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Stuart H. Deming

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# Anti-Corruption Policies: Eligibility and Debarment Practices at the World Bank and Regional Development Banks

STUART H. DEMING\*

In the 1990s, the World Bank and the regional development banks, including the African Development Bank (AFDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IADB), began to seriously address the issue of corruption and its relationship to development in their procurement practices.<sup>1</sup> Taking advantage of their virtually unmatched leverage with borrower governments and multinational corporations, these multilateral lending institutions now use their procurement practices as a means of deterring corruption. The policies adopted and enforced by each institution seek to eliminate opportunities for corruption associated with their operations and to tie their lending to progress in combating corruption.

## I. The World Bank

Policies instituted by the World Bank provide a multifaceted approach to using, in a meaningful way, the Bank's procurement practices as a means of deterring fraud relating

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\* Stuart H. Deming is a principal with Deming PLLC in Washington, D.C. and in Michigan where he represents clients in a range of foreign business and investigatory matters. He previously served with the U.S. Securities and Exchange Commission and in various capacities with the U.S. Department of Justice. This article is adapted from a chapter of Mr. Deming's best-selling book: *The Foreign Corrupt Practices Act and the New International Norms* (ABA Publishing, 2d ed. 2010). For many years, he co-chaired the ABA's National Institutes on the Foreign Corrupt Practices Act. He founded the ABA's Task Force on International Standards for Corrupt Practices, and he is a member of the Board of Editorial Advisors to the *Foreign Corrupt Practices Act Reporter*. Mr. Deming received his B.A., M.B.A., and J.D. from the University of Michigan. He has also been licensed as a Certified Public Accountant in the State of Michigan.

1. What is commonly referred to as the "World Bank" is officially known as the World Bank Group. The World Bank Group is composed of five closely-associated institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID). While separate procedures may be associated with each of these institutions, each follows the same basic pattern. As a result, reference is made to the World Bank, as opposed to each institution, when discussing the anti-corruption procedures associated with these institutions.

to the projects supported or funded by the World Bank. More than mere platitudes are involved. Well-defined enforcement mechanisms are in place and being actively employed to address allegations of fraud, corruption, and other improprieties.

Severe sanctions requiring debarment or “blacklisting” by the World Bank have been imposed in a multitude of cases.<sup>2</sup> In addition to being subject to sanctions imposed by other institutions, the public nature of the sanctions imposed by the World Bank holds the prospect of exposing an individual or entity to scrutiny in the country where the sanctioned conduct occurred as well as being accessible to an organization that may contemplate engaging the individual or entity or financing a project with which they may be involved.

An individual or entity can be found ineligible or debarred, either indefinitely or for a stated period of time, when it is determined that the individual or entity engaged in corrupt or fraudulent practices in competing for, or in executing, a contract financed by the World Bank. Debarment by the World Bank may also result in ineligibility for procurements at other multilateral lending institutions, as well as before government agencies in a growing number of countries.<sup>3</sup>

Issues relating to fraud and corruption are now critical to the procurement process. A proposal will be rejected if it is determined that the bidder or consultant considered for the award of a contract engaged in corrupt or fraudulent practices in competing for the contract.<sup>4</sup> The portion of a loan allocated to a contract for goods, works, or services can be cancelled if a determination is made that representatives of the borrower or executing agency engaged in corrupt or fraudulent practices during the procurement or selection process.<sup>5</sup>

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2. An updated listing of individuals and entities debarred by the World Bank can be found on the World Bank's website. The World Bank Group [World Bank], World Banking Ineligible Firms, <http://www.worldbank.org/debarr> (last visited Apr. 1, 2010) [hereinafter Ineligible Firms].

3. The sanctions procedures also contemplate disclosure to governments and other organizations. See, e.g., World Bank, *IBRD/IDA Sanctions Procedures*, § 22 (Jan. 1, 2009), reprinted in STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* App. II-G, pt. 4, at 599 (ABA Publishing, 2d ed. 2010) [hereinafter *Sanctions Procedures*]. It should be added that the sanctions procedures associates with the different components at the World Bank Group are fundamentally the same. See, e.g., IFC, *IFC Sanctions Procedures*, § 18 (2007), available at [http://www.ifc.org/ifcext/anticorruption.nsf/AttachmentsByTitle/Sanctions\\_Procedures/\\$FILE/Sanctions\\_Procedures.pdf](http://www.ifc.org/ifcext/anticorruption.nsf/AttachmentsByTitle/Sanctions_Procedures/$FILE/Sanctions_Procedures.pdf); MIGA, *MIGA Sanctions Procedures*, § 18 (Nov. 2, 2006), available at <http://www.miga.org/documents/MIGA-Sanctions-Procedures1.pdf>.

As just one example of the collateral consequences of debarment by the World Bank, the Millennium Challenge Corporation, a development organization funded by the U.S. government, excludes individuals or entities debarred by the World Bank from its procurements. Millennium Challenge Corporation, *Millennium Challenge Corporation Program Procurement Guidance: Guidance on Excluded Parties Verification Procedures in MCA Entity Program Procurements Program*, 1 (Feb. 15, 2008), available at <http://www.mcc.gov/documents/mcc-ppg-eligibilityverification.pdf>.

4. World Bank, *World Bank Procurement Guidelines*, § 1.14, ¶ (b) (Oct. 2006), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266~isCURL:Y,00.html> [hereinafter *Procurement Guidelines*]; World Bank, *World Bank Consultant Guidelines*, § 1.22, ¶ (b) (2006), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060656~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html> [hereinafter *Consultant Guidelines*].

