

Report
Concerning the Debarment Processes
of the World Bank

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I. INTRODUCTION

This Report is intended to provide an encapsulated review of the experience – and the possible future course – of the World Bank¹ in attempting to identify and sanction, through the process of debarment, organizations and individuals believed to have engaged in fraudulent or corrupt activities in relation to Bank-financed and Bank-executed projects. After an introduction to the general use of debarment in the context of the Bank's needs and responsibilities, the Report notes the long period during which the matter was addressed by the Bank, if at all, only informally at the regional level rather than the headquarters level; the gradual awakening of the Bank to the seriousness of the problem; and the early, informal responses of the Legal Department. It proceeds to review the practices authorized under the January 1998 Operational Memorandum establishing a Sanctions Committee; the evolution of the associated investigative processes; and the current practices under the clarified procedures adopted in August of 2001. It then discusses the various issues that have arisen in the course of these developing processes, and proffers recommendations that should be considered in the course of a fresh assessment of the more significant of those issues and of several of the lesser issues presented. It concludes with a caution to keep the Bank's overall mission in mind in the process of evaluating potential changes.

In the development of this Report, we examined several thousand pages of Bank documents pertaining to the Bank's history and developing practices concerning debarment – including investigative files, notices of debarment, minutes of Sanctions

¹ The terms "World Bank" and "Bank" are used in this Report to include not only the International Bank for Reconstruction and Development but also the International Development Association, unless the context requires a different construction. The recommendations in Part V also propose the inclusion of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) in future coverage by the debarment processes.

Committee meetings, and Sanctions Committee recommendations. We also surveyed the analogous practices of selected governmental and intergovernmental organizations. In addition, we read all available letters of complaint from respondents in debarment proceedings, and their attorneys, to assess their perceptions of the practices employed by the Bank. A considerable portion of our time was expended in interviews with Bank managers and professionals concerning their experiences with the Bank's debarment practices, and a lesser portion was spent in interviews with persons experienced in such matters within national governmental agencies and other international organizations. We were aided in this process by our extensive notes of earlier interviews conducted in the course of the preparation of our Report to the Bank Concerning Mechanisms to Address Problems of Fraud and Corruption, dated January 21, 2000 (hereinafter our "January 2000 Report").

II. BACKGROUND CONCERNING THE WORLD BANK'S APPROACH TO DEBARMENT

A. Overview of the General Use of Debarment by Organizations

All organizations of any size occasionally find themselves victims of fraud or corruption. The manner in which they respond to such fraud and corruption depends to a certain degree upon the nature of the organization – in particular whether it is a business corporation, a national governmental agency, or an international organization.

All such organizations can refer a matter for investigation and criminal prosecution in a nation with domestic jurisdiction over the acts (and with a jurisprudence that renders collective entities subject to the nation's criminal laws), but in many nations only referrals from sister government agencies or from domestic corporations are likely to induce investigators to undertake the extensive work that will be required. All can institute a lawsuit for civil recovery, launched in such a nation against an offending company or individual, but such civil suits can be extraordinarily costly as well as problematic in their outcome, and even if a judgment is favorable it can prove difficult to collect. All can refer the matter to supervisory officials in professional or trade

associations, or to consumer protection agencies, but such entities are often ineffective and even successful referrals are of limited utility. All can take preventive actions within their own organizational structure (by means of employee education, regular audits, etc.) to lessen the likelihood of such problems in the future. All can decide against continuing to do business with such an offender.

This last response – withholding future business – is commonly employed by victims that are national government agencies, frequently in conjunction with a criminal proceeding in the national courts or a civil action for recovery of loss. In itself, it is usually not considered a satisfactory action for deterrent or other purposes, despite the fact that some government agencies are significant purchasers of goods and services and thus preclusion from future governmental contracts can have an adverse impact upon a precluded firm's economic health. In national agencies that are called upon frequently to take such actions, simple procedures are often set up to assure that such preclusion from future contracts – usually called debarment or disbarment – takes place on a regularized basis. In many agencies the decision to debar is made by a lawyer in the general counsel's office or procurement office after reviewing the agency records of the matter. In others, the offending firm is given notice of the impending debarment, and is invited to submit a response before a decision is made. In a few countries, agencies may permit a firm to appear before the deciding official to try to demonstrate why it should not be debarred – and when this is permitted the burden of convincing the official commonly lies with the firm. Appeal of such decisions to debar may be attempted in some countries by filing a civil lawsuit, but the standard for reversal usually requires a finding of an abuse of discretion on the part of the official involved, and the official is presumed to have exercised discretion in an appropriate manner.²

² The debarment practices of national agencies that would be the most pertinent from the Bank's standpoint would probably be those of the U.S. government, for the reason that those are the practices that are most familiar to the majority of lawyers appearing before the Bank as counsel for respondents in debarment proceedings. The

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An international organization can refer suspected fraud or corruption to national government agencies of the nation in which the act takes place, or in some instances another nation with which the company or the organization is sufficiently affiliated to permit jurisdiction under national law. But as compared with the situation of a victim that is a national government agency or a company that is domiciled in the nation in question, there is less incentive for a government investigating agency to investigate thoroughly a fraud or corruption that has resulted in a monetary loss only to an international organization – and correspondingly there is somewhat less impetus for a prosecuting agency to press forward with a criminal case under such circumstances. The organization in theory can sue, but even in a nation with a well-functioning judicial system such cases can be so protracted and costly that they tend to discourage resort to such approaches. An international organization's likely recourse, when such formal approaches appear of doubtful value, is to take the simple preventive action of refraining from doing any business with the firm in the future – an action that increasingly is

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U.S. procedures are controlled primarily by the provisions of the Federal Acquisition Regulations. Under those provisions, the agency issues a notice of proposed debarment to the firm in question, specifies the reasons for the proposed action, and notes that the firm may present written or oral arguments against the imposition of a debarment. If the firm elects to present arguments, it will be afforded an informal, non-adversarial meeting with the debarring official. Ordinarily the proceedings conclude after the meeting, with the official then reaching a determination whether to debar and for how long a period. In relatively few instances, the official in the course of the meeting will determine that the firm has established that there is a "genuine dispute over facts material to the proposed debarment," in which case the firm will be provided an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront agency witnesses, in the course of a fact-finding proceeding before the official or another designated finder of fact. The proceeding is informal, traditional rules of evidence do not apply, and the deciding official reaches a determination on the basis of the preponderance of the evidence. Separate agency regulations may provide for review within the agency, but the determination will be set aside only if it is found to be arbitrary, capricious, and an abuse of discretion. The accused firm may seek judicial review, but the standard for overturning the agency decision is so narrow that such a course is seldom pursued.

undertaken through a notice to the firm that it is ineligible for future contracts. Yet, since most international organizations are not significant contributors to national economies, their debarment of firms carries only a prospective protective effect, and only insofar as that particular organization is concerned; little or no general deterrence to future fraud or corruption is imparted either to the offending firm or to other firms that might be tempted to engage in similar conduct. Under such circumstances, a decision to debar may be arrived at through very informal means – as by an ex-parte decision by an attorney in the legal counsel's office, with notice going to the company after the determination has been made.³

B. Special Considerations Affecting Debarment by the World Bank

There is no legal reason why the World Bank cannot debar firms by similarly informal means. The first debarments by the Bank indeed were through the

³ Although the United Nations has rarely utilized this mechanism, its written procedures provide for a variation of such an approach. Instead of announcing a decision to debar, the UN may simply remove the offending firm from its Vendor Prequalification List without giving that firm the prior opportunity to answer the charges against it.

Even international organizations that have the potential to affect national economies make their decisions to debar on the basis of summary processes. Discussions with officials from other development banks reveal that simple approaches are employed by those institutions in reaching a decision to preclude a firm, permanently or temporarily, from future contracts. The European Bank for Reconstruction and Development simply leaves such matters to executive decision, employing no special process. The African Development Bank employs a procurement review committee which receives allegations of misconduct and which may transfer the matter to the internal auditing department for inquiry, or may hire an outside investigator, and after reviewing the results the committee may issue a sanction precluding the firm from future contracts; no opportunity is given to the firm involved to present its version of the matter. The Asian Development Bank employs a procedure in which an anti-corruption unit in the office of the general auditor conducts investigations and presents the results to an oversight committee; the committee, after taking into account the investigative results, including any written comments provided to the investigators by the firm involved, reaches a determination whether to declare the firm ineligible on the basis of the written record.

application of such a simple process. The Bank, however, does not fit the pattern of most international organizations. It appears to be the consensus of senior Bank managers and professionals that the Bank should regard its situation as a distinctive one, and that this suggests the appropriateness of a more structured procedure. That view seems to have developed through the following reasoning:

- The Bank has a special economic interest and responsibility. As the premier international development bank, it spends noteworthy sums in many countries – enough to have a material long-term effect on a number of national economies. A firm debarred from doing business with the Bank would find itself cut off from a very consequential source of funding. Moreover, the Bank itself can be adversely affected by a firm's debarment. The projects that the Bank funds, directly or indirectly, are frequently large in scale or specialized in nature, requiring administration by firms of a significant size or with a particular expertise. The number of firms with the required capabilities may be very few in number. Hence the Bank, in barring a firm from future business, may be eliminating from future contention one of the very few firms with the characteristics required by the Bank for important projects. Debarment, therefore, can have a significant adverse effect not only upon a debarred firm and its shareholders, but upon the size of the pool of companies available for projects that the Bank considers significant. An inaccurate or unjust determination can be costly to both. Consequently, although it obviously is in the economic interest of the Bank that the debarment process employed by the Bank not result in erroneous findings that fraud or corruption *has not been* established, it can also be in the economic interest of the Bank as well as the firm that the process not result in erroneous findings that fraud or corruption *has been* established.

- The Bank operates under an abiding and understandable conviction that it bears a very special international responsibility. Its founding documents, its publications, its public explanations of its mission, and its manner of operation

over its history, demonstrate almost palpably the belief that the Bank as an institution is pursuing a calling rather than a series of assignments – a calling that places in the Bank’s special trust the economic and social well-being of the half of humanity left largely untouched by the progress of the past century. In fulfilling its responsibility for alleviating poverty and fostering both economic development and the development of responsible and accountable governments, the Bank recognizes 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. This has been manifested in several aspects of the Bank’s operations – including, specifically, the Bank’s implementation over the past half-dozen years of a highly visible program to combat fraud and corruption wherever it may be encountered.

- As a result of these considerations, it would appear desirable that the Bank employ a debarment process that exceeds the minimal standards that an ordinary contracting organization would be expected to adopt. The fundamental purpose of the process must remain the protection of funds entrusted to the Bank, in order that the Bank might effectively fulfill its principal responsibilities, but in protecting those interests the Bank should seek to provide an errant firm with a fair opportunity to rebut the evidence pointing to its wrongdoing. Moreover, the Bank should employ procedures that are not only fair in fact, but that can be perceived as fair. It should be viewed as acting properly, as noted by one senior bank official, “in the court of public opinion.”

C. General Conclusion as to the Use of Debarment by the World Bank

Our conclusion – after reviewing numerous documents relating to the Bank’s general responsibilities, its debarment process, and its processes for addressing other challenging matters, and after engaging in discussions (spanning several dozen hours) with numerous managers and professionals in Bank offices that may be affected by the debarment processes – is that the Bank is justified in choosing to take upon itself a

somewhat more rigorous approach to debarment than might be adopted by most other organizations.⁴ Nonetheless, we believe it important to emphasize that it would be counterproductive for the Bank to go beyond the general range of procedures it currently is employing to assure fairness to respondents, although some changes in the procedures would seem to be in order for purposes of increased effectiveness and efficiency.

In broad terms, the Bank would be best served by debarment procedures that (1) would effectively and efficiently protect the monies entrusted to the Bank, and (2) would assure a fair opportunity for a firm to explain its interpretation of the facts underlying any allegations against it.

With regard to effectiveness, we believe that the goal should be to employ procedures that would have the promise of insuring detection and debarment of virtually all firms that in fact have engaged in fraudulent or corrupt activities. Because such activities are covert, and thus particularly difficult to expose and to document, the bulk of the Bank's resources in this area logically would be concentrated on detection and documentation. Certainly the most difficult facet of the entire process lies in marshalling the records of the Bank, and in obtaining the relevant records of the firm, and often the national government, involved – a task that can take considerable time and that can be expected to meet with significant impediments, both intentional and situational.

⁴ As a consequence of pursuing such an approach, considerably more time may be required between the completion of an investigation and the rendering of a decision on whether a respondent is to be debarred from future Bank-financed projects. During this period, there is a risk that the respondent might be awarded one or more additional contracts involving Bank funding. In situations where the evidence suggests that if such contracts were to be awarded there would be significant potential for future misuse of funds for which the Bank is responsible, the Bank should consider means of protecting itself. These might include not only notifying regional procurement officers of the nature of the respondent's alleged conduct, but putting in place procedures for the temporary suspension of the respondent from eligibility for Bank-financed contracts pending the outcome of the Sanctions Committee proceedings. (See Part V, Section E.)

With regard to efficiency, the procedures for assessment of the evidence secured, and for reaching a decision concerning debarment, should be as simple and straightforward as possible, and should be designed to avoid requiring participation or other involvement on the part of senior managers.

With regard to fairness, we strongly believe that the Bank should avoid the error of mandating too much formality on the false supposition that there is a rough correlation between formality and fairness. Fairness in this context can result from: (1) ferreting out the relevant records and other evidence; (2) presenting the relevant evidence to a group of persons who possess knowledge of the general subject area and who are charged with making a pragmatic, common-sense assessment whether records and other evidence indicate fraud or corruption; (3) providing the firms and individuals involved with copies of such evidence and with an opportunity to demonstrate why the facts do not support a conclusion that fraud or corruption had occurred; and (4) permitting the group charged with making the determination to reach its decision free of outside pressures. This can be achieved – and achieved most readily – by employment of a fairly simple process.⁵

These are the basic elements of a system that would fairly meet the legitimate interests both of the Bank's member nations and of those suspected of fraudulently or corruptly diverting funds.

⁵ It is stating the obvious to note that even procedures that exceed requirements of fairness will frequently be attacked by lawyers presuming to fulfill their expected role as advocates for respondents. There should be no aspiration by the Bank to eliminate such attacks; procedures designed with an eye to dissuading lawyers from doing what they are retained to do would be a diversion of Bank resources in pursuit of a futile hope. The goal must be fairness, not placation.

III. EARLY, INFORMAL PRACTICES OF THE WORLD BANK TO EXCLUDE CONTRACTORS FROM ELIGIBILITY

During most of its history, the Bank paid little attention to matters involving fraud or corruption, either as they affected Bank operations or as they affected the nations in which projects were being funded. When instances of fraud or corruption occasionally came to the attention of Bank personnel, they were more frequently considered as irritating impediments to the Bank's principal mission than as examples of criminal conduct warranting official disapproval and condemnation. No announced policy existed to guide procurement officers in responding to such matters.

In the early 1990s, several Bank professionals (but relatively few Bank managers) began developing a greater sensitivity to the effect of fraud and corruption on Bank procurement. During this period, three fraud and corruption cases arose in succession – all of which were referred, as a matter of default, to the Legal Adviser for Procurement and Consultant Services (the “Legal Adviser”) and to the chief of the Bank's Central Procurement Office (the “Chief Procurement Adviser”). In each case, the two officials, in consultation with others, examined the available evidence, sought additional evidence, gave the suspected company an opportunity to explain the matter, and then concluded that fraud or corruption indeed had taken place. In each instance, the errant company was informed by the Bank that for a period of two years it would not be eligible for further Bank contracts.⁶ As a consequence of the experience with these cases,

⁶ In the first case, it came to the attention of the Bank's Ethics Officer that a bribe had been paid in connection with a bank-financed consulting contract. The personnel officer sought the advice of the Bank's Chief Procurement Adviser and the Legal Adviser for Procurement in the Legal Department as to how the matter should be handled. The two officials confronted the firm involved, which admitted wrongdoing, and then, after consulting others in the Legal Department, informed the firm that it would be blacklisted for a period of two years. In the second case, a matter involving routine falsifications as to qualifications by a large, international consulting company was quietly revealed to the Bank by a former employee of the company, and the information was passed to a successor Legal Adviser. The new Legal Adviser, disturbed to find that there were no written procedures for such situations, contacted the reporting employee through
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the likelihood of more such cases in the future, the lack of any guidelines to govern the Bank's responses, and the expressed concerns on the part of some of the Executive Directors with regard to the Bank's initiative in exercising such authority (as well as the apparent lack of a clear consensus with respect to the proper role of the Executive Directors during the Bank's assessment of such cases), the Legal Adviser and others, under the guidance of the General Counsel, were prompted to consider how they might clarify the Bank's standards pertaining to procurement matters, and the responses the Bank might make to violations of those standards.

