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Rethinking the World Bank's Sanctions System

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FEATURE COMMENT: Rethinking The World Bank's Sanctions System

The World Bank is reviewing its system for suspending and debaring contractors (known formally as the World Bank sanctions system). The system is used to sanction contractors that have engaged in fraud or corruption (and other enumerated bad acts) related to Bank-financed projects. The World Bank sanctions system proceeds in stages—investigation, review, sanctions and possible remedial efforts—which appear unlikely to change, in any fundamental way, under the current review. The World Bank has, however, invited public comment on the incremental changes which have been proposed.

As the discussion below reflects, although the proposed reforms are potentially quite significant, the Bank has not yet assessed its “first principles”—its goals, and the costs and benefits of meeting those goals. Nor has the Bank released the data necessary for completing that assessment. After reviewing the sanctions process, and identifying what appear to be the Bank’s *current* goals in its sanctions system (stemming reputational and fiduciary risks), the discussion below recommends that the World Bank defer finalizing any reforms until it concludes its assessment of first principles, and has at hand all the data necessary to assess the sanctions system against those first principles.

How the World Bank reforms its sanctions system is important, both to contractors working on World Bank projects and to the broader developing world. The World Bank finances tens

of billions of dollars in procurement every year, across the globe, and its procurement guidelines—and its sanctions system—offer important models for nations and institutions building new systems to fight corruption in procurement. See, e.g., UN Office of Drugs and Crime, *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption* (2013); Rose-Ackerman, “International Actors and the Promises and Pitfalls of Anti-Corruption Reform,” 34 U. Pa. J. Int’l L. 447 (2013).

Understanding the World Bank’s Sanctions System—The sanctions system at the World Bank, see “World Bank Sanctions Procedures” (April 15, 2013), available at go.worldbank.org/CVUUIS7HZ0; Green, *International Government Contract Law* § 5:20 (West 2013), was shaped in part by recommendations from former U.S. Attorney General Richard Thornburgh. See, e.g., Fariello and Daly, “Coordinating the Fight Against Corruption Among MDBs: The Past, Present, and Future of Sanctions,” 45 Geo. Wash. Int’l L. Rev. 253, 258 (2013). And, as the table below reflects, the World Bank system in many ways resembles the U.S. federal system. See, e.g., Priess, “Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks,” 45 Geo. Wash. Int’l L. Rev. 271, 272–73 (2013).

As with the U.S. federal system, see Federal Acquisition Regulation subpt. 9.4, 48 CFR subpt. 9.4, the World Bank sanctions process is self-contained and stands apart from any criminal or civil proceedings. See generally Dubois, “Domestic and International Administrative Tools to Combat Fraud and Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System,” 2012 U. Chi. Legal Forum 195; Williams, “The Debarment of Corrupt Contractors from World Bank-Financed Contracts,” 36 Pub. Cont. L.J. 277 (2007). The World Bank system, like the U.S. sys-

tem, affords due process protections to contractors and individuals under review, see, e.g., de Chazournes and Fromageau, “Balancing the Scales: The World Bank Sanctions Process and Access to Remedies,” 23 Eur. J. Int’l L. 963 (2012), and results in a “general” bar—it is not a contract-by-contract exclusion system.

Unlike the U.S. federal system, however, the World Bank sanctions system is highly adjudicative. See, e.g., World Bank, “Sanctions System at

the World Bank” (“[T]he World Bank’s sanctions system consists of a two-tier adjudicative process, with a first level of review carried out by the Bank’s Suspension and Debarment Officer (SDO) ... and, for contested cases, a second level of review by the World Bank Group Sanctions Board, an independent body with a majority of external members.”), available at go.worldbank.org/WICZWZY0E0.