5. *Procurement Guidelines*, supra note 4, § 1.14, ¶ (c); *Consultant Guidelines*, supra note 4, § 1.22, ¶ (c).

Similar steps are possible in cases of fraud or corruption in the actual execution of a contract or project awarded or financed by the World Bank.<sup>6</sup> The World Bank can appoint auditors to inspect the accounts and records of suppliers, contractors, or consultants related to the performance of a contract.<sup>7</sup> Procedures for reporting allegations anonymously and protecting whistleblowers have also been implemented.<sup>8</sup>

#### A. ANTI-CORRUPTION POLICIES AND GUIDELINES

The World Bank's procurement rules and the rules for the selection of consultants include language specifically addressing fraud and corruption.<sup>9</sup> A vendor must be found to be responsible in order to be eligible to bid on a World Bank contract.<sup>10</sup> An individual or entity's integrity is among the critical factors in determining responsibility.<sup>11</sup> Debarment by the World Bank, a World Bank member government, or an international organization can be the basis for a finding of non-responsibility.<sup>12</sup> The commission of an "act or offense indicating a lack of integrity or honesty" or the serious violation of a World Bank contract may also serve as a basis for a finding of non-responsibility.<sup>13</sup>

A vendor may be suspended pending a determination of responsibility.<sup>14</sup> A non-responsibility determination applies to "all affiliates of the vendor."<sup>15</sup> A finding of non-responsibility must be based on evidence "that it is more likely than not that the vendor is not a responsible vendor."<sup>16</sup> A preponderance of evidence is required to support the "finding that the vendor is not a responsible vendor."<sup>17</sup> The period or extent of ineligibility may be reduced or eliminated with "newly discovered material information,"<sup>18</sup> a "bona fide change in ownership or management,"<sup>19</sup> "measures taken by the vendor to become responsible,"<sup>20</sup> or other reasons deemed to be appropriate.<sup>21</sup>

6. *Procurement Guidelines*, *supra* note 4, § 1.14; *Consultant Guidelines*, *supra* note 4, § 1.22.

7. *Procurement Guidelines*, *supra* note 4, § 1.14, ¶ (e); *Consultant Guidelines*, *supra* note 4, § 1.22, ¶ (e).

8. Information relative to the World Bank's hotline and reporting allegations concerning questionable conduct can be found on the World Bank's website. World Bank, Report Suspected Fraud or Corruption, <http://go.worldbank.org/OBUOB60810> (last visited Apr. 23, 2010).

9. *Procurement Guidelines*, *supra* note 4, § 1.14, ¶ (b); *Consultant Guidelines*, *supra* note 4, § 1.22, ¶ (b).

10. World Bank, World Bank Vendor Eligibility Policy, ¶ 1.2, <http://go.worldbank.org/W40WJB5AA0> (last visited Apr. 23, 2010).

11. *Id.* ¶ 3.1.

12. *Id.* ¶¶ 3.1(g) and 3.2.

13. *Id.* ¶¶ 3.1(f) and (i). Refusal to cooperate with a World Bank audit or investigation can also be a basis for a finding of non-responsibility. *Id.* ¶ 3.1(i).

14. *Id.* ¶ 4.1.

15. *Id.* ¶ 5.4.

16. *Id.* ¶ 5.5.

17. *Id.*

18. *Id.* ¶ 6.2(b)(i).

19. *Id.* ¶ 6.2(b)(iii).

20. *Id.* ¶ 6.2(b)(iv).

21. *Id.* ¶ 6.2(b)(v). One commentator raised concerns that the process for rejecting a vendor is not as well developed as that relating to a debarment. Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L. J. 277, 289-94 (2007).

Legal agreements for each project incorporate by reference the World Bank's Anti-Corruption Guidelines.<sup>22</sup> Project participants are to be furnished the Anti-Corruption Guidelines.<sup>23</sup> The Anti-Corruption Guidelines outline the obligations of borrowers and recipients "to prevent and combat fraud and corruption" in projects financed by the World Bank.<sup>24</sup> Borrowers and recipients are required to take "all appropriate measures to prevent and combat fraud and corruption."<sup>25</sup> "[T]imely and appropriate action" is required when cases of fraud and corruption arise.<sup>26</sup>

The Anti-Corruption Guidelines are broad in scope. They extend to fraud and corruption committed, or attempted, by recipients of loan proceeds in connection with the use of World Bank loan proceeds.<sup>27</sup> The phrase "recipients of loan proceeds" applies to individuals or entities receiving loan proceeds for their own use, serving as fiscal agents for the deposit or transfer of loan proceeds, or making or influencing decisions regarding the use of loan proceeds.<sup>28</sup> The "use of loan proceeds" includes diverting loan proceeds for ineligible expenditures or influencing, through fraud or corruption, a decision as to the use of loan proceeds.<sup>29</sup>

## B. INVESTIGATION OF QUESTIONABLE CONDUCT

The Integrity Vice Presidency (INT) at the World Bank investigates allegations that an individual or entity is engaged in questionable conduct in conjunction with a World Bank-financed project. The INT's jurisdiction is not limited to the procurement process.<sup>30</sup> It extends to fraud and corruption in the use of World Bank loan proceeds in conjunction with World Bank-financed investment projects as well.<sup>31</sup> The jurisdiction also extends to "non-compliance with the [World] Bank's third-party audit rights and deliberate obstruction of [World] Bank investigations into fraud and corruption."<sup>32</sup>

### 1. *Nature of Conduct Subject to Investigation*

Sanctionable Misconduct investigated by the INT includes fraud, corruption, coercion, collusion, and obstructive conduct.<sup>33</sup> The conduct need not be completed or succeed in

22. World Bank, *The World Bank's Anti-Corruption Guidelines and Sanctions Reform: A User's Guide*, at 1 (Oct. 15, 2006), available at [http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/EnglishFinalAnti\\_CorruptionGuidelines5\\_05\\_08nd.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/EnglishFinalAnti_CorruptionGuidelines5_05_08nd.pdf) [hereinafter *Anti-Corruption Guidelines*].

