

Date of issuance: March 6, 2015

**Sanctions Board Decision No. 76
(Sanctions Case No. 265)**

**IFC Project No. 26271
Ukraine**

Decision of the World Bank Group¹ Sanctions Board terminating the sanctions proceedings against the three contesting respondents in Sanctions Case No. 265 (the “Respondents”) due to a lack of jurisdiction to review the allegations of sanctionable practices presented.

I. INTRODUCTION

1. The Sanctions Board met in a plenary session on December 3, 2014, at the World Bank Group’s headquarters in Washington, D.C., to review this case. The Sanctions Board was composed of L. Yves Fortier (Chair), Olufunke Adekoya (by videoconference), Georgina E. Baker, Morgan J. Landy, Catherine O’Regan, Denis Robitaille, and J. James Spinner.

2. A hearing was held at the request of one of the respondent entities (the “Respondent Parent Company”) and in accordance with Article VI of the IFC Sanctions Procedures. The World Bank Group’s Integrity Vice Presidency (“INT”) participated in the hearing through its representatives attending in person. The Respondent Parent Company was represented by two of its officers and outside counsel. The contesting individual respondent (an employee of the Respondent Parent Company, hereinafter referred to as the “Respondent Employee”) attended in person and was accompanied by another employee of the Respondent Parent Company. The second respondent entity (a company controlled by the Respondent Parent Company at the time of the alleged misconduct, hereinafter referred to as the “Respondent Subsidiary”) declined to participate in the hearing. The Sanctions Board deliberated and reached its decision based on the written record and the arguments and evidence presented at the hearing. The Sanctions Board does not make any finding in respect of the Respondent Subsidiary’s Assistant General Manager (the “Assistant General Manager”), the fourth respondent in this case, who has not filed an appeal to the Sanctions Board as of the date of this decision.

3. In accordance with Section 8.02(a) of the IFC Sanctions Procedures, the written record for the Sanctions Board’s consideration included the following:

- i. Notice of Sanctions Proceedings issued by the IFC Evaluation and Suspension

¹ In accordance with Section 1.02(a) of the International Finance Corporation (“IFC”) Sanctions Procedures as adopted November 1, 2012 (the “IFC Sanctions Procedures”), the term “World Bank Group” means, collectively, the International Bank for Reconstruction and Development (“IBRD”), the International Development Association (“IDA”), IFC, and the Multilateral Investment Guarantee Agency (“MIGA”), but does not include the International Centre for the Settlement of Investment Disputes (“ICSID”).

Officer (the “IFC EO”) to the Respondents on June 13, 2014 (the “Notice”), appending the Statement of Accusations and Evidence (the “SAE”) presented to the IFC EO by INT, dated December 10, 2013;

- ii. Responses submitted by the Respondent Parent Company, the Respondent Employee, and the Respondent Subsidiary to the Secretary to the Sanctions Board on September 17, September 21, and September 23, 2014, respectively;
- iii. Reply submitted by INT to the Secretary to the Sanctions Board on October 31, 2014 (the “Reply”);
- iv. Supplemental Response submitted by the Respondent Parent Company to the Secretary to the Sanctions Board on November 14, 2014; and
- v. Supplemental Submission submitted by INT to the Secretary to the Sanctions Board on November 14, 2014.

4. Pursuant to Sections 4.01(c), 9.01, and 9.04 of the IFC Sanctions Procedures, the IFC EO recommended debarment with conditional release for each of the Respondents, together with any entity that is an Affiliate² directly or indirectly controlled by any of the Respondents. The IFC EO recommended a minimum period of ineligibility of three (3) years for each of the Respondents, after which period (a) the Respondent Parent Company and the Respondent Subsidiary may each be released from ineligibility only if such entity has, in accordance with Section 9.03 of the IFC Sanctions Procedures, demonstrated to the World Bank Group’s Integrity Compliance Officer that it has (i) taken appropriate remedial measures to address the sanctionable practices for which it has been sanctioned and (ii) adopted and implemented an effective integrity compliance program in a manner satisfactory to IFC; and (b) the Respondent Employee may be released from ineligibility only if he has, in accordance with Section 9.03 of the IFC Sanctions Procedures, demonstrated to the World Bank Group’s Integrity Compliance Officer that (i) he has taken appropriate remedial measures to address the sanctionable practices for which he has been sanctioned, (ii) he has completed training and/or other educational programs that demonstrate a continuing commitment to personal integrity and business ethics, and (iii) any entity that is an Affiliate directly or indirectly controlled by him has adopted and implemented an effective integrity compliance program in a manner satisfactory to IFC.

