World Bank Group investigations: a Chinese perspective

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Practice notes | **Maintained** | China

This note provides a detailed analysis of World Bank Group (WBG) investigative measures and the sanctions process. It analyses the sanctions framework and the key actors responsible for implementing it. The note explores how sanctions investigations are conducted with a particular focus on the process as applied in China (PRC) and addresses parties' options in response to an enforcement action, including challenging the allegations through the WBG's quasi-judicial sanctions procedures. The note also provides guidance on what PRC entities should consider when confronted with the challenges of the WBG sanctions system.

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Scope of this note

The *World Bank Group* (WBG, or the Bank) has raised the profile of its sanctions system in recent years as multilateral development banks (MDBs) have placed a greater priority on combatting fraud and corruption. The WBG relies on its sanctions system to fulfil its fiduciary duties under the Bank's Articles of Agreement, and to ensure that WBG funding achieves its intended purpose. The threat of sanctions also deters those who might seek to divert WBG funds towards illicit ends, or otherwise corrupt the integrity of the WBG procurement process. WBG enforcement efforts focus on five sanctionable practices: fraud, corruption, collusion, obstruction, and coercion.

This practice note provides a detailed analysis of WBG investigative measures and the sanctions process. It analyses the sanctions framework and the key actors responsible for implementing it. The note explores how sanctions investigations are conducted with a particular focus on the process as applied in *China* (PRC) and addresses parties' options in response to an enforcement action, including challenging the allegations through the WBG's quasi-judicial sanctions procedures. The note also provides guidance on what PRC entities should consider when confronted with the challenges of the WBG sanctions system.

WBG investigations: overview

The WBG established its first sanctions framework in 1998 to review and address allegations of sanctionable practices in WBG-financed projects. In 2001, the WBG introduced the Department of Institutional Integrity, later re-named the Integrity Vice Presidency, as its investigative arm. As a quasi-judicial, two-tiered administrative system, the WBG's sanctions system is neither bound by nor does it displace criminal, civil, or administrative measures available to national authorities. The independent administrative tribunal for the sanctions system, that is, the Sanctions Board, has consistently held that sanctions cases are governed exclusively by WBG rules and procedures, not by the law of a particular jurisdiction. Conversely, the WBG often refers cases of misconduct to relevant national authorities so that they may, at their discretion, undertake independent investigations.

The WBG sanctions system aims to discourage violations of the WBG's governance and anti-corruption measures, and at the same time employ the system to incentivize prevention, remediation, and rehabilitation. These goals are consistent with the limited jurisdiction of the WBG, as it focuses only on violations of specific WBG guidelines in connection with WBG-financed projects. For example, the WBG Procurement and Consultant Guidelines cover the obligations of bidders, suppliers, contractors and their agents, subcontractors, sub-consultants, service providers or

suppliers and any of their personnel. Jurisdiction is also provided for under the WBG Anti-Corruption Guidelines, which extend to any loan recipient other than a member country and its representatives. This broad category includes end-users of the loan proceeds as well as fiscal agents and persons or entities that influence decisions regarding the use of Bank funds. It is important to note, however, that the carve out for member countries includes governments and government officials at all levels. Nevertheless, this exemption is only made for official action. If a government official engages in one or more of the sanctionable practices in their private capacity, the official is not exempt from sanction.

The WBG can respond to sanctionable conduct in a variety of ways (see *World bank sanctions investigations*), but since 2010 the Bank has set "debarment with conditional release" as its benchmark sanction. "Debarment" prohibits sanctioned companies and individuals from engaging in WBG-financed projects, typically for three years, though the duration varies based on aggravating and mitigating factors. "Conditional release" sets out certain requirements such as implementing a strong compliance program, engaging an independent monitor, or even conducting an independent internal investigation, with the expectation that the debarment will be lifted if the company successfully completes the prescribed requirements. The imposed conditions of release are generally meant to encourage the adoption of company protocols and practices aligned with the WBG's Integrity Compliance Guidelines.

Since 1999, the WBG has sanctioned more than 900 companies and individuals. The scope of these sanctions can also have a wider implications on a company's business, and often include subsidiaries unless the respondent can show that the application of sanctions to the affiliate would be disproportionate and not reasonably necessary to avoid circumvention of the sanctions. The pace of enforcement has risen overall, with a new focus on China. In fiscal year 2010, the WBG sanctioned a total of 45 companies and individuals, and not a single one was a PRC-based company or a PRC national. In contrast, in fiscal year 2019, the WBG sanctioned a total of 53 companies and individuals, and 17 (32.1%) were Chinese entities. 15 of the 17 sanctioned entities were debarred (two received a lesser sanction without debarment), including 12 PRC *state-owned enterprises* (SOEs), mostly in the construction, engineering, communications, and energy sectors. Of the 17 sanctioned entities, nine were sanctioned pursuant to settlement agreements between the WBG and the entity, three were sanctioned pursuant to Sanctions Board decisions following appeal, and five were sanctioned by default because the entity chose not to present any defence to the WBG allegations.

When looking at these 17 entities, there is a clear pattern of how sanctions are applied. Nearly all nine of those entities that entered into a settlement agreement received reduced sanction periods and mitigation credit due to co-operation and remedial efforts, with some receiving as little as a 15-month debarment period. The remaining eight entities that either refused co-operation or were sanctioned by default received debarment periods averaging three years, nearly double the time of those entities who developed a response strategy to proactively address WBG investigation issues. This demonstrates that implementing comprehensive efforts to address a WBG investigation can result in reduced sanctions and major benefits to the entity.

Given this changing environment, it is crucial for PRC entities and their counsel to understand the WBG's sanctions system.

World Bank sanctions framework and implementation

To implement its anticorruption policies in Bank-financed projects, the WBG constructed a quasi-judicial framework. The below policies, directives, procedures, and guidance make up the WBG's quasi-judicial sanctions system and provide the framework in which the Integrity Vice Presidency, the Office of Suspension and Debarment, and the Sanctions Board operate.

- **WBG Policy: Sanctions for Fraud and Corruption.** This:
  - mandates an administrative system for adjudicating allegations of fraud and corruption in connection with WBG financing or guarantee operations and imposing sanctions; and
  - identifies practices subject to sanction and possible forms of sanctions.