23. *Id.* attachment ¶ 9(a)(ii).

24. *Id.* attachment ¶ 1.

25. *Id.* attachment ¶ 2.

26. *Id.* attachment ¶ 9(c). Even before the onset of an investigation, this includes immediately reporting "any allegations of fraud and corruption that come to its attention." *Id.* attachment ¶¶ 9(b), 10(b).

27. *Id.* attachment ¶¶ 7-10.

28. *Id.* attachment ¶ 5. It does not matter whether the fiscal agent is a beneficiary of the loan proceeds. *Id.*

29. *Id.* attachment ¶ 4.

30. *E.g.*, *Sanctions Procedures*, *supra* note 3, at pt. I, ¶ (c); *Anti-Corruption Guidelines*, *supra* note 22, attachment ¶¶ 4-5, 9-10.

31. *Sanctions Procedures*, *supra* note 3, at pt. I, ¶ (c); *Anti-Corruption Guidelines*, *supra* note 22, attachment ¶¶ 4-5, 9-10.

32. *Anti-Corruption Guidelines*, *supra* note 22, at 4; see also *Sanctions Procedures*, *supra* note 3, at 3.

33. *Anti-Corruption Guidelines*, *supra* note 22, at 6-9.

order to be sanctionable.<sup>34</sup> Each form of misconduct has a unique definition under the World Bank's guidelines.

a. Corrupt Practice

A "corrupt practice is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party."<sup>35</sup> It does not matter whether the offer was accepted or received or whether "the purpose of the payment was achieved."<sup>36</sup> As the definition implies, both active and passive bribery are prohibited. "[T]he definition of corrupt practice is not limited to the prohibited activity during the procurement process but extends to bribery during the execution of the contract."<sup>37</sup> Bribery may also be employed to prompt lax enforcement of contract clauses or requirements relative to a multitude of issues such as a delay, the quality of a product, or the use of subcontractors.<sup>38</sup>

Classic examples of corrupt practices may include bribing officials to be chosen or placed on the "short list" or to obtain confidential information relating to the factors that will be critical to the selection process.<sup>39</sup> This can include situations where an individual or entity is awarded a government contract financed by the World Bank and a kickback of some sort is offered or directed toward the government official who steered the contract to the individual or entity.<sup>40</sup>

b. Fraudulent Practice

A "fraudulent practice is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation."<sup>41</sup> In general, any material misrepresentation or omission of material information constitutes a fraudulent practice. A negligent or innocent misrepresentation or omission does not constitute a violation.<sup>42</sup> The action must be taken

34. *E.g., id.* at 9.

35. *E.g., id.* at 5.

36. *E.g., id.* at 9.

37. Williams, *supra* note 21, at 287.

38. *Id.* (citing MARIO A. AGUILAR ET AL., PREVENTING FRAUD AND CORRUPTION IN WORLD BANK PROJECTS: A GUIDE FOR STAFF 9 (2000)).

39. This included situations where improper benefits were made to World Bank staff and where a company participated in a joint venture with World Bank staff while also conducting business with the World Bank. *Anti-Corruption Guidelines, supra* note 22, attachment ¶ 7(a). Companies have been debarred for engaging in corrupt activities with World Bank officials. Press Release, World Bank, Statement: World Bank Group Discloses Debarments under Corporate Procurement Program, No.2009/198/EXC (Jan. 11, 2009), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22030864~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>.

40. *Anti-Corruption Guidelines, supra* note 22, at 6.

41. *Id.*; *see also* Press Release, World Bank, World Bank Debars Four for Engaging in Fraud in Bank-Financed Projects, No. 2009/375/INT (June 2, 2009), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22198025~pagePK:64257043~piPK:437376~theSitePK:4607,00.html?cid=3001>,= (submission of a false bank reference letter to secure a contract for a project in Azerbaijan was the basis of a debarment of an entity and its principal).

42. "To act, 'knowingly or recklessly,' the fraudulent actor must either know that the information or impression being conveyed is false, or be recklessly indifferent as to whether it is true or false. Mere inaccuracy in such information or impression, committed through simple negligence, is not enough to constitute a fraudulent practice." *Anti-Corruption Guidelines, supra* note 22, at 5, note 10.

knowingly or in a manner “recklessly indifferent as to whether [the information] is true or false.”<sup>43</sup>

One example of a fraudulent practice would be a situation where the credentials or expertise of a consultant were misrepresented in order to meet the criteria to be selected as part of a procurement associated with the World Bank.<sup>44</sup> This could include misrepresenting experience or facts in proposals or falsifying or forging documents in support of proposals.<sup>45</sup> Other examples include “financial misrepresentations, the falsification of contract implementation information and accounting records, the tender of misleading bids, malicious frontloading of contract prices, overbilling, and the alteration of invoices or other supporting documents.”<sup>46</sup> It also extends to “any document-based change designed to manipulate or alter procurement or contractual outcomes.”<sup>47</sup> Withholding information about material conflicts of interest could also fall within this category.