By the mid-1990s, the Bank had undergone a dramatic change with regard to its recognition of problems of fraud and corruption. It acknowledged openly – initially through an address of the President to the Boards of Governors in 1996 – that fraud and

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an intermediary and asked for assistance in obtaining witness statements. After securing the statements, the Legal Adviser, together with the Consultant's Adviser in the Bank's Central Procurement Office, invited the firm to examine the documentary evidence in the Bank's possession and to discuss the matter. Representatives of the firm did so, but sought to deny the firm's responsibility for the forgeries. The matter was then brought to the attention of more senior Bank officials as presenting an issue of "honest and efficient procurement," and eventually to a senior vice president and to the General Counsel. Ultimately, and despite the intervention of political officials from the firm's country, the Bank's director in charge of procurement matters, after clearance by senior Bank officials, transmitted to the firm a notice that it would be precluded from participation in Bank projects for a period of two years. The third case arose a year later, and stemmed from a revelation by an employee of a company that allegedly had been asked to pay a bribe. Again the matter was referred to the Legal Adviser and to the Chief Procurement Adviser. After a detailed study of the file, the two officials invited the company to review the materials and to explain the transactions. Despite the company's attempts to explain the matter away, it became clear to the two officials that the company had at the very least engaged in unprofessional conduct, and, after clearance by the senior vice president and the General Counsel, the company was informed that it would be blacklisted for a two-year period. In each of these three cases the Bank informed the countries involved that the firms had been barred from future Bank-financed contracts for the periods prescribed.

corruption constituted a major problem for the Bank and for the nations that the Bank was attempting to assist. A number of developments followed. The Legal Department worked with the Central Procurement Office to revise the Bank's procurement guidelines in order to make it manifest that fraud and corruption would not be tolerated, and undertook to outline procedures for a regularized process for investigation and adjudication of instances in which fraud and corruption seemed to have taken place. After approval by the Executive Directors, changes in the Guidelines for Procurement under IBRD Loans and IDA Credits were promulgated in 1996, and corresponding changes in the Guidelines for the Selection and Employment of Consultants by World Bank Borrowers were promulgated in 1997. A regularized means of investigating allegations of fraud and corruption by suppliers, contractors, and consultants was eventually organized and supervised by the Internal Auditing Department, which set up an Investigations Unit for that purpose in early 1998. The Investigations Unit was later transferred to the supervision of a new Oversight Committee on Fraud and Corruption, a change set forth in staff announcements dated May 12th, 1998 and October 15th, 1998. The responsibility for assessing the evidence revealed by the investigations, and for recommending to the President the appropriate disposition of such cases, was assigned to a newly created Sanctions Committee – a concept approved by the Executive Directors in 1996 and implemented by an Operational Memorandum dated January 5, 1998.

It is the debarment practices of the Bank under the Operational Memorandum of 1998, and possible alternatives to those practices, that will be the principal focus of the remainder of this Report.⁷

⁷ Acts of corruption in Bank-financed projects may involve not only the contracting firms but also public officials with influence over those projects. Since neither the Bank in general nor the Sanctions Committee in particular has the authority or the capacity to take action against corrupt public officials, this Report will not address the ways in which the Bank might handle such matters. Nevertheless, if the Bank desires to have an effective and comprehensive approach to combating fraud and corruption, it must be prepared to respond aggressively where there is evidence of corruption on the part of
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IV. OVERVIEW OF DEBARMENT PRACTICES OF THE WORLD BANK UNDER THE OPERATIONAL MEMORANDUM OF 1998

The Operational Memorandum announced on January 5, 1998 (hereinafter the “Operational Memorandum”),⁸ was designed to implement the central part of the provisions on fraud and corruption incorporated in the 1996 and 1997 “Guidelines for Procurement under IBRD Loans and IDA Credits” and “Guidelines for the Selection and Employment of Consultants by World Bank Borrowers” (hereinafter, collectively, the “Procurement Guidelines”). Those guidelines provided that if the Bank determined that a bidder, supplier, contractor, or consultant had engaged in fraudulent or corrupt practices in competing for, or in executing, a Bank-financed contract, the Bank would declare the offending firm to be ineligible, for an indefinite period of time or for a stated period, to be awarded future Bank-financed contracts.

A. Operational Memorandum Provisions Regarding Debarment Procedures

The procedures set forth by the Operational Memorandum were as follows. An allegation of fraudulent or corrupt practices, together with any supporting evidence, would be directed to the Legal Adviser. The Legal Adviser, after consulting as necessary with the Auditor General, the senior manager for procurement policy, and other Bank staff, would then make a determination whether there was any reason to set aside the allegation on the grounds that it lacked seriousness, that it was not supported by substantial evidence, or that it was not timely. Absent such grounds, and absent also an admission by the accused firm that it had engaged in fraudulent or corrupt practices (in

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public officials. At a minimum, the Bank must be willing to make referrals to, cooperate with, and provide evidence to law enforcement agencies and prosecutors in affected nations.

⁸ The Operational Memorandum is attached as Appendix A.

which case the Legal Adviser would recommend to the General Counsel that the matter be submitted for consideration by the newly-authorized Sanctions Committee), the Legal Adviser would submit the results of the initial review to the General Counsel, who would then advise the relevant Managing Director whether further investigation should be carried out by Bank staff, by specialized outside investigators or auditors, or by law enforcement authorities of the government affected by the matter. If it was decided that the investigation should be initiated by the concerned government, the investigation was to be conducted according to that country's applicable legal procedures. If it was decided instead that the Bank staff or outside investigators would conduct the investigation, the Operational Memorandum provided that the investigation would be "conducted in a manner that fairly protects the privacy of the accuser and the rights of the accused firm; in particular, (a) the accused firm has the right to be assisted by legal counsel; (b) if the accuser is willing to submit to cross-examination, the Bank arranges for the accused firm to question the accuser in the presence of Bank staff; and (c) the accuser may also be requested to answer under oath questions submitted by the accused." The results of such an investigation would then be submitted by the General Counsel or the Managing Director to the Sanctions Committee.

B. Operational Memorandum Provisions Regarding the Sanctions Committee Composition

The Sanctions Committee authorized by the Operational Memorandum could take one of two forms: the President could appoint either (1) a five-person committee consisting of two Managing Directors, the General Counsel, and two other senior staff members; or (2) a three-person committee consisting of individuals selected from outside the Bank. The Committee thus appointed would be authorized to seek technical advice from within the Bank or from outside the Bank, as it believed necessary. If the accused firm admitted the alleged fraud or corruption, or if the Committee found that the evidence from the Bank's investigation was "reasonably sufficient" to show that the firm had engaged in such practices, the Committee was directed to recommend to the President that the firm, and any parent or subsidiary firm, be declared ineligible to be

awarded a Bank-financed contract either for a specific period or for an indefinite period, depending upon the magnitude of the offense. The Committee was also directed to recommend whether the Bank should communicate the final decision to any other borrowing country affected by the fraudulent or corrupt acts. After waiting not less than two weeks from the receipt of the Committee's recommendation, the President was to make an administrative decision on implementing the Committee's proposed sanction.

Shortly after the promulgation of the Operational Memorandum, the President appointed a Sanctions Committee under the first of the two options authorized – a five-person committee composed of senior Bank officials. The membership, as selected, consisted of two Managing Directors, one of whom was to serve as Chairman; the General Counsel; and two Vice Presidents. The Legal Adviser was to serve as the Secretary of the Committee.

C. Practices under the Operational Memorandum

The following paragraphs set forth a condensed description of the general practices followed from early 1999 to date. The practices until August of 2001 evolved from the earlier informal practices and were guided only by the general provisions of the Operational Memorandum. On August 2, 2001, the Bank adopted a written statement of Sanctions Committee Procedures (hereinafter the "August 2001 Procedures").⁹ That statement of procedures was designed to substantially clarify, for the benefit of Bank personnel and respondents, the particular steps that were being taken by the Bank to implement the general provisions of the Operational Memorandum. They set forth the practices of the Committee in the context of the earlier work by the Bank's investigators, the subsequent review of the Committee recommendation, and the eventual publication of the result. To the extent that any differences, as opposed to clarifications, were

⁹ A copy is attached as Appendix B. These procedures were intended to be in place for a period of about a year, during which time, after consultation between Bank management and the Executive Directors, a new Operational Memorandum and implementing procedures would be developed and issued.

introduced by the August 2001 Procedures, those differences will be noted briefly in this Part, but will be discussed more particularly in Part V in the context of specific issues that have arisen with respect to aspects of the Bank's debarment practices. In addition, other details of these practices that appear to warrant further explication will similarly be addressed in Part V.

1. Investigative Origin of Cases

Suspicious of wrongdoing are commonly called to the attention of the Bank by procurement auditors, by field personnel involved in procurement matters, by government officials in countries in which projects are being funded, by employees of firms alleged to be engaged in fraud or corruption, by employees of competitor firms, and by others. Those reporting such matters may communicate directly with the Bank's auditors or investigators, or indirectly through use of the Fraud and Corruption Hotline, the Ethics Helpline, or the telephone number publicized by the Office of the Ombudsman.

The investigative capacity of the Bank expanded greatly following the promulgation of the Operational Memorandum. The small Investigations Unit that had been established in early 1998 within the Internal Auditing Department was transferred to operate as an arm of the Oversight Committee on Fraud and Corruption, and eventually was transferred again to become the nucleus of the new Department of Institutional Integrity ("INT").¹⁰ Its staff has grown to include 21 experienced investigators, 16 of whom focus exclusively on fraud or corruption matters involving procurement. This expanded capacity has permitted the Bank to reduce the proportion of cases in which it must rely on outside auditors and investigators, and has permitted the

¹⁰ The Chairman of the Oversight Committee was the Managing Director who is also the Chairman of the Sanctions Committee, a matter that had raised some questions by attorneys for respondents with regard to the possible conflict between the two roles. The questions were obviated when the Oversight Committee's responsibilities were restructured and its investigative oversight functions absorbed into INT.

evolution of a cadre of in-house professionals who have gained considerable familiarity with, and understanding of, the intricacies of Bank procurement practices – familiarity and understanding that does not commonly reside outside the Bank. Paralleling the growth of the size of the Bank’s in-house investigative staff, however, has been the growth in the number of cases referred for investigation – and in consequence INT still requires frequent reliance upon outside firms for investigative assistance. The Bank’s caseload, which stood at about five at the time of the promulgation of the Operational Memorandum in 1998, now totals over 400, with approximately 350 involving allegations of fraud or corruption relating to procurement matters. Exacerbating the inherent difficulty of investigating complex matters involving reams of documents in locations around the world is the fact that the Bank’s investigators, whether in-house or external, do not possess the traditional powers of investigators in a national police agency – including, at least after court approval, the power to compel testimony and compel the production of documentary evidence.

2. Adjudication of Cases by the Sanctions Committee

Upon the conclusion of an investigation that is believed by INT to warrant consideration by the Sanctions Committee, INT transmits to the Secretary of the Committee a proposed notice of debarment proceedings. The proposed notice is addressed to the firm believed to have engaged in fraud or corruption, it sets forth the specific acts alleged to constitute the proscribed conduct, it states the sanction that may be imposed, it notes the opportunity of the firm to contest the charges, and it includes an appendix attaching or identifying all of the documentary evidence relating to that charge. The notice, after informal exchanges between the Secretary and INT, is reviewed by the Secretary in consultation with the Chairman of the Committee and the General Counsel, and, absent objection by either of them, is issued in final form to the firm that is the subject of the investigation.

The respondent firm is provided a period of time – currently 60 days– to submit written materials in response to the notice, after which INT is given 20

days to submit a reply to the respondent's arguments and evidence. Following the submission of the written materials, a hearing date is set, and the notice of debarment proceedings, together with any written materials provided by the respondent, are sent to all the members of the Sanctions Committee. In the early cases considered by the Committee, the notices and their appendices averaged about a dozen pages in length; in the more recent cases they are more easily measured by their thickness, ranging from slightly less than one inch to several inches. The Committee members, whose working hours are fully absorbed in performing their primary duties with the Bank, appear to expend approximately two hours in reviewing a typical case prior to the hearing on the matter. At the hearing, which is informal, the principal investigator – whether a staff member of INT or an outside investigator retained for the purpose – presents a summary of the evidence;¹¹ the respondent or its representative is permitted an opportunity to present any evidence that it believes to be supportive of its position and is permitted an opportunity to argue against any implications of responsibility for the charged acts. Witnesses may not be called, although a respondent may make a statement to the Committee.¹² The hearings usually average about an hour in duration.

Following the hearing, the Sanctions Committee, in the course of closed deliberations, reviews the evidence in the record. It frequently seeks a clearer understanding of procurement matters from the Legal Adviser, acting as Secretary for the Committee, and commonly relies upon the General Counsel, acting as one of its five members, for advice concerning various legal aspects of the case or the proceedings. To recommend imposition of a sanction, the Committee must find that the evidence is “reasonably sufficient” to support a finding that the respondent had engaged in the

¹¹ In the early days of the Committee an oral summary of the evidence would commonly be presented by the Legal Adviser, rather than by the investigator who had developed the case.

¹² Under the August 2001 Procedures, the Committee itself may choose to call and question a witness (a procedure that has not yet been employed).

fraudulent or corrupt practice charged – a standard of proof that several members appear to have found somewhat unclear in the context of particular cases. If the Committee finds that the evidence is not reasonably sufficient, the case is closed. If it finds that reasonably sufficient evidence does exist, the Committee considers appropriate sanctions, weighing the various aggravating and mitigating factors found to be present in the case. Usually, where reasonably sufficient evidence is found to exist, the Committee has chosen to recommend that the respondent be debarred from being awarded future Bank-supported contracts, either permanently or for a stated period. On occasion the Committee has chosen to recommend that the respondent be sanctioned by means of a letter of censure. In making its assessments and determinations, while the Committee is entitled to act by majority vote under the August 2001 Procedures, in practice it operates by consensus.

3. Appeal and Publication of Sanctions Committee Determinations

Pursuant to the terms of the Operational Memorandum, the Committee transmits its recommended sanction to the President, with a copy being provided to the respondent and to the other interested parties. After waiting for a period of at least ten working days, the President decides whether to concur in, or to modify, the Committee's recommendations and proposed sanction. Neither INT nor the respondent is permitted as a matter of right to present additional evidence or arguments to the President. In a number of instances, however, representatives of respondents have attempted to persuade the President that concurrence in the Sanctions Committee recommendation would not be appropriate, and on several occasions Executive Directors representing the respondent's country have expressed to the President concerns about the procedural fairness of the Sanctions Committee's determination. The President's decision on the matter is final.

Public announcement of the sanction is achieved by posting on the Bank's website. The underlying purpose is to demonstrate the seriousness of the Bank's initiatives against fraud and corruption, and to deter future misconduct by other firms.

Currently, there are 74 respondents – 72 debarred firms and individuals and two reprimanded firms – listed on the website (figures that reflect the fact that most cases involve multiple respondents).

Since 1998, 18 cases have completed the above process, and six more have been initiated by the transmission of a proposed notice of debarment. Until the three most recently completed cases, about 95 percent of respondents were determined to have been responsible for fraud or corruption, and most respondents were barred from future Bank-funded contracts, either indefinitely or for a stated period. Given the number of cases now under investigation by INT, the workload of the Sanctions Committee can be expected to increase appreciably.

V. DISCUSSION OF PARTICULAR ASPECTS OF THE CURRENT PRACTICES OF THE WORLD BANK

A. Composition and Structural Location of the Sanctions Committee

1. Background

The Operational Memorandum, as noted earlier, provides that the members of the Sanctions Committee are to be appointed by the President, with the membership consisting of either (a) two Managing Directors (one of whom would be designated to serve as the Chairman), the General Counsel, and two other senior staff, or (b) three persons from outside the Bank. It had been contemplated at the time that the Committee would be of an ad hoc nature, being assembled, or reassembled, as the need arose. The President elected the first of the two options, and in practice the Committee has since functioned as a standing committee consisting of two Managing Directors, the General Counsel, and two Vice Presidents.

The practices under the August 2001 Procedures have continued this arrangement.

2. Observations and Discussion

The composition and placement of the Sanctions Committee was a logical one at the time the Operational Memorandum was promulgated, and it remains a logical one. Certainly managing directors and other senior Bank officials are – on the basis of their responsibilities, knowledge, and experience – in a better position than any other individuals to make thoughtful evaluations whether it is in the interest of the Bank and its member nations to continue to do business with a firm that is engaged in practices that, at the very least, seem to raise serious ethical concerns. Collectively, they possess a thorough grounding in the Bank's overall operations as well as its procurement processes, and their professionalism is not open to question. Moreover, the anticipated caseload at the time of the promulgation of the Operational Memorandum was moderate; the new matters progressing through the investigative process were greater in number than in previous years but were still at a manageable level, and therefore the Committee responsibilities of the members were not particularly time consuming. It was for these reasons that, in our January 2000 Report concerning the Bank's overall fraud and corruption program, we had not proposed a change in the existing composition of the Committee. However, in light of the progressive solidification of the Bank's resolve to develop and demonstrate procedures in all of its operations that exemplify its commitment to fairness and due process and not simply good business practices, as recounted in the introduction to this Report, and in light of the experience of the Bank with the operations of the Committee over the past few years, the composition of the Committee now warrants reexamination.

