Hughes Hubbard & Reed

Multilateral Development Bank Sanctions and Investigations Primer

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Introduction

It is now well established that multilateral development banks ("MDBs") play a key role in the global fight against corruption. Sanctions by MDBs are powerful deterrents that have an impact on companies' eligibility for MDB-funded projects as well as far-reaching reputational and business consequences. Efforts by MDBs to encourage and require compliance programs are also increasingly bearing fruit, particularly for companies in Asia, Africa, and Latin America that may not have previously considered the need for anti-corruption compliance controls. Perhaps most importantly, MDBs can exercise "jurisdiction" over companies and individuals of any nationality and in any location, so long as an MDB-funded project is involved. As result, for companies from countries without strong foreign anti-corruption laws operating in countries without strong domestic anti-corruption frameworks, MDBs present the primary enforcement threat. Over the past few years, several large and prominent companies have been subject to sanctions by MDBs for various forms of misconduct, including divisions of General Electric, Odebrecht and several of the largest Chinese construction companies.

Overview of MDB Sanctions Regimes

WORLD BANK

The World Bank's current sanctions regime is set out in full in the "Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects," issued on June 28, 2016, with an effective date of January 7, 2016 ("Sanctions Procedures").

A. Investigation and Adjudication: Main Actors and Process

The core of the World Bank's sanctions regime is built around three main actors: the Integrity Vice Presidency, the Office of Suspension & Debarment and the Sanctions Board, which respectively represent the Bank's investigatory branch and two adjudicatory bodies.

Integrity Vice Presidency • The Integrity Vice Presidency ("INT") is primarily responsible for investigating allegations of sanctionable practices on Bank-funded projects. INT learns of potential violations through various sources, including government officials of the borrowing country (*e.g.*, members of the implementation agency or the bid evaluation committee), World Bank staff participating in the project, local or international press and whistleblowers (*e.g.*, competitors). Typically, once INT has concluded its investigation and finds that there is sufficient evidence supporting the allegations of sanctionable practices, INT summarizes its findings in a Statement of Accusations and Evidence ("SAE") and refers the case to the Office of Suspension & Debarment for first-level adjudication.

The current head of INT is Mouhamadou Diagne, who was appointed Vice President in May 2020. Diagne previously served as the Inspector General of the Global Fund to Fight Aids, Tuberculosis, and Malaria. As Vice President of INT, he reports directly to the World Bank President.

Office of Suspension & Debarment • The Office of Suspension & Debarment ("OSD"), headed by the Chief Suspension and Debarment Officer ("SDO"), acts as the initial (and, often final) adjudicator of cases brought by INT. The OSD determines if the evidence supports a finding of a sanctionable practice under the applicable World Bank Procurement, Consultant or Anti-Corruption Guidelines and, if so, may recommend the imposition of sanctions by issuing a "Notice of Sanctions Proceedings" to the respondent. If the respondent does not contest the OSD's recommended sanctions, the sanctions are imposed as recommended and the OSD's decision is published on the OSD's website. If the respondent wishes to contest the recommended sanctions, the respondent can do so through two non-exclusive options. The respondent may, within 30 days of receipt of the Notice, submit a written "Explanation" to the SDO, who, upon review of the Explanation, may (i) maintain the initial recommendation; (ii) revise the recommended sanctions; or (iii) withdraw the Notice. The respondent can then appeal the SDO's decision to the Sanctions Board. The respondent can also choose to bypass the

SDO and file a written "Response" directly with the Sanctions Board within 90 days of its receipt of the Notice. During fiscal year 2020, OSD reviewed 29 cases and 22 settlements, while the Sanctions Board issued six public final decisions.

Sanctions Board • The Sanctions Board is the final adjudicator of contested cases and is the first body of non-Bank affiliated persons to review each sanctions case. Unlike the OSD, which is composed entirely of World Bank-appointed staff, since 2016 the Sanctions Board has consisted of five members and two alternates, all of whom are external to the World Bank and who may not hold any appointment within the World Bank, IFC, or MIGA. The Sanctions Board reviews any allegations *de novo* on the basis of the written record before it. If requested, or if decided *sua sponte* by the Chair of the Sanctions Board, evidence may also be presented during a hearing. Final decisions made by the Sanctions Board, which describe the Board's reasoning in reaching the decision in detail, are posted on the World Bank's public website. Decisions of the Sanctions Board are non-appealable and the Sanctions Board has confirmed that it will only reconsider its decisions in narrowly defined and exceptional circumstances, such as the discovery of new and potentially decisive facts, fraud in the proceedings, and/or a clerical mistake in the original decision (Decision No. 62 ¶ 6 (January 2014); Decision No. 107 ¶ 4 (January 2018)). From its inception in 2007 through June 2020, the Sanctions Board has issued a total of 130 decisions.

B. Temporary Suspensions and Early Temporary Suspensions

In cases where the SDO recommends a sanction including a debarment exceeding a period of six months (which it does in most cases), the OSD will impose a temporary suspension on the respondent from the time the Notice of Sanctions Proceedings is issued through the final adjudication of the sanctions proceedings. Within 30 days of the delivery of the Notice of Temporary Suspension, the respondent may submit a written Explanation detailing why the Notice should be withdrawn.

