopted by the Bank Group in 2006, the ‘baseline’ sanction to be imposed for any sanctionable practice was debarment for a stated period of time. Under this sanction, the Bank Group has no discretion as to whether sanctioned firms may become eligible again for Bank Group-financed contracts once they ‘serve their time’, and often no way of determining whether they have actually been rehabilitated or will simply continue to engage in fraud and corruption.

This left the Bank Group and Borrowers alike with considerable residual fiduciary and reputational risk when a debarment expired. This ‘back end’ vulnerability led Bank Group staff to examine ways to increase the effectiveness of the sanctions process in achieving its primary purpose—safeguarding Bank Group funds—by devising a mechanism to provide the Bank Group with better assurance of rehabilitation before firms are let back into the system.

One option considered by the Bank to address the ‘back end’ risk was to institute a procedure upon the expiration of the minimum period of debarment set by the EO or the Sanctions Board, whereby sanctioned parties would apply for ‘reinstatement’ of their eligibility for award of Bank Group-financed contracts and other forms of participation in Bank Group-financed activities. The
Respondent would be required to demonstrate its ‘present responsibility’\textsuperscript{70} before it is reinstated. The Asian Development Bank currently uses a similar mechanism, although without resort to the specific concept of ‘present responsibility’.\textsuperscript{71} This

\textsuperscript{70} The concept of ‘present responsibility’ is used in the Bank Group’s Vendor Eligibility Policy but not defined. WORLD BANK VENDOR ELIGIBILITY POLICY, \textit{supra} note 64, at §3. However, general standards apply to determinations of present responsibility, including “not hav[ing] committed any act or offense indicating a lack of integrity or honesty” and including a number of other factors, including financial and technical capacity. The US Federal Acquisition Regulation (FAR) uses this concept as a basis for determining whether or not a firm is eligible for government procurement. The burden is on the bidder to prove its present responsibility. Like GSD’s Vendor Eligibility Policy, the FAR does not contain a definition of ‘present responsibility’ and the determination is discretionary on the part of debarment officials. However, a series of factors are considered when making determinations of present responsibility in the light of past misconduct, including standards of internal control, cooperation with government investigations, payment of all civil, criminal and administrative penalties, remedial measures taken or agreed, recognition of the seriousness of the misconduct by management, and appropriate disciplinary measures against the wrong-doers. These are similar to mitigating factors in the Bank Group’s sanctions process, but under the FAR, such factors may lead to non-debarment because the firm in question, notwithstanding any past misconduct, is considered presently responsible. A similar concept exists under German public procurement regulations Verdingungsordnung für Bauleistungen (VOB) and Verdingungsordnung für Leistungen (VOL) provide for the possibility of excluding a bidder from participating in a bidding process on the grounds of “unreliability” (Unzuverlässigkeit). Neither the VOB nor the VOL provides a definition of “reliability”. The contours of “unreliability” and “serious infraction” can therefore be difficult to establish as there is no exhaustive list of reliability criteria. The government agency is free to ask for all information it deems pertinent in order to determine a bidder’s reliability. The principal’s discretion is therefore significant.

\textsuperscript{71} See ASIAN DEVELOPMENT BANK, INTEGRITY PRINCIPLES AND GUIDELINES (May 2010), available at http://www.adb.org/Documents/Policies/Anticorruption-Integrity/default.asp (last visited July 14, 2011), paragraph 89 et seq. We understand that IDB follows current Bank Group practice for its operational procurement, and AfDB does not have debarment with conditional release. EBRD has recently adopted debarment with conditional release along similar lines to
option would have perhaps provided the Bank Group with the greatest degree of assurance that a debarred firm would not engage in recidivism, as it would have afforded the Bank Group maximum discretion to assess the risks of recidivism by taking a holistic look at the firm at the end of the debarment period and considering all relevant factors before deciding whether the firm appears to be presently responsible.

After due study and consideration, however, the Bank Group decided not to pursue this option, which would have represented a more radical departure from the then-current system, albeit still within the broad parameters of the ‘debarment with conditional release’ concept. It was felt that the highly discretionary nature of the reinstatement decision and the lack of defined conditions for reinstatement may have raised concerns among stakeholders, particularly firms that bid on Bank Group-financed projects, given that Respondents would not know with certainty what concrete steps they need to follow in order to be reinstated other than to ‘reform’ and become ‘presently responsible’. This option might also have placed smaller firms and individuals in a particularly disadvantaged position, as they would be required to show that they have met a standard of ‘present

those currently in use by the Bank Group (i.e., compliance with conditions leads to a shortening of the debarment period).
responsibility’ without the requisite expertise, to which larger firms usually have access, regarding present responsibility concepts.\textsuperscript{72}

Moreover, the introduction of an explicit ‘present responsibility’ concept would have had potentially far-reaching implications, in particular for the use of sanctions for purposes of general deterrence. The Bank Group’s sanctions regime has the dual purpose of protecting Bank Group funds and also promoting both specific and general deterrence.\textsuperscript{73} It is in order to promote general deterrence that even firms that are unlikely to pose a present fiduciary risk to Bank operations may sometimes be sanctioned, albeit with significant mitigating factors pertaining. It would be difficult, if not to say impossible, to justify this approach under a strict ‘present responsibility’ concept, which focuses exclusively on the Respondent.\textsuperscript{74} Finally, although it would be possible to mitigate the risk through appropriate disclaimers, the Bank Group would have faced increased reputational risk if it decided to reinstate a firm that subsequently engages in a sanctionable

\textsuperscript{72} On the other hand, it is possible that firms would actually see this flexibility in a more positive light, as flexibility also means that debarred firms are free to establish their ‘present responsibility’ on any arguments they wish to present to the Bank Group, not only with regard satisfying to pre-set conditions.