5. Effective June 13, 2014, pursuant to Section 4.02(a) of the IFC Sanctions Procedures, the IFC EO temporarily suspended the Respondents, together with any entity that is an Affiliate directly or indirectly controlled by any of the Respondents, from eligibility to become an IFC Counterparty³ in any new investment project, advisory service, or other operation of IFC

² The term “Affiliate” means “any legal or natural person that controls, is controlled by, or is under common control with, the Respondent, as determined by IFC.” IFC Sanctions Procedures at Section 1.02(a).

³ The term “IFC Counterparty” means “with respect to IFC Projects that are investment operations, a borrower, investee company or sponsor; and with respect to IFC Projects that are technical assistance and advisory services operations, a consultant or service provider.” IFC Sanctions Procedures at Section 1.02(a).

(collectively referred to as “IFC Projects”). The Notice specified that the temporary suspension would apply across the operations of the World Bank Group.

II. GENERAL BACKGROUND

6. According to INT, the case arises in the context of IFC Project No. 26271 (the “Project”), which was intended to expand a palm oil refinery in Ukraine that had been built with IFC financing (the “Refinery”). At the time of the Project’s preparation in 2008, the owner of the Refinery and beneficiary of IFC’s prospective loan (the “Borrower”) was solely owned by an entity that was a joint venture between the Respondent Parent Company and another company. In May 2008, IFC issued a mandate letter describing “the scope of work that IFC [would] perform relating to the financing of the Project” (the “Mandate Letter”) to the Borrower and its two sponsors, including the Respondent Parent Company. In November 2008, IFC and the Borrower entered into a loan agreement for the Project (the “Loan Agreement”); and in December 2008, the Respondent Parent Company signed a related guarantee agreement with IFC (the “Guarantee Agreement”).

7. In November 2011, local community groups based in Indonesia and civil society organizations filed a complaint with IFC’s Compliance Advisor Ombudsman (the “CAO”) with reference to the Project (the “Complaint”). According to the CAO’s Operational Guidelines included in the record, the office of the CAO was created in 1999 by the World Bank Group as “the independent recourse and accountability mechanism of [IFC] and [MIGA] for environmental and social concerns.” The CAO’s mandate is to “[a]ddress complaints from people affected by IFC/MIGA projects (or projects in which those organizations play a role) in a manner that is fair, objective, and equitable; and [e]nhance the environmental and social outcomes of IFC/MIGA projects (or projects in which those organizations play a role).”

8. According to the Complaint, local community members had suffered human rights abuses and forced evictions in relation to unresolved land disputes in the area of a palm oil concession of the Respondent Subsidiary in Indonesia. The Complaint sought review and resolution of the social and environmental impacts of the Project, which would assertedly double the Borrower’s processing capacity in Ukraine and thereby contribute to an expansion of the activities of the Respondent Parent Company’s wholly-owned subsidiaries in the palm oil sector in Indonesia. Considering the applicable criteria governing the eligibility of complaints to the CAO, including the requirement that the complaint pertain to a project that IFC/MIGA is participating in, or is actively considering, the CAO found the Complaint to be eligible. Following the CAO’s determination of eligibility, the Respondent Subsidiary and the local community groups agreed on the terms of a mediation process, including the composition of a joint mediation team. In the context of the mediation process, the parties discussed that the resolution of one of the land disputes would need to refer to an earlier map of the area (the “Map”), and agreed on the course of action in the event that the Map could not be found. INT alleges that the Respondents engaged in corrupt practices by offering money to the chair of the joint mediation team (the “Mediator”), who had been appointed by the CAO, in exchange for the Map.

III. APPLICABLE STANDARDS OF REVIEW

9. Under the World Bank Group's sanctions framework, the set of procedural rules applicable to sanctions proceedings is determined by the nature of the project involved⁴ and the date of issuance of the relevant Notice of Sanctions Proceedings.⁵ Here, INT asserts that the alleged misconduct related to an IFC project, and the Notice was issued on June 13, 2014. Accordingly, INT's allegations against the Respondents are governed by the procedural rules set out in the IFC Sanctions Procedures as adopted November 1, 2012.