### c. Collusive Practice

A “collusive practice is an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party.”<sup>48</sup> A typical example of a collusive practice is where an individual or entity works with other individuals or entities to manipulate the system to achieve an improper result.<sup>49</sup> A collusive practice also includes situations where an individual or entity works with others to steer a contract award to a particular individual or entity.<sup>50</sup>

Stifling competition can be a collusive practice. Manipulating the requirements for a request for proposal so as to exclude others would be an example of collusion, as would situations where parties work in tandem to actively and maliciously impede others from having an opportunity to bid on a potential contract.<sup>51</sup> A collusive practice can be an arrangement among possible suppliers wherein they agree, before bids are submitted, on a price over and beyond what is competitive and decide who among their number will sub-

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43. *Id.*

44. *Id.* at 6-7.

45. See Press Release, World Bank, Croatia: World Bank Sanctions BIS Healthcare Group in a Health Reform Project (Nov. 22, 2004), available at <http://go.worldbank.org/HKCFUV3NA1> (debarment of company and its principal for misrepresenting their experience and qualifications); Press Release, World Bank, World Bank Debars Firm, Individual For Fraudulent Practices Under Russian Federation Community Social Infrastructure Project, No: 2006/343/ECA (Mar. 30, 2006), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20870134~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (debarment for forging a manufacturer’s letter of authorization and for misrepresenting information in corporate documents).

46. Williams, *supra* note 21, at 287 (citing AGUILAR, *supra* note 38, at 9).

47. *Id.* at 287-88.

48. *Anti-Corruption Guidelines*, *supra* note 22, at 8.

49. *Id.*; see Press Release, World Bank, World Bank Debars Seven Firms and One Individual for Collusive Practices Under Philippines Roads Project, No: 2009/200/INT (Jan. 14, 2009), available at <http://go.worldbank.org/BKL6BASPQ0> (last visited April 20, 2010) [hereinafter Press Release 2009/200/INT] (firms sanctioned after it was determined that they “had participated in a collusive scheme designed to establish bid prices at artificial, non-competitive levels and to deprive the [World Bank] Borrower of the benefits of free and open competition”).

50. *Anti-Corruption Guidelines*, *supra* note 22, at 8.

51. *Id.*

mit the winning bid, still artificially high, while the other suppliers submit extremely high bids (that have no chance of winning).<sup>52</sup>

In such a situation, the proceeds may be shared among the suppliers or possibly through a rotation system to facilitate the bids of other suppliers.<sup>53</sup>

d. Coercive Practice

A “coercive practice is 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.”<sup>54</sup> An example of a coercive practice is taking steps that may prevent a competing bidder from submitting a timely bid.<sup>55</sup> Another example is exerting undue pressure on decision makers.<sup>56</sup>

e. Obstructive Practice

An “obstructive practice” is

(i) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a [World] Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or any combination of the foregoing, or (ii) acts intended to materially impede the exercise of the [World] Bank’s contractual rights of audit or access to information.<sup>57</sup>

One example is a situation where a company that has been awarded a World Bank-financed contract fails to respond to a request by the World Bank to review its records.<sup>58</sup>

2. *Investigatory Process*

If the INT finds evidence of Sanctionable Misconduct, it presents the case to a Sanctions Evaluation and Suspension Officer (EO)—the first step in the adjudicatory process.<sup>59</sup> The EO evaluates “whether there is sufficient evidence to support a finding” that someone has engaged in a sanctionable practice.<sup>60</sup> If the EO determines that proceeding with the adjudicatory process is not appropriate, the EO notifies the INT and does not issue

52. Williams, *supra* note 21, at 288 (citing ROBERT KLITGAARD, *CONTROLLING CORRUPTION* ch. 6 (1988)).

53. *Id.*; see Press Release, World Bank, Timor-Leste: World Bank Sanctions Companies in School Project (Nov. 22, 2004), available at <http://go.worldbank.org/QEQ0NUN3O0> (companies debarred for colluding to divide different lots of furniture by deciding which company would have the lowest bid).

54. *Anti-Corruption Guidelines*, *supra* note 22, at 7.

55. *Id.*

56. *Id.* at 7-8.

57. *Id.* at 7, 9. One example is a situation where a company that has been awarded a World Bank-financed contract fails to respond to a request by the World Bank to review its records. *Id.* attachment ¶ 7(e).

58. *Id.* at 9.

59. Generally, as long as substantive issues are not addressed, the EO may be approachable relative to providing clarification or answering questions concerning procedural aspects of the process. *Sanctions Procedures*, *supra* note 3, § 1(1).

60. *Id.* § 9(1).

the notice.<sup>61</sup> The INT may resubmit a proposed notice to the EO after making appropriate amendments.<sup>62</sup> If the alleged sanctionable practice took place more than ten years prior to the issuance of the notice by the EO, the matter must be closed.<sup>63</sup>

If the EO determines that sufficient evidence exists, the EO issues a "Notice of Sanctions Proceedings."<sup>64</sup> The Notice specifies the allegations,<sup>65</sup> summarizes the facts constituting the sanctionable practice,<sup>66</sup> identifies the evidence that the INT intends to present along with any exculpatory evidence,<sup>67</sup> and includes a recommended sanction.<sup>68</sup> If a Notice is issued, a temporary suspension automatically goes into effect with all of the components of the World Bank Group, unless the EO determines sixty days after the submission of an explanation that a suspension should not take effect.<sup>69</sup>

If, after the submission of an explanation, the EO determines that there is insufficient evidence to support a finding that a sanctionable practice took place, the EO may withdraw the Notice and the proceedings may be closed.<sup>70</sup> The INT retains the right to resubmit an amended proposed Notice on the basis of additional information not contained in the original notice.<sup>71</sup> If a Notice of Sanctions Proceedings is issued and the respondent, the individual or entity subject to the recommended sanctions, does not contest the allegations, the recommended sanctions become final.<sup>72</sup>

### 3. *Hearings Process*

If the respondent contests the allegations made by the INT or the recommended sanctions, or both, the case is referred to the World Bank's Sanctions Board—the second step in the adjudicatory process.<sup>73</sup> The Board, comprised of three members of World Bank staff and four external members, considers the evidence against the respondent, along with any response from the respondent, before making a final decision.<sup>74</sup> The Sanctions Board

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61. *Id.* § 9(2).