Comparing Debarment Systems	U.S. Federal Procurement	World Bank
Causes of Debarment	Broadly defined (for discretionary, i.e., non-“statutory” debarments)	Per Guidelines: a corrupt, fraudulent, coercive, collusive or obstructive practice
Referral and Sources of Evidence	Any source; any investigation	Integrity Vice Presidency (INT) investigation; redacted reports provided to third parties
Temporary Suspension	Allowed, e.g., notice of proposed debarment	Allowed, if sufficient proof
Standards for Debarment	Preponderance; then contractor must show responsible (qualified)	Preponderance, ultimately by Sanctions Board
Hearing	Yes	Yes, before Sanctions Board
Resolutions (range)	Debarment to Administrative Agreement	Debarment to Settlement (reviewed)
Cross-Debarment	All federal agencies	All multilateral development banks
Judicial Review	Yes	No

Although federal suspension and debarment officials retain substantial discretion (at least in matters which are not subject to mandatory statutory debarment), their World Bank counterparts serve in a role much more like an administrative judge’s. Cf. Dubois and Nowlan, “Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law,” 36 Yale J. Int’l L. Online 15 (2010) (arguing that World Bank sanctions system works best if it incorporates principles of global administrative law).

As the accompanying diagram (Figure 1) explains, the World Bank suspension and debarment officials receive reports from the investigators in the World Bank’s Integrity Vice Presidency (INT), and, based upon the available record, the suspension and debarment officials must recommend an appropriate sanction, subject to review by the Sanctions Board. See, e.g., Dubois, “The Litigator’s Role in the World Bank’s Fight Against Fraud and Corruption,” 39 Litigation 38 (2013).

Unlike their counterparts in the U.S. Government, World Bank suspension and debarment officials may not engage in open-ended discussions regarding present responsibility with contractors facing potential debarment. See, e.g., Nadler, Ware and Mohr, Feature Comment, “New Developments In The World Bank’s Sanctions Regime,” 54 GC ¶ 157 (noting World Bank suspension and debarment officials’ limited role in settlements). Instead, the World Bank sanctions system calls for the Bank’s suspension and debarment official to make a careful decision on the record, calibrating the presented evidence against the narrowly defined categories of bad acts which can trigger debarment. See, e.g., Brown, *Bribery in International Commerce* § 7:28 (West 2013). As noted, that decision, in turn, can be appealed to the Bank’s Sanctions Board.

Because of these subtle but critical differences between the two systems, while the U.S. system is focused on assessing the *present responsibility* of the vendor, see, e.g., FAR 9.402, 48 CFR § 9.402—

