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 Bank[1] 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

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[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]

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[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

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

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

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

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,

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

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

awarded a Bank-financed contract either for a

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

Suspicions 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 Sa

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

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[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, th

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

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.

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

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

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

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[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 acco

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

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 Ledatil1.()3.1(ue7 0 6)]TJ-.4747

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.

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[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

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

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

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 respon

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 achie

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

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(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

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.

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 is it 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 procee

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

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.

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[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 relevanc

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

- 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 bidd

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

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.

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]

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[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

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

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

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 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.

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

(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

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

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

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[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 valuent by eu.810019 Te strong dislliкT216 202.docrimin

in Section L, the imposition of debarment or another sanction by the Sanctions

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

and acknowledge at least some degree of responsibility for the matter disclosed. The

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

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 th

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,

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 deci

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

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

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.