\textsuperscript{73} See generally Second Thornburgh Report, supra note 24, at 60-61.

\textsuperscript{74} Similarly, a strict ‘present responsibility’ approach would have called into question the imposition of minimum debarment periods.
practice; reinstatement could be seen as providing a firm with a Bank Group ‘seal of approval’.  

In the end, the Bank Group adopted a form of debarment with conditional release whereby the debarred party is required to meet certain specific, pre-defined conditions before it is released, after a certain minimum period of debarment.

It is important to stress that the purpose of this change in the baseline sanction is not to debar companies for a longer period of time or indefinitely, but to place greater emphasis on rehabilitation, encouraging sanctioned firms to adopt adequate, effective policies and measures that make it less likely that they will engage in such misconduct again. The Bank has also developed detailed guidance on the principal conditions for release, which focus on the debarred party demonstrating that it has in place, and has implemented for an adequate period, an integrity compliance program satisfactory to the World Bank Group. Bank Group staff engaged in extensive consultations with both public and private sector stakeholders, and extensively studied international best practice models including the recently adopted OECD Good Practice Guidance on Internal Controls, Ethics,  

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75 As mentioned below, this risk also applies, but to a much lesser extent, to the form of conditional release that the Bank eventually adopted.
and Compliance, in developing integrity compliance guidelines for the World Bank Group against which the compliance programs of sanctioned parties would be evaluated.

These models suggest that a global consensus is emerging as to the principles and components required for an effective integrity compliance program. The guidance developed by the Bank reflects this international consensus. At the same time, the guidance recognizes the need for flexibility in applying fundamental principles to the particular circumstances of sanctioned parties, particularly small and medium sized enterprises, which play a major role in the Bank Group-financed operations in developing countries, for which a full-blown compliance program may be unnecessary or prohibitively expensive. Program elements will need to be tailored to the party taking into account such criteria as its size, business sector, and particularly its risk areas, as well as the legal environment(s) in which the party operates.


77 The process seeks to be flexible enough to account for the diverse nature of entities debarred under the World Bank Group system. Between 2008 and the present, approximately 90% of the entities debarred were either SMEs or individuals, the large majority of which were from Part II countries. Less than 10% were large multinationals.
For instance, while a large multinational company likely will need comprehensive, formalized measures, such as a senior officer and staff fully committed to overseeing the program, a small enterprise may be able to forgo much formality and instead merge the compliance function with other designated management and control officers or staff. As for individuals, while they will not be asked to adopt a formal program, they may be asked to participate in training and other awareness and educational efforts designed to inculcate a new mind-set, one of zero tolerance for fraud, corruption and other misconduct.

An Integrity Compliance Office, headed by an Integrity Compliance Officer (ICO) and lodged in INT has been established for the purpose, among other things, of providing guidance to sanctioned parties in establishing appropriate integrity compliance programs to fulfill the conditions for their release from debarment. The ICO also monitors implementation and decides whether the conditions have been satisfied.\(^78\)

\(^78\) Similarly, the ICO also decides whether conditions established by the Sanctions Board or EO as part of a conditional non-debarment sanction have been satisfied. The conditions imposed are likely to be similar to those imposed under debarment with conditional release, including for example adoption or improvement of an Integrity Compliance Program and/or other remedial actions related to the relevant misconduct. See Sanctioning Guidelines, supra note 31, at Part II.A; and Sanctions Procedures, supra note 7, at §9.03 (Compliance with Conditions for Non-Debarment and Release from Debarment).
The decision to place the ICO function inside of INT was not without some controversy, in particular given INT’s role in as ‘prosecutor’ of sanctions cases. Some parties may see this as a possible conflict of interest, even if in some legal systems prosecutors do, in fact, play an analogous role. But the Bank has adopted several safeguards to the fairness and impartiality of the ICO’s decision-making. The ICO has separate functional and administrative reporting lines from those offices charged with the investigation and litigation of sanctions cases, and INT management has made appropriate arrangements, including the adoption of an ICO Code of Conduct, to ensure that the ICO is insulated from undue influences from within INT or otherwise. And, finally, the ICO’s decisions on release may be appealed by the Respondent to the Sanctions Board on grounds of abuse of discretion.

Of course, the use of debarment with conditional release does not provide an iron-clad guarantee that debarred parties will not resume sanctionable practices. It should be borne in mind that, even under the proposal adopted, there remains a degree of reputational risk attached to the Bank Group releasing a debarred firm, if the party then resumes its bad behavior. But we believe that this risk needs to be balanced against the more acute risks run by the Bank Group when it releases a

79 In the US, for example, the Department of Justice monitors compliance with non-prosecution agreements.
debarred party without any form of due diligence. On the other hand, the goal of rehabilitation would be undermined if there was no possibility of release.

C. Sanctions and Corporate Groups

The Bank Group’s sanctions procedures allow for the sanctioning of affiliates of the Respondent in a sanctions case so as to prevent circumvention of Bank sanctions through the use of affiliates or changes in corporate forms and for the application of sanctions to the successors and assigns of sanctioned parties. Some internal guidance had already existed on these matters, but the guidance was relatively sparse, leading to uncertainty, in particular in relation to the appropriate application of sanctions to large corporate groups or after a complex corporate restructuring.