- **WBG Policy: Sanctions Board Statute.** This sets out the role, composition, competence and responsibilities of the Sanctions Board.
- **WBG Directive: Sanctions for Fraud and Corruption in Bank Financed Projects.** This:
  - sets out the institutional and normative architecture of the sanctions system;
  - determines the jurisdiction of the sanctions system; and
  - provides directions on the application of sanctions.

- **WBG Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects (Sanctions Procedures).** This sets out the procedures to be followed in the two-tiered adjudicative process by which the WBG determines whether to sanction parties alleged to have engaged in a sanctionable practice in connection with a bank-financed project.
- **WBG Guidance: Sanctions for Fraud and Corruption in Bank Financed Projects (Sanctioning Guidelines).** This provides guidance on the range of sanctions possible, along with guidelines for the impact of aggravating and mitigating factors on the length of sanction.

Integrity Vice Presidency (INT)

The Integrity Vice Presidency serves as an independent unit within the WBG, investigating allegations of sanctionable practices in bank-financed projects, including alleged fraud and corruption by WBG staff and corporate vendors. INT's investigative findings provide the factual basis for WBG sanctions proceedings, which are initiated if INT uncovers evidence to adequately support a finding that it is more likely than not that an entity engaged in sanctionable conduct. In addition to initiating and participating in sanctions proceedings, INT also has the authority to negotiate and, where appropriate, enter into settlement agreements with respondents. When conditions of release are imposed as part of a sanctions penalty, INT assigns an integrity compliance officer (ICO) to evaluate the respondent's efforts to meet the conditions, for example, by adopting an integrity compliance program (ICP) and monitoring its implementation.

In 2019, INT had a 77-member team consisting of investigators, lawyers, forensic accountants, economists, risk specialists, data scientists, and information system specialists. During that same year, INT received 2,461 complaints, 80% of which received no further action. 384 of these complaints resulted in a preliminary investigation, and of those only 49 resulted in new investigations.

Office of Suspension and Debarment (OSD)

The Office of Suspension and Debarment is the first tier of the WBG's two-tiered adjudicative system. When INT presents the results of an investigation, OSD assigns the case to a suspension and debarment officer (SDO) who conducts an initial review of the evidence and evaluates the merits of the allegations brought by INT to determine

whether there is sufficient evidence that a respondent engaged in one or more of the sanctionable practices. If the SDO determines that sanctionable practices occurred, they will recommend an appropriate sanction against the respondent based on the Sanctioning Guidelines.

OSD is also responsible for:

- Issuing the Notice of Sanctions Proceedings.
- Temporarily suspending respondents' eligibility to be awarded WBG-financed contracts.
- Reviewing settlement agreements negotiated between INT and the respondent.
- Imposing the SDO's recommended sanction on respondents that do not appeal to the Sanctions Board.

In 2019, OSD consisted of the Chief Suspension and Debarment Officer, who was supported by three staff attorneys, a legal assistant, a program assistant, and interns.

Sanctions Board

The Sanctions Board functions as the second and final tier of the WBG's adjudicative system. If a respondent appeals the sanctions decision made by OSD or contests the allegations made by INT, the case is brought before the Sanctions Board. The Sanctions Board's primary responsibilities are to review and make decisions in sanctions appeals cases by a majority vote from the seven members hearing a case. Importantly for respondents, the Sanctions Board reviews each case *de novo*, meaning that prior decisions from other WBG sanctions system bodies do not impact their decisions. They also conduct a more expansive review of the record than OSD, allowing parties to bring at least one further round of pleadings with additional arguments and new evidence. Once the Sanctions Board reaches a decision, however, the decision is final and accompanied by a statement of reasoning for the basis of the decision. Sanctions Board decisions cannot be appealed.

The Sanctions Board is comprised of seven members, all of whom are external to the WBG. Three of the members are appointed by the WBG's Board of Executive Directors. These members must have specialised knowledge of procurement matters, law, dispute resolution, or operations of development institutions. Additionally, two are appointed for each of the *International Finance Corporation* (IFC) and *Multilateral Investment Guarantee Agency* (MIGA) (both members of the WBG) by the Executive Directors. These members must have an understanding of private sector cross-border lending and equity investments for IFC projects and non-commercial guarantee operations for MIGA projects. Each member serves a single non-renewable term of up to six years and is selected based on their professional expertise and independence. As of 2019, the board consists of members from South Africa, Switzerland, Argentina/Spain, Nigeria/United Kingdom, Singapore, the United States, and Chile/United States.

World bank sanctions investigations

Investigation by INT

The path to any sanctions proceeding typically begins with an investigation conducted by INT into an alleged sanctionable practice. INT investigates all credible leads related to violations within WBG-financed projects. Investigations are frequently initiated based on complaints from contractors or other bidders, concerned individuals, government officials, employees of non-governmental organisations, and other MDBs with knowledge of the project

and the alleged sanctionable practices. As a first step, INT will conduct a preliminary analysis of the information provided based on the seriousness of the allegations, the potential development impact of the alleged misconduct, the credibility of the complainant, the availability of corroborating evidence, the amount of project and contract funds involved, and other factors. If the allegations appear plausible and the prudential factors weigh in favour of further examination, INT will initiate a full investigation.

INT conducts a full investigation into the facts to determine if the entity has engaged in one or more of the five sanctionable practices. INT collects all available evidence, including exculpatory or mitigating evidence, as a part of the investigative process. If INT finds that the facts uncovered during the full investigation support a conclusion that it is "more likely than not" that the entity under investigation engaged in sanctionable practices, INT will deem its investigation substantiated. While INT aims to conclude each investigation within 12 to 18 months, in fiscal year 2019, 13% of WBG investigations exceeded the 18-month timeframe.

During the course on an investigation, INT employs a variety of means to develop evidence. Their investigative techniques include:

- Reviewing relevant WBG procurement, bid, and project documents.
- Auditing the target and other related third parties.
- Conducting site visit interviews with witnesses including company employees, third party contractors, government officials with knowledge of the project, and issuers of supporting documentation.
- Reviewing additional documents provided by the target.
- Gathering information and statements provided by the target's responses to the show cause letter.

At the centre is the responsibility of most parties involved in a WBG-funded project to maintain and produce on demand all related records, documents and communications. INT employs its agents to interview witnesses and review written records as it works to accumulate evidence sufficient to meet its burden of showing that it is more likely than not that a sanctionable practice occurred.