The experience with the Sanctions Committee as it is currently constituted reveals a number of difficulties.

Some of the difficulties are of a managerial and administrative nature. An increasing caseload has required a greater time commitment by Committee members for purposes of reading the case files and engaging in what has become in essence an adjudicatory exercise, rather than an exercise of business discretion, with

serious repercussions for respondent firms and for the Bank. An expanding quantity of evidence in recent cases has aggravated the problem.¹³ All of the members, past and present, have acknowledged that they found the responsibility burdensome from a time allocation standpoint. Although a typical case may consume only half a dozen hours or so for preparation, hearing, deliberation, and decision, the regular responsibilities of the members already consume more time than is included in a standard work week, and several members have found themselves reviewing case files in their evening or weekend hours.¹⁴ In the words of one member, they feel very “stretched.” Moreover, scheduling for hearings and deliberations is complicated by the active travel schedules of several of the members. These difficulties will be exacerbated as many of the 350 cases now in the investigative pipeline begin to emerge for Committee consideration; 27 INT cases are currently poised to be referred to the Committee, and it is expected that within a few months approximately double that number will have been transmitted.¹⁵

Some of the other difficulties are more troublesome in that they may be perceived as affecting the basic fairness of the Committee’s determinations.

First, the members other than the General Counsel are not lawyers, yet they must deal with essentially legal issues, such as the weight to be given certain

¹³ The three most recently completed cases involved evidence totaling over 12 inches in thickness, and required far more time for evaluation than was previously common. One knowledgeable observer within the Bank has estimated that the pre-hearing review even of an average case would ordinarily require not the two hours or so that busy Committee members have been able to devote, but rather two days or so.

¹⁴ Several observers, including some members of the Sanctions Committee, believe that the limited preparation time that members can devote to a case has hindered the work of the Committee.

¹⁵ In the recent past, no more than about 20 percent of the cases investigated would ultimately reach the Sanctions Committee, but this proportion may become somewhat greater as a result of the increase in the professional capacity of the Bank’s in-house investigators.

kinds of evidence and the adequacy of the overall submissions to satisfy a particular standard of proof. In addition, increasingly they must also attempt to evaluate the strengths and weaknesses of zealous allegations by respondents' attorneys claiming that certain aspects of the process itself deny due process to their clients. With regard to such issues, the Committee, as noted earlier, seeks the views of the General Counsel within its membership, and the General Counsel must then attempt to walk a fine line between expressing his own informed conclusion and expressing an objective interpretation of an abstract legal standard. This not only places the General Counsel in a somewhat difficult position, it places the other members of the Committee in an awkward situation to the extent that they may find their independent views conflicting with one of their fellow members who possesses legal training.

Second, the managerial and professional positions of the Committee members within the Bank open the entire process to claims of conflicts of interest. Such claims, it must be emphasized, are predicated on appearance, not reality. They have been raised particularly strongly by counsel for respondents, and any objective review must recognize that many of the arguments presented sound with the hollow ring of verbiage designed to divert attention from the substantive charges against the client firms.

The premise of the perceived conflicts is that Bank managers cannot fairly judge matters concerning loans that their subordinates have evaluated and supervised, and that they themselves may have approved. The reality, however, is that the operational distance between senior Bank managers and those making substantive decisions concerning loans is sufficiently great that a manager's connection to the resulting contracts is attenuated to the point of invisibility. Moreover, any assumed predisposition on the part of such managers may be perceived as running in two contrary directions: (a) against sanctioning on the ground that a manager would be embarrassed in acknowledging that a firm had successfully manipulated the Bank in the course of negotiating or performing a contract within that manager's jurisdiction; or (b) in favor of sanctioning on the ground that a manager would be angered by a firm that had violated its

responsibilities under such a contract. Indeed, discussions with Bank officials who are not members of the Committee have revealed that some had interpreted perceptions of conflicts to run in one of these two directions, and some had interpreted them to run in the other. All of these officials, though, were troubled by the existence of these perceptions. Moreover, all past and current members of the Committee were clearly uneasy about a system that presents the opportunity for such perceptions, and the opportunity for respondents' representatives to employ arguments attempting to exploit the situation in individual cases. All seemed to feel, at least to some degree, that the current procedures invited questions concerning the integrity of the Bank processes and their own professional integrity as well. In sum, all seemed to find it a less than comfortable situation.

Third, and closely related to concerns about conflicts of interest, is the fact that the current placement of the Committee, and the nature of its membership, may be perceived as subjecting the Committee members to externally generated pressures. Concerns about pressures arising from prior managerial responsibilities have been noted, but the concerns at issue here are those prompted by the assumption that members, being human, may privately speculate with regard to the wishes of those to whom they bear ultimate responsibility – their line superiors and the Bank's member nations – and prompted also by a further assumption that in some cases these wishes may even be communicated directly. Certainly any committee situated within the Bank's structure, and composed of individuals in senior managerial or advisory positions, will be viewed as less than totally free of subtle constraints in exercising its responsibilities. As in the situation with regard to perceptions of more traditional conflicts of interest, the concerns are largely theoretical, but not entirely so. Just as lawyers may seek to induce a national legislator to express concerns to an executive agency that is reviewing the fate of a firm in the legislator's home jurisdiction, lawyers for respondents in Bank debarment proceedings have expressed similar concerns both to Bank employees connected with the debarment process and to Executive Directors from the countries in which the firms are

domiciled. Although members of the Committee have not complained of such contacts, it is apparent that the situation may be perceived as a problematic one. This is not to suggest that there have been any direct pressures upon members to decide a matter one way or another – pressures that we are confident would be strongly and curtly resisted – but high-level inquiries into the fairness of particular aspects of the process can subconsciously affect members’ collective determinations concerning the weight to be given the evidence, the satisfaction of the burden of proof, and other matters that could directly influence the final determination in a debarment proceeding.¹⁶

These latter two concerns – conflicts and external pressures – are costly to the Bank in terms of the credibility of the debarment process. For the same reason that the Bank may wish to be seen as doing more than is necessary to assure fairness to respondents, it should wish to avoid, to the extent reasonable and practical, the appearance of possible conflicts or the opportunities for the application of pressure.

3. Recommendations

There are three ways in which the Bank could minimize the principal concerns noted above. First, it could establish a Sanctions Committee composed solely of individuals from outside the Bank whose services are retained for a fixed period of time – an option provided in the Operational Memorandum. Second, it could establish a Committee composed of Bank employees, but employees whose future careers could not be perceived as in any way dependent upon their decisions in matters coming before the Committee – employees, for example, who will be retiring from Bank service after their current assignment, or employees who have left the Bank but who have been rehired for a

¹⁶ Specific concerns based on members susceptibility to external pressures have arisen most frequently from the Bank’s regional offices. We understand that several field office managers and others have found it incomprehensible that the Committee had failed to debar particular firms. Being unable to attribute the failures to evidentiary shortcomings, their fear is that this is an indication that the Bank, despite its strong public stance against fraud and corruption, is not in a position to withstand the influence that might be brought to bear by large international firms.

specific term of years to serve as members of the Committee on a part-time basis. Third, it could establish a mixed Committee composed of members drawn from each of the above two groups.¹⁷

In discussing the Sanctions Committee's problems with officials within the Bank, we encountered two particularly strongly-held and seemingly diametrically opposed views: on the one hand, that the Bank should simply get rid of the multiple headaches of the sanctioning system by moving the sanctioning body outside the Bank's regular structure; and, on the other hand, that it would be unfortunate to move the responsibility outside the Bank and thereby occasion the loss to the system of detailed knowledge of the Bank's methods of operation, procurement practices, and related considerations.¹⁸ Certainly it is clear that, under any of the above alternatives, it would be of critical importance that the Committee be composed of individuals with training and extensive experience in procurement matters, in law,¹⁹ and in the operations of the Bank or other international development banks. To the extent that the Committee is to be composed of individuals from outside the Bank, we would expect that prime candidates for membership might be found among recent retirees from Bank procurement, legal, and

¹⁷ If one of these changes were to be adopted by the Bank, we would suggest that the term "Committee" be changed to "Board" or some similar reference that would reflect a less ad hoc existence. This would be in keeping with the Bank's interest in demonstrating its commitment to a fair and deliberate process. Hereinafter in this Report, however, the term "Sanctions Committee" will still be used to refer to any future sanctioning entity, in order to avoid confusion.

¹⁸ Some of those holding this view also believe that to move the sanctioning body outside the Bank would constitute an evasion by the Bank of a fundamental responsibility and would cede to outsiders the authority to determine whether the Bank should permit the funds that it provides to be paid out to particular suppliers, contractors, subcontractors and consultants.

¹⁹ One former Committee member strongly recommended that the Committee include a lawyer with extensive investigative experience.

managerial positions.²⁰ To the extent that the Committee membership is to be drawn from within the Bank, we recognize that even with the expanding caseload of the Committee the responsibilities of membership would not come close to requiring full time concentration, and hence that membership would be assigned as an adjunct to other Bank responsibilities; unlike the current situation, however, the members would not be drawn from quite such senior ranks, and accordingly we would expect that ample time would be allotted for the professional performance of Committee work.

Of the available options, we would recommend that the Bank employ a system in which (a) the membership of the Committee is drawn both from current Bank employees who are not the most senior managers and from individuals who are not current Bank employees²¹; (b) the individual members, and the membership as a whole, meet the qualifications of background and position as discussed above; (c) the total membership consists of seven such individuals, with current Bank employees constituting no more than three; and (d) the Committee sits in panels of three to hear cases, with two members of each panel, including the chairman, being drawn from the

²⁰ To the extent that outside candidates who lack Bank experience are considered for membership, 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. For similar reasons, it would seem important that the development and periodic revision of the rules under which the Committee operates should remain within the Bank, and that the Legal Department (not the Committee members themselves) should continue to serve as the arbiter of their interpretation.

²¹ In order to promote confidence in the independence of the members of the Sanctions Committee, the members who are not current Bank employees could be appointed through a process whereby the President of the Bank would recommend individuals for appointment and the appointments would be made by the Board of Directors.

Committee members who are not current Bank employees. We believe that a careful iteration of such an approach reasonably could be expected to minimize concerns about the current system – regarding membership availability and allocation of time, conflicts of interest, outside influences, and pressures of increasing caseload – while maintaining necessary membership experience and expertise.

B. Staff Support for the Sanctions Committee

1. Background

The Operational Memorandum does not address the matter of staff support for the Committee, but in practice the Legal Adviser has provided both legal advice and administrative support to the Committee since its inception.

Under the August 2001 Procedures, the Committee is authorized to appoint a Bank staff member to serve as its Secretary and perform a variety of functions, and the Legal Adviser has been designated to serve in that capacity.

2. Observations and Discussion

Utilizing the Legal Adviser to provide the Committee with legal advice on procurement procedures and related matters has the advantage of according the Committee direct access to the Bank's principal authority on the subject. The Legal Adviser, however, is assigned this responsibility as an addition to the regular work of the office. That regular work is a demanding, full-time responsibility, and yet the Legal Adviser must divert attention to the preparation of the analyses required for advising the Sanctions Committee about the contracting and procurement considerations raised by evidence adduced by INT in cases being submitted for the Committee's consideration. That advice cannot be proffered on the basis of perfunctory analyses; it carries serious consequences and requires serious evaluation of the factual and legal issues involved. Moreover, in addition to the advisory function performed for the Committee, the Legal Adviser under current practices is expected to perform or to supervise the traditional administrative duties of a committee secretary. The competing responsibilities are time

consuming to the degree that they clearly have become burdensome. Continuing in this manner would not be in the Bank's interest.

In addition to the burden upon the Legal Adviser's time, the current approach also gives rise to concerns about the perception of the Committee's impartiality. As is the case with regard to the Bank managers who are members of the Committee, the prior work of the Legal Adviser in the initial internal review of procurement documents, about which information or advice is later sought by the Committee, has been viewed by some observers within the Bank as fostering the impression of a conflict of interest. Again, the concerns are directed to a matter of impression, not reality.

3. Recommendations

The Legal Adviser's adjunct responsibilities for providing the Committee with legal advice on procurement matters should, we suggest, be reassigned to another experienced Legal Department attorney in order to leave the Legal Adviser free to concentrate on that office's principal duties. In making such a reassignment, it is important to ensure that the attorney designated to assume the role be particularly well-qualified to provide the Sanctions Committee with highly competent and authoritative analyses of all relevant procurement considerations, including the practical aspects as well as the legal ones. Because of the increasing Sanctions Committee caseload, we suggest that consideration be given to characterizing the assignment as a formal secondment to the Sanctions Committee for a specified period of time. In addition, we suggest that the administrative functions that had been performed by the Legal Adviser be severed and shifted entirely to a staff assistant assigned to the Committee.

C. Conduct Giving Rise to Liability

1. Background

The Operational Memorandum contemplates that sanctions are to be imposed on bidders, suppliers, contractors, and consultants that are found to have engaged in corrupt or fraudulent practices in competing for or executing Bank-financed

contracts. The August 2001 Procedures have defined a slightly broader scope, covering fraudulent or corrupt practices *in connection with* Bank-financed or Bank-executed activities.²² Both the Operational Memorandum and the August 2001 Procedures rely on the definitions of “fraud” and “corruption” set forth in the Procurement Guidelines to delineate the scope of such practices.

2. Observations and Discussion

It is fundamental to the concept of fairness to potential subjects of administrative proceedings that they be forewarned of the kinds of conduct that will render them subject to such proceedings. Certainly the scope of the particular activities for which a bidder, supplier, contractor, or consultant may be sanctioned by the Bank should be clearly and concisely defined. The current definitions meet that standard for fairness. They do not, however, fully reach the range of conduct that would be appropriate to protect the Bank from fraudulent and corrupt practices.

The current definitions are of fairly broad scope, but they do not include all the forms of fraudulent and corrupt conduct that would be advisable for proper coverage. We had recommended in our January 2000 Report that the definitional shortcomings, which were identified in 1999 by a Bank consultant, should be examined carefully, and that the Procurement Guidelines should be refined to reach the full panoply of means by which fraud and corruption may take place. We continue to believe that those changes are important, and we also believe that the concept of “public official” should be recast to encompass not only officials in national governments but officials of the Bank and other international organizations.

²² There appears to be no compelling reason why activities indirectly financed by the Bank, or financed with funds insured by the Bank, should not be subject to the sanctioning process. Accordingly, we are recommending in Section O that the process apply to the activities supported by the IFC and MIGA.

In the course of revising these definitions, it would be advisable to add coverage of an uncompleted effort to defraud or to corrupt (an attempt to conclude a fraudulent or corrupt act, or an action in furtherance of an advanced conspiracy) that was interrupted by investigators or by other fortuity. It also would be advisable to assure coverage of acts of fraud or corruption accomplished through a middleman; acts constituting assistance to others in executing fraud or corruption; and acts designed to conceal fraud or corruption, by whomever undertaken. Such coverage is common in the jurisprudence of a wide range of national jurisdictions, usually in the form of the general provisions applicable to all specifically defined offenses in criminal codes.

3. Recommendations

We recommend that the existing gaps in the definitions of fraud and corruption be corrected, and that incomplete forms of the offenses, and forms of the offenses accomplished largely by others, be incorporated as well.

D. Time Limitations

1. Background

The Operational Memorandum, in describing the process for dealing with allegations of fraud and corruption, states: “If the incident is alleged to have occurred more than three years earlier, the Legal Adviser does not pursue the matter.” In practice, the language in the Operational Memorandum has been understood by the Legal Adviser, and by other past and present attorneys in the Legal Department, to represent an administrative provision designed for efficient allocation of investigative resources, and not a time limitation that could be used by a respondent to avoid being debarred from future Bank work. Some attorneys for respondents have recently and vigorously argued that the language should be understood as a time limitation that would prohibit the issuance of a notice of debarment with regard to acts that occurred more than three years previously, or that would at least preclude the investigation of incidents that occurred more than three years before an allegation of corrupt or fraudulent practices was received by the Bank.

The August 2001 Procedures do not contain a time limitation for investigations leading to a proposed notice of a debarment, but instead give the Director of INT the ability, “in the exercise of professional discretion and in the interest of the most effective usage of Bank resources and of the promotion and protection of the Bank’s mission and effectiveness, [to] decide whether to commence, suspend or terminate an investigation, and the manner in which such investigation is conducted.” In particular, with respect to the pursuit of old matters, “the Director may decide not to pursue the investigation of an allegation pertaining to an incident that occurred more than three years earlier.” The provision is set forth as one of the factors guiding the application of triage measures necessitated by the large number of cases being referred for investigation and adjudication.