As part of the recent reforms, therefore, the Bank Group has developed far more detailed and comprehensive guidance for Bank Group staff, the EOs and the Sanctions Board on these matters. Besides setting out clearer criteria for the application of sanctions to affiliates and successors and assigns, the new guidance makes some important improvements in previous guidance. Perhaps most significantly, it provides a definition of ‘control’, which sets the parameters for the application of sanction, to wit: the ability to direct or cause the direction of the

80 See generally Sanctions Procedures, supra note 7, at §9.04.
policies or operations of another entity. The definition sets out a number of non-exclusive indicia of control that the Bank may apply in determining control, including interlocking equity ownership or management, overlapping employees, sharing of facilities and the like.

The new guidance also closes an existing loophole by making it clear that affiliates under common control with the Respondent may be sanctioned\(^8\) and, conversely, permits more targeted sanctions in cases where the sanctionable practice is shown to have been limited to a particular division within a firm. The guidance sets out four rebuttable presumptions when applying sanctions to corporate groups: (1) sanctions apply to the entire corporate entity unless the Respondent can show that the sanctionable practice was limited to a particular unit or division; (2) sanctions are applied to all subsidiaries (i.e., entities controlled by the Respondent) unless the Respondent can show that application would be disproportionate and not reasonably necessary to avoid circumvention; (3) sanctions are not applied to parents (entities controlling the Respondent) and ‘sister’ firms (entities under common control with the Respondent) unless INT can show some degree of either culpability (i.e., direct involvement in, or willful blindness to, the wrongdoing) or responsibility (i.e., failure to supervise or

\(^8\) Id. at §1.02 (defining “Affiliate” as, inter alia, “any legal or natural person that… is under common control with, the Respondent”). Prior to this reform, the sanctions procedures had only allowed for sanctioning of entities ‘controlling or controlled by’ the Respondent, thus leaving out the usual third element of most definitions of an affiliate.
maintain adequate controls) or that application is necessary to avoid circumvention; and (4) when INT has made a prima facie case that a firm is the successor or assign of a sanctioned entity, the sanction will apply to the putative successor or assign unless it can rebut INT’s case or otherwise show that such application would be inconsistent with the spirit of the guiding principles.

Moreover, the new guidance draws an important distinction between ‘responsibility’ and ‘culpability’, in an effort to provide a more nuanced, and therefore fair, sanctions regime. Culpability means, first and foremost, direct involvement in the wrongdoing, such as through participation or instruction. ‘Responsibility’, on the other hand, may arise simply from a failure to supervise or to maintain adequate controls or ethical culture within the corporate group such that the wrongdoing is made possible. Responsibility does not normally lead to debarment, but rather either conditional non-debarment (with the conditions including amelioration of internal controls, etc.) where the issues are systemic or, in cases involving an isolated incident of a failure to supervise, a letter of reprimand. However, egregious forms of responsibility, in particular ‘willful blindness’ to a sanctionable practice by a controlling entity or manager, may lead to sanctions comparable to those imposed for culpability.

As for successors and assigns, the general rule (subject to the presumption mentioned above) is that the sanction will follow the business line of the original
sanctioned party, so that if, for example, a controlling interest in a sanctioned firm is acquired by another firm and the sanctioned firm becomes its subsidiary, only the subsidiary would normally continue to be sanctioned. However, the guidance recognizes that there may be cases where the business of the predecessor and successor firms are so intertwined, or where the business of the predecessor constitutes such a large portion of that of the successor, that drawing a distinction would be impractical or pose an undue reputational risk for the Bank Group. In such cases, the sanction would apply to the successor in its entirety.

The new procedures provide due process protections for most affiliates subject to sanction. Parent and ‘sister’ firms are named in the Notice of Sanctions Proceedings and provided with substantially the same procedural rights as Respondents. Any issue arising after a sanction has been imposed is decided in the first instance by Management, but subject to appeal to the Sanctions Board on the same abuse of discretion grounds that apply to ICO determinations. In contrast, controlled subsidiaries of the Respondent need not be specifically named, and their interests are presumed to be represented in sanctions proceedings by the Respondent itself.

82 Such rights are not, however, afforded to subsidiaries of the Respondent. The Bank Group assumes that the interests of subsidiaries will be represented through the Respondent that controls them.

83 See generally Sanctions Procedures, supra note 7, at §9.04.
D. Updated and Public Sanctioning Guidelines

The Bank Group has updated its Sanctioning Guidelines with three main objectives in mind: (1) greater predictability for both the decision makers and the potential parties to sanctions proceedings; (2) greater clarity about the basis of sanctions decisions to MDBs and other institutions participating in mutual recognition of sanctions (a.k.a. ‘cross-debarment’) with the Bank Group; and (3) guidance and flexibility for INT in negotiating agreed resolutions of sanctions cases. As a secondary objective, these Guidelines may also serve as a benchmark for further harmonization of sanctions policies and practices with other MDBs. The updated Sanctioning Guidelines, unlike the previous version, have been made public to further these objectives.