Voluntary disclosure program

While an investigation by INT can be very disruptive to business, there are proactive options for those who are aware of possible misconduct within their company. In 2006, the WBG launched its voluntary disclosure program (VDP) as a tool to combat corruption and fraud in Bank-financed projects.

This program bears some similarity to the US *Department of Justice* voluntary self-disclosure pilot program related to *Foreign Corrupt Practices Act* violations. The VDP allows entities that have engaged in sanctionable practices but who are not currently under investigation to reduce their sanctions exposer and limit public disclosure of the misconduct if the entity voluntarily discloses the misconduct as well as all known prior wrongdoing to the WBG. In addition, the entity must satisfy the WBG's standardised, non-negotiable terms and conditions.

Generally, to meet VDP standards, entities must:

- Fully disclose all past misconduct in Bank-financed projects and contracts.
- Implement an integrity compliance program.

- Pay the bulk of the costs associated with VDP participation.

Entities considering participating in this program should weigh the potential benefits of reducing the sanctions imposed, but must also note that if the entity breaches its VDP obligations, INT will impose a ten-year mandatory debarment. For some companies, in certain circumstances, the VDP program can provide an attractive option to avoid possible WBG investigations and mitigate the full cost of a sanctions proceeding and the length of the resulting debarment period.

Aggravating and mitigating factors

During the course of an INT investigation, there are certain findings and concurrent actions an entity may take that could increase or decrease the severity of sanctions against them.

Under the Sanctioning Guidelines, findings of severe misconduct (including repeated pattern of misconduct, use of sophisticated means in conducting a sanctionable practice, and the role of senior management or leadership personnel involved in the misconduct), degree of harm caused by the misconduct, impeding or attempting to impede an INT investigation, and a past history of misconduct can all be considered aggravating factors that will increase the severity of a sanction. Findings demonstrating the entity's minor role in the misconduct, evidence indicating that the entity took voluntary corrective action, and co-operation and INT's investigation can have the opposite effect, and can result in the reduction of potential sanctions. The Sanctioning Guidelines combined with the VDP all demonstrate that an entity's actions and strategy regarding an INT investigation can play a critical role, and that, to some extent, the entity may be able to exert some control on the outcome.

Show cause letters

During an investigation, INT may send the company under investigation a show cause letter, asking the respondent to review INT's findings and make a case for why disciplinary action should not be taken. The show cause letter may not necessarily be detailed, which often makes it quite difficult for a company to determine the exact points at issue. It may be followed by further requests, for example, asking for additional information to corroborate or disprove any defences the target company may have presented to INT. Responding to show cause letters can be particularly risky, especially without proper counsel. INT may deem inaccurate responses to be deceptive or misleading, and that can be the basis for a separate sanctionable conduct finding, compounding the problems for the company and resulting in additional penalties including a longer period of debarment.

Of course, as with any investigation into fraud and misconduct, INT is focused on knowledge and intent. Was the alleged misconduct a corporate misstep, or was it intentionally done, and perhaps directed by company management? Was it a one-time infraction, or was the misconduct tantamount to company policy? Even where INT determines a sanctionable practice occurred, evidence that the company did all it could to prevent it in the first place can be a helpful mitigating factor. PRC companies contemplating WBG-funded projects should take necessary precautions to avoid running afoul of WBG requirements. As a first step, companies should review the WBG Integrity Compliance Guidelines, which provide practical guidance to companies on internationally recognized standards in corporate ethics and compliance. Implementing compliance policies and procedures that reflect the guidelines' principles in order to deter, prevent and identify sanctionable practices and properly respond to violations not only helps avoid an encounter with INT in the first place, but also can lighten the sanction imposed when INT establishes that a violation occurred, making it much less likely to find that the company acted knowingly or recklessly.

Finally, it is important to note that WBG oversight reaches all phases of a World Bank project, ranging from bidding to final invoicing for payment. Many recent enforcement actions by INT have focused on companies that fraudulently inflate past qualifying experience in an effort to present a more competitive bid. Companies that have quality control

measures designed to flag inaccurate or misleading information that might otherwise be included in bidding or tender documents have a lower risk of making this kind of mistake, and are also in a better position to argue to INT that such an infraction occurred in spite of such control measures. A company that lacks such protocols is in a much more precarious situation. The same principles apply to other indicators of a company's efforts to prevent sanctionable practices, including proper due diligence on suppliers and third-party contractors, maintenance of high training standards in compliance and ethics, and generally ensuring that the company maintains a culture of compliance from the top leadership down.

Notice of temporary suspension

At any point prior to the completion of an investigation, INT may determine that it has developed sufficient evidence to support a finding that a sanctionable practice occurred. Once it has made this determination, INT may choose to issue a Notice of Temporary Suspension (Notice) after review and approval by an SDO.

The Notice of Temporary Suspension is an interim measure that has the same effect as debarment although it is more limited in scope and is governed by a procedure distinct from actual debarment. Importantly, the temporary suspension can only last six months following the receipt of the first Notice. Within 30 days of delivery of the Notice, the respondent may explain in writing why it believes the Notice should be withdrawn. This is called the respondent's Preliminary Explanation, and a company may present helpful facts or broader context that challenge the findings of INT at that stage. As with any response to a show cause letter, a company must carefully consider its approach to a Notice, as any response will be incorporated into the record and can set the foundation for future defences in a sanctions proceeding. A company must also be cautious that its statements are accurate and that they cannot be characterised as misleading by INT.

Within 30 days of receipt of respondent's Preliminary Explanation, the SDO may decide to withdraw the Notice. If the SDO decides not to withdraw the Notice and the respondent completes the initial six-month suspension, INT can then request that the SDO make one of the following decisions:

- Extending the suspension for a period no longer than six months in order to further the ongoing investigation.
- Submitting a Statement of Accusations and Evidence (SAE) to the SDO and automatically extending the temporary suspension pending final outcome of the sanctions proceedings.
- Allowing the suspension to expire.