2. Observations and Discussion

The question that the Bank is now called upon to address is not whether the language in the Operational Memorandum has been correctly interpreted and applied, but whether in the future a specific time limitation should be imposed upon the Bank, within which it must conclude its investigation and file a proposed notice of debarment. Such a time limitation would, in essence, create an enforceable right by which a respondent firm would be able to avoid debarment from future Bank contracts. It is not apparent why such a provision would be contemplated by the Bank, since it would run contrary to the Bank’s responsibilities and would not appear to be justified by the considerations that support the employment of statutes of limitations barring criminal and civil actions in national courts.

The Bank carries a responsibility to its member nations to avoid the fraudulent diversion of the funds with which it is entrusted. There will be many occasions when the Bank is unable to prevent such diversion, and there will be many other occasions when the Bank is unable to ferret out sufficient evidence to justify a firm’s debarment on the basis of diversion. On such an occasion, an assessment by an investigator or the Legal Adviser as to the insufficiency of the available evidence would,

quite properly, prompt the cessation of an investigation or a debarment proceeding. When the Bank has been able to secure such probative evidence, however, it would be anomalous if the application of an arbitrary time limitation could be permitted to derail the debarment process. It would be particularly anomalous since the Bank would retain its inherent power to reject even an honest potential contractor with a chancy performance record, while finding itself unable to preclude from future contracts a firm that is shown by probative evidence to have engaged in fraud and corruption but whose debarment was prevented by a time limitation.

Despite suggestions of counsel for respondents that a time limitation would be justified by the same considerations underlying statutes of limitations in criminal or civil actions before domestic courts, the analogy is faulty for two reasons.

First, the primary purpose in court cases is to achieve redress by punishing offenders or recovering losses. The primary purpose of the Bank's debarment process, to the contrary, is the future protection of Bank-derived funds, not punishment or recovery. (See Section L.) Although lack of timeliness in court cases in some instances might warrant the preclusion of punitive sanctions or compelled repayment, lack of timeliness in debarment proceedings would not warrant depriving the Bank of its inherent power to select those with whom it chooses to do business in the future.

Second, the rationale underlying legislatively-imposed bars in court cases rests upon two propositions, neither of which is applicable in the kinds of situations arising in Bank debarment proceedings.

The first proposition is that the law must discourage an injured party from allowing a prolonged period of time to pass between a wrongdoing and the taking of legal action. Yet, exceptions exist to cover situations in which the injured party does not have the opportunity to take prompt action. One such exception covers an instance in which an injured party is unaware of the damage because of the covert nature of the wrongdoing or the injury (the classic instance being a situation in which a fraud has been perpetrated); in such a case any time limitation is commonly construed to run not from

the time the wrongdoing occurs but from the time the wrongdoing is discovered or reasonably should have been discovered. That particular exception in court cases is the rule in Bank debarment proceedings – virtually all instances of fraud and corruption are covert and hidden, at least for some span of time, as a result of their very nature. Once fraud and corruption cases come to the attention of the Bank, though, the Bank has a record of prompt action. For example, in the particular cases in which the subject of time limitations was raised most strongly by respondents’ counsel, the wrongdoing was first disclosed to the Bank in July of 1999, and the Bank had its debarment investigations underway within the same month. There was virtually no delay in the initiation of formal investigations leading to the filing of notices of debarment proceedings. This is markedly different from the circumstances that would prompt the imposition of statutory bars to legal action. Another exception, also based upon the lack of an opportunity for an injured party to take prompt action, is that in which the wrongdoer is outside the jurisdictional reach of the country in which the injured party is located; in such cases, national jurisdictions commonly provide that, since the injured party’s ability to secure evidence is hampered by the absence of the wrongdoer, the running of the period of limitation is tolled during the wrongdoer’s absence. The Bank’s evidence gathering capacity is similarly hampered in virtually all cases, since relatively few arise in the jurisdiction in which the Bank’s headquarters is located, and hence a rigid time limitation would punish the Bank for an investigative disability that is inherent in all its debarment cases and that would be accorded an exception to the application of national statutes of limitations.

The second proposition is that the law must recognize – and mitigate through the imposition of time bars – the fact that the passage of time diminishes the potential accuracy of the truth-determining process because of its adverse effect on the memories of witnesses. Faded memories can prompt serious doubts as to the factual basis on which the adjudicatory process must rely. But the matters coming before the Sanctions Committee are quite different from the overwhelming majority of criminal and civil cases – cases that commonly rest upon eyewitness identification, testimony as to

oral understandings, and other such factors, the accuracy of which indeed is dependent in part on the freshness of witnesses' recollections. Debarment actions, however, almost always rest upon a very different kind of evidence – voluminous documentary evidence and paper trails of a persuasiveness that is unaffected by the passage of time.

In sum, the Bank has an inherent need, as the principal international lending institution, to protect itself and its members from future harm. The situation differs from that in which time limitations traditionally have been applied because of the limitation of debarment proceedings to protective purposes and consequences, the delayed discovery of evidence being the rule in fraud and corruption matters rather than the exception, and the enduring credibility of the kind of evidence upon which fraud and corruption determinations must rest. Moreover, since the perpetrators of acts of fraud or corruption invariably strive to hide their acts, the imposition of time limitations on debarment investigations or proceedings would merely serve to reward those who could effectively cover their tracks for the duration of the limitations period.

3. Recommendations

Where there is reasonably sufficient evidence to establish that a firm has in fact engaged in fraudulent or corrupt practices, no matter how long ago the incident occurred, the Bank should retain the opportunity to protect its assets from misuse in the future by debarring the firm from participating in subsequent Bank-funded contracts.

E. Disposition and Interim Suspension Not Requiring Sanctions Committee Hearing

1. Background

Both the Operational Memorandum and the August 2001 Procedures provide that a debarment is to take effect only upon (a) a finding by the Sanctions Committee that a respondent engaged in fraud or corruption, and (b) a final decision by the President concurring in the Committee's recommendation. All debarment cases must go through this process, and no mechanism exists for disposing of cases without a full

hearing before the Sanctions Committee. In addition, there is no provision for temporarily declaring a respondent ineligible for Bank-financed contracts during the period between the time that evidence of a respondent's fraud or corruption is discovered and the time that the sanctioning process is completed.

2. Observations and Discussion

Since the Sanctions Committee began its work in 1998, there has been a continuous increase in the number of cases being reviewed by the Committee at any one time, the complexity of those cases, and, as a result of these factors and the increasingly aggressive and frequently dilatory tactics adopted by respondents and their attorneys, the average length of time between the referral of a matter to the Committee and the final disposition of that matter. As these problems are exacerbated in the future, it will become even more difficult for the Bank to deal effectively with all of the matters involving credible evidence of fraud or corruption. The difficulties faced by the Bank will include, among other things, the increasing burden on the Sanctions Committee as the number and complexity of cases expands, and the opportunity for a greater number of respondents to engage in further misuse of Bank-provided funds pending the outcome of debarment proceedings before the Committee. To alleviate these problems, the Bank should consider adopting procedures that would (a) enable the Bank to dispose a significant proportion of cases without the necessity of a full hearing before the Sanctions Committee and (b) permit the Bank temporarily to suspend a respondent from eligibility for new Bank-financed contracts pending the final disposition of a debarment matter.

a. Disposition of Matters Based on Internal Review

The August 2001 Procedures require certain officials within the Bank to review INT's proposed notice of debarment before it is issued. In lieu of this review, the proposed notice of debarment could first be reviewed by a designated official of the Bank (the "Reviewing Officer"), with advice from procurement and legal experts within the Bank. If, on the basis of that review, the Reviewing Officer concluded that the evidence was sufficient to support a finding that the respondent had engaged in a

fraudulent or corrupt practice, the Reviewing Officer would authorize the notice of debarment to be issued and would identify a sanction to be imposed on the respondent.²³

Within a stated period from its receipt of the notice of debarment (e.g., 60 days) the respondent would be entitled to request, and thereafter to receive, a full review and hearing before the Sanctions Committee. The standard of review would be *de novo*, meaning that the Sanctions Committee would take a fresh look at the matter and would not be bound by the findings or recommendations of the Reviewing Officer. If, however, the respondent did not choose to request a hearing before the Sanctions Committee within the stated period of time, the sanction proposed by the Reviewing Officer would become final upon the expiration of that period.

In this way, the adoption of the proposed process could reduce the number of cases that go to the Sanctions Committee because not all decisions of the Reviewing Officer would be appealed. Some respondents would recognize that in light of the evidence possessed by the Bank it would be futile to contest the matter further, and since the respondent would be informed of the sanction that would be imposed when it was informed of the recommendation of the Reviewing Officer, the respondent could decide whether to take its case to the Sanctions Committee with full knowledge of the consequences of not doing so. As a result, the Bank would be able to dispatch some “minor” cases without going through the time and expense associated with a full review and hearing by the Committee. This would become increasingly helpful to the Bank as INT investigates more cases of fraud and corruption involving contracts and transactions that previously have not been the focus of attention because individually they did not reach a high level of significance, but which, because of their number, are now recognized as collectively important and as matters that need to be addressed for purposes of general deterrence. By means of the described process, a large number of

²³ The identification of the appropriate sanction would be governed by the same criteria as those employed by the Sanctions Committee.

such cases could be concluded at the Reviewing Officer level. The result would be a heightened efficiency in the future operation of the sanctioning system.

b. Suspension Pending Completion of the Sanctioning Process

In the cases that proceed to the Sanctions Committee level, there inevitably will be delays – some unavoidable and some contrived – before the completion of the debarment procedures. In these cases, the Bank should consider taking temporary, interim steps to prevent the respondent from receiving additional Bank-financed contracts while the matter is pending before the Sanctions Committee. The Bank has an obligation to protect the funds entrusted to it from further misuse at the hands of a contractor who already has been shown by credible evidence to have engaged in fraudulent or corrupt practices. The Bank can achieve such protection through a fairly simple mechanism utilizing the Reviewing Officer.

At the time of the issuance of the notice of debarment, the respondent could be notified that, 60 days following the issuance of the notice of debarment, its eligibility to be awarded new Bank-financed contracts would be temporarily suspended pending a final disposition of the debarment matter.²⁴ The respondent would have the right, at any time within a stated period (e.g., 45 days) following the issuance of the notice of debarment, to present a brief written statement to the Reviewing Officer setting forth the reasons why the suspension should not remain in effect during the pendency of the case before the Sanctions Committee.²⁵ If the

²⁴ The ongoing work of the respondent on any existing Bank-financed projects would not be affected by the temporary suspension. Of course, if the facts set forth in the notice of debarment supported a finding that misprocurement had occurred, the underlying contract would be subject to cancellation. The cancellation, however, would be carried out through the Bank's long-standing procedures which are applicable to particular contracts and are separate and distinct from the debarment process.

²⁵ Since the respondent would be entitled to a full review and hearing by the Sanctions Committee of evidence and arguments concerning the imposition of permanent
(continued...)

Reviewing Officer determined, on the basis of the evidence contained in the notice of debarment and the evidence and arguments presented by the respondent, that the respondent had engaged in fraudulent or corrupt practices, the suspension would become effective at the end of the 60-day period. The standard of proof should be the same as applied by the Sanctions Committee (see Section H), but, at this stage, and on this issue, the burden of proof should be on the respondent. Any suspension imposed by the Reviewing Officer would continue in effect until the proceedings before the Sanctions Committee had been completed and the Sanctions Committee's decision had become effective. In any event, no public announcement of the suspension, the finding, or the ultimate sanction would be made until the sanction became final.

A procedure for temporary suspension plainly would be beneficial to the Bank because, during the time required to receive a determination from the Sanctions Committee, the Bank would no longer bear the risk of Bank-financed contracts being awarded to contractors whom the evidence showed had engaged in fraud or corruption. This is especially important because, once issued, such contracts are not considered subject to revocation as a result of a subsequent debarment. The Bank has recognized that, even in situations in which debarment is imposed, the cancellation of existing contracts with the respondent might have adverse consequences to the borrower, and therefore that the debarment should not affect previously-awarded contracts. Accordingly, if new Bank-financed contracts are awarded during the pendency of a matter before the Sanctions Committee, those contracts will not be cancelled or

(continued...)

sanctions, the respondent's submission to the Reviewing Officer is relevant only to the temporary suspension. In view of the limited period during which the suspension would remain in place, and in the interest of the efficient use of Bank resources, the presentation to the Reviewing Officer should consist of no more than a brief written statement setting forth the respondent's arguments against suspension, and should not be permitted to be transformed by counsel into an additional hearing.

cancelable on the basis of an eventual debarment order resulting from a finding of fraud or corruption. The opportunity for such awards, therefore, should be minimized during any periods in which a contractor, on the basis of probative evidence, stands accused of fraud or corruption.

A procedure for temporary suspension would also be beneficial to the Bank because it would remove the incentive for a respondent to contest the case at the Sanctions Committee level solely for the purpose of delaying an inevitable declaration of ineligibility. Some respondents, well aware of the overwhelming evidence against them, would otherwise insist on review by the Committee only in order to permit them to scout out other contracts, in a different region or from a different borrower, before becoming subject to a debarment order.

In light of its purpose, its practical justification, and its temporary effect, the proposed suspension process is consistent with basic notions of fairness and due process. While the respondent would be denied the privilege of competing for additional Bank-financed contracts pending a full hearing before the Sanctions Committee, the procedures for temporary suspension would provide the respondent with appropriate protections. Under the August 2001 Procedures, in transmitting the notice of debarment INT is required to present all relevant evidence in its possession or known to it that would reasonably tend to exculpate the respondent or that would mitigate the respondent's culpability. Any such exculpating and mitigating evidence would be included with the materials presented to the Reviewing Officer. In addition, the respondent would have the opportunity to present additional evidence and arguments in writing to demonstrate why the temporary suspension should not go into effect. As a result, the Reviewing Officer would be aware of all available evidence favorable to the

respondent in making a determination concerning whether the respondent had engaged in fraudulent or corrupt practices.²⁶

Furthermore, there is nothing inherently objectionable about imposing temporary constraints on the rights of the accused prior to a final determination as to its culpability through the workings of the judicial process so long as such constraints are designed to protect a legitimate public purpose. For instance, even in criminal cases in national courts where due process protections are vitally important since the freedom of the accused may be at stake, virtually all jurisdictions, even those that impose a strong presumption in favor of the innocence of the accused, recognize the right of the state to take temporary protective measures such as confining the accused or imposing other strictures on the accused's liberty pending the outcome of the trial. These interim measures are recognized as justified in situations in which the state's interest in holding the accused is considered to outweigh the accused's right to freedom, such as instances in which the nature of the crime – whether involving fraud or violence or other conduct – suggests that further crimes may be committed by the accused, or in which there is believed to be a risk that the accused may leave the jurisdiction. Similarly, criminal procedures in many jurisdictions permit the seizure of assets of the accused prior

²⁶ It is worth noting that the process for permanent debarment contemplated in the Operational Memorandum is less rigorous than the process being proposed for temporary suspensions. The Operational Memorandum provided that the Sanctions Committee would act solely on the basis of the evidence presented by the investigators without any opportunity for the respondent to respond to the charges; it is only as a result of operating procedures developed by the Sanctions Committee that the respondents were given the opportunity to present written evidence and to appear before the Committee.

Additionally, it should be noted that the procedures for taking away a contractor's eligibility to compete for contracts awarded by the United Nations is also less rigorous than the process being proposed for temporary suspensions. Although the United Nations has employed this practice in only a few instances, its procedures permit a supplier to be denied eligibility following an internal review of the evidence without prior notice to the supplier.

to a trial in which the assets have probative evidentiary value or in which there is a risk that, if the accused continues to exercise control over those assets, they could be hidden or dissipated before the conclusion of the trial. Accordingly, given that the Bank has an overriding obligation to protect the assets entrusted to it, if there is evidence to show a firm or individual has engaged in fraud or corruption in a previous Bank-financed project, the temporary suspension of that firm or individual is certainly as justified a precaution as those employed in national jurisdictions.

3. Recommendations

We recommend that the Bank adopt the outlined two-step practice whereby cases need not proceed to the Sanctions Committee level unless requested by the respondent, and whereby a Reviewing Officer may temporarily suspend a respondent from Bank-financed projects pending the outcome of the Sanctions Committee's proceedings.

F. Presentations to the Sanctions Committee

1. Background

The Operational Memorandum does not provide for either the INT investigator or the respondent to make presentations before the Sanctions Committee. With respect to INT, the Operational Memorandum simply provides that the results of its investigation (presumably in writing) be submitted to the Sanctions Committee, however, in most instances the Sanctions Committee also has given INT the opportunity to appear before the Committee. With respect to the respondent, the Operational Memorandum does not appear to contemplate that the respondent would have any opportunity, either in writing or in person, to communicate with the Committee. In practice, in each case heard by the Sanctions Committee to date, the respondent has been given the opportunity to submit written materials to the Committee and to appear before the Committee to present evidence and oral arguments.