If INT believes before it concludes its investigation into a respondent that there is sufficient evidence to support a finding of a sanctionable practice and that it is "highly likely" that the investigation will result in a SAE to be presented to the SDO within a period of one year, INT may submit a request for an Early Temporary Suspension to the SDO for approval. If the SDO then determines that there is sufficient evidence to support a finding that Respondent has engaged in a Sanctionable Practice and that the accusations are such that the SDO would have recommended a debarment of at least two years, then the SDO shall issue the Notice of Temporary Suspension to the respondent.

An Early Temporary Suspension has an initial duration of six months, and, if at that time the SAE has not yet been submitted to the SDO, INT may request an extension of the Early Temporary Suspension by an additional six months. This extension request must be submitted no later than five months after the start of the temporary suspension and must (i) describe the current progress of the ongoing investigation and (ii) contain a representation that the investigation is ongoing and being pursued with "due diligence and dispatch." Upon

submission of an SAE, the temporary suspension will be automatically extended until the end of the sanctions proceeding. The Sanctions Procedures set a relatively low standard for the imposition of Early Temporary Suspensions, which—given their potential to cause irreversible economic damage before INT's investigation is even concluded—has been criticized as a potential violation of the concerned entity's general due process rights.

Like debarments imposed as part of a final decision, Temporary Suspensions and Early Temporary Suspensions render the respondent ineligible for World Bank contracts; however, they are not announced publicly. Instead, they are posted on the "Bank's Client Connection website" and shared only with the limited number of persons specified in the Sanctions Procedures. As a result, temporary suspensions do not trigger cross-debarment.

C. Settlements and Voluntary Disclosures

In addition to contested and uncontested sanctions proceedings, INT routinely resolves investigations through negotiated resolution agreements ("NRAs"). In fiscal year 2020, INT entered into 23 NRAs. INT and the respondent can enter into settlement discussions any time during the investigation phase and even once the proceedings have begun. Depending on the terms of the NRA, the case can be closed, sanctions reduced or proceedings merely deferred pending compliance with specified conditions, which often includes ongoing cooperation (*i.e.*, providing INT with valuable information about potential misconduct, either by the cooperating party or other companies and individuals).

High-profile NRAs reached in the past include the February 2012 settlement with French engineering firm Alstom SA and the April 2013 settlement with Canadian giant SNC Lavalin. More recently, in January 2019, the World Bank announced that it had reached a settlement with Construtora Noberto Odebrecht S.A. ("CNO") in connection with fraudulent and collusive practices on the World Bank-funded Río Bogotá Environmental Recuperation and Flood Control Project in Colombia. CNO is a Brazilian construction and engineering subsidiary of Odebrecht S.A. and is the largest construction and engineering firm in Latin America. As part of the settlement, CNO agreed to a three-year debarment with the requirement that it meet specific corporate compliance conditions—including the development of an integrity compliance program consistent with the World Bank Group Integrity Compliance Guidelines and full cooperation with INT going forward—in order to qualify for release from debarment. The settlement agreement reflects a reduced sanction in recognition of CNO's cooperation and voluntary remedial actions, which included encouraging honest disclosures by employees, producing privileged documentation, and coordinating internal investigations with INT. The term of the settlement also triggers cross-debarment for CNO. As discussed further below, several other subsidiaries of Odebrecht also agreed in 2019 to settle charges with the Inter-American Development Bank. In 2020, INT similarly resolved allegations of corrupt, fraudulent, and collusive practices through NRAs with companies including FCC Construccion S.A., Egis Consulting Engineers Pvt. Ltd., and Yooshin Engineering Corp., among others.

AFDB SANCTIONS REGIME

A. Investigation and Adjudication: Main Actors and Process

The AfDB's sanctions regime is comprised of an investigative body, the Office of Integrity and Anti-Corruption ("PIAC"), and a two-tiered adjudicatory system that includes the Sanctions Commissioner and Sanctions Appeals Board.

Office of Integrity and Anti-Corruption ("PIAC") • PIAC is the primary AfDB body charged with investigating and preventing Sanctionable Practices. PIAC is divided into two divisions, PIAC.1 (integrity and prevention division) and PIAC.2 (investigations division). PIAC.1 supports the Bank's mission by developing proactive measures that seek to decrease incidents of fraud and corruption. PIAC.2 is responsible for conducting investigations into allegations of Sanctionable Practices affecting the Bank's budget or a bank-funded project as well as allegations of misconduct by bank staff.[1] Once PIAC.2 has concluded its investigation and has determined to seek charges against a Respondent, it prepares a Finding of Sanctionable Practices that: (i) identifies the parties; (2) states the alleged Sanctionable Practices; (iii) provides a summary of relevant facts and grounds for the alleged Sanctionable Practices; (iv) proposes a sanction; and (v) includes all material information, including evidence supporting the allegations as well as exculpatory or mitigating evidence.[2]