If the SDO decides to extend the suspension, it must submit a description of progress on the investigation, a list of evidence that remains to be gathered, a good faith estimate of time required to complete the investigation, and a representation that the investigation is still ongoing and being pursued with due diligence and dispatch. The SDO must inform the respondent of the decision to extend suspension no later than the last day of the initial period of suspension. If INT finalizes and submits the SAE, then an extension of suspension pending final outcome of sanctions proceedings will automatically occur as the submission of the SAE triggers formal sanctions proceedings.

Statement of accusations and evidence (SAE)

Once INT has completed its investigation and gathered sufficient evidence, it initiates sanctions proceedings by preparing an SAE and submitting it to the SDO. The SAE is required to include:

- INT's specific accusations of sanctionable practices.

- INT's designation of each respondent alleged to have engaged in such practices, as well as each affiliate proposed to be sanctioned.
- INT's summary of the facts constituting sanctionable practices and the grounds for sanctioning any designated affiliates; and
- The evidence in support of its accusations, together with any exculpatory or mitigating evidence.

In order to determine whether the SAE contains sufficient evidence to administer sanctions, the SAE undergoes two rounds of review involving the SDO and the Sanctions Board. First, the SDO reviews the case materials brought by INT to see if the SAE contains sufficient evidence in its accusations. After a company receives the SAE, it is advisable that the company seeks counsel to review and help formulate potential defences and a response strategy.

Chinese legal issues impacting World Bank investigations

In addition to the above points, there are a number of important Chinese legal issues that have a direct impact on WBG investigations in China.

Authority of the WBG to conduct investigations in China

China initially joined the WBG in December 1945 when the WBG recognised it as the Republic of China. The PRC formally replaced the Republic of China as a WBG member in 1980 when it acquired formal member state status. All WBG member states consent to the compliance requirements and investigative authority of INT as a condition of its membership. It is this consent that provides the WBG its authority to exercise jurisdiction over and investigate Chinese and China-based entities engaged in WBG-funded projects, as well as the authority to conduct investigation activities in China or in conjunction with Chinese authorities.

Entities that participate in WBG-funded projects are also subject to the jurisdiction of the WBG sanctions system because they are parties to contractual agreements (that is, bidding documents and contracts) that incorporate the Anti-Corruption Guidelines, Procurement Guidelines, or Consultant Guidelines. These agreements serve to define sanctionable practices and enumerate the obligations of parties utilising WBG funds. Because these guidelines give the WBG the power to investigate and sanction parties participating in WBG-funded projects, companies should understand the procedures and formulate plans to respond to possible WBG investigations. However, the WBG's ability to exert jurisdiction and conduct investigations may be required to be implemented in compliance with, and may even be limited by, local Chinese laws and regulations.

Impact of Chinese state secrets law

Under PRC law, state secrets are generally defined as matters that have a vital bearing on national security and national interests, and are known by designated people for a stipulated period of time (*Article 2, Guarding State Secrets Law 2010* (2010 State Secrets Law)).

The 2010 State Secrets Law provides the general scope of China's state secrets regime, which broadly stipulates that information should be considered a state secret if the divulgence of such information is likely to prejudice national security and national interests in fields such as political affairs, the economy, national defence, or foreign affairs (*Article 9*). Due to the broad definitions of state secrets, it can often be difficult to identify information that constitutes state secrets. Some information may be clearly labelled as such, while other information may be unlabelled but still fall under the 2010 State Secrets Law. In some instances, information can even be retroactively

classified as a state secret under the current regime even if it was not labelled as such at the time of disclosure. China's 2010 State Secrets Law, *Rules for Implementing the Guarding State Secrets Law 2014*, *Criminal Law 1997* (last revised in 2017), and other laws and regulations also provide additional substantive and procedural requirement for the protection and possession of state secrets. For more information on this regime, see *Practice note, State secrets, trade secrets and confidentiality: China: What is a state secret?*.

Chinese state-owned and private enterprises that bid on WBG contracts often operate in industries that the Chinese government considers vital to China's national interests and security, including transportation, construction, telecommunications, energy, finance, and technology. Given the role that PRC companies play in executing WBG-funded projects, it is likely that information obtained as part of a WBG investigation involving a Chinese party may implicate information China considers vital to its national security and national interests. It is important to be aware of the fact that there may be internal information and commercial activities being investigated by INT that could involve Chinese state secrets.

According to China's 1997 Criminal Law, any person who unlawfully or negligently divulges state secrets or provides state secrets to a party outside the territory of China can be sentenced to life imprisonment (*Article 111*), or even the death penalty if the case is very serious (*Article 113*). Because of the seriousness of the punishments, the vague definitions of state secrets in the 2010 State Secrets Law, and the difficulty of handling such information with respect to providing it to non-Chinese organisations like the WBG, both foreign and domestic entities based in the PRC face serious challenges in terms of co-operating with INT investigations and document requests if it could require the entity to provide information that could be considered a state secret.

Further complicating matters is the concept of sensitive information. Sensitive information is information that is considered confidential but does not constitute a state secret, and where the Chinese government may have an interest in whether such information is disclosed to non-Chinese entities, particularly foreign governments or international bodies. Sensitive information is not explicitly regulated in the same manner as state secrets (that is, no laws or regulations specifically govern sensitive information), but disclosure to the public or any third parties without proactive interaction with the Chinese government may result in negative consequences for the disclosing party, particularly where such disclosure may embarrass or create a political, economic, security, or other scandal for the Chinese government. Unlike state secrets, there is no explicit definition of sensitive information, although it generally follows the definition of a "state secret" under the law itself, and the nature and consequences of disclosing such information may vary based on the timing of the disclosure and the parties receiving the information. Depending on the discretion of the Chinese enforcement body, certain information can be concurrently or retroactively identified as "sensitive", and could therefore be subject to the laws and regulations regarding state secrets. Unfortunately, this issue is not necessarily something that is described in detail in law, but is rather something that entities located in China need to consider in practice.

PRC laws, policies, and the unique features of China's state secrets regime create a number of legal and practical risks where information or documents related to China are disclosed to foreign governments or organisations without the Chinese government's knowledge. This of course would extend to similar circumstances for WBG investigations. Therefore, before a PRC-based entity provides information to INT investigators as part of a WBG investigation, it is advisable to engage in strategic planning and develop detailed protocols governing the disclosure of information to investigators.