62. *Id.*

63. *Id.* § 9(1)(b).

64. *Id.* § 9(3).

65. *Id.* § 7(1).

66. *Id.* § 7(2).

67. *Id.* § 7(3).

68. *Id.* § 7(4).

69. *Id.* § 9(6).

70. *Id.* § 9(9).

71. *Id.*; see Press Release, World Bank, World Bank Sanctions Lahmeyer International for Corrupt Activities in Bank-Financed Projects, No. 129/2007/INT (Nov. 6, 2006), available at <http://go.worldbank.org/7DBYL7MON0> [hereinafter Press Release 129/2007/INT] (the actual convictions of both Lahmeyer International GmbH and the recipient of the bribe were not contained in the original notice in the debarment proceedings against Lahmeyer International for its activities in connection with a water project in Lesotho).

72. *Sanctions Procedures*, *supra* note 3, § 9(9); see Press Release 2009/200/INT, *supra* note 49 (sanctions recommended by the EO in the notice imposed upon the failure of Dongsung Construction Co. Ltd. to contest the allegations).

73. See *Sanctions Procedures*, *supra* note 3, at pt. I, ¶ (b).

74. Int'l Bank for Reconstruction & Dev. & Int'l Dev. Ass'n Int'l Fin. Corp. and Multilateral Ins. Guarantee Agency, *Sanctions Board Statute*, art. V (Dec. 2006), available at [http://www.ifc.org/ifcext/anticorruption.nsf/AttachmentsByTitle/Sanctions\\_Statute/\\$FILE/Sanctions\\_Statute.pdf](http://www.ifc.org/ifcext/anticorruption.nsf/AttachmentsByTitle/Sanctions_Statute/$FILE/Sanctions_Statute.pdf).

Chair in a particular case may designate a smaller, three-person Sanctions Board Panel, composed of two external members and one World Bank staff member.<sup>75</sup>

Written submissions to the EO and Sanctions Board are permitted as part of the sanctions process.<sup>76</sup> Sensitive evidence may be withheld where the Sanctions Board or Sanctions Board Panel determines that “there is a reasonable basis to conclude that revealing the particular evidence might endanger the life, health, safety, or well-being of a person” or constitute a violation of the terms of the Voluntary Disclosure Program.<sup>77</sup>

The INT or the respondent may request a hearing.<sup>78</sup> The INT is represented by a person from its office.<sup>79</sup> The respondent may be “self-represented” or represented by someone authorized by the party.<sup>80</sup> The hearing and submissions of the parties are confidential and not available or open to the public.<sup>81</sup> The presentations are informal and limited to arguments and evidence in written submissions.<sup>82</sup> No live witness testimony is permitted unless requested by the Sanctions Board or Sanctions Board Panel.<sup>83</sup> Only the Sanctions Board or Sanctions Board Panel may question the witness.<sup>84</sup>

Formal rules of evidence do not apply in these proceedings.<sup>85</sup> “Any form of evidence may form the basis of arguments presented.”<sup>86</sup> In addition, “[h]earsay evidence or documentary evidence shall be given the weight deemed appropriate.”<sup>87</sup> Purpose, intent, and knowledge may be inferred from circumstantial evidence.<sup>88</sup> “A party’s refusal to answer, or failure to answer truthfully or credibly, may be construed against [the] party.”<sup>89</sup> Communications subject to the attorney-client privilege or the attorney work product doctrine are protected and not subject to disclosure.<sup>90</sup>

The decision of the Sanctions Board or Sanctions Board Panel is based upon the written submissions and any arguments made at a hearing.<sup>91</sup> The standard of proof is whether the evidence “supports the conclusion that it is more likely than not that the Respondent engaged in a Sanctionable Practice.”<sup>92</sup> “More likely than not” means that “a preponderance of the evidence supports a finding that the respondent engaged in the Sanctionable Practice.”<sup>93</sup>

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75. *Id.* art. VIII.

76. *Sanctions Procedures*, *supra* note 3, § 10.

77. *Id.* § 12(3).

78. *Id.* § 14.

79. *Id.* § 15(1).

80. *Id.* § 15(2).

81. *Id.* § 16(1).

82. *Id.* § 16(2)(c).

83. *Id.* § 16(2)(d).

84. *Id.*

85. *See id.* § 17.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* § 16(3).

90. *Id.* § 18.

91. *Id.* §§ 13, 19(1).

92. *Id.* § 19(2)(a).

93. *Id.*

The INT has the burden of proof to establish that “it is more likely than not that the respondent engaged in the Sanctionable Practice.”<sup>94</sup> If the INT successfully establishes the Sanctionable Practice, the burden of proof shifts to the respondent “to demonstrate that it is more likely than not” that the conduct did not amount to a Sanctionable Practice.<sup>95</sup> If the respondent establishes that the conduct did not amount to a Sanctionable Practice, the proceedings are terminated.<sup>96</sup> The INT may reinstitute the process “if evidence not available at the time of filing of the [original] notice is subsequently obtained.”<sup>97</sup>

#### 4. Sanctions

The sanctions imposed by the Sanctions Board or Sanctions Board Panel are not bound by the recommendation of the EO.<sup>98</sup> The sanctions imposed may fall into five basic categories:

1. *Public Letter of Reprimand*, which is issued to the sanctioned party.<sup>99</sup>
2. *Debarment*, “which means that the sanctioned party is barred, effective immediately, from participating in [World] Bank projects, either indefinitely or for a period of time.”<sup>100</sup>
3. *Conditional Non-Debarment*, which means that the sanctioned party is told that they will be debarred unless they comply with certain conditions, *i.e.*, doing certain things to make sure that fraud and corruption does not happen again, such as putting in place an ethics program, and/or making up for the damage caused by their actions, such as restitution.<sup>101</sup>
4. *Debarment with Conditional Release*, “which means that the sanctioned party is debarred until the specified conditions have been complied with.”<sup>102</sup>
5. *Restitution*, “which means paying back the ill-gotten gains to the government or to the victim of the fraud and corruption.”<sup>103</sup>

The Sanctions Board or Sanctions Board Panel may impose one or more sanctions, including cumulative sanctions.<sup>104</sup> The sanctions may be imposed on any individual or entity that, “directly or indirectly, controls or is controlled” by the party charged.<sup>105</sup> Among the factors that may be considered in the imposition of sanctions are: the “egregiousness and severity” of the conduct;<sup>106</sup> the degree of active conduct on the part of the party charged;<sup>107</sup> the magnitude of the losses or damages;<sup>108</sup> the past history of sanction-

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94. *Id.* § 19(2)(b).

95. *Id.*

96. *Id.* § 19(2)(c).

97. *Id.*

98. *Id.* § 19(2)(d).

99. *Anti-Corruption Guidelines*, *supra* note 22, at 13.

100. *Id.*

101. *Id.*

102. *Id.* at 14; see Press Release 129/2007/INT, *supra* note 71 (Lahmeyer International’s debarment to be reduced by four years if Lahmeyer International “puts in place a satisfactory corporate compliance and ethics program and cooperates fully . . . in disclosing any past misconduct . . .”).

103. *Anti-Corruption Guidelines*, *supra* note 22, at 14.

104. *Sanctions Procedures*, *supra* note 3, §§ 19(3)(f), (g).

105. *Id.* § 19(4).

106. *Id.* § 19(5)(a).

107. *Id.* § 19(5)(b).

able conduct;<sup>109</sup> breach or attempted breach of refraining voluntarily from seeking or obtaining World Bank financing, contracts, or awards pending the outcome of sanctions proceedings;<sup>110</sup> mitigating circumstances such as cooperation in investigation;<sup>111</sup> and the period of temporary suspension already served.<sup>112</sup>

### 5. Disclosures

The sanctioned party's identity and sanctions imposed are publicly disclosed.<sup>113</sup> Information obtained from the sanctions proceedings may be provided to governmental authorities, international organizations, or other development banks.<sup>114</sup> Disclosure can occur before determining the culpability of an individual or entity. No prior notice is required, nor is there a means of precluding such disclosures. Limitations on disclosures to governments or international organizations may be imposed if "there is a reasonable basis that revealing the information might endanger the life, health, safety, or well-being of a person" or violate an understanding associated with the Voluntary Disclosure Program (VDP).<sup>115</sup>

### C. VOLUNTARY DISCLOSURE PROGRAM

The World Bank established the VDP as a means for an individual or entity to take remedial action by addressing conduct that might: (1) otherwise pose an impediment to securing opportunities through the World Bank; or (2) lead to the imposition of sanctions for current projects with the World Bank. Except for those under active investigation by the World Bank,<sup>116</sup> individuals and entities may participate in the VDP if they have been a party to, or involved in, projects or contracts financed or supported by a member of the World Bank Group.<sup>117</sup>

In exchange for their full cooperation, VDP participants avoid debarment for disclosed past misconduct, their identities are kept confidential, and they may continue to compete for Bank-supported projects.<sup>118</sup> This agreement extends to the conduct of current or former officers, employees, or agents of the entity involved in the disclosed misconduct.<sup>119</sup>

108. *Id.* § 19(5)(c).

109. *Id.* § 19(5)(d).

110. *Id.* § 19(5)(e).

111. *Id.* § 19(5)(f); see Press Release 129/2007/INT, *supra* note 71 (lack of cooperation with World Bank investigating officials was acknowledged as a factor in the sanctions imposed in the debarment proceedings against Lahmeyer International GmbH).

112. *Sanctions Procedures*, *supra* note 3, § 19(5)(h).

113. *Id.* § 21; see Ineligible Firms, *supra* note 2 (listing firms ineligible to do business with the World Bank Group).

114. *Sanctions Procedures*, *supra* note 3, §§ 22(1)-(3).

115. *Id.* §§ 12(3), 18.

116. World Bank, Dept. of Institutional Integrity, Voluntary Disclosure Program, *VDP Guidelines for Participants*, ¶ 5.1(a) (July 20, 2006) available at <http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPGuidelinesforParticipants.pdf> [hereinafter *VDP Guidelines*].

117. *Id.* ¶ 5.1.b (including the IBRD, the IDA, the IFC, and the MIGA).

118. *Id.* ¶¶ 3-4.

119. *Id.* ¶ 4 ("The Bank will not seal: the Participant's debarments for its, or its current or former officers', employees', or agents' involvement in disclosed Misconduct that occurred prior to the Participant joining the VDP.")