The updated Guidelines seek to enhance predictability, while maintaining sufficient room for the exercise of discretion by the EOs and the Sanctions Board in order to reflect the unique circumstances of each particular case. As already

84 Five MDBs – the World Bank Group, AfDB, AsDB, EBRD, and IDB – have signed an Agreement for Mutual Enforcement of Debarment Decisions. Under this Agreement, each participating MDB informs the others of any debarments it has imposed of more than one year in length. Subject to an ‘opt out’ provision (permitting exceptional decisions by Management based on legal or policy considerations), all participating MDBs enforce each debarment thus notified to them as a matter of course and without subjecting them to a further sanctions process. AGREEMENT FOR MUTUAL ENFORCEMENT OF DEBARMENT DECISIONS (April 9, 2000), available at www.adb.org/documents/integrity/cross-debarment-agreement.pdf (last visited July 14, 2011). Also see generally Zimmermann and Fariello, supra note 10.
noted, for all five sanctionable practices the ‘baseline’ sanction is now debarment with conditional release, with a minimum period of debarment of 3 years. (The former Guidelines had provided for a range of 3-5 years.) The Guidelines now include more detailed treatment of aggravating and mitigating factors, with indicative ranges for increases (in the case of aggravating factors) and reductions (in the case of mitigating factors). Sanctions may be cumulative in cases of distinct multiple infractions. Except when permanent debarment is imposed, parties debarred for a period in excess of 10 years may petition for a reduction after 10 years have elapsed. The Guidelines also provide more detailed guidance on the appropriate use of sanctions other than the “baseline” sanction of debarment with conditional release. As is currently the case, the Sanctioning Guidelines are meant as a useful tool for the EOs and Sanctions Board in exercising their discretion, not as binding ‘rules’. 85

Perhaps the most significant change, however, lies not in the contents of the new Guidelines, but in the fact that they are now public. While the Sanctioning Guidelines were formerly an internal document intended solely as guidance to the EO and Sanctions Board, they now serve other, additional purposes. Publication of the Guidelines helps to enhance deterrence, as well as legal certainty for

85 The Sanctioning Guidelines themselves state that they contain “guiding principles… which are not meant to be prescriptive in nature, but to provide guidance to those who have the discretion to impose sanctions on behalf of the [World Bank Group]…” Sanctioning Guidelines, supra note 31, at preamble.
Respondents, by making clear in concrete terms the consequences of various forms of misconduct. By setting out in detail the mitigating and aggravating factors that determine the type and level of Bank sanctions, they are bound to significantly influence the way in which cases will be now be pleaded and argued. And wider awareness of the Sanctioning Guidelines helps to demonstrate the Bank’s care and attention to questions of due process and the rule of law.

E. Settlement of Sanctions Cases

The current formal mechanism for the settlement of sanctions cases was introduced in 2010, just prior to the most recent round of changes to the Bank Group’s sanctions process. Negotiated resolutions such as plea bargaining or settlement agreements are a near universal feature of civil, administrative and criminal procedure across legal systems as a useful means to enhance efficiency by resolving disputes using less time and fewer resources while providing certainty of outcome for the parties, but were missing as a formal part of the Bank Group sanctions process. Prior to its formal adoption, the Bank had already resolved two major sanctions cases through negotiation with actual or potential Respondents, but we believe that settlements should be more efficient and add more value now that they operate within a clear, formalized framework.
Under this new mechanism, the negotiated resolution of cases can take place at any stage of the sanctions process up to the issuance of a decision by the Sanctions Board, or during the investigation stage prior to the commencement of sanctions proceedings. Settlements may take two basic forms:

- **Negotiated Resolution Agreements.** These agreements effectively end—or, for settlements reached prior to their commencement, replace—sanctions proceedings in respect of the case with an agreed sanction which may (or may not) include compliance by the Respondent with certain conditions. As for debarment with conditional release, conditions will normally include the introduction or improvement of an integrity compliance program and/or remedial measures such as disciplinary action against the wrongdoers and, in exceptional cases, restitution. Cooperation with ongoing or future Bank investigations may also be a part of the terms of such a resolution.

- **Deferral Agreements.** These agreements ‘freeze’ sanctions proceedings for a period of time pending compliance by the Respondent with certain conditions, upon compliance of which the case is then settled. The parties will jointly petition the EO for a deferral of proceedings for a stated period of time not exceeding 5 years, conditioned on the performance of the obligations by the Respondent set out in an agreement. Obligations will typically mirror those

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86 For the settlement mechanism, see generally Sanctions Procedures, supra note 7, at art. XI.
for negotiated settlement agreements. Upon the lapse of the deferral period, if the Respondent has fully performed its obligations under the deferral agreement, the Notice is deemed withdrawn with prejudice and all accusations against the Respondent therein are rendered null and void. If, on the other hand, the Respondent at any time during the deferral period breaches its obligations under the settlement agreement, the sanctions proceedings, upon request by INT, are recommenced.

The new settlement mechanism includes a number of safeguards to ensure fairness, transparency and credibility, including criteria for entering into settlements and a number of procedural ‘checks and balances’. Among other things, the Bank Group General Counsel clears all negotiated resolution agreements, in agreement with the General Counsel of IFC or MIGA in cases involving IFC or MIGA projects. The settlement agreement is also subject to review by the relevant EO to confirm that: (1) the agreement was entered into voluntarily and without duress and (2) the agreed sanction, if any, does not entail a manifest violation of the Bank Group’s sanctioning guidelines. The settlement is then embedded within a sanction imposed by the EO, typically debarment with conditional release.

87 It should be noted that settlements are subject to the same Sanctioning Guidelines as cases that are adjudicated. However, the Guidelines do provide that willingness to enter into a settlement should be viewed as a form of cooperation and are therefore a significant mitigating factor justifying a lesser sanction than would otherwise apply.
The new mechanism also provides that INT will monitor the performance of settlement agreements. Where INT believes that the Respondent has not complied with the agreement, it notifies the Respondent, who has 30 days to submit a denial or justification for the non-compliance. INT will then determine, in consultation with the Bank Group General Counsel, whether the settlement agreement has in fact been violated. If it is so determined, the consequences specified in the settlement agreement (e.g. debarment for a stated period of time) will obtain. The Respondent may appeal INT’s determination to the Sanctions Board, but only on limited grounds (i.e., gross disregard of the facts).