The August 2001 Procedures reflect the practices adopted by the Sanctions Committee of receiving written and oral presentations, and establish a framework for the submission of written materials and for the presentation of oral arguments by INT and by, or on behalf of, the respondent. With regard to both the written and the oral presentations, the August 2001 Procedures provide for INT to make the initial presentation, for the respondent to respond, and for INT to reply. They specifically permit the respondent to be represented by an attorney or other individual.

2. Observations and Discussion

The Operational Memorandum appears to have contemplated a process under which the Sanctions Committee would review the evidence against a respondent and would reach a determination as to its culpability without receiving any communication (either written or oral) on the respondent's behalf. It is notable that, from its inception, the Sanctions Committee chose to afford each respondent an opportunity to explain its understanding of the matter to the Committee in writing, and also to meet with the Committee face-to-face. This is an example of the Bank employing practices which are more favorable to the respondent than what is required by the Bank's written procedures and demonstrate a good faith effort by the Bank to assure that those charged with engaging in fraudulent and corrupt practices are given the chance to explain their view of the evidence against them and to present any facts that they believe to be exculpatory or mitigating. The explanatory process, however, is susceptible to being maneuvered by attending counsel into a more adversarial form of presentation.

Although the Committee is not required to meet with either INT or the respondents, members report that they find the presentations to be informative. Moreover, they feel it is important to permit a respondent to meet with the Committee and present its defense directly, although members have also expressed concern that since the respondents' evidence is usually presented by professional advocates for their positions, it can be difficult to separate fact from posturing, and that, in some instances, the presentations tend more to blur the circumstances than to shed light on them.

Unfortunately, since the process as it has developed has become essentially one in which the strength of each side's presentation is directed toward persuading the Committee, it is inevitable that each side, particularly after being challenged by the other, will present its own somewhat adversarial interpretation of the underlying evidence.

Another concern that has been expressed by some members of the Committee is that, since there are no fixed limits on the quantity of written materials or the duration of oral presentations, the process is becoming more burdensome and, as the number and complexity of cases increases, may become unmanageable. This problem can be addressed by imposing reasonable limits (and by changing the structure and composition of the Committee – see Section A). A related concern, that has been raised by those involved in presenting the results of the investigation, is that the 20-day period for submitting a reply to the respondent's written materials is often too short to permit a reasonable assessment of the facts and interpretations that have been set forth. This problem can be addressed by relaxing the deadline.

Since attorneys lacking a sound case are often prone to shift their arguments to attacks against the procedural process that their clients face, several have sought to undermine the credibility of the Bank's procedures for imposing sanctions on those accused of fraud or corruption. In doing so, attorneys for some respondents have complained that it is inappropriate for the INT investigator to be the person presenting the Bank's evidence to the Committee since, they assert, the same entity should not serve as investigator and "prosecutor;" an investigator should play an impartial role, while only a prosecutor should play an advocate's role. Their argument might be somewhat more understandable if the expected role of INT in such a situation were indeed that of a prosecutor instead of that of summarizing and explaining the evidence. In any event, we find the position to be without merit in an administrative proceeding, and note that even in court proceedings – and in some court proceedings in common-law countries as well as other countries – the practice has long been found an acceptable one. Furthermore, we do not believe that those pressing this position would be satisfied even if the investigative

and hearing roles were separated, since the same respondents that complain about one entity serving a dual role also complain that there is a lack of independence on the part of the decision makers because the Committee members are employees of the Bank; in their view, presumably, the use of either INT or outside investigators would also fail adequately to safeguard respondents due to the fact that these investigators are working for the Bank. Indeed, applying these standards, all Bank employees and all outsiders retained by the Bank are tainted. Trying to appease counsel who make these arguments would render the Bank incapable both of performing investigations and presenting evidence.

A more understandable concern that has been raised by attorneys for some respondents is that it is unfair to give INT two opportunities to submit written material and make oral presentations (the initial presentation and a reply), while the respondent has only one such opportunity. They also have argued that it is unfair to give INT the last opportunity to be heard. (In the extreme, they even suggest that this gives INT the ability to practice “prosecution by ambush” by holding back certain evidence until the reply, and effectively depriving the respondent of the chance to rebut such evidence since the respondent does not have another opportunity to respond. This argument is not valid since the August 2001 Procedures require that all evidence that INT intends to present to the Committee be included in the notice of debarment, which is the initial written submission.) In any event, the Bank’s current procedures seem to meet the objectives of effectiveness, efficiency, and fairness; INT must begin by laying out the complete case against the respondent and then the respondent is given the opportunity to respond to the evidence that has been presented by INT and to present evidence of its own. A system that did not allow INT to comment on the respondent’s evidence would be incomplete, and it is necessary and appropriate that the Bank’s procedures allow INT an opportunity to reply, but not another opportunity to present new evidence unrelated to the respondent’s contentions in its response. Such a practice is fair to the respondent since both INT and the respondent are given the opportunity to present evidence of their

own and to comment on the other's evidence. This procedure in fact is the common practice in courts in many jurisdictions, and it is generally considered to be a reasonable practice when the first presenter has the burden of proof. (See Section G.) Nevertheless, if the Bank should choose to avoid giving respondents a chance to complain that such a system is unfair with a relatively minor additional burden on the Committee, it seems that there would be little harm in giving respondents an additional opportunity to be heard, as long as it is expressly limited to responding to new matters that INT has presented in its reply.

3. Recommendations

In order to assure that the Committee is well-informed, and for the reasons discussed earlier relating to the Bank's desire to apply balanced procedures and give the respondent a fair opportunity to present all information pertinent to its defense, we recommend that the Committee continue to receive both written and oral presentations from the parties. With respect to the role of INT in making presentations to the Sanctions Committee on behalf of the Bank, we recommend that the current practice be maintained.

To keep the proceedings manageable, we also recommend that the Committee place reasonable limits on the length of written submissions, other than documentary evidence that may be appended, and the duration of oral presentations. Furthermore, we recommend that INT be given more time to prepare its replies to the respondents' written materials, and that respondents be permitted to provide additional evidence or arguments following the submission of the INT's replies, as long as they are limited to the matters newly raised by those replies.

G. Burden of Proof

1. Background

Neither the Operational Memorandum nor the August 2001 Procedures specifically addresses whether the Bank or the respondent has the burden of

proof. Nevertheless, both documents require the Sanctions Committee to find that the evidence is “reasonably sufficient” to conclude that the respondent engaged in fraud or corruption. In practice, the Committee has imposed the burden of proof on the Bank’s investigators to present evidence that satisfies that standard.

2. Observations and Discussion

Virtually all judicial and administrative proceedings require that the party initiating the action carry the burden of establishing the basis to justify the outcome that is requested. In matters brought before the Sanctions Committee, the Bank, as the party initiating the proceedings and proposing affirmative action by the Committee, appropriately bears the burden of providing evidence to show that the respondent has engaged in fraudulent or corrupt practices. However, that is not the end of the analysis. In many other types of proceedings, once the initiating party has made out its case, the burden shifts to the other party to overcome the evidence against it.

For example: (a) where there are allegations of fraud relating to a respondent’s claims as to its qualifications in a certain specialty, if the investigators were to present evidence to support those allegations the burden might shift to the respondent to demonstrate that its claims were accurate; or (b) where there are allegations of corruption arising out of payments made by the respondent to a third-party without any apparent interest in a Bank-financed project, if the investigators were to present evidence of such payments the burden might shift to the respondent to show that the payments had a legitimate purpose.

3. Recommendations

The Bank should have the burden of presenting evidence to establish that a respondent has engaged in fraudulent or corrupt practices. However, where such evidence has been presented, the burden should shift to the respondent to show cause as to why that respondent should not be sanctioned as a consequence of such behavior.

H. Standard of Proof

1. Background

Both the Operational Memorandum and the August 2001 Procedures require the Sanctions Committee to find that the evidence is “reasonably sufficient” to conclude that the respondent engaged in fraud or corruption. In practice, certain non-lawyer members of the Sanctions Committee have expressed concerns about the adequacy of their understanding as to the proper application of the standard.

2. Observations and Discussion

The standard of proof required in criminal, civil and administrative proceedings varies depending on the nature of the rights and interests that are at stake in the proceedings. For example, in criminal proceedings, where the freedom of the accused may be at stake, the standard of proof is usually set at a high level (e.g., “beyond a reasonable doubt”), whereas in civil proceedings, in which an attempt is made to provide a level playing field, the standard of proof is usually more moderate (e.g., “preponderance of the evidence”). The nature of the proceedings before the Sanctions Committee would not justify the imposition of a particularly rigorous standard of proof for two reasons.

First, as noted previously, sanctions resulting from this process have only prospective application and do not have the potential to redress prior wrongdoing by either punishing a respondent (as in a criminal proceeding) or compelling a respondent to make restitution (as in a civil proceeding). The primary purpose of the Bank’s sanctioning process is to protect the assets entrusted to the Bank from misuse or abuse in the future. In furtherance of that objective, it would be neither effective nor efficient to adopt an unduly rigorous standard of proof.

Second, the Bank’s investigators have neither traditional law enforcement powers that investigators in member nations use to obtain evidence to build a criminal case, nor even the limited rights to compel the production of documents or

witness testimony that parties to civil proceedings in national courts may utilize. The investigators must rely on the Bank's own records and those that are provided voluntarily by third-parties or by the respondent. Both the Bank's INT investigators and contract investigators have expressed frustrations in trying to meet necessary evidentiary standards with "a limited toolkit." In such circumstances, it would be unrealistic to expect the evidence to satisfy a particularly strict standard of proof.

Nevertheless, even if the "reasonably sufficient" standard is intended to strike an appropriate balance, since some members of the Committee acknowledge that they do not fully understand the standard, it may be applied incorrectly.²⁷ This may make it either too easy or too difficult for the Bank to make its case or for the respondent to be treated fairly. This is an example of a situation in which the General Counsel, because of his legal training, may be put in the difficult position of having to explain the standard to the other members of the Committee while not unduly influencing their independent judgment as to whether the evidence in the particular case satisfies the standard.

To avoid this problem and to ensure that the standard of proof is applied properly, the Bank should use more descriptive phraseology in setting forth the standard of proof. For example, the standard would be easier to understand and apply if the Sanctions Committee were asked to determine whether, on the basis of the evidence presented, it is "more likely than not" that the respondent engaged in fraudulent or corrupt practices.

If it was determined that the Committee should have specific guidance on how to apply the standard of proof, more could be done to educate the members of the Committee as to the intent of the standard. In this regard, in background

²⁷ In the view of several Bank officials, from different Bank offices, who are familiar with the application of the standard in a recent series of cases, the standard has in fact proved sufficiently ambiguous that it has been the subject of misinterpretation or misapplication.

materials prepared for the use of Committee members, the standard could be elaborated upon in more descriptive ways, for example, by reference to whether members of the Committee would expect a governmental agency, that was aware of all the evidence presented, to choose to avoid doing business with the respondent in the future. Alternatively, the standard could be explained with specific examples showing what evidence would satisfy the standard of proof and what would not, so that members of the Committee would have at least some point of comparison.

3. Recommendations

To increase the clarity and achieve more uniformity in application, the “reasonably sufficient” standard of proof should be replaced with a more descriptive standard, such as “more likely than not.” If desirable to help in the interpretation of the standard, the Bank could provide the Committee members, as well as INT and the respondent, with clearer guidance on how the standard of proof is to be applied.

I. Access to Bank Documents

1. Background

Under the Operational Memorandum, a respondent is not given a right of access to Bank documents. In practice, respondents have been given all documents that were presented by the Bank’s investigators to the Sanctions Committee, but respondents have not had the broad “discovery” authority that would be available in a criminal or civil proceeding.

Under the August 2001 Procedures, the respondent’s access to Bank documents was expanded to include all relevant evidence in INT’s possession or known to INT that would reasonably tend to exculpate the respondent or that would mitigate the respondent’s culpability. The only exception to the general requirement that all evidence presented to the Sanctions Committee is to be made available to the respondent is that certain evidence may be withheld “upon a determination by the Committee 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.”

2. Observations and Discussion

This is another area in which the Bank, in the interest of fairness to the respondent, has gone beyond what is required. While the Bank would be justified in acting unilaterally on the basis of evidence against a respondent, the Bank has chosen to share that evidence, as well as exculpatory and mitigating evidence, with the respondent.

The Bank has struck what should be viewed as a very reasonable and responsible balance in attempting to achieve a process that is effective, efficient, and fair. If the Bank’s investigators discover or even become aware of evidence that would be helpful to the respondent, that evidence must be shared with both the Sanctions Committee and the respondent. Presumably, the investigators will have undertaken a particularly careful review of the Bank’s records in the course of their investigation, so any such evidence will have come to their attention.

Nevertheless, counsel for some respondents have argued that they should have broad “discovery” rights to review independently whatever Bank documents they request, as they might in a civil proceeding in the courts of some of nations. However, if the Bank were to grant such rights, the efficiency and effectiveness of the process could be compromised since there is a potential for abuse that could invite delays and an unnecessary diversion of Bank resources.²⁸ Furthermore, the analogy to such a civil proceeding is not on point, since, as discussed below, the Bank’s right to access the respondent’s documents is circumscribed, and certainly far narrower than the rights of a party to a civil proceeding.

²⁸ For example, we have been told that the United Nations has experienced analogous situations in arbitration proceedings in which discovery requests have been drafted so broadly that it was necessary to assemble and produce dozens of boxes of documents, virtually all of which had no bearing on the underlying allegations.

Counsel for respondents have also argued that INT lacks the objectivity necessary to determine what evidence may be exculpatory or mitigating and that they should not have to rely on INT to determine what may be relevant to their case. These respondents argue that they should have unfettered access to INT's entire investigation file. INT, however, is required to include all evidence – other than that which is redundant or of peripheral relevance – that supports the allegations against the respondent in the notice of debarment, and, as noted, INT is also obliged to provide all exculpatory and mitigating evidence, so all relevant evidence would appear to be available to the respondent under the current procedures. The only clear exception would be evidence that supports INT's case but which might not be included in the notice of debarment because, due to its sensitive or confidential nature, the Bank has a legitimate interest in preventing its disclosure.²⁹

Finally, there is the question of what consequences should result from a finding by the Committee that sharing certain evidence with the respondent might endanger the life, health, safety, or well-being of a person. Counsel for some respondents have argued that when such evidence is withheld from them, they cannot mount an adequate defense and the matter should be dismissed entirely. Such a disposition is not appropriate. For example, in a case in which a credible witness provides compelling information of fraudulent or corrupt practices on the part of a respondent, the Committee certainly should not be barred from sanctioning the respondent for that behavior because there is a serious concern that the respondent would retaliate against the witness if the identity of the witness were disclosed. Arguments cloaked in the language of fairness and due process must not be permitted to render the Bank incapable of protecting both its

²⁹ The ability to withhold such information from the Committee applies only to information that supports INT's case, because the August 2001 Procedures require that all exculpatory or mitigating evidence in INT's possession or known to INT be provided to the Sanctions Committee, subject to the Committee's discretionary ability to withhold such evidence upon a finding that revealing such evidence might endanger the life, health, safety, or well-being of a person.

assets and the well-being of individuals who are willing to cooperate in an investigation, and to preclude a respondent from escaping the reasonable consequences of its actions.

3. Recommendations

We recommend that the Bank maintain the practice under the August 2001 Procedures with respect to providing access to its documents whereby the respondent is not given unlimited access to Bank documents but is entitled to access to all relevant evidence in INT's possession, or known to INT, that would reasonably tend to exculpate the respondent or that would mitigate the respondent's culpability.

J. Access to Contractor Documents

1. Background

Neither the Operational Memorandum nor the August 2001 Procedures contain any reference to the rights of the Bank to obtain pertinent documents from bidders or contractors.

Nevertheless, the Procurement Guidelines specify that the Bank, in contracts financed by a Bank loan, may include a provision requiring suppliers, contractors, or consultants to permit the Bank to inspect their accounts and records relating to the performance of a Bank-financed contract and to have them audited by auditors appointed by the Bank. It is our understanding that the forms of contracts currently being used by the Bank do include this requirement.

2. Observations and Discussion

The Bank's rights under the Procurement Guidelines to inspect the accounts and records of suppliers, contractors or consultants are limited to those accounts and records *relating to the performance of a Bank-financed contract*. This language is too narrow in several respects, including the fact that:

- the Bank does not have the right to inspect records of activities outside the parameters of the performance of a Bank-financed contract that may be pertinent to the alleged wrong-doing, such as those related to the bidding process;

- the Bank has the right to access the records only of those who are awarded a Bank-financed contract, so the Bank would not have access to records of others, such as an unsuccessful bidder that may have engaged in fraud or corruption in the bidding process; and
- the Bank does not have the ability to require that particular records be created or maintained for a specific period, so it may obtain only such records as a particular supplier, contractor, or consultant chooses to maintain.