Impact of Chinese data privacy law

Over the past three years, China has developed a legal regime regulating data transfers, storage, and privacy protection for Chinese individuals and data located and stored in mainland China. The key law acting as the foundation for this framework is China's *Cybersecurity Law 2016* (2016 CSL, with effect from 1 June 2017). It

prescribes various requirements for the collection, storage, protection, and transfer of data and personal information for individuals in the PRC. For more information, see *Legal update, China passes Cybersecurity Law*.

These laws create similar legal and practical risks as state secret issues, and can extend to WBG investigations. WBG investigations may require the provision of certain data or information that could be regulated under the 2016 CSL or other regulations. Providing investigators with such information and particularly the cross-border transfer of this information to investigators or entities outside of China could trigger these laws and result in potential liability. Therefore, before a PRC-based entity provides information to INT investigators as part of a WBG investigation, it would be advisable to engage in strategic planning, detailed reviews, and consultation on how to handle the production of evidentiary material that may include protected data or personal information.

Impact of Chinese criminal judicial assistance law

On 26 October 2018, China's *National People's Congress* (NPC) promulgated the *International Criminal Judicial Assistance Law* (2018 ICJA Law), with immediate effect. The 2018 ICJA Law governs all requests for criminal judicial assistance in international criminal investigations and proceedings, including requests to serve documents, collect evidence, conduct investigatory actions, compel testimony, seize or freeze assets, and transfer convicted persons (*Article 2*). Furthermore, Article 4 of the 2018 ICJA Law serves as a "blocking statute" for criminal investigations in China by requiring both domestic and foreign institutions, organisations, and individuals (including the PRC-based subsidiaries of non-Chinese companies) within the territory of the PRC to obtain permission from the competent Chinese authorities before executing such requests. This is important to consider for companies under investigation, but is equally important for entities weighing the possibility of participating in the WBG's VDP. For more information, see *Article, China's international criminal judicial assistance law and the impact on MNC internal investigations*.

The ICJA Law applies only to requests for assistance related to criminal investigations conducted by foreign governments. Thus, the terms of the law presumably do not extend to requests related to WBG investigations. However, many investigations, including WBG and internal corporate investigations, may evolve into a criminal matter. Therefore, companies operating in China should carefully assess these implications prior to transferring evidence offshore as part of a WBG request.

Impact of Chinese labour law

China's labour laws are among the most stringent in existence and impose a highly demanding standard of proof. Hence, a company may devote significant resources to completing an investigation and arrive at robust remediation decisions, only to encounter substantial pushback from its own human resources department or Chinese labour law attorneys before being able implement those decisions. This can include attempting to implement disciplinary measures, issuing warning or admonishment notices, or even terminating employees. As an ironic consequence, companies could also be exposed to investigation and even legal penalties for not implementing these decisions in a timely manner, despite labour law hurdles and disputes raised by outside counsel.

The above issues could potentially impact a WBG investigation in the following ways:

- Cases that arise from a disgruntled employee may heighten the risk of a potential whistleblower situation whereby the employee threatens to or actually discloses damaging information about the company. This could initiate a WBG investigation, or create additional exposure to a company already under investigation.

- Non-implementation of certain remedial measures, recommendations from INT or the SDO, compliance programs, or even termination of employees due to China's strict labour laws could create complications for a company trying to comply with its obligations under a WBG investigation or period of debarment.
- When designing WBG-mandated ICPs, Chinese labour laws must also be taken into account in order to ensure that the company maintains its compliance with both WBG and local legal requirements.

Impact of Chinese law on whistleblowers, VDP, and mitigating factors

The above-mentioned laws create additional hurdles for whistleblowers and entities located in the PRC looking to take advantage of the VDP and mitigating factors involving voluntary disclosure. PRC employment laws create a framework for the protection of whistleblowers with directives about how an entity may treat a whistleblower following disclosure, placing restrictions on retaliation, and prescribing methods of dispute resolution. For more information on China's regime governing whistleblowers, see *Practice note, Whistleblower protection: China*.

Additionally, for those entities looking to take advantage of the VDP or to otherwise secure mitigation credit for co-operating with or assisting in a WBG investigation or proceeding, the *2010 State Secrets Law* and the *2018 ICJA Law* must be considered. Information provided to fulfil conditions of the VDP or as part of a cooperation effort should be screened for state secret and sensitive information. Additionally, because the WBG allows mechanisms for criminal referrals to member countries with respect to identified misconduct, entities must consider the possible application of the of judicial assistance laws and regulations, particularly regarding the method and scope of cooperation and how, when, and to whom reports and information from internal investigations and any underlying evidence in the PRC are produced in order to obtain VDP credit or mitigation. These issues require careful planning and strategy from local Chinese counsel, the company involved, and any other party engaged with the WBG on behalf of the entity under investigation.

Challenges facing WBG-assigned outside investigators

The WBG has followed a trend in international compliance work by increasingly requiring companies to retain an independent investigator to conduct a review of a subset of past, present or contemplated WBG projects in which the debarred entity was involved. For outside counsel taking this role, Chinese law can pose a unique challenge. Since these third parties are conducting investigations on behalf of the WBG in China, they are often restrained by the same laws discussed above. See also *Appointment of independent integrity compliance monitor/investigator*.

World Bank sanctions proceedings

Notice of Sanctions Proceedings

If the SDO deems the accusations are supported and the respondent has not reached a settlement with INT, the SDO issues a Notice of Sanctions Proceedings to the respondent and recommends appropriate sanctions. Pursuant to Sanctions Procedures Section 4, the Notice of Sanctions Proceedings must

- Set forth the recommended sanctions.
- Inform the respondent of its temporary suspension and the manner in which the respondent may provide an explanation (if applicable).

- Inform the respondent of how it may contest the accusations.
- Append a copy of the SAE provided by INT.

This marks a crucial decision point for a respondent, as 90-day time clock begins ticking as soon as the respondent receives the Notice. A respondent must decide whether to contest the sanctions proceedings via submission of a written explanation to the SDO, arguing for withdrawal or revision of the recommended sanctions and attaching credible evidence in support. If no explanation is submitted within 90 days, the recommended sanctions are automatically implemented.