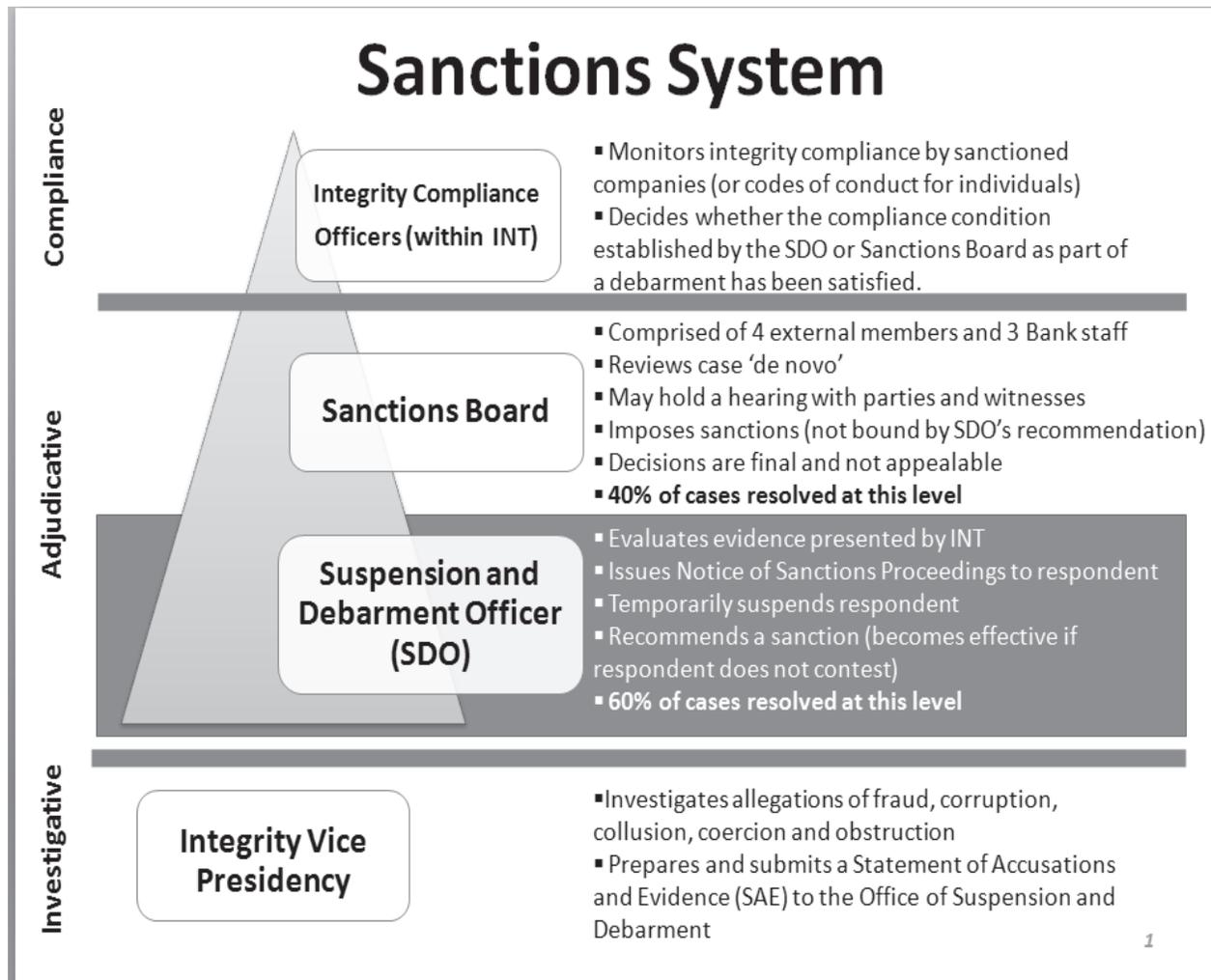


Figure 1 -- Source: World Bank

whether the vendor has the necessary systems and integrity to perform suitably—the World Bank's sanctions system seems to be geared more toward reducing *fiduciary risk* (the risk that Bank funds will be misdirected) and *reputational risk* (the loss of legitimacy caused by corruption), by punishing and deterring certain bad acts. Cf., e.g., World Bank, "History of Sanctions Reform," available at go.worldbank.org/GOYL1VLJMO (World Bank "Group faced fiduciary and reputational risks when it had credible evidence that a firm or individual had engaged in fraud and corruption and the firm or individual remained eligible to bid on Bank Group-financed projects").

The Bank's hierarchical process, with its distinct steps and careful checks and balances, leaves individual Bank officials without the discretion (or authority) to assess the special performance risks (or opportunities) which a vendor may present. The

World Bank system assumes that sanctions can and should be imposed for specific bad acts. Nothing in the Bank system suggests, for example, that the suspension and debarment officials would have the discretion to ignore a sanctionable act if doing so would keep a vital (but risky) contractor available for future competitions. Cf., e.g., Matjan, "The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes," 45 *Geo. Wash. Int'l L. Rev.* 291 (2013) (discussing limited bases for reduction in World Bank sanctions).

There is a logic to this focus, because the Bank (in its role as lender) does not actually administer contracts; it is a bank, not a procuring agency, and it has different stakeholders and different concerns. Cf. Canni, "Debarment Is No Longer Private World Bank Business: An Examination of the Bank's Distinct Debarment Procedures Used for Corporate Procurements and Financed Projects," 40 *Pub. Cont. L.J.* 147

(2010) (discussing World Bank debarment system for its own “corporate” purchases).

The U.S. system, in contrast, is much more flexible. In the U.S. federal system, the debarment decision is, at its heart, a business decision, centered around performance risk and weighing many factors, including (as a practical matter) potential effects on future competitions. See, e.g., Manuel, “Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments” 9 (Cong. Res. Serv. 2012) (“Because [under the U.S. federal system] the public interest encompasses both safeguarding public funds by excluding contractors who may be nonresponsible and not excluding contractors who are fundamentally responsible and could otherwise compete for government contracts, agency officials could find that contractors who engaged in exclusion-worthy conduct should not be excluded, particularly if they appear unlikely to engage in similar conduct in the future.” (footnotes excluded)); cf. Fariello and Daly, *supra*, at 259 (“Through multiple reforms over the years, the Bank has moved fairly decisively away from its original conception of sanctions as a purely business decision towards a rule of law approach.”).