10. In any contested case governed by the IFC Sanctions Procedures, the Sanctions Board determines, pursuant to Section 8.02(b)(i) of the IFC Sanctions Procedures, whether the evidence presented by INT, as contested by a respondent, supports the conclusion that it is "more likely than not" that the respondent engaged in a sanctionable practice. Section 8.02(b)(i) defines "more likely than not" to mean that, upon consideration of all the relevant evidence, a preponderance of the evidence supports a finding that the respondent engaged in a sanctionable practice. As set forth in Section 7.01 of the IFC Sanctions Procedures, formal rules of evidence do not apply; and the Sanctions Board has discretion to determine the relevance, materiality, weight, and sufficiency of all evidence offered.

11. Under Section 8.02(b)(ii) of the IFC Sanctions Procedures, INT bears the initial burden of proof to present evidence sufficient to establish that it is more likely than not that a respondent engaged in a sanctionable practice in an IFC Project. Upon such a showing by INT, the burden of proof shifts to the respondent to demonstrate that it is more likely than not that the respondent's conduct did not amount to a sanctionable practice.

12. For cases arising in the context of projects financed by IBRD or IDA (collectively referred to as the "World Bank"), the applicable definitions of sanctionable practices would be provided by the World Bank's Procurement, Consultant, or Anti-Corruption Guidelines that are specified in the relevant financing agreement as governing the project, or that are referenced in subsequent agreements between the borrowing country and a respondent.⁶ For purposes of the present IFC matter, it may be noted that the Guarantee Agreement signed by the Respondent Parent Company does not use or define the term "corrupt practice." The Loan Agreement between IFC and the Borrower defines the term "corrupt practice" as "the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party," consistent with the IFC Anti-Corruption Guidelines attached to the SAE. The Mandate Letter, which as noted above was addressed to the Respondent Parent Company as well as to the Borrower and the Borrower's second sponsor, does not include a definition of "corrupt practice" but refers to "IFC's procedures for addressing allegations of

⁴ See, e.g., IFC Sanctions Procedures at Section 1.01(a) (providing that the IFC Sanctions Procedures set out the procedural rules to be followed in cases involving sanctionable practices in connection with IFC Projects).

⁵ See, e.g., IFC Sanctions Procedures at Section 13.01(a)(i) (providing that the IFC Sanctions Procedures shall apply to all proceedings for which a Notice is issued by the IFC Evaluation Officer on or after November 1, 2012).

⁶ See, e.g., Sanctions Board Decision No. 70 (2014) at para. 10.

fraud and corruption in IFC projects . . . at www.ifc.org/anticorruption.” In response to the Sanctions Board Chair’s request for clarification, INT confirmed that the version of the IFC Anti-Corruption Guidelines that was on IFC’s website and in effect at the time of signature of the Mandate Letter included the same definition of “corrupt practice” as the Loan Agreement.

13. In view of the above provisions, the term “corrupt practice” may be understood here as “the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.” The IFC Anti-Corruption Guidelines add the following interpretative note: “Corrupt practices are understood as kickbacks and bribery. The conduct in question must involve the use of improper means (such as bribery) to violate or derogate a duty owed by the recipient in order for the payor to obtain an undue advantage or to avoid an obligation. Antitrust, securities and other violations of law that are not of this nature are excluded from the definition of corrupt practices.”

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT’s Principal Contentions in the SAE

14. *Jurisdiction:* INT does not explicitly address the sanctions system’s jurisdiction in the SAE. However, INT refers to “the connection of [the Respondent Subsidiary] as a major supplier to [the Refinery owned by the Borrower], which was the beneficiary of IFC’s investment in the . . . Project.” Separately, INT notes that the Mandate Letter “includes [the Respondent Parent Company] as one of two sponsors for the . . . Project,” and that the Mandate Letter “states that [the Borrower] and the Sponsors shall be jointly and severally liable for the obligations to IFC under this Mandate Letter.” In addition, INT notes that IFC’s loan to the Borrower was guaranteed by the Respondent Parent Company.