After the SDO reviews the explanation, four possible outcomes can occur:

- **Impose initial notice.** If the SDO reviews the explanation and determines that nothing in it changes their original view, the proceedings continue under the initial notice.
- **Withdrawal of notice.** If there is a manifest error or clearly insufficient evidence to support the claims, the notice may be withdrawn.
- **Revision of notice.** If the response provides new evidence or arguments as to mitigation factors, the notice may be revised.
- **Resubmission of notice.** If INT withdraws a notice, it may submit a revised SAE on the basis of additional information not contained in the original notice.

In fiscal year 2019, five Chinese entities decided not to contest a received notice and the SDO entered default judgments, constituting the full sanction recommended in the notice. If the respondent provides an explanation, but disputes the SDO's decision following review, the challenge then moves to the second-tier, and the respondent can contest the Notice of Sanctions Proceedings and the SDO decision before the Sanctions Board (discussed below), which will give the case *de novo* consideration and make a final determination.

The rapid pace of WBG sanctions proceedings often hampers effective responses by PRC SOEs, private companies, and individuals (and any other entity operating in China and involved in WBG-funded projects). Published statistics make clear that companies in receipt of a Notice of Sanctions Proceedings can benefit from a well-planned defence strategy and a robust response at an early stage, challenging the allegations in part or in whole.

However, in the past year, one out of three debarred PRC entities appear to have presented no defence at all, instead simply accepting the full scope of the sanctions terms set forth by the WBG in the notice. The pressure of a strongly mounted defence might well have changed those outcomes. A quick and effective defence response, along with supporting evidence, often drives settlements with the WBG on terms that are significantly more favourable that the sanctions presented in the original notice. Companies located or with operations within the PRC involved in WBG-funded projects would be well-served to maintain on-the-shelf rapid-response plans in the event the company receives a WBG notice (or becomes aware of an investigation through other means such as a show cause letter). The plan should be designed to facilitate the quick hiring of counsel, a rapid internal investigation, a plan to seek additional response time from the WBG, and a process for expedient internal approvals to assemble and present favourable evidence and argument to the WBG. A company armed with such plans and represented by capable counsel can mount the most powerful and effective defence possible before INT, the SDO and the Sanctions Board, as described above and below, often leading to a much more favourable outcome.

Challenging the case with the Sanctions Board

Within 90 days after delivery of the Notice of Sanctions Proceedings, the respondent can submit a written response to the accusations submitted by INT and/or the recommended sanction issued by the SDO contained in the notice with written arguments and evidence to the Sanctions Board. While in some circumstances it makes sense to pursue a full defence, in other cases, it may be best for the respondent to admit all or part of the accusations in the notice highlighting mitigating circumstances.

Within 30 days after the Sanctions Board delivers the written response from the respondent to INT, INT will submit a written reply to the response to the Sanctions Board. During this time, the Sanctions Board will also consider other materials such as additional motions, evidentiary submissions, and oral arguments made at a hearing, which is conducted if requested by the respondent in its response, by INT in its reply, or otherwise deemed necessary by the Sanctions Board. During a hearing, each side will be given a chance to present their case to the Sanctions Board with INT presenting its case first, followed by the respondent. INT is permitted to reply to respondent's case if it so chooses.

Sanctions Board hearings differ from most standard court proceedings in several ways. In terms of evidence, the Sanctions Board does not allow live witness testimony and no cross-examination of the other side's evidence is allowed, though rebuttal evidence may be presented. In general, formal rules of evidence do not apply and the respondent has no right to discovery from INT. However, it is important to note that the WBG does honour the basic contours of attorney-client privilege.

Sanctions Board rulings

Upon reviewing the case record, the Sanctions Board will render a decision. If it determines that the evidence does not support a finding that it is more likely than not that the respondent engaged in sanctionable practices, the proceeding will be terminated. If it determines that the evidence shows it is more likely than not that the respondent engaged in sanctionable practices, the Sanctions Board will impose an appropriate sanction, which can fall along a spectrum reflecting the seriousness of the violation. These include:

- **Reprimand.** The sanctioned party is reprimanded in the form of a formal Letter of Reprimand of the sanctioned party's conduct.
- **Conditional non-Debarment.** The sanctioned party is required to comply with certain remedial, preventative or other conditions as a condition to avoid debarment from WBG projects. Conditions may include verifiable actions taken to improve business governance, including the adoption or improvement and implementation of an integrity compliance program, restitution and/or disciplinary action against or reassignment of employees.
- **Debarment.** The sanctioned party is declared ineligible, either indefinitely or for a stated period of time,
    - to be awarded or otherwise benefit from a Bank-financed contract, financially or in any other manner;
    - to be a nominated sub-contractor, consultant, manufacturer or supplier, or service provider of an otherwise eligible firm being awarded a Bank-financed contract; and
    - to receive the proceeds of any loan made by the Bank or otherwise to participate further in the preparation or implementation of any Bank-financed project.
- **Debarment with conditional release.** The sanctioned party is subject to ineligibility in Bank-financed projects and is released from debarment only if the sanctioned party demonstrates compliance with certain remedial, preventative or other conditions for release, after a minimum period of debarment. Conditions

may include (but are not limited to) verifiable actions taken to improve business governance, including the adoption or improvement and implementation of an integrity compliance program, restitution, and/or disciplinary action against or reassignment of employees.

- **Restitution.** The sanctioned party is required to make restitution (financial or otherwise) to the borrower or to any other party.

A debarred entity is prohibited from bidding on Bank-financed projects, but this does not mean the entity can no longer execute contracts that have already been awarded. It does mean, however, that they can no longer be awarded new projects, even if they have already submitted a bid or if they have been pre-selected.

The Sanctioning Guidelines set the base sanction for all misconduct at three years debarment with conditional release. The goal of this policy is to encourage respondent's to mitigate future risks of misconduct and provide an enforcement mechanism for ensuring that entities respond to WBG concerns. The imposition of a penalty of conditional release means that the sanctioned entity must comply with the conditions set out by OSD and/or the Sanctions Board and met the standards of the ICO.

However, it is important to note that the above listed penalties can also be applied in various combinations to meet the goals of the WBG. For example, a sanctioned entity could go straight to debarment, or it could receive a period of conditional non-debarment with a requirement to pay restitution.

Cross-debarment with other MDBs

Another cost to debarment by the WBG is that the debarment will be extended and enforced by other MDBs through a process known as cross debarment. In addition to the WBG, the following four other MDBs participate in cross-debarment:

- The Asian Development Bank.
- The African Development Bank.
- The European Bank for Reconstruction and Development.
- The Inter-American Development Bank.