These are generalizations, of course, and neither system is “pure”: World Bank officials do consider contractors’ performance risk in certain contexts, and U.S. officials can, at times, debar contractors largely for reasons of reputational risk. In the main, though, the two systems are structured around radically different goals. But taken together, the parallel systems highlight the three key issues that arise when corruption taints public procurement: the public purchaser loses legitimacy (reputational risk), precious public funds are diverted (fiduciary risk), and the purchaser loses best value (performance risk, which can be bundled into fiduciary risk, but here is addressed as a distinct risk at the procuring agency level).

Sanctions System Review and Issues—

Against this backdrop, the World Bank has undertaken a new review of its sanctions system. See World Bank, “Review of the World Bank Group Sanctions System: Consultation Plan” (Sept. 5, 2013), available at consultations.worldbank.org/consultation/sanctions-reviews; Bruce Zagaris, “World Bank Conducts Stock-Taking of Its Sanctions System,” 29 Int’l Enforcement L. Rep. ¶ 354 (Sept. 2013). The World Bank sanctions system has been reformed a number of times before, and this latest review is to build on

those earlier reforms. See, e.g., Nadler and Ware, Feature Comment, “The World Bank Implements New Sanctions Procedures,” 53 GC ¶ 41.

To frame the review, the World Bank undertook internal consultations, and a preliminary report on the initial findings was discussed with the Bank’s Audit Committee on March 22, 2013, in executive session. The preliminary report (which reportedly is several hundred pages long, including attachments) has not been released to the public; instead, a summary (an “initiating discussion brief”) has been posted at the consultation website cited above.

The review is to proceed in two phases. During phase I, the Bank is assessing how various reforms have been implemented since the last round of reform in 2007, the impact of the sanctions regime on Bank operations, and the legal adequacy of the current system “in light of current developments in national and international law.” “Review of the World Bank Group Sanctions System,” *supra*. In phase II, the Bank will “address the larger, first-principles issues of the overall efficiency and effectiveness of the system—i.e., whether the system as a whole is meeting its objectives of excluding corrupt actors and deterring fraud and corruption in World Bank Group operations, at an appropriate cost to the World Bank Group.” *Id.*

Issue: Defining First Principles: Because the Bank has deferred consideration of first principles until phase II of the project (which may not occur until 2014), it has not identified the core principles and purpose of the sanctions regime. As the discussion above reflects, as currently structured, the Bank’s sanctions system focuses first on *fiduciary* and *reputational* risk, and does not focus on the *performance* risk that client governments may face from corrupt or incompetent contractors. Many of the reforms being considered (some of which are discussed below) would be easier to assess if the Bank, as a threshold matter, identified the core goals under the current system, and framed how it will assess the costs and benefits of addressing those goals.

Issue: Making Data Available to Public: Regardless of the direction chosen—for example, the Bank may opt to keep its focus on *reputational* and *fiduciary* risks, or it may decide to take a more granular approach to performance risk—those first principles should be assessed against a more complete evidentiary base. The initiating discussion brief (the summary report released by the Bank) is only 18 pages long, and it would be impossible to assess from that

brief report whether the Bank is succeeding in meeting its core goals.

Thus, for example, while the initiating discussion brief notes on page 8 that “over 86% of sanctions cases have involved fraudulent practices, of which the vast majority has involved forgery or other forms of misrepresentation in bidding documents,” one cannot discern from the limited data whether these misrepresentations in bidding actually do point to risks in performance.

By the same token, without release of the data gathered to date, one cannot determine whether further research is needed to assess possible alternative paths. It may, for example, be practically impossible for the Bank to assess the day-to-day performance risks that contractors pose during administration of Bank-financed projects—but without release of the preliminary data, there is no way to assess that.

Issue: Suspensions Pending Investigations: If the Bank broadly assesses first principles—if it concludes, for example, that although the sanctions system is focused on reputational and fiduciary risks, the system must also be mindful of costs to borrowers—it will be better equipped to assess some of the procedural adjustments that it has already proposed.