INT has the discretion to determine, in consultation with the Bank Group General Counsel, whether or not it is appropriate to engage in settlement negotiations with a particular Respondent or Respondents and the appropriate terms and conditions for any resulting settlement agreement. The reasons that the Bank may find it appropriate to engage in a settlement include the following:

- Settlement is most appropriate in cases where there are significant mitigating factors, including in particular in cases where the Respondent has cooperated or is likely to cooperate in the future in a significant way with the investigation, has taken corrective measures or otherwise has shown that it no longer presents a significant fiduciary risk to the Bank Group. In such cases,
conditional non-debarment or debarment with conditional release may be appropriate agreed sanctions.

- Settlement may also be used as a tool to save Bank resources in cases where a Respondent is willing to agree to admit culpability and/or provide valuable information about its own or others’ malfeasance in exchange for a reduced period of debarment or other lesser sanction within the parameters of the Sanctions Procedures and the Sanctioning Guidelines.

- Settlement may also be appropriate in cases where the Respondent may not be willing to admit culpability, but is nevertheless open to resolving the case expeditiously through settlement. In such cases, settlement is most appropriate where significant resources can be saved (e.g., because in the absence of a settlement the Respondent is expected to prolong proceedings or significant INT resources would be required to complete the investigation) or where the outcome of the case may be in doubt.

The new process gives due consideration to the reputational risk that the Bank may incur in connection with the settlement, as well as issues of natural justice and due process for Respondents. In this connection, the Bank approaches with caution any settlement of cases involving serious wrongdoing, in particular in the absence of significant mitigating factors. Since the Respondent must enter into
settlement of its own free will and free from any duress, if the Respondent is not represented by legal counsel, INT ensures that the Respondent fully understands the terms of the settlement agreement. A settlement agreement may be terminated without prejudice to either party of the EO finds that the Respondent did not enter into it freely and fully informed of its terms. Moreover, the terms of the settlement must not undermine the purposes of the sanctions process, including general deterrence. Any sanction proposed by INT must be broadly consistent with the Sanctioning Guidelines, taking into account all relevant mitigating and aggravating factors. In addition, settlement agreements must conform to fundamental principles of fairness and to the Bank’s legal framework, including its Articles of Agreement and its applicable policies and practices.

F. Corporate/Operational Cross-Debarment

Unlike other MDBs, the Bank Group maintains a separate sanctions system for its own corporate procurement. To be deemed a responsible vendor with whom the Bank Group will conduct business, a vendor must meet a range of standards, most of which relate to the financial and organizational capacity of the vendor to deliver or perform the services, as well as its track record in not having seriously violated the terms of a Bank Group contract in the past. In addition, however, a vendor must not have committed “any act or offense indicating a lack of integrity

88 See Sanctions Procedures, supra note 7, at §11.02(d).
or honesty that seriously and directly affects [its] present responsibility…,
including fraudulent, corrupt, collusive, coercive, or obstructive practices…”.

Under that system, then, the ‘burden of proof’ is, in effect, placed on vendors to
demonstrate to the Bank Group’s General Services Department (GSD) that they
are ‘responsible’ before GSD will approve their application or awarding them a
contract.

Before the recent reforms, a finding by GSD that a party was ‘non-responsible’ on
the basis of fraud or corruption did not affect the eligibility of that party to be
awarded Bank Group-financed contracts and otherwise participate in Bank
Group-financed projects and programs. This status quo ante reflected the
differences in the two debarment systems, but allowed firms and individuals that
have been found by one arm of the Bank Group to have engaged in fraud or
corruption to participate in Bank Group-financed projects that were governed and
administered by another arm of the Bank Group, posing both a fiduciary risk to

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89 Id., §3.1(f).
90 See generally WORLD BANK VENDOR ELIGIBILITY POLICY, supra note 64.
91 GSD may debar vendors for other reasons such as breach of contract or sub-standard
performance, but these would not trigger cross-debarment.
92 It should be noted that GSD’s Vendor Eligibility Policy has been revised to provide for
automatic cross debarment and cross suspension of parties that have been debarred or suspended
under operational sanctions process. WORLD BANK VENDOR ELIGIBILITY POLICY, supra note 64, at
§§3.1(g), 3.2 and 4.1.
those projects as well as the reputational risk to the Bank of appearing to apply inconsistent treatment.

The Bank Group has now addressed these risks by adopting a new procedure whereby cases in which GSD has made a declaration of non-responsibility for fraud and corruption in connection with corporate procurement may be referred to the operational sanctions process (i.e., the IBRD/IDA EO and the Sanctions Board). The jurisdiction of the IBRD/IDA EO and the Sanctions Board has been expanded to allow them both to hear cases involving sanctionable practices in connection with Bank Group corporate procurement, when and if the firm in question has been declared ineligible by the Director, GSD for fraud and corruption. Such cases are referred to the EO immediately upon the issuance of the GSD decision.

INT acts as the ‘bridge’ between the two processes, working with GSD on the corporate case, while at the same time preparing an SAE so it will be ready for review by the EO immediately upon the issuance of the GSD decision. INT retains its discretion, however, not to refer particular cases, for example, where there is little or no risk that the firm declared ineligible by GSD would bid, or be eligible to bid, on Bank Group-financed contracts or otherwise participate in Bank Group-financed projects or programs (e.g., a small-scale local service provider).

93 Sanctions Procedures, supra note 7, at §3.01(a)(ii).
The operational sanctions case then proceeds as usual, except that the GSD decision, together with all the pleadings and evidence from the GSD process, are appended as exhibits to the SAE. The GSD decision thereby becomes part of the record considered by the EO and the Sanctions Board in weighing the evidence, but they are not bound by it.