Participants enter the VDP by agreeing to a non-negotiable, standardized set of “Terms and Conditions.”<sup>120</sup> The World Bank will debar, for a period of ten years, any participant that continues to engage in misconduct or otherwise materially violates the VDP Terms and Conditions.<sup>121</sup>

Under the VDP, participants commit to: (1) not engage in misconduct in the future; (2) disclose to the World Bank the results of an internal investigation into conduct subject to sanction by the World Bank involving projects or contracts financed or supported by the World Bank; and (3) implement a comprehensive internal compliance program.<sup>122</sup> A compliance monitor approved by the World Bank observes the compliance program for three years and<sup>123</sup> reports annually to the World Bank.<sup>124</sup>

A VDP participant conducts an internal investigation of all its contracts related to the World Bank that were signed—or in effect—in the five years before entering the VDP.<sup>125</sup> The participant reports the results of its investigation to the World Bank, and the World Bank verifies the completeness and accuracy of that investigation. The World Bank then shares selected disclosures with member countries, World Bank management and staff, and other stakeholders through reports carefully redacted to keep the VDP participant’s identity confidential.

Participants in the VDP program pay most, if not all, of the costs associated with the VDP process.<sup>126</sup> In most situations the costs can be expected to be substantial because there are significant expenses associated with conducting an internal investigation, designing and implementing necessary compliance programs or taking other remedial measures, and engaging a compliance monitor.

#### D. MEMBER GOVERNMENTS AND GOVERNMENT OFFICIALS

Member governments and government officials are not sanctioned by the World Bank.<sup>127</sup> If the fraud or corruption involved “takes place within a government,” efforts are made by the World Bank to address the problem with the government.<sup>128</sup> If resolution is not possible through those efforts, the World Bank can take action “under its legal agreement with the country.”<sup>129</sup> Depending on the circumstances, disbursement of a loan may

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120. *Id.* ¶ 5.3.1.

121. *Id.* ¶ 5.8.1.

122. *Id.* ¶ 3.

123. *Id.* ¶ 5.6.2.

124. *Id.*

125. *Id.* ¶¶ 5.5.1, 5.5.6.

126. *Id.* ¶ 7.1.1 (making an exception available under ¶ 7.1.2 for entities with fewer than fifty employees for some of the costs to be borne by the INT).

127. *Anti-Corruption Guidelines, supra* note 22, at 14.

128. *Id.*

129. *Id.*

be suspended or undisbursed loan amounts cancelled.<sup>130</sup> Even early “repayment of the loan” may be required.<sup>131</sup>

## II. Regional Development Banks

Regional development banks have, in large part, followed the World Bank’s anti-corruption practices,<sup>132</sup> policies, and procedures addressing corrupt and fraudulent practices.<sup>133</sup> Thus, their policies and procedures are largely modeled on the World Bank.<sup>134</sup> Indeed, language consistent with the World Bank’s language, relative to fraud and corrupt practices, was added to their procurement guidelines.<sup>135</sup> Hotlines and other means of reporting violations have also been implemented.<sup>136</sup>

130. *Id.* (showing these circumstances may include when a determination is made by the World Bank that fraud or corruption has occurred in connection with the loan proceeds, and the borrower, which can be a member country, fails to take timely and appropriate action; that the borrower, which is not a member country, has been sanctioned under another project; or when the borrower or another recipient of loan proceeds failed to abide by the Anti-Corruption Guidelines).

131. *Id.*

132. See Williams, *supra* note 21, at 278-79 (making one major distinction between the World Bank and the regional development banks is the absence of a well-established equivalent of the World Bank’s VDP).

133. Asian Development Bank [ADB], Anticorruption and Integrity, Frequently Asked Questions, <http://www.adb.org/Integrity/faqs.asp#q10> (last visited Apr. 1, 2010) (reflecting the primary exception—ADB’s efforts largely preceded those of the World Bank).

134. The sanctions procedures associated with the ADB, EBRD, and IADB are, respectively: ADB, *Integrity Principles and Guidelines* (Nov. 2006), available at <http://www.adb.org/Documents/Guidelines/Integrity-Principles-Guidelines/default.asp?p=antipubs>; EBRD, *Enforcement Policy & Procedures* (Mar. 27, 2009), available at <http://www.ebrd.com/about/integrity/epp.pdf>; IADB, *Sanctions Procedures*, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=841305>. The AFDB does not appear to have published procedures associated with its sanctions process. Some notable differences exist among the procedures of each institution. For example, the ADB does not publicly disclose the identity of individuals or entities sanctioned under its procedures. ADB, *Confidentiality of Anticorruption Sanctions List*, <http://www.adb.org/Anticorruption/issues.asp> (last visited Apr. 1, 2010). However, the ADB does disclose the identity of individuals or entities that attempted to participate in ADB-financed activity while ineligible. ADB, *Anticorruption and Integrity: Sanction*, <http://www.adb.org/Integrity/sanctions.asp#attempt> (last visited Apr. 1, 2010).

135. African Development Bank Group [ADBG], *Rules and Procedures for Procurement of Goods and Works*, ¶ 1.14 (May 2008), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/Revised%20RULES%20AND%20PROCEDURES%20FOR%20PROCUREMENT%20OF%20GOODS%20&%20WORKS%20FINAL%20SEPTEMBER%202009%20ENGLISH.pdf>; ADBG, *Rules and Procedures for the Use of Consultants*, ¶ 1.22 (May 2008), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-related-Procurement/Revised%20PROCEDURES%20FOR%20THE%20USE%20OF%20CONSULTANTS%20FINAL%20ENGLISH%20SEPTEMBER%202009.pdf>; ADB, *Procurement Guidelines*, ¶ 1.14 (Feb. 2007), available at <http://www.adb.org/Documents/Guidelines/Procurement/Guidelines-Procurement.pdf#page=14>; ADB, *Guidelines on the Use of Consultants by ADB and Its Borrowers*, ¶ 1.23 (Feb. 2007), available at <http://www.adb.org/Documents/Guidelines/Consulting/Guidelines-Consultants.pdf#page=17>; EBRD, *Procurement Policies and Rules*, at 25, ¶ 2.9 (amended May 2007), available at <http://www.ebrd.com/about/policies/procure/ppr.pdf>; IADB, *Policies for the Procurement of Goods and Works Financed by the Inter-American Development Bank*, ¶ 1.14 (July 2006), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=774392>; IADB, *Policies for the Selection and Contracting of Consultants Financed by the Inter-American Development Bank*, ¶ 1.21 (July 2006), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=774394>.