In the summary report, the Bank proposed, for example, that there should be more “early temporary suspensions” (ETSs) pending INT investigations, which can take several years. This proposal may go even farther: one commenter from the Freshfields law firm noted that “there is also a suggestion to relax the standard to obtain an ETS by, for example, allowing an ETS to issue on the mere commencement of an INT investigation.” See also Independent Advisory Board (IAB), 2012 Annual Report, at 10 (February 2013) (board report, covering work of INT, raised possibility of temporary suspensions based upon probable cause alone, at outset of investigation, to mitigate risks), available at siteresources.worldbank.org/PROJECTS/Resources/40940-1244163232994/IAB-2012AnnualReport.pdf.

The proposed early suspensions could severely impact future competitions on Bank-financed projects. However, until the Bank clarifies its core principles (i.e., until it decides whether it is also responsible for ensuring adequate competition in its borrowers’ public procurement markets, and so should assess the competitive impacts of any early temporary suspensions), the Bank cannot fairly assess whether the proposed changes to the sanctions process are in keeping with its goals.

Issue: Suspensions Pending Settlement: The Bank’s summary report suggests on page 13 that consideration should be given to requiring firms under investigation to suspend further contracting (through a “voluntary undertaking or ETS”) as a condition to entering into “major settlement negotiations.” If the Bank’s core goal is to protect its reputation, this approach is entirely logical. Although it would discourage firms from entering into settlement negotiations, this approach would minimize any risks of new scandals emerging during those negotiations. If, however, the Bank instead concludes that encouraging settlement negotiations and maintaining robust competition are also core goals, for doing so will reduce performance risks for borrower nations in the long run, the Bank may conclude that forcing these “voluntary” suspensions is not a worthwhile reform.

Issue: Allowing Investigators to Appeal Decisions by the Suspension and Debarment Officer: The Bank’s summary report suggests on page 16 that INT should be allowed to appeal decisions by the Bank’s suspension and debarment officers to the Sanctions Board—in other words, that the investigators should be allowed to appeal a decision by the “gatekeeper” (the suspension and debarment officer) *not* to recommend a sanction. Once the Bank enunciates its first principles, it is difficult to see how any commonly recognized goal could be met by this suggestion. Even if the core goal of the sanctions system is limited to a reduction in fiduciary and reputational risks, the summary report cites no evidence that the suspension and debarment officers have erroneously passed on cases in which those risks have been presented. And if the goals are more broadly defined to include efficiency in the process, there seems little logic in creating broad new rights of appeal in the Bank’s investigative arm.

Issue: Cross-Debarment: The Bank’s summary report also suggests “permitting the World Bank to refer to third-party debarments as a basis for ineligibility”—to open the door, in other words, to broader use of cross-debarment, so that when another nation or institution debars a contractor, the Bank will follow suit. While cross-debarment is facially appealing, discussions in the procurement community (including a public colloquium at the George Washington University Law School on October 22) suggest that summary cross-debarment

could be deeply disruptive, and might well raise issues of due process and proportionality. See generally Yukins, “Cross-Debarment: A Stakeholder Analysis,” 45 Geo. Wash. Int’l L. Rev. 219 (2013), available at *ssrn.com/abstract=2316252*; Priess, “Anti-Corruption Internationally: Challenges in Procurement Markets Abroad—Part III: Complexity and Divergence: Procurement Sanctions for Corruption—A Comparative Perspective,” 2013 Gov. Contr. Year in Rev. Briefs 5 (February 2013); cf. Hostetler, Note, “Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects,” 14 Yale Hum. Rights & Dev. L.J. 231 (2011) (arguing World Bank investigation should trigger anticorruption proceedings in borrower nation). If the Bank concludes that its goal is not simply to eliminate reputational risk (a goal which could be met by summary cross-debarment), but rather more broadly to enhance performance at the project level, it may decide to take a more cautious approach to cross-debarment.

Conclusion—As the discussion above reflects, while the World Bank’s review of its sanctions system is very welcome, the Bank may wish to defer any conclusions regarding appropriate reforms until it has had an opportunity to define and assess first principles in its sanctions system, and has more data at hand to weigh the costs and benefits of proposed reforms.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Christopher R. Yukins. Professor Yukins (cyukins@law.gwu.edu) is the Lynn David Research Professor in Government Procurement Law, and co-director of the Government Procurement Law Program, at The George Washington University Law School in Washington, D.C. He is also counsel to the law firm of Arnold & Porter LLP. This article, which reflects only the personal views of the author, is based upon comments which the author previously submitted to the World Bank.