Even if the Bank's documents were to provide the broader authority described above, it would not be an easy or simple task for the Bank to compel compliance if a respondent refused to produce documents requested in the course of an investigation. As noted later in this Report, there may be circumstances under which the Bank should consider a respondent's degree of cooperation with an investigation in determining the severity of the sanction to be imposed. (See Sections M and N.) Just as there may be benefits in giving the respondent an incentive to cooperate with an investigation, the Bank should consider adopting procedures that would discourage a respondent from obstructing an investigation or failing to cooperate. There may be situations in which the Bank's ability to prove its case depends on gaining access to evidence under the control of a particular contractor or bidder. If that party were to fail to cooperate with the investigation and the Bank was unable to compel the party to produce the evidence, the Bank should have some recourse against the party simply by virtue of its non-cooperation. While there are many actions the Bank could take against the party, ranging from imposing a sanction to shifting the burden of proof before the Sanctions Committee, at a minimum, the Bank's procedures should permit the Sanctions Committee to infer from a respondent's failure to produce requested evidence that such evidence would tend to support the allegations against the respondent.

3. Recommendations

The Procurement Guidelines and the documents required to be submitted by bidders on Bank-financed projects should be revised to enhance the Bank's

ability to obtain meaningful information from the records of all parties that bid on Bank-financed contracts, whether or not they ultimately are awarded the contract.

Furthermore, a respondent's obstruction of or failure to cooperate with an investigation should be considered by the Sanctions Committee, and the Committee should be permitted to draw an inference from such actions by the respondent that the evidence it refuses to produce would tend to establish the respondent's culpability.

K. Confrontation of the Accuser

1. Background

Under the Operational Memorandum (a) if the accuser is willing to submit to cross-examination, the Bank is to arrange for the accused firm to question the accuser in the presence of Bank staff, and (b) the accuser can be requested to answer under oath questions submitted by the accused. In practice, there have been no matters handled under the Operational Memorandum in which the accuser has been cross-examined or has responded to written questions.

The August 2001 Procedures do not include provisions for cross-examining, or submitting written questions to, an accuser or to any other person. INT and a respondent are treated alike in this regard, as they are in most others. The Committee, however, may choose to call witnesses who may be questioned only by the Committee.

2. Observations and Discussion

The original approach under the Operational Memorandum was illusory because it depended on the acquiescence of the accuser, which in practice was never obtained. In situations in which the accuser is not a Bank staff member, the Bank would have no authority to compel the accuser to submit to verbal or written questions. Although the Bank might be able to compel an accuser who is a staff member to do so, the Operational Memorandum speaks in terms of an accuser who is "willing."

The new approach under the August 2001 Procedures is realistic, appropriate, and places both INT and the respondent in the same posture. As is common in administrative proceedings, neither can require a person's attendance and testimony. In exceptional cases, though, where live testimony could be useful, the Committee has the opportunity to elect to hear directly from witnesses. In all cases, both INT and the respondent are permitted to submit witness statements, which may be in the form of sworn affidavits or some other less formal format, including the investigator's written interview reports and summaries. If anything, the process would seem to operate to the respondent's benefit rather than to INT's, since the advantage of presenting testimony by a persuasive witness is still available to the respondent to the extent that the respondent is permitted by the August 2001 Procedures to select one of its corporate officers to make an oral statement to the Committee – a statement that is unsworn and not subject to cross-examination.

Some respondents have complained that witness testimony that is given to investigators and relayed to the Committee is "hearsay" and should not be considered by the Committee. Their attorneys point out that hearsay evidence is not usually admissible in criminal or civil proceedings in most nations. However, as noted previously, these are not judicial proceedings, and there are valid reasons that formal rules of evidence not apply. Although there are exceptions, hearsay evidence is generally not admissible in court cases to establish the truth of the underlying statements for the following reasons:

- since the finder-of-fact that is called upon to determine whether the hearsay evidence is true (a judge, a judicial panel, or a jury) does not receive testimony directly from the witness, that entity is not able to evaluate the witness's credibility by observing the witness's conviction, sincerity and demeanor;
- since the witness is not present, the party against whom the allegations are made does not have the opportunity to cross-examine the witness and cannot elicit other testimony from the witness that might undermine the

reliability of the specific facts which the witness presents or the credibility of the witness in general; and

- since the witness's testimony is presented second-handedly, the person who testifies as to what the witness said may be misrepresenting the witness's statements.

While these concerns have merit in traditional judicial proceedings, they are not compelling in proceedings before the Sanctions Committee, at least as they relate to evidence presented by INT against a respondent. INT investigators are trained professionals who are experienced in assessing credibility and who interview witnesses in the course of investigations conducted in accordance with standards and procedures developed by the Bank. Moreover, unlike the situation in judicial proceedings where judges or juries do not know the witnesses presenting the absent person's statements, the INT investigators regularly appear before the Sanctions Committee. As a result, the nature of their integrity and professional competence is well-known to the Sanctions Committee, and the Sanctions Committee is well-suited to determine whether it can rely on either the investigator's assertions as to what a witness said or the conclusions drawn by the investigator as to the credibility of that witness. In addition, although the respondent does not have the right to cross-examine the witness, since INT is required to provide all exculpatory or mitigating evidence to the Sanctions Committee and the respondent, any information provided by the witness to INT's investigator that is helpful to the respondent's case will be available. Accordingly, in these circumstances it is not unfair to a respondent to permit hearsay evidence to be presented, and in many situations, it also may be valuable for the respondent to have the right to introduce hearsay evidence of its own.

Were the Bank to exclude hearsay evidence, it would most certainly have an adverse impact on the effectiveness and efficiency of the Bank's investigations. The Bank's investigators do not have law enforcement powers that would enable them to compel testimony from material witnesses; rather they must rely on whatever cooperation

they can obtain wherever they receive it. Even if a witness were willing, it may not be practical or cost effective to transport that witness from some remote corner of the world thousands of miles from headquarters to make a brief appearance before the Committee when a written statement can be presented instead.

Even if hearsay evidence is accepted by the Committee, the Committee has the discretion to determine what weight a particular item of evidence deserves, and the respondent is permitted to attack the reliability of such evidence (including on the grounds of prejudice from lack of opportunity to confront the accuser) on a case-by-case basis.

3. Recommendations

We recommend that the Sanctions Committee continue to receive witness testimony that is provided indirectly through either INT or the respondent, and to assess its weight in view of all the circumstances, including the lack of opportunity to evaluate the witness's credibility by face-to-face observation, and the lack of opportunity for the other party to cross-examine the witness.

L. Range of Possible Sanctions

1. Background

The Operational Memorandum specifies only one form of sanction – debarment – and leaves to the Sanctions Committee only the determination whether the debarment is to be for a limited period or an indefinite one. The Legal Department has assumed that, in the absence of an express prohibition, the Sanctions Committee has the implicit authority to impose a lesser sanction. The sanction that in practice has been employed most frequently by the Committee is debarment for an indefinite period – a sanction that is treated in effect as a permanent debarment.³⁰

³⁰ Debarment by national agencies commonly is not permanent.

The August 2001 Procedures provide that the Committee may elect not only debarment, but also a formal reprimand or “other sanctions that the Committee deems appropriate under the circumstances.”

2. Observations and Discussion

In any sanctioning system – criminal, civil, or administrative – the nature of the sanctions available depend upon the overall goal of the system, and the particular purposes sought to be achieved by the imposition of sanctions in individual cases passing through the system. The specification of sanctions without having the purposes of the proceedings clearly in mind is not a useful exercise.

In a national criminal justice system, the overall goal may be described as reducing the impact of crime upon the citizenry to a degree that is socially tolerable. In pursuit of that overall goal, the particular purposes sought to be achieved by sentencing may be divided into two categories – punitive and utilitarian. The punitive category involves imposition of a sanction to satisfy national views concerning “just punishment” – which may also be cast in terms of vindication of social norms, retribution, and similar verbiage. The utilitarian category involves imposition of a sanction to achieve incapacitation (so that the defendant is unable to harm others at least for a period of time), future deterrence (both of the defendant involved and of others with a proclivity to engage in similar conduct), and, in some jurisdictions, rehabilitation (so that the defendant is no longer disposed to engage in such conduct) and restitution (so that the injured party is not required to initiate a separate civil action).³¹

³¹ In some national jurisdictions, the period of incarceration or the amount of the fine designed to serve utilitarian purposes is limited to the period or amount established as appropriate under the purpose of just punishment. This serves as an assurance that a penalty imposed for a utilitarian purpose will not exceed what would be perceived as “fair” under all the circumstances. In practice, therefore, the upper limit of the penalty would be set by the gravity of the misconduct – even though a longer period of incapacitation might be warranted for purposes of protecting against further misconduct, or a longer period of time for purposes of rehabilitation.

(continued...)

In a national civil justice system, the overall goal is relatively simple – to restore injured parties to the positions they held prior to the wrongdoing, to the extent that monetary awards are able to do so. Although some national civil justice systems add a punitive component in certain cases, this practice is not regarded as particularly satisfactory in terms of achieving justice.

In an administrative debarment system, such as that employed by the Bank, the short-term goal is to protect the agency's funds that will be expended in the future in the course of its procurement or funding programs. In the Bank's system, the broader goal might be characterized as segregating out firms that engage in fraud and corruption so as to leave a pool of honest and capable firms to undertake projects that the Bank finds useful for achieving the worldwide reduction of poverty. The system is not intended to fulfill its goal through employment of a punitive purpose, as in a criminal proceeding, nor through employment of a restorative purpose, as in a civil proceeding (even though restoration of losses might occasionally be accomplished as an adjunct of the sanctioning process). The purpose is aptly summarized by the term used in the Committee's name – "sanctions" – penalties that serve to ensure compliance or conformity. Compliance is achieved, in broad terms, through incapacitation in the form of debarment, and through deterrence in the form of publicizing the risk of future debarment. Compliance may also be achieved, however, through various means of forced or encouraged rehabilitation.

(continued...)

Contrary to the situation with regard to national criminal sanctions, the purpose to be served by the sanction in Bank debarment proceedings is not a punitive one. In debarment cases, consequently, the constraints of a punitive purpose would not apply. A fraudulent diversion by a contractor of \$100,000 could carry the same sanction as a diversion of \$1 million – as long as the sanction is believed to be reasonable and appropriate to protect the Bank from future loss of funds by way of deterrence, incapacitation, or rehabilitation.

These considerations suggest the utility of authorizing a range of sanctions that might be employed, singly or in combination, by the Sanctions Committee to assure the imposition of proscriptions and conditions – tailored to the individual cases coming before the Committee – that would best serve the overall interests of the Bank and the sanctioning purposes appropriate to those interests. Among the purposes to be served by the available sanctions would be the following:

- Incapacitation. The current Bank standard – debarment for an indefinite period or for a term of years – is, as noted, an analog of incapacitation in the criminal justice context, and effectively precludes a firm from engaging in future misconduct affecting Bank matters for as long as the debarment persists.
- General Deterrence. The publication of a debarment would continue to have as great a general deterrent effect upon other firms interested in Bank-financed contracts as could be wrung out of any system – criminal, civil, or administrative. The publication of any sanction – even a formal reprimand – would carry a degree of deterrent impact, but none can approach the sobering effect of a publicly announced debarment.
- Specific Deterrence. Debarment for a term of years, in addition to serving an incapacitative purpose for the period of the debarment, would also serve as a significant deterrent to future misconduct by the firm involved to the extent that the firm, once eligible again for Bank-supported contracts, would have a strong incentive to operate properly and adhere to all Bank standards. In a case in which even a temporary debarment, restricted to a very limited period, does not appear appropriate in light of the circumstances, a formal reprimand may still carry a degree of deterrence, particularly if publicized. In either event, whether debarred or formally reprimanded, a firm would be aware that its future performance would probably be watched by any potential funder more closely than the performance of a firm that had never been sanctioned – a further deterrent against future misconduct.

- Rehabilitation by Conditional Non-Debarment. Although compelled rehabilitation of individuals has proved to be very difficult, compelled rehabilitation of corporations is usually not as problematic. It is difficult for people to change; it is easy for corporations to exchange personnel. Consequently, with regard to a firm that appears to have been peripherally associated with misconduct, but not to the extent warranting even temporary debarment, it should be available to the Sanctions Committee to impose a limited sanction that would induce a behavioral change on the part of the firm – a change that would reduce the likelihood that the firm would be involved in future misconduct. (The alternative would be imposition of a reprimand – a sanction that in itself carries scant promise of a change in a respondent’s attitude and behavior.) That limited sanction could appropriately be in the form of a probationary period during which the firm would be compelled to terminate the employees involved in fraud or corruption; to initiate an effective business ethics training program; to adopt a soundly-structured compliance program incorporating systematic audits by independent auditors selected or approved by the Bank, anonymous reporting systems, and internal investigations; and to correct its other corporate deficiencies that could affect the honesty of its dealings. In certain cases, it may also be appropriate to require the firm to place an outsider of recognized integrity, from a list of such individuals supplied by the Bank, on the firm’s board of directors. Such a series of provisions might be found appropriate most often in: (a) a case in which the charged conduct was a clear aberration and the firm’s previous practices had met all Bank standards; (b) a case in which there were multiple respondents, some less deeply involved in wrongdoing than others, and in which the firm might not have been included in the notice of debarment but for the actions of the more culpable respondents; (c) a case in which the firm had voluntarily disclosed its misconduct to the Bank before its discovery;³² or (d) a case in which the Bank has

³² See the discussion in Section N concerning participation in a voluntary
(continued...)

an overriding need for the services of the particular firm. It should be emphasized that, in drafting procedures to implement a sanction of this nature, not only must care be taken to limit its application to cases involving relatively minor culpability on the part of the firm, but particular care must be taken to cast its execution in a manner that would not require the Bank to administer the program – just to require that the firm demonstrate to the Bank’s satisfaction that it has done what it has undertaken to do

- Rehabilitation by Conditional Release from Debarment. The provisions of this option would be essentially the same as those described in the preceding paragraph, but they would be set forth as requirements to be met before a firm could emerge from a period of temporary debarment.³³
- Restitution. In any matter involving a sanction other than permanent debarment, it might also be appropriate for the Sanctions Committee to require, as a condition of a probationary sanction or of the termination of a period of temporary debarment, that the respondent firm make restitution to the Bank or to the affected government. To secure an additional, deterrent purpose, the amount would ordinarily be expected to be set as the greater of (a) a multiple of the gain anticipated or realized by the respondent, or (b) a multiple of the loss occasioned to the Bank or to the affected government. (Such a multiplier would be advisable in order to discourage close cost-benefit analyses by firms contemplating the risk that would be occasioned if they were to engage in an opportunity that is presented

(continued...)

disclosure program as a mitigating circumstance.

³³ The Asian Development Bank has employed such requirements before permitting a temporarily debarred firm to regain eligibility.

for a profitable act of fraud or corruption. The deterability of a petty thief may be debatable, but the deterability of a corporate offender is far less so.)

Extracted from the described means of satisfying these purposes, therefore, would be (not necessarily in order of severity): (a) debarment of permanent duration; (b) debarment for a term of years; (c) a compliance program involving the positioning of monitors on a board of directors or elsewhere within a firm, the termination of corrupt employees, the initiation of ethical training for all employees, the adoption of systematic audits and investigations, and the encouragement of voluntary reporting by employees; (d) restitution; (e) formal reprimand; (f) other appropriate sanctions; and in all cases (g) publication of the particulars of any sanction imposed.

A sanctions system developed with the foregoing considerations in mind could impose severe sanctions when warranted, and yet, when not warranted under all the circumstances, retain sufficient flexibility to avoid permanent preclusion of an otherwise capable company that possesses a capacity or expertise that few other firms do, and whose services may not be able to be supplied equally well by others. After such a firm succeeded in meeting the Sanctions Committee's conditions for future eligibility, the absence of permanent preclusion could prove to be in the Bank's benefit, as well as the firm's. At the very least the approach, by restoring another potential bidder to the field, might serve to increase competition in bidding for future Bank-financed projects.

There remains the question whether such a panoply of components would be found acceptable by those in the Bank who have worked diligently for the development and effective operation of a strong debarment system. The concern would be that permitting any sanction less than debarment would suggest a retreat from the Bank's commitment to its campaign against fraud and corruption, and that imposing any sanction less than permanent debarment would reflect adversely on the quality of the work by INT. After many discussions with Bank professionals operating within different components of the current sanctioning system, we are satisfied that virtually all would

consider such a system, if carefully implemented, an advance rather than a retreat.³⁴ In fact, more than one observer felt that there were grounds for believing that an all-or-nothing result – debarment or no debarment – has placed an unfair burden on Sanctions Committee members, and has led to a failure to find against the respondent in some cases where evidence strongly suggested that some form of sanction was in order.³⁵

3. Recommendations

We recommend that, in the course of developing new procedures for the operation of the Sanctions Committee, special attention be given to the explication of a number of different levels of sanctions, developed with an eye to particular purposes to be served by the sanctioning process.