Corporate/operational cross-debarment is facilitated by the fact that both processes share the same definitions of sanctionable practices (i.e., corrupt, fraudulent, coercive, collusive and obstructive practices) and the same standard of proof (i.e., a finding that it is more likely than not that the Respondent engaged in a sanctionable practice). However, there are some significant differences, including the fact that operational sanctions are decided (if appealed by the Respondent) by an independent body including a majority of members external to the Bank Group. Moreover, the burden of proof is on the Bank Group (i.e., INT) in operational sanctions cases, while it is on the Respondent in corporate cases. These differences reflect the differing nature of the decision to be made: when sanctioning on the corporate side, the Bank Group is merely making a business decision for itself not to do business directly with the sanctioned firm. Speed and efficiency are paramount concerns. On the operational side, the Bank Group is also making a business decision, but it is one that principally affects not itself but its borrowers, by constraining their ability to do business with certain firms and individuals using Bank Group financing. Thus, to enhance the credibility of
operational sanctions with stakeholders, a more robust process has evolved over the years with the approval, and often at the urging, of Executive Directors.

These reforms respect the different needs of the GSD and sanctions processes providing for a *de novo* review of each case. The main risk in the procedure thus adopted by the Bank Group, of course, is the possibility that the EO and/or Sanctions Board would not come to the same conclusion as the Director, GSD as to the culpability of the Respondent or the appropriate sanction to be imposed on it.94 This may create the impression that the Bank Group is taking a more aggressive stance for its own corporate procurement than for its operations or *vice versa*. But the risk of differing outcomes is inherent in a multi-stage review process (including the existing sanctions process). One way to avoid this risk entirely would be to provide for automatic cross-debarment of GSD decisions by the Sanctions Board, but this was deemed unlikely to be acceptable to the Bank Group’s borrowers and other stakeholders, given the differences in due process between the two systems. Transferring jurisdiction over corporate cases involving fraud and corruption to the Sanctions Board would also have eliminated this risk, but this was deemed inadvisable, since it would essentially relegate the Bank Group’s discretion over what companies it chooses to do business with under its corporate procurement and contracting policies using its own budgetary resources

94 One key reason this could occur is the difference in the burdens of proof; in cases where the evidence is not clear-cut, the difference may prove decisive.
to an external body. After much discussion, the Bank Group came to the conclusion that the risk of differential sanctions will be sufficiently mitigated by the fact that the EO and Sanctions Board have the same evidence as GSD at its disposal, as well as the GSD decision itself. If the EO or the Sanctions Board were to come to a different conclusion, they would need to do so consciously and explain its reasons for the different result.

G. Publication of Law Digests and Sanctions Board Decisions

As of January 15, 2011, the Bank Group adopted a new procedure whereby the Sanctions Board will publish the full text of its decisions in sanctions cases. The procedures require the Board to issued fully reasoned decisions, including both the basic facts of the case as well as the legal reasoning underpinning their decision.

Under the previous version of the Bank Group’s sanctions procedures, the names of sanctioned parties, together with the sanction imposed, were posted on the Bank Group’s external website, but the evidence and other considerations

95 Other MDBs have a unified sanctions process, decided by an internal sanctions committee, so that this issue of ‘outsourcing’ a business decision does not arise for them.
96 Under the Sanctions Procedures, the debarment period decided by the Director, GSD is a factor to be considered by the EO and the Sanctions Board in determining an appropriate sanction. Sanctions Procedures, supra note 7, at §9.02(g).
underlying the sanction were not made public. The procedures required only that the written decision of the Sanctions Board be disseminated to the Respondent and INT, although in practice the decisions had also been shared with the Bank Group EOs, Bank Group Management and the Legal Vice Presidencies.

There were, in the view of Bank Group Management, compelling arguments for greater transparency in the decision-making of the Sanctions Board. Transparency is, of course, itself a virtue, but beyond that it will act as an important safeguard against arbitrary, blatantly unfair or inconsistent decisions. It will therefore act as a mechanism for accountability, not just for the Sanctions Board itself, but also for INT and potentially the EO as well. If the Sanctions Board makes a questionable decision, either because its reasoning or its assessment of the evidence is flawed, that will be a matter of public record and judged in the court of public opinion. Similarly, the strength or weakness of the cases brought by INT will come to light. Given this, publication would also provide a powerful incentive for all actors in the sanctions process to maximize the quality of their work. Greater transparency will also enhance the deterrent value of sanctions by revealing the circumstances underlying the sanctioning of Respondents. And, finally, publication of Sanctions Board decisions—in particular their rationales—will enhance legal certainty for the Bank Group and stakeholders alike by creating, over time, a body of jurisprudence that will supplement the admittedly spare substantive legal framework for the Bank Group’s sanctions regime.
In this connection, under the new procedures, the Sanctions Board will also issue and periodically update a digest of the legal holdings contained in Sanctions Board decisions. The digest will be posted on the Bank Group’s external website. The digest will be updated annually, or perhaps semi-annually or even quarterly, as justified by the caseload and at the discretion of the Chair of the Sanctions Board. The digest will contain brief discussions of the principal legal holdings in each case, together with factual background relevant to an understanding of the holding.