Sanctions Office • The Sanctions Office is headed by the Sanctions Commissioner and is the first-tier adjudicator for sanctions cases within the AfDB, reviewing the Findings of Sanctionable Practices submitted by PIAC.2. The Sanctions Commissioner is nominated by the AfDB President and is appointed by the Board of Directors of the Bank. The Sanctions Office is run administratively by the Sanctions Secretary.[3] If the Sanctions Commissioner determines that the Findings of Sanctionable Practice supports a *prima facie* finding that Respondent has engaged in a Sanctionable Practice, the Sanctions Commissioner issues a formal Notice of Sanctions Proceeding ("Notice") to the Respondent, and notifies PIAC as well as the Sanctions Appeals Board and its Secretary.[4] The Notice indicates, *inter alia*, to Respondent that Respondent has 60 days from receipt of the Notice to respond to the allegations in the Findings of Sanctions Practice and, if a temporary suspension has been issued, the manner in which Respondent may contest the Temporary Suspension.[5] After the receiving Respondent's response (or if no response is submitted, solely on the basis of the Findings of Sanctionable Practices) the Sanctions Commissioner determines whether a "preponderance of the evidence" supports a finding that Respondent engaged in the Sanctionable Practice.[6]

Sanctions Appeals Board • The Sanctions Appeals Board is the second-tier adjudicator of sanctions cases in

1 AfDB Sanctions Procedure, § 3.1; PIAC 2017 Annual report, p. 6, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/PIAC_Annual_Report_2017_EN.pdf.
2 AfDB Sanctions Procedure, § 5.2.
3 AfDB Sanctions Procedure, § 3.2.
4 AfDB Sanctions Procedure, § 5.4.
5 AfDB Sanctions Procedure, § 5.5.
6 AfDB Sanctions Procedure, § 5.7.

the AfDB system and hears appeals from decisions made by the Sanctions Office. The Board consists of three members, including two external experts and one internal member, and several alternates. The two external members and two alternates are nominated by the Bank President and confirmed by the Board of Directors of the Bank. The one internal Sanctions Appeals Board member and one alternate are appointed directly by the Bank President from among the senior staff members of the Bank.[7] The Bank also appoints a Secretary to the Appeals Board who reports to the Chairperson of the Board.[8] A Respondent may appeal a Sanctions Decision made by the Sanctions Commissioner within 25 days.[9] The Sanctions Appeals Board reviews the application *de novo* and Respondent may, as a result, present new evidence and arguments not presented in its Response.[10] After receipt of the Appeal, the Sanctions Board forwards a copy to the PIAC and PIAC can submit a Reply. If PIAC includes new evidence or arguments in its Reply, Respondent can submit an additional rebuttal limited only to the new arguments or evidence made by the Reply.[11] Unlike in the World Bank's sanctions regime, Respondents have no right to a hearing in front of the AfDB Sanctions Appeals Board. The Board can, however, hold a hearing on the request of either the Respondent or PIAC, or *sua sponte* if it so chooses. The form, length, and nature of the hearing are likewise determined by the Board.[12]

B. Temporary Suspensions

Although the AfDB also allows for Temporary Suspensions, it imposes a stringent standard for their implementation. The AfDB procedures specify that PIAC may submit a request for a Temporary Suspension at the time the Findings of Sanctionable Practices is presented, or for an Early Temporary Suspension prior to the conclusion of an investigation. Temporary Suspensions, however, will only be granted if the "continuous eligibility of the subject of the investigations would cause imminent financial or reputational harm" to the AfDB.[13] Requests for Early Temporary Suspensions require a showing by PIAC of "sufficient evidence to indicate a likelihood that the Respondent has engaged in a Sanctionable Practice." [14] In cases where an Early Temporary Suspension has been requested, Respondents may submit an Objection to the Temporary Suspension to the Sanctions Commissioner.[15]

C. Settlements

Under the AfDB's Sanctions Procedures, at any time prior to the issuance of a Final Decision, PIAC and the Respondent can agree to a Negotiated Settlement. PIAC and the Respondent may also request a stay of proceedings to conduct settlement negotiations. All settlement agreements must be approved by the AfDB General Counsel—who reviews the agreement to ensure that the agreement does not violate the AfDB's

7 AfDB Sanctions Procedure, § 3.3.
8 AfDB Sanctions Procedure, § 3.4.
9 AfDB Sanctions Procedure, § 8.1.
10 AfDB Sanctions Procedure, § 8.1.
11 AfDB Sanctions Procedure, § 8.5.
12 AfDB Sanctions Procedure, § 8.8.
13 AfDB Sanctions Procedure, § 6.1.
14 AfDB Sanctions Procedure, § 6.1.
15 AfDB Sanctions Procedure, § 6.4.

policies and procedures—and by the Sanctions Commissioner—who reviews the agreement to ensure fairness, transparency, and credibility.[16]

The AfDB concluded its first set of negotiated settlement agreements in early 2014 and since then has continued to be open to settling with contractors. In December 2015, for example, the AfDB reached a settlement with Tokyo-based multinational conglomerate Hitachi, ending the AfDB's three-year investigation into allegations of sanctionable practices by certain Hitachi subsidiaries on a power station contract in South Africa. The settlement included the subsidiaries' debarment for one year in exchange for an undisclosed but—according to the press release—"substantial" financial contribution by Hitachi to the AfDB. This case presents a prominent illustration of cooperation between MDBs and national enforcement authorities. The AfDB shared information obtained in the course of its three-year investigation with the U.S. SEC, which, in turn, launched its own investigation into the matter. The SEC's investigation was settled in September 2015, with Hitachi agreeing to pay $19 million in civil penalties.