M. Aggravating and Mitigating Circumstances

1. Background

The Operational Memorandum does not expressly refer to consideration by the Sanctions Committee of either aggravating or mitigating circumstances. As noted above, however, in its introductory paragraph the Operational Memorandum states that the Committee may declare a firm ineligible “either indefinitely or for a stated period of time.” Later the Operational Memorandum states that “the recommended period of ineligibility may be limited or indefinite, depending on the magnitude of the offense.” These provisions appear to assume the existence of a basis for selecting a period of debarment.

³⁴ Indeed, there is a recognition that it is important for purposes of deterrence occasionally to adjudicate cases (such as those involving minor sums of money or a low degree of culpability) that do not seem to be candidates for the sanction of debarment, and there is a concern that if debarment is the only sanction available such cases may not be pursued.

³⁵ In the context of these cases, the availability of a reprimand to the firms involved was not considered a serious option.

The August 2001 Procedures – after setting forth the possible sanctions of debarment for an indefinite or limited period of time, reprimand, and “other sanctions that the Committee deems appropriate under the circumstances” – specifies that the Sanctions Committee may consider a number of described factors in determining an appropriate sanction.

2. Observations and Discussion

In a sanctioning system in which only one sanction is available – such as permanent debarment – there is no reason for a sanctioning body to consider aggravating or mitigating circumstances. Once a second sanction is introduced – such as debarment for a limited period – the sanctioning body will be required to make an election. The Operational Memorandum not only specifies a second sanction of debarment for a term of years, but indeed has been understood within the Bank to permit the application of a sanction in the form of a reprimand. As noted above, the August 2001 Procedures carry forward the recognition of these three alternatives, and add the availability of “other sanctions” that the Committee finds to be appropriate.

In a system in which the sanctioning body is permitted discretion in selecting among various sanctions, it is plainly desirable that its discretion be exercised in a principled fashion. Certainly one approach to encouraging principled decisions is to select principled members for the sanctioning body and rely upon their good sense in meting out sanctions in particular cases. The shortcoming of relying solely on this approach lies in the fact that in other contexts it has been found that intelligent and thoughtful human beings – even those trained in the same discipline – tend to exhibit markedly different conclusions when it comes to selection of possible sanctions.³⁶ For that reason, in addition to selecting principled and thoughtful members to serve on the

³⁶ It is recognition of this shortcoming that in the last 25 years has led many national jurisdictions to establish specific guidelines to be employed by judges in assessing appropriate penalties in criminal cases.

sanctioning body, setting forth criteria to channel the members' exercise of discretion makes the process more likely to achieve a consistent approach.

In helping to assure more consistent sanctioning, the employment of specific criteria would assist in developing more predictable sanctioning and possibly, as a result, a greater likelihood of general deterrence. Also, assuming a reasonably broad range of available sanctions, specific criteria would encourage attempts to achieve proportionality, and consequently both the results and the process could more readily be perceived as fair. Moreover, if such criteria were to include consideration whether a respondent firm had implemented preventive or remedial measures – such as putting a compliance program in place, changing internal operating procedures, and terminating employees involved in wrongdoing – a material incentive would be provided for widespread employment of such measures by all firms interested in securing Bank-supported contracts.

By setting forth alternative periods of ineligibility “depending on the magnitude of the offense,” the Operational Memorandum may be read to imply that the Committee is expected to employ reasonable standards for selecting a period of ineligibility that appears appropriate to the case. The August 2001 Procedures are much more specific; they provide:

“(e) Factors Affecting Sanction Decision: The Committee may consider the following factors in determining an appropriate sanction:

- (1) egregiousness and severity of Respondent's actions;
- (2) past conduct of Respondent involving fraudulent or corrupt practices;
- (3) magnitude of any losses caused by the Respondent;
- (4) damage caused by the Respondent to the credibility of the procurement process;
- (5) quality of the evidence against the Respondent;
- (6) mitigating circumstances;

(7) savings of Bank resources or facilitation of an investigation being conducted by INT occasioned by Respondent's admission of culpability or cooperation in the investigation and hearing process; and

(8) any other factor that the Committee deems relevant.”

A still more extensive recitation of the aggravating and mitigating factors to be considered would serve to increase the likelihood of consistency and proportionality. Moreover, it would be useful to particularize more carefully both the aggravating and mitigating forms of conduct that may span a continuum – for example, the aggravating factor of destruction of evidence by the respondent firm, the somewhat less aggravating factor of refusing to cooperate in the investigation, the mitigating factor of full cooperation, and the greater mitigating factor of voluntary disclosure of the existence of the wrongdoing. (See Section N.) Our discussions with past and present Sanctions Committee members cause us to believe that such greater specificity would be welcomed by those charged with making the final decisions on such matters.

It should be noted that the August 2001 Procedures do not provide guidance on how mitigating circumstances should be factored into a sanctioning decision; the Committee members are free to use their best collective judgment to determine an appropriate result. Certainly guidance entailing more specificity could be incorporated into the process, but in keeping with the general view that is preferable to favor simple and informal practices in the Bank's sanctioning system, it appears that at this time it would be preferable simply to expand the aggravating and mitigating factors warranting consideration in light of purposes to be served by the sanctioning process, and to leave the weight of the circumstances, and their interaction with each other, to the judgment of the Committee.

3. Recommendations

The Sanctions Committee Procedures should be revised to set forth a fairly detailed list of the aggravating factors and mitigating factors that, in light of the

purposes to be served by the sanctioning process, should be considered by the Committee in arriving at appropriate sanctions in individual cases.

N. Recognition of Cooperation

1. Background

Neither the Operational Memorandum nor the August 2001 Procedures contain any express provision that would enable investigators to assure an individual or firm that it would be advantageous to cooperate in an investigation. The August 2001 Procedures do state, though, that the Sanctions Committee may consider, as one of the factors affecting the sanctioning decision, the “savings of Bank resources or facilitation of an investigation being conducted by INT occasioned by the Respondent’s admission of culpability or cooperation in the investigation or hearing process.” In the absence of more explicit language covering the subject, the Bank has taken a general position that any party found to have engaged in fraudulent or corrupt practices should be subject to any sanction permitted by the Operational Memorandum. Recently, however, INT has attempted to develop procedures for a principled means of recognizing the contribution made by those who provide evidence that otherwise would be difficult or impossible to obtain.

2. Observations and Discussion

In criminal investigations and prosecutions undertaken in national jurisdictions, the subject of providing some form of consideration in exchange for the cooperation of a participant in an offense has long been viewed as a problematic one. Nonetheless, the practice exists to some degree in virtually all jurisdictions. In some it is openly acknowledged; in others it is covert; and in still others it is denied to exist at all but is accomplished in practice through the exercise of discretion at a relatively low level. Even in jurisdictions where it is acknowledged and controlled by procedural safeguards, the practice still conveys the impression it is a somewhat unseemly short-circuiting of the

criminal justice process.³⁷ The principal reason for the impression is that a cooperating wrongdoer is popularly believed to “deserve” the same punishment that is due to any other wrongdoer.

These concerns are sought to be addressed in national jurisdictions by various means of assuring that a cooperating witness will retain exposure to some degree of deserved punishment. Those means include imposing controls on promises made by investigators and prosecutors, such as: (a) limiting an agreement so that it does not encompass all of the charges that may be filed; (b) limiting an agreement to one involving the severity of the penalty to be imposed rather than to the charges to be filed; (c) limiting an agreement to the making of a recommendation to the applicable court concerning the penalty to be imposed; or (d) limiting an agreement to the provision of a binding assurance that all evidence obtained as a result of the information will be used only against others and not against the person providing the information.³⁸ (The first three are directed to the prospect of a lesser penalty; the last is directed to the prospect of avoiding liability in the absence of independently obtained evidence.) In addition, such controls may be augmented by guidelines governing their application, by requiring approval of any agreement by a senior official in the investigative or prosecutive agency, or by requiring eventual approval by the body in which the sentencing authority rests.

This problem of national criminal justice systems is spawned by a fundamental characteristic of those systems that is not applicable to the Bank’s sanctioning system – the application of penalties based upon the concept of just punishment. Analytically, the Bank is in a very different situation. As noted previously

³⁷ In some cultures, it also carries an aura of unseemliness as a result of historical reasons for a strong dislike of persons who cooperate with governmental investigators.

³⁸ A provision of this nature can be valuable in that it can be pointed out to a potential witness that the more information he reveals the more the information that cannot be used against him.

in Section L, the imposition of debarment or another sanction by the Sanctions Committee is not for punitive purposes. Thus, the whole burden of attempting to justify imposition of a lesser sanction for a cooperating witness – in the face of pressures to assure that all participants receive “deserved punishment” – evaporates in the context of a system that embraces only utilitarian purposes, not punitive ones. The question in the sanctioning process is not philosophical, but practical. It is not whether an informant seems to “deserve” some form of punishment – a matter left to national justice systems – but whether the value to the Bank of the informant’s cooperation will likely exceed the loss to the Bank caused by its agreement not to proceed against the informant with the full panoply of sanctions that otherwise would be available. If the proposed agreement with the informant would have a net³⁹ long-term result of protecting funds for which the Bank is responsible, and if there is no other avenue by which the information could readily be obtained, there is little reason to reject such an arrangement on the ground that it permits an informant to avoid a particular sanction that he otherwise might, theoretically, have received.

Without the philosophical constraint imposed by the concept of just punishment, an evaluation of the exchange of a lesser penalty for cooperation may focus upon the practical aspects of Bank investigations and Bank sanctions.

The reality is that investigations into fraud and corruption are exceedingly difficult even for national police agencies with extensive investigating powers. The acts take place in a clandestine manner, and their ultimate success depends upon their remaining undiscovered, at least for a protracted period of time. Those within firms or government agencies who may have knowledge of such acts frequently have

³⁹ The “net” result would need to follow from consideration of a number of factors, including the desire to assure that Bank funds are not left exposed to future wrongdoing by an undebarred informant, and a recognition of the loss of some degree of general deterrence by failing to impose the same level of sanction on all of the charged respondents.

some participatory responsibility for what has occurred, and even more frequently have a reasonable fear that they could suffer dismissal or other adverse economic consequences (or worse) if they should reveal information about the matter. In these circumstances, such individuals have little incentive to come forward voluntarily and reveal what they know to the Bank. The Bank, without the ability to offer potential informants the incentive of a reasonably predictable outcome for their cooperation, may well forfeit the opportunity to obtain evidence of serious misconduct that it otherwise would have no means of uncovering. Not only would it lose the ability to stem its losses from the fraud or corruption, it would lose the deterrent effect of issuing a warranted debarment, and it also would lose an opportunity to work with an errant firm in implementing compliance programs designed to prevent such incidents in the future.

This reality, in the past, has hampered Bank investigations and has otherwise worked to the Bank's disadvantage. Even when an audit or other independent circumstance reveals the probable existence of a fraudulent scheme involving the misuse of Bank-derived funds, such schemes are commonly so complex that it is impossible to develop an understanding of what took place without the assistance of someone with firsthand knowledge – frequently someone bearing a degree of culpability with regard to the matter. Without the ability to induce the cooperation of such persons, Bank investigators have been stymied in attempting to secure evidence necessary for them to proceed further. Outside investigators retained by the Bank – investigators whose primary experience has been in national agencies with greater evidence-gathering authority – have expressed surprise and frustration about the lack of authority from the Bank to hold out the promise of a lesser sanction to potential cooperating witnesses and cooperating firms. The problem does not end if a respondent firm, despite the apparent lack of advantage, decides to cooperate. There have been instances, in fact, in which a cooperating respondent has received the same sanction as one that had stonewalled the investigators at every stage of the investigative process. Whatever justification may have

existed for imposing identical sanctions in such cases, the results leave the unfortunate impression that there is no value to be gained by cooperating with the Bank.

The preceding discussion has focused on situations in which the Bank has initiated an investigation into suspected wrongdoing, and the potential cooperating witness is commonly one of a number of individuals or firms that may ultimately be found to bear some culpability for the suspected act. Inducing cooperation in such situations is, as noted, important, but it is also important that the Bank develop means of encouraging individuals and firms to *volunteer* disclosure of wrongdoing *before* it is suspected by the Bank, and to do so even when the individual or firm bringing the matter to light may be the sole potential respondent. This is not easy to achieve; voluntary confession in the absence of independent evidence of guilt is not, of course, a common human response. Accordingly, any successful program designed to prompt voluntary disclosures must offer inducements material enough to overcome such natural reticence, and must publicize the inducements and the means of qualifying for them.

The principal inducement in a well-designed voluntary disclosure program ordinarily would be official recognition of a volunteered revelation as an unusually significant mitigating factor to be considered in any subsequent debarment action initiated by the Bank. Depending upon the degree to which a potential respondent had satisfied the publicized requirements for qualifying for the program, the sanction to be imposed by the Bank would be lessened. In a case in which a respondent had satisfied all of the requisites, the respondent's reporting of the matter commonly would be considered a presumptively dispositive mitigating circumstance, and the sanction selected as appropriate would be designed to achieve rehabilitation by conditional non-debarment. (See Section L.)

The requisite to a firm's eligibility for such treatment would have to be carefully developed and explained by the Bank. Qualification for the program would be limited to firms in which the improper activities were an exception to the firm's usual method of operation. The firm would be required to make a full and complete disclosure,

and acknowledge at least some degree of responsibility for the matter disclosed. The disclosure would have to be made prior to the initiation by the Bank of an investigation into the subject matter, and usually prior to the possession by the Bank of any reasonable suspicion concerning the matter. The firm must have initiated appropriate remedial actions. Those remedial actions would include firing the principal wrongdoers; taking disciplinary action against those collaterally involved; initiating a compliance program if one had not previously been in place;⁴⁰ making restitution to the degree practicable; and undertaking any other steps that the Bank finds to be appropriate. In addition, the firm would be expected to cooperate fully with the Bank by providing a full explanation of the wrongdoing that had taken place, supplying all relevant documents relating to the matter, and otherwise cooperating with the Bank's investigation and evaluation.⁴¹

It is apparent that a carefully-developed voluntary disclosure program could serve as a highly cost-effective means of extending the reach of the Bank's efforts against fraud and corruption.

3. Recommendations

As a result of the fact that protection of funds supplied by the Bank, rather than abstract concepts of justice, are at the heart of the Bank's sanctioning system, and as a result of a clear need on the part of Bank investigators for some means of providing incentives for witness cooperation and for voluntary disclosure, it is appropriate that the Bank develop principled procedures to govern such situations. INT,

⁴⁰ The Bank may determine that it would be preferable to require that a functional compliance program have been in place before the wrongdoing occurred, in order to provide the maximum inducement for all firms interested in Bank-financed contracts to adopt such internal controls.

⁴¹ A number of national governments have developed formal voluntary disclosure programs, employing such criteria, for cases arising within the jurisdiction of administrative tribunals. In some nations that permit the criminal prosecution of corporate entities, analogous programs have been developed for criminal cases.

in coordination with the Legal Department, has been engaged in an effort to develop a responsible set of procedures that would protect both the legitimate interests of cooperating witnesses and the interests of the Bank. That effort should be completed and the work-product implemented. In addition, the two departments should collaborate in developing a voluntary disclosure program that intermeshes appropriately with the other aspects of the sanctioning system.

O. Parties Subject to Sanctions

1. Background

The Operational Memorandum provides that sanctions may be imposed on a respondent that is found to have engaged in fraudulent or corrupt practices, as well as any firm that owns the majority of the respondent's capital or of which the respondent owns the majority of the capital.

Under the August 2001 Procedures, the parties on whom sanctions are to be imposed were expanded to include any individual or organization that, at any time during which the sanctions remain in effect, directly or indirectly, controls or is controlled by the respondent (whether, in the case of a corporation or other entity, such entity is in existence at the time the sanctions are imposed or is formed at a later date during the period that the sanctions remain in effect).

2. Observations and Discussion

The approach under the Operational Memorandum recognized that, in order to protect Bank-derived funds from an enterprise that had engaged in fraudulent or corrupt practices in previous Bank-financed projects, it is appropriate for the Bank to debar others that have common ownership with the particular respondent. Without this ability, firms and individuals that have been found to have been involved in fraudulent or corrupt practices would be able to circumvent the effect of being debarred by acting through other firms that remained eligible to bid on future projects. Still, the Operational Memorandum does not, by its terms, go far enough to reach firms that share majority

ownership with the respondent. Since it would be possible to control the activities of a separate firm without owning a majority interest in that firm, the August 2001 Procedures focus on control rather than ownership in order to establish a nexus between a respondent and its affiliates.⁴² This seems to be a more practical criterion for achieving the desired purpose.