In 2010, these MDBs signed the Agreement for Mutual Enforcement of Debarment, whereby the participating MDBs can notify the others of a debarment decision that exceeds one year and the other MDBs will enforce the decision within their own institution.

Debarred entities must be aware that, as a result of the notice of cross-debarment, other MDBs will often initiate audits or close reviews of the debarred entity's past contracts to uncover similar sanctionable conduct. This may spark new investigations that expose the entity to additional proceedings convened by other MDBs, and potentially additional sanctions (which would also have cross-debarment effects, in turn).

Given the compound effects that cross-debarment can have on a business, it is even more crucial for companies under investigation by the WBG, or other MDBs, to promptly contest the accusations in order to avoid debarment, or at least position themselves for a more favourable negotiated settlement. Once an MDB sanction is imposed, the sanctioned company should also be prepared for potential inquiries from other development banks regarding its historical contracts, and prepare for greater scrutiny applied to ongoing MDB contracts, especially as to the type of

conduct underlying the original debarment (for example, misrepresentation of prior qualifications in the bidding process).

Referral of cases to national authorities

Another important risk that debarred entities face is the possibility that the WBG may refer cases resulting in sanctions to relevant national authorities. If INT believes local laws, for example, the anti-corruption laws of a nation in which a WBG project was located, are violated, INT will prepare a referral report to the WBG counterparts located in the relevant jurisdiction. Specifically, these reports recount the allegations investigated by INT, the investigative methodology, the findings of the investigation, as well as any action taken by the WBG.

The WBG will also turn over all evidence from the investigation if they believe it relates to a violation of the laws of the relevant country. While the WBG continues to emphasise the importance of its co-operation with national law enforcement authorities during investigations, they have also noted that the uptake of their referrals have been met with mixed responses. Nevertheless, initiation of an investigation or inquiry by national law enforcement can be a major collateral consequence for respondents under investigation or debarred by the WBG, further compounding the fallout and consequences of a WBG sanctions proceeding.

Potential for settlement

Since 2010, the WBG has allowed parties under investigation to be given the opportunity to resolve a matter through a Negotiated Resolution Agreement (NRA), rather than proceeding through the sanctions system. Generally, INT can raise the possibility of settlement, which is usually done after the issuance of a show cause letter to the entity under investigation.

If INT raises the possibility of settlement at any time during the sanctions proceedings, INT and the respondent may present a request to the SDO for a stay in proceedings in order to conduct settlement negotiations. The stay may be granted for no longer than 60 days, but can be extended by a joint agreement between INT and the respondent with approval from the SDO.

INT is responsible for negotiating and drafting settlement agreements with the respondent, which are reviewed by the WBG General Counsel and approved by OSD. It is the responsibility of the SDO assigned to the settlement to verify that:

- The respondent entered into the agreement voluntarily and fully informed of its terms.
- The terms of the agreement are broadly consistent with the Sanctioning Guidelines.

The ICO will also discuss integrity compliance with parties engaged in settlement negotiations as relevant, thereby helping to fashion appropriate conditions for release from sanction up-front in the process.

Usually, settlements will include the imposition of a sanction along with specific obligations for co-operation, remediation, and the establishment or improvement and implementation of a compliance system. Common terms include an admission of liability, the appointment of an independent monitor and/or investigator, and an obligation to cooperate with the WBG during the period of debarment and possibly during conditional non-debarment. Importantly, companies can often reduce the length of sanctions during the settlement discussions by highlighting mitigating factors (see *Aggravating and mitigating factors*).

In fiscal year 2019, INT entered into 16 settlement agreements. For Chinese respondents, this is the most common method for resolving investigations by the WBG into sanctionable practices. Of the 15 Chinese respondents that were debarred during this time period, nine (or 60%) of them engaged in a negotiated settlement.

One additional consideration that may be important to some respondents is that WBG press releases related to sanctions imposed via settlement agreements usually involve only brief descriptions of the underlying conduct, while sanctions imposed following a default judgment or a ruling by the Sanctions Board involve the public release of the full decision with much greater detail of the underlying conduct.

Based on the data, there appears to be a trend towards negotiated settlements as the preferred method for resolving WBG-related investigation matters. Should an entity seek a settlement as a means of resolving an WBG investigation, a strategy should be put in place as early as possible to maximize the potential for not only obtaining a settlement, but engaging in actions that will allow for better negotiating leverage, including but not limited to actions that can be considered as mitigating factors and avoiding actions that could be considered aggravating factors.

Compliance with conditions for non-debarment and release from debarment

After a decision on sanctions is reached by OSD or the Sanctions Board, or an NRA is negotiated that meets the conditions mentioned above, an ICO will discuss requirements for meeting the conditions of release, including the development of an ICP that meets the WBG requirements with the sanctioned entity.

At this stage, the ICO plays an important role in monitoring compliance with the conditions for release or non-debarment. These often include requirements that the sanctioned entity:

- Develop and adopt an ICP.
- Appoint an independent monitor and/or investigator.
- Periodically report progress by the sanctioned party to the ICO.
- Conduct external audits and inspection of the books and records of the sanctioned party.

Develop and adopt an ICP

As a condition for release from debarment or as a condition for non-debarment, many sanctioned entities are required to develop and adopt an ICP that reflects the principles outlined in the WBG's Integrity Compliance Guidelines. At this stage, many debarred entities choose to retain external counsel to help them develop a Compliance Handbook and build an ICP in line with the Integrity Compliance Guidelines.

Appointment of independent integrity compliance monitor/investigator

In addition to developing and adopting an ICP, the WBG may also require the debarred entity to retain an independent integrity compliance monitor (Monitor) at the respondent's own expense that is acceptable to both the debarred entity and the ICO. The Monitor is required to submit an initial report to the ICO and the debarred entity, including an evaluation of the entity's newly developed and adopted ICP, recommendations for how to further strengthen the ICP, and an evaluation of the effectiveness of the ICP. The Monitor is also responsible for preparing

a number of periodic reports to evaluate the effectiveness of the implementation of the ICP during the period of debarment.