More recently in June 2020, the AfDB debarred Danish contractor Burmeister & Wain for 21 months under a negotiated settlement for fraudulent and corrupt practices on an AfDB-funded project in Mauritius. According to the AfDB's announcement, Burmeister & Wain used third party intermediaries to give financial inducements to Mauritian officials in order to obtain confidential information that helped it tailor the technical specifications of its bid for the AfDB-funded project, and also concealed its arrangements with the third parties in violation of the tender rules. . The AfDB indicated that Burmeister & Wain's release from debarment is conditioned on adoption of a comprehensive integrity compliance program that meets the standards of the AfDB.

INTER-AMERICAN DEVELOPMENT BANK SANCTIONS REGIME

First adopted in 2001 and updated in 2011 and 2015, the Inter-American Development Bank ("IDB") sanctions system features a two-tiered sanctions process overseen by the IDB's Office of Institutional Integrity ("OII"), Sanctions Officer, and Sanctions Committee. In accordance with the General Principles and Guidelines for Sanctions and the Uniform Framework for Preventing and Combating Fraud and Corruption, the IDB's sanction system investigates and prosecutes the five standard sanctionable practices, referred to as Prohibited Practices by IDB, agreed to as part of the Joint International Financial Institution Anti-Corruption Task Force's harmonization efforts in 2006.

A. Investigation and Adjudication: Main Actors and Process

Office of Institutional Integrity • OII is an independent advisory office within the IDB responsible for investigating allegations of fraud, corruption, and other Prohibited Practices in IDB-financed activities. OII also plays a primary role arranging Negotiated Resolution Agreements ("NRAs"). OII also provides consultations on

16 AfDB Sanctions Procedure, § 15.1, 15.3.

risk indicators and mitigation measures for operational staff working on IDB-financed projects and conducts Integrity Risk Reviews ("IRR") of specific projects, sectors, or topics to identify and assess integrity risks. Under the IDB's two-tiered process, if OII determines after its investigation that charges are warranted, it issues a Statement of Charges to be reviewed by the Sanctions Officer. The Statement of Charges includes: (i) the identity of each party alleged to have engaged in a prohibited practice; (ii) the alleged prohibited practice; (iii) a summary of the relevant facts on which the allegations are based; (iv) all evidence relevant to the determination of the sanction in the possession of OII; (v) all exculpatory or mitigating evidence in the possession of OII; and (vi) any other information that OII determines to be relevant to the Statement of Charges.

Sanctions Officer • The Sanctions Officer acts as the primary adjudicator of IDB sanctions proceedings, determining based on OII investigations whether or not the uncovered evidence supports the allegation of Prohibited Practices and determining what sanction may be appropriate for the situation. If the Sanctions Officer agrees that the investigated party engaged in the alleged Prohibited Practice, it issues a Notice of Administrative Action ("NAA") to the Respondent indicating that sanctions proceedings have been initiated. The NAA contains a copy of the Statement of Charges, the findings of the Sanctions Officer, and a copy of the Sanctions Procedures, as well procedural documents informing the Respondent that it has the opportunity to respond and that the IDB may impose a range of sanctions.

After receipt of the NAA, the Respondent may submit a written Response to the Sanctions Officer. The OII may also submit additional information to the Sanctions Officer, who may then require additional clarifications or evidence from the Respondent and from the OII. After reviewing all evidence and submissions, the Sanctions Officer issues its determination as to whether or not the Respondent has engaged in the alleged Prohibited Practice(s) and what punishment should be imposed. If no Response is received within the 60-day period, the Respondent is judged to have admitted the allegations and to have waived its opportunity to appeal to the Sanctions Committee. After expiration of the 60-day period, the Sanctions Officer re-assesses the submission of OII and the Respondent and shall issue a Determination either dismissing the allegations or finding that a preponderance of the evidence supports the finding that the Respondent engaged in the Prohibited Practice and imposing sanctions on the Respondent.

While the Determination of the Sanctions Officer is appealable to the Sanctions Committee, OII reports that the number of cases that are appealed has decreased in recent years from over 40% in 2015 to under 19% in 2017 and 17% in 2019.

Sanctions Committee • The Sanctions Committee is the final adjudicatory body in the IDB sanctions regime and consists of three IDB staff members, four external members, and one alternate member who represents the Inter-American Investment Corporation, the IBD's private sector lending arm. The Sanctions Committee reviews appeals from the Sanctions Officer's determinations on a *de novo* basis using a preponderance of the evidence standard. The Sanctions Committee is also not bound by the sanction decided by the Sanctions Officer and is free to impose a different sanction or no sanction at all.

Following the Sanctions Officer's Determination, the Respondent has 45 days to file a written appeal with the Executive Secretary of the Sanctions Committee. OII may submit additional written materials in reply to Respondent's appeal. As in the AfDB system, the Sanctions Committee may hold hearings as it deems appropriate, but neither OII nor the Respondent have the right to a hearing in front of the Sanctions Committee. The Sanctions Committee's Decision is final and cannot be further appealed aside from in certain limited circumstances.