In sanctioning firms that appropriately bear some degree of responsibility for an act of fraud or corruption, but that have a less than direct connection with, or influence concerning, the wrongdoing, it is appropriate that the Sanctions Committee consider the full range of available sanctions. (See Section L.) Certainly not all parties sharing collective responsibility would warrant the same level of sanction. For example, the Sanctions Committee may be presented with situations in which (a) a rogue employee or agent has acted in a corrupt or fraudulent manner, and, despite the best efforts of the respondent to have policies and procedures in place to prevent such behavior, the respondent could not have prevented it, or (b) the respondent has independently volunteered information about a problem in its organization and taken preventative or remedial action (such as terminating those involved in wrongdoing, mitigating the damage already caused, and putting internal controls in place) before the Bank had discovered the underlying practices. (See Section N.) In such kinds of situations, it may be appropriate for the Sanctions Committee to impose simply a probationary period conditioned on the firm's continued demonstration of commitment to the employment of preventive and remedial practices.

Finally, with respect to the scope of parties on whom sanctions may be imposed, the Sanctions Committee has jurisdiction over corrupt and fraudulent practices arising only in connection with IBRD and IDA funds. It does not have

⁴² Control in this situation would not be limited to complete control. It would include, for example, a situation in which a debarred individual moves into a senior managerial position in another firm, and through that position is able to exert influence, if not total control, over that firm's activities.

jurisdiction over wrongdoing in connection with IFC or MIGA funds. As noted by one former senior official in the Legal Department, these entities “obviously” should be included, recognizing that the particularized activities of MIGA may require that specialized advice be made available to the Sanctions Committee when considering such cases.

3. Recommendations

We recommend that the authority of the Sanctions Committee to impose sanctions continue to apply not only to particular respondents, but also to any individual or organization that, directly or indirectly, controls or is controlled by the respondent.

We also recommend that, particularly with regard to such situations, the Sanctions Committee have the authority to consider the various non-traditional sanctions listed in Section L, including conditional probation, if a case appears to warrant it. This could give firms an incentive unilaterally to take internal corrective measures, which is an outcome the Bank should seek to promote. Nevertheless, if such a variation from the traditional practice were to be implemented, the respondent should bear the burden of establishing that it should be entitled to receive the benefits of such a lesser sanction.

In addition, we recommend that parties that receive contracts through projects that utilize IFC or MIGA funds, and that engage in fraudulent or corrupt practices in relation to those contracts, be subject to the imposition of sanctions by the Sanctions Committee.

P. Final Decision on Imposition of Sanctions; Appeal

1. Background

Under the Operational Memorandum and the August 2001 Procedures, the Sanctions Committee makes a recommendation of a sanction to the President of the Bank, and the President makes the final decision concerning imposition

of the sanction. The recommendation to the President is not an “appeal” as such, and neither INT nor the respondent has an opportunity to present additional evidence or arguments to the President. The President’s decision is final, and there is no opportunity to appeal that decision.

2. Observations and Discussion

The appropriate approach to appeals from decisions of the Sanctions Committee must be determined in light of the decision that is ultimately reached on the structural location and composition of the Sanctions Committee.

If the Committee continues to be made up of senior officers of the Bank, it will be necessary to consider whether the current process for adopting decisions of the Sanctions Committee should be maintained. There are certain reasons that may be cited in support of the current approach, including:

- By subjecting the work of the Sanctions Committee to scrutiny by a senior official who has not been involved in the process, there is an opportunity to take account of any perceived deficiencies in the manner in which the allegations against the respondent have been handled.
- The President, as the chief executive officer of the Bank, is the most appropriate person to have the final say in determining whether the Bank should do business, even indirectly, with a particular contractor.
- A sanction approved by the President, as the Bank’s highest ranking official, has greater weight than one imposed without such approval.

On the other hand, there are aspects of the current approach that create certain difficulties, including:

- Involving the President in the process imposes burdens on his time.
- Involving the President in the process subjects him to “lobbying” by advocates of respondents, including in some cases the Executive Director

representing the country of the respondent. Since the President reports to the Board on which the Executive Director serves, this may be perceived as subjecting the President to undue influence. In any event, the situation certainly creates the opportunity for the impression of the exertion of undue influence – a matter that can erode the Bank’s reputation for taking a firm stance against fraud and corruption

- Involving the President in the process places him in a difficult position in the rare instance in which a Sanctions Committee determination seems to be of questionable appropriateness; affirming the determination would be thought by some to confirm the “rubber-stamp” aspect of the process, and rejecting the determination would be perceived by others to be a slap at those who, as members of the Committee, are devoting extra time to a task intended to implement the President’s widely-heralded fraud and corruption program.

If the Sanctions Committee continues to be composed of senior officers of the Bank but it is decided that the President should not be involved in the process, the Sanctions Committee might be vested with the authority to issue final rulings on matters before it.

If the Sanctions Committee is restructured and moved outside the operational sphere of the Bank, the analysis of the process would be different. For example, one of the reasons advanced for permitting an “appeal” from the decision taken by the Sanctions Committee is that the Committee, as currently constituted, is made up of officers of the Bank, so Bank personnel are serving as investigators, prosecutors, judge, and jury. If the Committee were made up of individuals who were not otherwise currently affiliated with the Bank, the Committee would have greater independence, and the rationale for subjecting their decisions to additional review would be lessened.

Another alternative would be to create an external body, analogous to the Administrative Tribunal, that would hear appeals from decisions of the Sanctions Committee.

If recommendations set forth in earlier sections are implemented to the extent that (a) a Reviewing Officer is delegated the responsibility of making a determination as to whether the evidence supports a finding of fraud or corruption prior to the issuance of the notice of debarment (as described in Section E), and (b) the Sanctions Committee is composed, at least in part, of individuals who are not current Bank employees (as described in Section A), the Sanctions Committee should have the ultimate authority to impose sanctions and its decisions should not be appealable. This two-step process is fair to respondents because all relevant evidence would be reviewed both by a Bank official without any connection to the investigation and by the Sanctions Committee, and sanctions could be imposed only if each review resulted in a finding of fraud or corruption. Furthermore, since some or all of the members (including the Chairman) of the Sanctions Committee empanelled to review a particular matter would not be Bank employees, the Sanctions Committee would have sufficient independence to avoid the perception advanced by attorneys for some respondents that the Sanctions Committee merely acts as an agent of the Bank.

Ultimately the questions of whether the decisions of the Sanctions Committee should be subject to further review and, if so, by whom, must be evaluated in light of the structural location and composition of the Sanctions Committee, a matter discussed in Section A. In any event, if a review process is to be provided, it would appear that any opportunity to seek review should be available to INT as well as a respondent, and certainly the conclusions of the Sanctions Committee should not be subject to being overturned without highly compelling grounds.

3. Recommendations

If the Sanctions Committee is maintained as an internal body, we recommend that the President be taken out of the decision-making process. This can be achieved by either giving the Sanctions Committee the final authority to impose sanctions (an approach we consider to be preferable from the standpoint of practicality) or creating an outside panel to hear appeals. If such an outside appeals panel is used, the panel

should include persons with knowledge of legal procedures in administrative matters of this nature and familiarity with the Bank's operations and procurement practices; the panel's jurisdiction should be discretionary, requiring petitions for review; the petition route should be available to both INT and the respondent in the matter; and the standard for overturning the Sanctions Committee determination should be the existence of plain error.

If the Sanctions Committee is composed, in whole or in part, of individuals who are not current Bank employees, we recommend that the Committee be vested with authority to make final decisions without further review or appeal.

Q. Public Disclosure of Sanctions

1. Background

The Operational Memorandum does not indicate whether the decisions of the President with regard to the recommendations of the Sanctions Committee are to be publicly announced. At the time of the inception of the Sanctions Committee shortly after promulgation of the Operational Memorandum, the Bank decided that the President's decisions should be announced publicly on the Bank's website.

The August 2001 Procedures specify that, if a sanction is imposed, "the identity of each sanctioned party and the sanctions imposed shall be publicly disclosed."

2. Observations and Discussion

As noted previously, the entire purpose of the Bank's sanctioning process is a utilitarian one – to induce compliance with its standards by firms that have entered into Bank-supported contracts, and by firms that may seek to enter into such contracts in the future. The goal is to protect funds entrusted to the Bank. With the enormous sums dispensed by the Bank on a regular basis, and with the large number of contracts through which those sums are disseminated, it is inconceivable that the Bank

could engage in a sufficient number of audits and investigations to assure that all moneys were regularly being used honestly and as intended. The Bank, therefore, is compelled to rest the protection of its funds, and its reputation, upon (a) the careful vetting of potential contractors, (b) the monitoring of projects in as responsible a manner as conditions will permit, and (c) the inducement of contractors to maintain a reasonably high level of general compliance with ethical business standards. The occasions for effective inducement of compliance with the Bank's ethical standards are those involving the dissemination of training materials and other hortatory encouragements to embrace sound business practices, and those involving the public dissemination of announcements demonstrating what can happen if those standards are ignored – debarment.

Such demonstrations can be very cost-effective. For many contractors, it is simply a reminder – a reinforcement of the moral precepts by which the firm customarily operates. For other contractors, it is a very real deterrent – an event inducing a sharp focus on the sobering reality of potential debarment from future Bank contracts. For the Bank, it provides a multiplier effect, enhancing the value of the investigatory efforts and sanctioning procedures far beyond the gain achieved by the debarment of a single dishonest respondent. This value is achieved principally through the moral-reinforcement or deterrent effect, but in the experience of some investigators the disclosure of the practice also has the effect of encouraging officers and employees in other firms to volunteer information to the Bank, through the Fraud and Corruption Hotline or by other means, concerning wrongdoing that they have observed.

The greatest proponents of public disclosure are Bank employees with field experience involving procurement matters. They recognize the practice is a genuinely effective progenitor of deterrence. Because of this, they favor as widespread a dissemination as possible, noting, in the words of one, that “the Bank is a worldwide institution and must publish its debarment results worldwide” if it is to achieve deterrence commensurate with the geographic range of its activities. As noted by another, lecturing by the Bank against corruption will not work by itself; “fear must be placed in the hearts”

of those willing to give or take a bribe. One of the few things that can provoke such fear is the prospect of a public announcement of debarment; if there should be any doubt about the fact, one need only note the vigor with which counsel for recent respondents have attacked this particular facet of the debarment process, threatening to bring lawsuits for defamation against the Bank, its senior officials, its employees engaged in various aspects of the sanctioning process, and its outside investigators retained to develop the evidence used in the case.⁴³

We recognize that on occasion the imposition of a public sanction in a particularly sympathetic case may be difficult from the standpoint of those involved in the decision-making process leading to the sanction. It is a human response that is involved, but it is a business decision that must be made. The fact is that if the Bank is to fulfill its responsibilities in a businesslike manner, it is required to make regular use of the deterrent opportunity provided by its administrative sanctioning proceedings. There should be little hesitation in doing so. The Bank properly has sought to employ fair procedures to insure against erroneous decisions, and having done so, the Bank properly may make fair use of the results of such procedures to dissuade other firms from falling into the same improper practices. If the decision to publicize the fact that a sanction has been imposed is discretionary, those making the decision will have to struggle with the arguments in opposition to disclosure in each particular situation, which in many cases will understandably evoke sympathies for the respondent. For this reason, a policy should be in place that eliminates any element of discretion from the disclosure process.

⁴³ The Bank and its employees, of course, possess an immunity from lawsuits, and under existing case law, and under the rationale set forth in a recent review of the subject by outside counsel retained by the Bank, there is not a realistic possibility that such a suit would be entertained in the courts. Moreover, in most nations a suit for defamation cannot succeed unless the plaintiff can establish that the defamation was intentional and unfounded, a matter that would be virtually impossible to establish, especially in light of the nature of the evidence adduced in even the weakest of the cases that have yet been presented to the Sanctions Committee.

Finally, it should be noted that since offending firms regularly compete for Bank-financed projects in which the contractors are selected by member nations, it would be counter-productive and ineffectual if the Bank were to reach a finding that a firm had engaged in fraudulent or corrupt practices but not inform all member nations with which that firm might attempt to contract in the future. If dissemination of debarment information is to be that widespread, there is no persuasive reason not to, at least, post the result on the Bank's website and thus achieve greater protection of the Bank itself through the posting's deterrent effect.

3. Recommendations

By adopting fair and regularized sanctioning procedures, the Bank has developed more than reasonable safeguards against error. In this context, the Bank can publish the results with assurance and safety, and certainly should publish those results in order to achieve the fundamental purpose of the sanctioning process – to induce compliance with Bank standards by current and future contractors. Such publishing should be undertaken in a manner that will achieve the broadest possible deterrent effect. This necessarily would include, but would not be limited to, posting of the determinations on the Bank's website.

R. Sharing of Investigative Information

1. Background

The Operational Memorandum does not address the subject of sharing information from an investigation with parties outside the Bank.

The August 2001 Procedures permit the Director of INT to provide information (a) to law enforcement and administrative agencies of member nations if the Director determines that laws of those nations may have been violated, and (b) to another international or multinational organization, including another development bank, and to an agency of a member government that promotes international development, if the Director determines that there is evidence of fraud or corruption in connection with a

project financed by that organization or agency. The August 2001 Procedures also permit the Chairman of the Sanctions Committee to provide materials submitted to the Committee to another international or multinational organization, including another development bank, and to an agency of a member government that promotes international development if that organization or agency has agreed to make available to the Bank similar information from its own files.

2. Observations and Discussion

The sharing of evidence between the Bank and national and international agencies involved in law enforcement or development-funding activities is a matter of common interest and benefit.

The providing of evidence by the Bank permits law-enforcement officials to pursue criminal charges against a party that is engaged in fraudulent or corrupt practices, and permits other development agencies to take appropriate debarment, civil-recovery, or protective actions on the basis of Bank evidence that their funds may have been, or may be subject to being, misused. Certainly the Bank has an interest in assuring that one of its member nations is not unnecessarily injured by fraud or corruption, just as it has an interest in assuring that the Bank itself is not injured. Manifestly the Bank has an interest in assisting fellow development banks in meeting common problems.

The providing of evidence in the other direction – to the Bank by national agencies and international organizations – has been found by Bank investigators to be of considerable utility; the value received is at least as much as the value imparted. Also, in exchanging information with national agencies the opportunity may be presented for joint investigations whereby the Bank is able to take advantage of a national agency's ability to compel evidence. Such opportunities can permit the Bank's investigators to succeed in situations that might ordinarily result in a standoff.

The practice of sharing evidence among these institutions is accepted by the participants as routine. At a recent Bank-sponsored conference of investigators from international agencies, the attendees readily acknowledged a common need for the exchange of information, and displayed a genuine enthusiasm for cooperative exchanges whenever possible. They have occasionally found impediments to such exchanges in instances in which evidence was obtained on condition that its use would be restricted to the agency requesting it, but these difficulties can usually be reduced in ongoing cases through responsible negotiations, and prevented in future cases through more careful structuring of witness agreements.

3. Recommendations

The existing practice of sharing evidence with national and international agencies should be continued and encouraged.

VI. CONCLUSION

In the context of its overall program against fraud and corruption, the Bank has elected to transmute a business decision based upon a procurement officer's determination of what is appropriate – a decision whether to have future dealings with a firm that has engaged in improper activities – into a business decision emerging from an investigative and deliberative process. In either form, though, it remains a decision that is a business decision.

The structure that the Bank has imposed upon the process is designed to go further than necessary in order to demonstrate an exemplary degree of fairness and regularity. The Bank's reasons for putting such a process in place are commendable. It is important to assure, however, that the Bank, having put in place these good-faith initiatives, is not now cajoled into imposing additional restrictions on itself that have little to do with fairness and regularity. Proposed changes in the process should be adopted only after a careful assessment, and after a conclusion by the Bank that they will serve as

improvements, not detriments, to the implementation of an effective and efficient process that enables the Bank to meet its principal responsibilities and goals.

With regard to the various questions that have been raised over the past few years concerning the operation of the sanctioning system, relatively few would ultimately prompt a conclusion that change is warranted. Of the changes that do appear warranted, by far the most significant is that involving a restructuring and repositioning of the sanction-determining body. Once a decision on that subject is reached by the Bank, some other adjustments may well be in order, including those noted in this Report, but at its basis the system now reflected by the August 2001 Procedures is reasoned, fair, and workable. Any changes should be directed toward assuring that those procedures function smoothly and permit the various Bank components involved in the process to work together in harmony. All changes should be guided by the fact that the ultimate sanctioning determination is still a business decision, and that the ultimate goal remains the protection of the funds for which the Bank bears responsibility in order that the Bank might fulfill its principal mandate.