15. *Allegations of corrupt practice:* INT alleges that the Respondents engaged in corrupt practices by offering the Mediator money in exchange for his help in obtaining the Map. INT relies primarily on the Mediator’s statements that the Respondent Employee and the Assistant General Manager had each offered him money for the Map. According to INT, these statements are corroborated by, among other evidence, the Assistant General Manager’s interview statement that he was willing to pay for the Map, and a text message that the Mediator sent to the Assistant General Manager. INT argues that the Respondents’ offer to the Mediator would have drawn him “from the position of an impartial facilitating chair to a paid agent doing their bidding,” thereby constituting an improper influence and leading to a violation of trust and duty. INT also asserts that, given the Map’s importance for the resolution of the land dispute, the Respondents would have gained an undue advantage by having access to the Map “to the exclusion of or even before the other parties to the mediation.”

16. *Sanctioning factors:* INT alleges that aggravation is warranted for the “central role, involvement and approval of management staff in the corrupt practice.” INT asserts that no mitigating factor has been identified in this case.

B. The Respondent Parent Company's Principal Contentions in Its Response

17. *Jurisdiction:* The Respondent Parent Company contends that the sanctions proceedings lack a jurisdictional basis, asserting that the “CAO mediation to resolve the land disputes . . . had nothing to do with World Bank funds or an IFC project.” According to the Respondent Parent Company, IFC’s website “makes clear that the sanctions process applies only to ‘firms or individuals that have engaged in fraud, corruption, coercion, collusion or obstruction *related to [IFC’s] investment and advisory services projects*’” (emphasis added by the Respondent Parent Company). The Respondent Parent Company states that, while it agreed to take part in the mediation process, it never conceded that IFC’s loan to the Borrower subjected all of the Respondent Parent Company’s palm oil plantations to the jurisdiction of the sanctions regime. According to the Respondent Parent Company, the mediation process was instead covered by a memorandum of understanding that governed the parties’ conduct. In response to INT’s assertion that the Respondent Subsidiary is a major supplier of the Refinery, the Respondent Parent Company asserts that INT has not carried its burden to prove this assertion, and that, in fact, the Respondent Parent Company is unable to determine whether the crude palm oil shipped to the Refinery originated from the Respondent Subsidiary or another plantation.

18. *Contentions regarding the alleged corrupt practice:* According to the Respondent Parent Company, INT has not shown that it is more likely than not that the Respondent Subsidiary’s or the Respondent Parent Company’s employees offered a bribe to the Mediator. The Respondent Parent Company challenges the weight and significance of INT’s evidence in a number of respects, including the credibility of the Mediator’s claims as well as the reliability of INT’s transcripts of interviews with other witnesses. The Respondent Parent Company asserts that any discussions with the Mediator about the costs for obtaining the Map were consistent with the Mediator’s prior direction that the Respondent Parent Company cover the expenses for the mediation. In addition, the Respondent Parent Company contends that INT has not shown that it is more likely than not that the Mediator was asked to violate or derogate a duty as a mediator. It also asserts that finding the Map would not have given the Respondent Subsidiary and the Respondent Parent Company an undue advantage, given that their employees did not know what it showed before they found it, and the Respondent Parent Company would not have been able to conceal or alter the Map unbeknownst to the Mediator and others involved in the mediation.

19. *Sanctioning factors:* The Respondent Parent Company asserts that INT has not established that management played a central role in the alleged corrupt practice so as to warrant aggravation. The Respondent Parent Company does not assert or address any mitigating factors.

C. Responses of the Respondent Employee and the Respondent Subsidiary

20. In separate submissions, the Respondent Employee and the Respondent Subsidiary briefly state that they join the Response of the Respondent Parent Company, without additional discussion or assertion of other considerations specific to either of them.

D. INT's Principal Contentions in the Reply

21. *Jurisdiction:* INT asserts that “[t]he land dispute case relates to IFC financing and there is sufficient basis for jurisdiction within the World Bank Group’s sanctions system.” INT refers to the CAO’s determination of eligibility and states that the “causal link and chain of facts as a basis for the CAO’s taking on the complaint and mediating the land dispute was clearly laid out and accepted by the Respondents.” In response to the Respondents’ argument that the Respondent Subsidiary was not a major supplier of the Refinery, INT states that “the fact remains that shipments to the . . . Refinery did originate from [the Respondent Subsidiary’s] plantation and as such the plantation was part of the supply chain as asserted by the CAO.” INT concludes that the “Respondents[’] attempt to bribe the [Mediator], who is an employee of the CAO, triggered the application of IFC’s anti-corruption guidelines . . . [and] the jurisdiction of IFC’s EO and the Sanctions Board over this case.” Referring to the fact that the Respondent Parent Company has sold the Respondent Subsidiary, INT asserts that this decision shows that the Respondent Parent Company recognized that its ownership of the Respondent Subsidiary and the Respondent Subsidiary’s contribution to the supply chain of crude palm oil to the Refinery provided a valid basis for the CAO’s intervention in the land dispute.