B. Temporary Suspensions

OII can request Temporary Suspensions at any time from the initiation of the investigation, and such suspensions may extend through the final decision of the Sanctions Committee. If imposed, the Sanctions Officer must send written notice to the Respondent and to OII (a "Notice of Temporary Suspension") which includes the recommendation for Temporary Suspension as well as a summary of the basis for the Sanctions Officer's decision. This information may be included in the NAA if the Temporary Suspension is implemented at the same time that the Sanctions Officer delivers this notice to the Respondent.

As under the AfDB system, to impose a Temporary Suspension the Sanctions Officer must find, in consultation with the Chairperson of the Sanctions Committee, that the subsequent award of contracts to the Respondent "could result in significant harm" to the IDB or to IDB-financed projects and that OII has "substantial evidence" that supports the allegation of Prohibited Practice. The Respondent may submit a written Request for Reconsideration to the Sanctions Officer within 20 days following delivery of the Notice of Temporary Suspension. The Temporary Suspension has immediate effect upon delivery of the Notice of Temporary Suspension and may last for up to 12 months or until the allegations are ultimately resolved through dismissal or sanction. Temporary Sanctions may be extended for additional 12-month periods on the recommendation of OII and approval of the Sanctions Officer, in consultation with the Chairperson of the Sanctions Committee.

C. Negotiated Resolutions

The Sanctions Procedures, as amended in 2015, authorize the IDB to enter into Negotiated Resolution Agreements ("NRAs") with investigated parties at any point prior to the receipt of the Statement of Charges by the Sanctions Officer. OII has indicated that it generally only employs NRAs in cases involving complex investigations where the investigated parties are able to and willing to provide information to the IDB about the (i) alleged Prohibited Practices and systematic risks in the affected operations or (ii) significant Prohibited Practices of the investigated party or other parties. This information is valued because it provides a full picture of the integrity risks facing IDB-financed activities, including details about agencies and individuals that may help the bank's operational teams to better manage these risks in the future. OII reported that in 2018 it negotiated three NRA engagements and concluded one—with Odebrecht S.A.—that marked its first-ever use of the NRA tool.

In September 2019, IDB announced that it had agreed to its first-ever NRA with Brazilian construction conglomerate Odebrecht S.A. following an extensive investigation by OII. OII's investigation revealed, and as part of the NRA Odebrecht did not contest, that between 2006 and 2008 Odebrecht paid approximately $380,000 in bribes to Brazilian officials in relation to the Highway Rehabilitation Program in the State of São Paulo and that between 2007 and 2015 it paid approximately $118 million through a network of agents and offshore accounts to Venezuelan officials in relation to the Tocoma Hydroelectric Power Plant Program. The NRA includes a six-year debarment followed by a four-year conditional non-debarment for Odebrecht's subsidiary CNO S.A. (and 19 of its subsidiaries) and a ten-year conditional non-debarment for Odebrecht's subsidiary Odebrecht Engenharia e Construção S.A. ("OEC") (and 41 of its subsidiaries). Odebrecht also committed, starting in 2024, to paying $50 million to NGOs and charities dedicated to managing social projects intended to improve the quality of life for vulnerable communities in IDB's development member countries. The NRA also requires that Odebrecht engage an independent compliance monitor to report on its compliance program to the IDB.

D. Recent Resolutions

As of January 2019, the IDB began to publish short summaries of case decisions by the Sanctions Officer and the Sanctions Committee in order to improve accountability and transparency of the sanctions adjudication process. To date, it has posted summaries of 29 Determinations made by the Sanctions Officer and decisions by the Sanctions Committee.

OTHER MDB SANCTIONS REGIMES: HIGHLIGHTS

A number of other MDBs have also implemented sanctions regimes based on the World Bank model. Select highlights of these regimes are presented below.

European Bank for Reconstruction and Development • Sanctions procedures at the EBRD are governed by the "Enforcement Policy and Procedures." Under these procedures, EBRD has adopted a two-tiered adjudicatory process, with an initial review by the "Enforcement Commissioner" and a second level review by an "Enforcement Committee," made up of five members (three external to the EBRD). Decisions of the Enforcement Committee are final and no longer subject (as before) to the referral to the Bank's President or Executive Committee. EBRD's investigative body is the Office of the Chief Compliance Officer. The Office of the Chief Compliance Officer has the authority to bring formal sanctions proceedings or enter into negotiated resolution agreements.

Asian Development Bank • Like many of the other MDBs, the Asian Development Bank's Integrity Principles and Guidelines ("Guidelines") are built around an investigative body—the Office of Anticorruption and Integrity ("OAI")—and two adjudicative bodies—the Integrity Oversight Committee and the Sanction Appeals Committee. In order to ensure greater independence from the investigation process, the Guidelines mandate that the

Sanctions Appeals Committee's chair be picked from senior ADB staff, external to the OAI. Unlike many of its peers, the ADB has decided not to move towards a full publication of its sanctions decisions. Instead, the ADB publishes high-level (and anonymous) summaries of its sanction cases and maintains its rule that the identity of first-time offenders is not publicized, unless limited exceptions apply (*e.g.*, failure to respond to notice of proceedings, failure to acknowledge debarment decision etc.). Accordingly the ADB's published sanctions list contains the names of entities and individuals who violated the sanctions while ineligible, entities and individuals who committed second and subsequent violations, debarred entities and individuals who cannot be contacted, and cross-debarred entities and individuals.