Greater transparency is not without its pitfalls, however. Potential exposure of weak cases or flawed decisions would provide accountability, but with that accountability will come obvious reputational risks for the sanctions process and the Bank Group. Moreover, there is a risk that the Sanctions Board will unwittingly rely on defamatory material in the record. While the Sanctions Board can be expected to avoid making assertions not justified by the evidence, the accuracy of the Sanctions Board’s determinations is, in large measure, dependent on the quality of the evidence presented to it. This underscores the crucial importance of the quality of the evidence, and the care taken during investigation. It also suggests the importance of a careful and cautious evaluation of the evidence. In this connection, the Bank Group can take comfort in the robust due diligence and due process that its sanctions process entails: evidence gathered by
INT investigators is vetted, in the first place, by a separate special litigation unit
within INT, then by the relevant EO and finally by the Sanctions Board, with an
opportunity for the Respondent to contest the evidence (other than confidential
witness statements) at each stage of the process.

It is worth noting that other comparable bodies within the Bank Group, the
Administrative Tribunal and the Inspection Panel, both publish their full
decisions. (The Administrative Tribunal may redact the name of the appellant
upon request.) The ILO Administrative Tribunal (ILOAT) and the United
Nations Administrative Tribunal (UNAT) both publish their decisions; the

97 See Rules of the World Bank Administrative Tribunal (as adopted by the Tribunal on September
26, 1980, and amended as of January 1, 2002), available at
http://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf/%28resultsweb%29/594F02F73B1EE4C08
98 See Statute of the Administrative Tribunal of the International Labor Organization (adopted by
the International Labor Conference on 9 October 1946 and amended by the Conference on 29 June
http://www.ilo.org/public/english/tribunal/about/statute.htm (last visited July 14, 2011), at art. VI,
paragraphs 2 and 3; and Statute of the United Nations Administrative Tribunal (as adopted by the
General Assembly by resolution 351 A (IV) on 24 November 1949 and amended by resolution
782 B (VIII) on 9 December 1953, by resolution 957 (X) on 8 November 1955, by resolution
50/54 on 11 December 1995, by resolution 52/166 on 15 December 1997, by resolution 55/159 on
12 December 2000, by resolution 58/87 on 9 December 2003, and by resolution 59/283 of 13
11. In practice, decisions are not only made available upon request but are publicly available on
their websites.
ILOAT redacts the name of appellants, whereas the UNAT provides full disclosure.

In many national court systems, including France, Germany, United Kingdom, China and the United States, court decisions or summaries thereof are generally made available to the public. 99 As a general rule, decisions establishing a new rule of law or changing existing law, criticizing existing law, or involving matters of public interest are published, while other ‘ordinary course of business’ type decisions are available to the public upon request. In cases where confidentiality, privacy or data protection concerns trump the right to information, decisions can be redacted (e.g., witness and defendant names). Freedom of information laws grant a general right to access administrative decisions, but provide for a number of exceptions in addition to the ones that apply to court decisions (e.g., in the US, national security and the proper functioning of the executive branch). 100

It is fair to conclude, then, that as a general matter there is a strong presumption in favor of transparency in most administrative, civil and criminal legal systems, with limited exceptions for privacy, security and other paramount considerations

99 The public availability of administrative decisions in China varies according to agency and locale. Court decisions, on the other hand, are generally available to the public.
100 See ADMINISTRATIVE PROCEDURE ACT (5 U.S.C.A.) § 552(b).
that are considered to ‘trump’ transparency. Indeed, public access to court decisions is often considered a keystone for due process.

MDB sanctions have, however, traditionally been a notable exception to the general rule. It is not standard practice among MDBs to publish full decisions in sanctions cases. The reasons for this different approach are varied, but we understand that there are two main drivers: The first is a specific concern over potential defamation claims over statements in published decisions. The second is a more general philosophical difference in the way MDBs view sanctions. Rather than the outcome of a quasi-judicial process, most other MDBs view the decision to impose a sanction as a business decision subject to the customary practice of non-disclosure of deliberative material.  

**Alternative Options Considered by the Bank Group.** In developing these proposals, Bank Group staff offered a menu of options for Management’s consideration. Among the other options considered before settling on those set out above were (i) keeping the status quo, (ii) publishing case digests exclusively, and (iii) publishing short-form decisions, with the sanction to be imposed, the

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102 Notwithstanding these differences, the MDBs have managed to achieve a remarkable degree of harmonization of sanctions policies, including the mutual recognition of debarment decisions. See generally Zimmermann and Fariello, supra note 10.
rationale for the sanction, and a brief recitation of relevant facts. After study and deliberation, and consultation with the Chair of the Sanctions Board, the Bank Group chose full publication over these other options because full publication does the best overall job in furthering the goals of transparency, accountability and enhanced deterrence and, assuming decisions are properly drafted, also furthers the goal of legal certainty. Moreover, full publication avoids the reputational risk to the Bank Group inherent in case summaries or short-form decisions, which may be subject to speculation as to whether they accurately reflect the underlying decision.

Publication of EO Determinations. If Sanctions Board decisions are published, then it became clear that the Bank Group should logically also provide for the publication of EO determinations in uncontested cases, where the EO’s determination becomes the basis for imposing a sanction. Since, however, the EO makes a different sort of decision from the Sanctions Board, the new procedures provide for a different form of publication. A typical public EO decision will include a brief recitation of the case, including the accusations against the Respondent set out in the Notice, the fact that the EO has found sufficient evidence to support the accusations in accordance with the standards in the procedures, and the fact that the Respondent has not contested the case. The decision will also set out the recommended (and now definitive) sanction to be
imposed on the Respondent and the aggravating and mitigating factors underlying the recommendation.