Increasingly the WBG is also adding a provision requiring the debarred entity to hire not only a Monitor, but also an independent investigator to conduct a review of a subset of past, present, and/or contemplated WBG projects involving the debarred entity. The investigator prepares a report of findings of indicators of sanctionable practices in the reviewed WBG projects based on independent audits, document review, interviews, and inspections of books and records. Assignment of an investigator may occur when INT has indications that the sanctionable conduct might have been more widespread, potentially affecting other WBG contracts. In this way, the WBG has used the sanctions process to extend its investigations reach and raise the level of scrutiny placed on a company that has been debarred. If previously undiscovered sanctionable conduct is uncovered during the course of the investigator's work, the WBG can use this evidence to either extend the original period of debarment or initiate a new sanctions proceeding against the company.

Application for removal

No earlier than 120 days prior to the deadline for compliance, the sanctioned party may submit an application setting forth arguments for, and evidence of, its compliance with the requirements set by the ICO. The application should include:

- A detailed report on the sanctioned party’s adoption or improvement of the ICP.
- Details related to remedial actions taken in response to the misconduct for which the sanctioned party was sanctioned.
- Details related to any additional misconduct detected during the period of debarment or conditional non-debarment.
- Details on any debarment of the sanctioned party by another international financial institution.
- Any criminal civil or regulatory conviction or decision based on any corrupt, fraudulent, collusive, coercive, or obstructive practice.

If the sanctioned party fails to submit an application or to fully co-operate with any verification of compliance, the sanctioned party will be deemed to have not complied with the relevant conditions for release. Non-compliance by default is not subject to review.

ICO decision

After reviewing the Application for Removal, the ICO will decide whether or not the sanctioned party has met the conditions for release. The ICO may verify the arguments and evidence in the application and the sanctioned party must fully cooperate, including allowing access to evidence and records. If the ICO determines the sanctioned party is not in compliance, the ICO can extend the period of debarment for no greater than one year, after which the sanctioned entity may re-apply for release as before.

It is possible for the sanctioned party to appeal determinations of non-compliance by the ICO. Within 30 days after the decision of non-compliance is made, the sanctioned entity may request in writing that the Sanctions Board review the decision. This request must include a copy of the application and the ICO decision. It may also include additional evidence and argument to support the appeal.

Within 90 days of receiving the appeal, the Sanctions Board will issue a decision as to whether the ICO commits an abuse of discretion. For the purposes of the WBG's sanctions framework, abuse of discretion is defined as a decision that lacks an observable basis or is otherwise arbitrary, is based on disregard of a material fact or a material mistake of fact, or was taken in material violation of the WBG Sanctions Procedures.

Practical considerations for PRC-based entities

As the World Bank and other MDBs continue to increase their enforcement efforts against entities that engage in sanctionable practices, the consequences can be quite significant. These cases have a major impact on any entity facing investigation, even if the allegations are eventually dismissed and the respondent is removed from debarment. First, there are the costs associated with investigating the alleged misconduct, negotiating settlement, responding through OSD and Sanctions Board procedures, and implementing the reforms necessary to gain release from debarment. In addition, a debarred company must anticipate and perhaps respond to follow-up inquiries from other MDBs (after cross-debarment) or from local national authorities (after a WBG referral). But perhaps more importantly, there are the direct costs of losing out on World Bank (and other MDB) contracts during the period of debarment as well as the indirect reputational costs for being sanctioned by the World Bank. Under these circumstances, it is important for practitioners in China to stay apprised on the trends in World Bank sanctions enforcement and understand how these developments can impact their clients and other entities.

Despite the challenges that INT investigations or WBG debarment can pose to PRC-based entities, the best way to mitigate these risks are to take steps prior to the initiation of an investigation. Key considerations prior to WBG investigation include:

- Consider whether the company should put in place a strict risk assessment and screening system for any WBG-funded related project that would include conducting due diligence or performing an internal audit to ascertain compliance with WBG standards or early detection of the risk or occurrence of a sanctionable practice. This not only reduces the risk of coming under a WBG investigation, but if an investigation is initiated, it could allow the company to obtain voluntary reporting credit.
- Ensure financial record keeping practices are accurate, complete, and truthful. Financial records are generally the first documents requested by any investigating authority. This makes the proper practices surrounding the creation and maintenance of such records critical.
- Properly maintain documents related to the project, including but not limited to contracts, communications, specifications, and technical documents. These should be stored properly, handled by only a select number of authorized individuals involved in the project, preserved for a period of time after the project, and only transferred to other individuals or entities outside of China following a thorough review and obtaining any necessary approvals. This is particularly important for project documents that may purportedly include possible state secrets or sensitive information.

Once a company is notified or made aware of a WBG investigation, the company should consider the following steps to minimize risks and maximize the potential to gain reductions in any potential sanctions:

- Initiate an internal investigation immediately. An internal investigation can help the company evaluate its risk and exposure, preserve and develop facts and information, identify critical evidence and individuals, communicate with third parties, and better prepare the company to engage a proactive strategy in responding to WBG investigations as well as develop a public relations or crisis management strategy.

- Consider possible confidentiality concerns prior to retaining counsel. When engaging a law firm to assist with handling WBG investigations or internal investigations, the company should consider confidentiality and matters involving attorney-client privilege, and how this could affect the investigation.
- Prepare for the inevitability of interview requests during a WBG investigation. Companies should work diligently with outside counsel to properly prepare interviewees requested by the WBG. Interviewees should be accompanied by local PRC licensed attorneys if:
    - the interviewee is a Chinese national;
    - the underlying conduct (in part or in whole) to be discussed occurred in China; or
    - the discussions may involve Chinese state secrets or sensitive information.
- Carefully assess Chinese labour law issues that could relate to the WBG investigation. If a remedial measure as a result of a WBG investigation or SDO recommendation includes employment actions (such as suspension or termination of an employee), a careful assessment of this action should be made with respect to local PRC labour laws, the company's daily operations, risk posed by the employee, or subsequent local government or administrative actions. If an assessment finds potential unintended negative consequences from such a remedial measure, then it would be advisable to seek professional advice from your outside counsel (including your local Chinese legal counsel) on appropriate steps to take with respect to this issue.
- Consider the engagement of outside counsel with expertise in international compliance and investigations to help prepare the company proactively if it will participate in WBG-funded projects.

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