AIIB • The AIIB's sanctions process is set out in the Policy on Prohibited Practices, which was released on December 8, 2016. The AIIB's process is largely modeled on the World Bank's system and provides for a two-tiered adjudicatory system. At the first stage, the AIIB's investigative body, the Compliance, Effectiveness and Integrity Unit (CEIU), headed by a Director General, is tasked with investigating suspected misconduct. Investigations Officers look into suspicious activities and make recommendations to a Sanctions Officer, who in turn decides whether charges are supported using a preponderance of evidence standard. Respondents have an opportunity to contest the Sanctions Officer's findings before he makes a final determination and imposes sanctions. At the second stage, respondents can appeal the Sanctions Officer's determination to the Sanctions Panel. The Panel is composed of three members, one internal and two external, who are appointed by the Bank's President. As mentioned above, in 2017, the AIIB voluntarily adopted the MDB's cross-debarment list and announced its intention to formally apply for inclusion in the MDB's Cross-Debarment Agreement.

Lessons from World Bank Sanctions Board's Decisions

The World Bank has historically been the only MDB to publish the decisions of its final adjudicative body in full text. In December 2019, the World Bank also published the second edition of its Sanctions Board Law Digest, which analyses the Sanctions Board's decisions from the Board's inception in 2007 through the end of the 2019 fiscal year. The growing body of World Bank Sanctions Board decisions, and the analysis in the Law Digest, are of particular value, as the decisions and analyses set out, in detail, the Board's reasoning, especially with respect to the remedial actions that it expects from companies and individuals to receive mitigating credit. These mitigation factors are discussed in every Sanctions Board decision.

An analysis of published Sanctions Board decisions shows that the mitigation accorded by the Sanctions Board can indeed be meaningful. For example, in one decision, the proposed sanction of a three-year debarment with conditional release (which corresponds to the Bank's "baseline" sanction) was reduced to a six-month retroactive, non-conditional debarment in large part due to a multitude of mitigating factors (Decision No. 63 ¶¶ 106-107, ¶¶ 109-110, ¶ 112 (January 2014)). The significance of mitigation credit is also evident from the increased sanctions levied when such factors are absent. (*See, e.g.,* Decision No. 69 ¶¶ 39, 41, 45 (June 2014); Decision No 125 ¶ 48 (February 2020)).

Some useful lessons from recent decisions are highlighted below.

Employee Discipline

The Sanctions Board has long placed emphasis on disciplining responsible employees. The Sanctions Board will only provide mitigating credit if such discipline is the result of an adequate inquiry into the matter (rather than provoked by a desire to find a convenient scapegoat). Accordingly, the Sanctions Board has declined to provide mitigation credit to companies that (i) disciplined a responsible employee without thoroughly investigating the underlying conduct to allow the company to "assess and address its own responsibility or that of other employees" (Decision No. 55 ¶ 77 (March 2013)) or (ii) did not provide any "proof of a demonstrable nexus" between the relevant employee's departure/disciplining and the sanctionable conduct at issue (Decision No. 56 ¶ 67 (June 2013))

A recent Sanctions Board decision confirmed that respondents must be prepared to present evidence and specifics regarding employee discipline. Broad assertions that appropriate measures have been taken and that specific staff have been disciplined must be supported by documentary evidence to receive mitigation credit. (Decision No. 117, ¶35 (April 2019)).

Moreover, the Sanctions Board has been clear that, to receive mitigating credit, the corrective actions have to target the staff actually involved in the misconduct. In one decision, the respondent claimed mitigating credit for having issued a warning letter against its finance and deputy finance director. The Sanctions Board denied mitigating credit on the basis that no disciplinary measures were taken against the marketing staff, who had allegedly processed the tender, as well as (lower-echelon) finance staff, who had processed the bid securities (Decision No. 68 ¶ 39 (June 2014)). More recently, the Sanctions Board has made clear that respondents must be willing to discipline even senior staff involved in misconduct. The Sanctions Board provided only limited mitigation credit to a respondent that disciplined junior employees involved in the misconduct but suspended a Deputy Chairman for only 10 days (Decision No. 116, ¶ 25 (March 2019)). Likewise, the Sanctions Board afforded no mitigating credit to a firm that claimed, without evidence, to have terminated a culpable employee, but failed to take any disciplinary action against management (Decision No. 130, ¶ 87 (Dec. 2020)).

Compliance Programs

The existence of a compliance program has long been one of the key areas of inquiry for the Sanctions Board. If an employer can demonstrate to the Sanctions Board's satisfaction that it had implemented, prior to the conduct at issue, controls reasonably sufficient to prevent or detect the conduct, the employer would appear to have a defense against liability for its employees' actions. For companies that have or may seek World Bank Group-financed contracts, these decisions create a substantial incentive to review and, as necessary, recalibrate existing compliance programs to both anticipate likely compliance risks and generally meet the World Bank's expectations for compliance programs.