VI. CONCLUSIONS

Taken as a whole, the recent reforms to the World Bank’s sanctions process have significantly improved, in our view, the efficiency, effectiveness and transparency of the system. Some of the major components of the reforms, notably early temporary suspension and debarment with conditional release, were intended to strengthen the system by addressing vulnerabilities and closing ‘loopholes’ in the system. The adoption of new, publicly available Sanctioning Guidelines and the publication of Sanctions Board decisions and EO determinations will, we believe, enhance the deterrent impact of sanctions. The new guidance on corporate groups extends the reach of sanctions to all affiliates of Respondents. And we have built a ‘bridge’ between the Bank Group’s corporate and operational sanctions systems.

It would be wrong, however, to characterize these reforms simply as an effort to ‘get tough’ on corruption. Private sector stakeholders should find much comfort in these reforms, in particular those – such as the publication of the Bank Group’s Sanctioning Guidelines and of Sanctions Board decisions – that increase the transparency and accountability of the system and increase legal certainty. Settlements provide potential Respondents with an efficient alternative means to
resolve sanctions cases, one that provides both the Bank and Respondents with certainty of outcome. And the adoption of model standards of compliance gives Respondents a clear idea of the Bank’s customary requirements for release from debarment.

The reforms also illustrate the way in which the Bank creates new law and legal policy. While the Bank, as an international organization, is not bound by any national law, it carefully considers broad rule of law values and principles, as evidenced by a benchmarking of major civil and common law legal systems, as well as international best practices, to inform its policy-making. Where appropriate, the Bank consults with external stakeholders before policies are adopted and ensures that its new policies are widely promulgated afterwards. These global standards are then adapted to the Bank Group’s particular needs and business model, but every effort is made to ensure that the Bank Group standards fall within the ambit of international best practice.

Taking the long view, it is clear that the Bank Group’s sanctions process has evolved over the years towards an increasingly quasi-judicial model. Features of this evolution include the creation of a two-tier review process involving both the EO and an independent Sanctions Board, the introduction of concepts like early temporary suspension and settlements, the publication of cases and the consequent development of Sanctions Board ‘jurisprudence’, and the like.
The reasons for this evolution are various. They include pressures and expectations of the Bank Group’s stakeholders, including particularly private sector as well as the Bank Group’s member countries, both of which have made increasing demands for appropriate due process. Evolving legal standards have also played an important role. But perhaps the most important driving force has been the logic of the basic structure of the process recommended by Thornburg in 2002 and adopted by the Bank in 2004. Despite warnings in the Thornburg Report to avoid an overly ‘legalistic’ approach, the creation of a two-tiered adversarial process, allowing for legal representation both for the Bank and the Respondent, made subsequent developments almost inevitable. The Bank’s implementation of the system, in particular the setting up of a special litigation unit within INT, further accelerated this evolution.

At the same time, Respondents and potential Respondents, rightly, have demanded that sanctions decisions be grounded in clear and transparent rules.

103 See, e.g., Second Thornburgh Report, supra note 24, at 27 (“…it should be kept in mind that the Sanctions Committee procedures are designed and intended to be very informal and avoid unnecessary legal complexities. For that reason, circumspection should be employed in evaluating former judges and litigating attorneys – persons whose careers have been steeped in the mastery of formal hearing procedures of particular national jurisdictions and who are thus more likely than others (for example those whose primary experience has been with informal arbitration proceedings or administrative proceedings) to exhibit a penchant for procedural formality and rigidity.”).
This has in turn required the development of a more detailed understanding of the grounds for sanction, among other things through the development of fully reasoned, public Sanctions Board decisions. INT, for its part, seeks to fill in the gaps in the Bank Group’s legal framework for sanctions through the prosecution of legal theories that are tested through the adjudication process. These developments can only be accommodated through a more sophisticated adjudicatory process than is typical for administrative processes.

It is clear, then, that the World Bank Group has moved decisively away from its original, pre-Thornburg approach to sanctions, more decisively indeed than Thornburg himself envisaged. In the process, the original ‘business decision’ conception of sanctions has been largely rejected, if not explicitly then at least by implication. If it were such, the decision to sanction could be taken using the Bank’s normal business processes and likely lead to very different results. By isolating the decision-making process and limiting the criteria for decision-making to quasi-judicial ones, the Bank has acknowledged that certain rule of law and due process considerations necessarily apply where it exercises quasi-public authority.

This development is not, in the view of the authors, to be regretted. There is much more at stake in a sanctions case, both for the institution and Respondents, than in a ‘normal’ business decision of the Bank. Respondents, in particular, do not
simply lose a business opportunity with the Bank Group.\textsuperscript{104} the public nature of sanctions, whether \textit{de jure} or \textit{de facto}, affects their good will with the general public—a factor often cited as worse than the immediate effect of the sanction itself. And with public sanctions decisions, the particular grounds for sanctions, including the actions of the Respondent, will be held up to public scrutiny.

At the same time, the sanctions process remains essentially administrative in nature. The Bank Group has not yet (and probably will not, at least in the immediate future) adopt the full panoply of rules that typify national civil or criminal systems, such as formal rules of evidence. At the end of the day, sanctions, while serious, cannot compare in severity of result to civil penalties or the deprivation of liberty that may potentially result from criminal proceedings. Due process and natural justice considerations are always calibrated to the stakes of the process in question: it is the potential outcome of proceedings that largely determine their nature. Moreover, the Bank must continually bear in mind standards of good governance, efficiency and effectiveness in pursuing its overriding duty to exercise responsible stewardship of public funds. The ongoing effort to balance these various considerations – both complementary and at times in tension with each other – will shape the future evolution of the World Bank’s sanctions process.

\textsuperscript{104} With the 2010 MDB Cross-Debarment Agreement, the immediate impact of sanctions on business opportunity has been multiplied. See generally Zimmermann and Fariello, \textit{supra} note 10.