136. The procedures for reporting fraud and corruption at the AFDB, ADB, EBRD, and IADB are, respectively: AFDB, *Reporting Fraud and Corruption*, <http://www.afdb.org/en/about-us/structure/auditor-generals-office-oag/integrity-and-anti-corruption/reporting-fraud-and-corruption/> (last visited Apr. 21, 2010); ADB, *How does ADB protect whistleblowers?*, <http://www.adb.org/Integrity/faqs.asp#q2> (last visited Apr. 21,

In 2006, the leaders of the AFDB, ADB, EBRD, IADB, World Bank, European Investment Bank Group (EIB), and International Monetary Fund (IMF) established a task force to work toward a consistent and coordinated approach to corruption associated with the activities and operations of their institutions.<sup>137</sup> Adopting standardized definitions of sanctionable conduct developed by the World Bank was among the first steps.<sup>138</sup> The leaders also agreed to develop common principles and guidelines for investigations.<sup>139</sup>

In addition to encouraging member institutions to exchange relevant information,<sup>140</sup> efforts are being undertaken to determine how enforcement actions taken by one institution can be given greater support by the other institutions.<sup>141</sup> Participants in a project financed by member institutions are required to disclose any sanction imposed on them.<sup>142</sup> Investment decisions must include enhanced efforts to identify beneficial ownership, criminal history, investigations or sanctions by regulatory bodies, and civil litigation involving allegations of financial misconduct.<sup>143</sup>

Recently, the multilateral development banks, as well as the EIB and IMF, agreed to the implementation of a cross-debarment regime among the multilateral development banks.<sup>144</sup> In principle, debarment at one of the participating multilateral development banks will now automatically extend to the other participating multilateral development banks. The implications of sanctions imposed by one of the multilateral development banks are thereby dramatically enhanced.

### III. Conclusion

The reach of the anti-corruption policies of the multilateral lending institutions cannot be overstated. Even entities that neither seek nor anticipate pursuing opportunities through the multilateral lending institutions may be affected. Failure to bring their business practices into compliance with these policies may bear on an individual's or entity's ability to secure business opportunities through others, whether as a subcontractor or in another capacity.<sup>145</sup>

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2010); EBRD, Reporting Fraud and Corruption, <http://www.ebrd.com/about/integrity/compl/about.htm> (last visited Apr. 21, 2010); IADB, Integrity at the IDB Group, <http://www.iadb.org/integrity/contact.cfm> (last visited Apr. 21, 2010).

137. Int'l Financial Institutions Anti-Corruption Task Force, *Uniform Framework for Preventing and Combating Fraud and Corruption*, at 1 (Sept. 2006), available at <http://siteresources.worldbank.org/INTDOII/Resources/FinalIFTTaskForceFramework&Gdlines.pdf>.

138. *Id.*

139. *Id.* at 2.

140. *Id.*

141. *Id.*

142. *Id.* at 2-3.

143. *Id.* at 2.

144. Press Release, World Bank, Multilateral Development Banks (MDBs) Step Up Their Fight Against Corruption with Joint Sanction Accord, No. 2010/341/INT (Apr. 9, 2010), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535258~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

145. These policies are essentially the same as the policies being implemented by private entities throughout the world as a result of the Foreign Corrupt Practices Act of 1977 and the various anti-bribery conventions. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1 to -3, 78 ff (2010).

The absence of an effective compliance program can also adversely impact more traditional settings where, as a matter of practice, individuals and entities may only work with entities that have instituted effective compliance programs. A compliance program recently implemented to qualify for a business opportunity will seldom be deemed to be as credible as a compliance program that has been implemented and actively enforced over a period of time. As a result, whether in line with the Foreign Corrupt Practices Act or anti-bribery legislation implemented by other countries, an effective compliance program has the added benefit of enhancing an entity's ability to secure, either directly or indirectly, opportunities with multilateral lending institutions.<sup>146</sup>

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146. As an example, on July 2, 2009, the World Bank Group announced "a comprehensive settlement with Siemens AG in the wake of the company's acknowledged past misconduct in its global business and a World Bank investigation into corruption in a project in Russia involving a Siemens subsidiary." Press Release, World Bank Group, Siemens to Pay \$100m to Fight Corruption as Part of World Bank Group Settlement, 2009/001/EXT (July 2, 2009), available at <http://go.worldbank.org/WXRNSDVI40>. The settlement included a commitment by Siemens to pay \$100 million over fifteen years to support anti-corruption work, an agreement of up to a four-year debarment for Siemens' Russian subsidiary, and a voluntary loss of the right to bid on World Bank-financed projects for a two-year period. All of Siemens' consolidated subsidiaries and affiliates were subject to the debarment.

The resolution with the World Bank followed a series of international investigations and legal proceedings related to fraud or corruption in Siemens' operations. *Id.* In December 2008, Siemens settled related allegations made by U.S. and German authorities. The allegations addressed by the World Bank Group were fundamentally the same as those being investigated by U.S., German, and other enforcement officials. If Siemens had held an effective anti-bribery compliance program, many if not most of the underlying reasons for the investigations would never have arisen.