The Sanctions Board also gives credit for compliance program modifications implemented in response to alleged misconduct. Even if a preexisting compliance program had not been reasonably designed to prevent or detect the conduct at issue, the Sanctions Board has indicated that it will also provide mitigation credit for post-conduct compliance modifications designed to prevent or detect the recurrence of the alleged misconduct (Decision No. 51 ¶¶ 51-52 (May 2012); No. 53 ¶¶ 60-61 (September 2012); No. 60 ¶¶ 129-30 (September 2013); No. 129 ¶ 55 (December 2020)). Limited compliance enhancements, on the other hand, lead to lesser credit. In one decision, the Sanctions Board agreed to provide "some mitigating credit, limited by the lack of more evidence" for the adoption of a company-wide prohibition against misconduct with approval and support of senior management (Decision No. 56 ¶¶ 68-69 (June 2013)). Unit or department-level improvements can also result in some mitigation credit. (Decision No. 55 ¶ 78 (March 2013)).

Moreover, recent Sanctions Board decisions indicate that the timeliness with which these remedial actions are implemented matters. In the past, the Sanctions Board has given significant weight to modifications that have been made prior to the issuance of the Notice of Sanctions Proceedings to respondents (Decision No. 63, ¶ 107 (January 2014)), No. 71, ¶ 94 (July 2014), No. 79, ¶¶ 46 (August 2015)). Recently, the Sanctions Board has determined that delays in remediation can and will result in less mitigation credit. In Decision 120, where

the respondent did not take remedial measures until two years after the respondent indicated it would, the Sanctions Board interpreted the delay to mean that the compliance reforms were "driven more by a desire for sanction mitigation than by genuine remorse or intent to reform" and awarded only partial mitigation credit as a result (Decision No. 120, ¶56 (May 2019)).

Recent Sanctions Board decisions also confirm that respondents may be required to provide evidence to support statements that particular compliance processes have been improved or strengthened. For example, in Decision No. 78, the Sanctions Board required a respondent to provide evidence to support an assertion that its third party due diligence process had been improved (Decision No. 117, ¶ 36 (April 2019). Likewise, in Decision No. 130 the Sanctions Board declined to award any mitigating credit where there was no evidence that the respondent had actually implemented the claimed compliance program, or that the claimed program addressed the misconduct at issue in the proceeding (Decision No. 130, ¶ 88 (Dec. 2020)).

Time Since the Misconduct

Recent decisions from the Sanctions Board have confirmed that mitigation credit will be available to respondents for the passage of significant amounts of time between when an offense occurred and when the sanctions proceedings is initiated. The Sanctions Board has stated that this factor weighs on "the fairness of the process for respondents" and that it will affect the weight that the Sanctions Board attaches to the evidence presented. Despite the fact that the Sanctions Procedures provide for a 10-year statute of limitations, the Sanctions Board has recently found that delays of six and a half years (Decision No. 121, ¶ 23 (May 2019)), four and a half years (Decision No. 118, ¶ 90 (April 2019)), five years (Decision no. 114, ¶ 64 (Nov. 2018)), six years and four months (Decision No. 113, ¶ 47 (Nov. 2018)), and three years (Decision No. 126, ¶ 60 (March 2020)) between the occurrence of the misconduct and the initiation of sanctions proceedings were enough to have merited mitigation credit in what appears to be an effort to spur speedier investigations and processing from INT. While the impact of each specific mitigation factor on the overall sentence is not discussed by the Sanctions Board and cannot be easily divined, in many of the cases where the Sanctions Board found that the passage of time warranted mitigation credit, the respondent received a marked decrease from the SDO's recommended sanction. Recent examples include a recommended three-year debarment with conditional release reduced to a letter of reprimand (Decision No. 121, ¶ 35 (May 2019)) and a recommended eleven-year and two-month debarment with conditional release reduced to a four-year and six-month debarment with conditional release (Decision No. 118, ¶ 93 (April 2019)).

Cooperation with INT

The Sanctions Board will give companies and individuals mitigating credit if they cooperate during the course of the investigation conducted by INT. Interestingly, such mitigation credit can be obtained even when the company does not comply with *all* of INT's requests (Decision No. 79 ¶ 48 (August 2015), mentioning "gaps" in the company's responses to INT's queries). More noteworthy still are instances where the concerned

companies were accused of initially obstructing INT's investigation. For instance, in Decision No. 60, the Sanctions Board found select respondents culpable of obstruction for having ordered the deletion of emails before INT's audit. Ultimately, however, these respondents were awarded "significant" mitigating credit for having (i) met with INT and admitted misconduct; (ii) provided incriminating evidence; and (iii) made efforts to retrieve previously deleted emails. (Decision No. 60, ¶ 133 (September 2013).) Similarly, in Case No. 63, the Sanctions Board found that attempts by a respondent entity's employees to interfere with INT's investigation warranted aggravation, while also applying mitigation for subsequent efforts by respondent entity's management to correct the employee's actions (Decision No. 63, ¶¶ 102 and 110 (January 2014)).

Moreover, in another decision, the Sanctions Board made it clear that it will not necessarily link the mitigating credit accorded to a cooperating company to the success of the investigation conducted by INT. In this particular decision, the Sanctions Board granted mitigation to a Respondent Director who participated in two interviews with INT, despite the fact that these interviews did not shed light on an area of particular relevance to the case. Indeed, the Sanctions Board noted the lack, in the record, of any indication that INT had asked questions pertaining to these relevant areas. It would therefore appear that the responsibility for successful cooperation lies not only with the respondents but also with INT (Decision No. 73 ¶ 48 (October 2014)).

Internal Investigations

Companies will also be given mitigation credit when they take the initiative to conduct their own internal investigation into the alleged misconduct. Here, it is important to note that the Sanctions Board expects (and will only give mitigating credit if) such internal investigations are undertaken by persons with sufficient independence, expertise, and experience (Decision No. 50 ¶ 67 (May 2012)). The Sanctions Board has clarified that the burden to prove the independence of internal investigators lies with the respondents: in Decision No. 68, the Board refused to apply mitigation where a respondent had claimed that its "Board of Management" had conducted an internal investigation without specifying the composition of the Board or speaking to the independence of its members (Decision No. 68, ¶ 43 (June 2014))

The Sanctions Board also expects internal investigations to be adequately documented and credibly performed and that such investigations lead to concrete and targeted follow-up actions, when appropriate (for denial of mitigation on these grounds, see Decision No. 77, ¶ 56 (June 2015) and Decision No. 126, ¶ 53 (March 2020)). Importantly, the Sanctions Board notes positively and accords mitigating credit when the results of an internal investigation are shared with INT and/or relevant national authorities (Decision No. 63, ¶112 (January 2014)). However, companies sharing such information should be cognizant of the potential implications, and, in particular, of the possibility of parallel proceedings, discussed *infra*.

International Cooperation and Referrals

Companies and individuals participating in MDB-financed projects should be aware that sanctions proceedings before an MDB do not occur in a vacuum. Instead, there has been a growing trend of increased cooperation and information-sharing among MDBs and between MDBs and international and national anti-corruption enforcement authorities, which can lead to parallel proceedings. Such increased cooperation is made possible through various tools. For example, to date, the World Bank has signed over 55 cooperation agreements with national and international enforcement authorities (including with the UK Serious Fraud Office, the European Anti-Fraud Office, the UN Office for Internal Oversight and the International Criminal Police Organization (INTERPOL)) in support of parallel investigations, information sharing and asset recovery.

Moreover, most MDB sanctions procedures contain so-called referral clauses, which allow the MDBs in question to share information about potential sanctionable practices with other MDBs and/or international and national prosecuting authorities. In the 2019 fiscal year, the World Bank itself referred 42 cases to national authorities. In total, as of the end of fiscal year 2019, the Bank has made 541 referrals to anti-corruption bodies in countries all over the globe. As discussed below, the effects of such increased cooperation are wide-reaching, and the two-way information sharing leads to national procedures "spilling over" into MDB sanctions procedures and vice versa.

Referrals from National Authorities to MDBs

Information shared by national authorities can help MDBs substantiate allegations of sanctionable practices while an investigation is still ongoing. National authorities can also refer information after an investigation has been closed and the sanctions proceedings are underway. This was poignantly illustrated by Sanctions Board Decision No. 72. The case underlying this 2014 decision arose in connection with two World Bank-funded projects in Iraq, for which respondents submitted successful bids with the assistance of a local agent. Among other things, INT alleged that respondents engaged in corrupt practices by offering and/or paying the agent a commission with the expectation that these funds would be used to influence procurement officials working on the projects. Respondents rejected the allegations. However, two days before the scheduled hearing before the Sanctions Board, INT obtained its evidentiary *pièce de résistance* through a referral by Iraqi national authorities, who shared with INT email correspondence in which the agent clearly stated that part of the commission would be used to make payments to a project manager. Largely based on this evidence, the Sanctions Board proceeded to debar the concerned respondents for four years, a dramatic increase from the one-year debarment with conditional release proposed by the SDO.

Referrals from MDBs to National Authorities

The Sanctions Board decision involving Dutch company Dutchmed BV highlights the tension that can arise between an MDB's contractual audit rights, the MDB's practice of referring matters to national authorities, and a respondent's potential rights against self-incrimination. On June 2, 2017, the World Bank Group Sanctions Board imposed a fourteen-year debarment on Dutchmed BV and its affiliates for five counts of corrupt practices and one count of obstructive practices in connection with a Bank-funded Health Sector Reform Project in Romania.

According to the decision, the respondent made corrupt payments to secure approximately $10 million worth of contracts, including illicit commissions to a procurement advisor and personal trips for personnel of a project management unit. INT also claimed that the respondent obstructed its investigations by materially impeding its audit and inspection rights and refusing access to its records. At the first tier of the sanctions regime, the Suspension and Debarment Officer found against the respondent and imposed a ten-year debarment.

The respondent appealed to the Sanctions Board, claiming that INT failed to establish the elements of corruption, and that its inability to cooperate stemmed from exercise of its right against self-incrimination under Article 6 of the European Convention on Human Rights. According to the company, based on its status as a suspect in national criminal proceedings, compliance with INT's request for unconditional cooperation would have impaired its exercise of this privilege in future prosecutions. Given the prolific nature of the World Bank's referral practices, the fear of self-incrimination may have had some merit. As of December 2016, INT's referrals had resulted in prosecution and conviction of at least 35 individuals and criminal charges against another 29 parties.

The Sanctions Board nevertheless found against the respondent on all counts. On the obstruction charge, the Board highlighted the contractual nature of INT's audit and inspection rights, distinguishing between the Bank's administrative proceedings and external criminal proceedings.

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