22. *Contentions regarding the alleged corrupt practice:* In response to the Respondent Parent Company’s evidentiary arguments, INT reasserts the Mediator’s credibility with reference to his qualifications, his conduct in the mediation process, and his decision to report the alleged bribe offer. INT further contends that the Respondents’ asserted support for the joint efforts of all parties to the mediation process to find the Map does not exclude the possibility that the Respondents also attempted to obtain the Map by offering a bribe to the Mediator. In addition, INT asserts that the Map and other supporting documents confirmed the local community’s claims, and that the Map’s impact on the mediation process contradicts the Respondents’ argument that the discovery would have given them no undue advantage.

23. *Sanctioning factors:* INT alleges that, in September 2014, the Respondent Employee contacted a witness whom INT had interviewed during the initial investigation, and told the witness that he had been trying to contact the Mediator. INT refers to Section 13.06 of the IFC Sanctions Procedures regarding the confidentiality of sanctions proceedings, and requests that the Respondent Employee’s actions be considered as an aggravating factor.

E. The Respondent Parent Company’s Principal Contentions in Its Supplemental Response

24. Taking into account INT’s statement that the Reply introduces new material evidence, the Sanctions Board Chair authorized the Respondents to file a Supplemental Response addressing new arguments and evidence presented by INT. The Respondent Parent Company submitted its Supplemental Response on November 14, 2014. Neither the Respondent Employee nor the Respondent Subsidiary filed any new submissions or sought to join the Respondent Parent Company’s Supplemental Response.

25. *Jurisdiction:* In its Supplemental Response, the Respondent Parent Company disputes INT's argument that its decision to sell the Respondent Subsidiary was motivated by an attempt to evade the sanctions system's jurisdiction, and asserts that this decision was instead based on the Respondent Subsidiary's commercial performance.

26. *Contentions regarding the alleged corrupt practice:* With respect to the Mediator's credibility, the Respondent Parent Company asserts that INT has failed to address inconsistencies in his testimony, as described in the Respondent Parent Company's Response. The Respondent Parent Company argues that evidence submitted with INT's Reply rather calls into question the Mediator's competence in the mediation process and therefore corroborates the Respondent Parent Company's "evidence . . . that [the Mediator] has always lacked credibility and transparency." According to the Respondent Parent Company, the Mediator's motive for accusing the Respondents of corruption is unclear from the record, but "it is more likely that [the Mediator] was concerned about the discovery of his lack of candor about the map's location . . . , so he took proactive steps to spin a story to hide his role in mediating the map's production."

27. *Sanctioning factors:* In response to INT's allegation that aggravation is warranted for the Respondent Employee's actions in contacting a witness and attempting to contact the Mediator, the Respondent Parent Company states that the Respondent Employee's actions were wrong and regrettable; were not taken at the direction of, or with the knowledge of, the Respondent Parent Company; and should not be taken as any attempt to pursue physical threats against the Mediator. The Supplemental Response of the Respondent Parent Company appends a letter submitted on behalf of the Respondent Employee, who reportedly requested counsel for the Respondent Parent Company to relay to the Sanctions Board that, among other points, this was a personal matter for him and that "he did not know that INT rules prohibited him from speaking with [the Mediator]."

F. INT's Principal Contentions in its Supplemental Submission

28. On November 3, 2014, the Sanctions Board Chair requested INT to provide clarification and additional information on the jurisdictional basis for Sanctions Case No. 265. INT filed its Supplemental Submission on November 14, 2014.

29. In its Supplemental Submission, INT does not identify a specific ground for jurisdiction, but enumerates a number of considerations. Specifically, INT (i) refers to the Respondent Subsidiary's alleged role as a supplier to the Refinery; (ii) argues that, by agreeing to take part in the mediation process, the Respondents "accepted the authority of the CAO un[t]il the end of INT's investigations"; (iii) asserts that the Respondent Parent Company accepted the Mandate Letter, which identifies the CAO as the independent recourse mechanism for people affected by IFC-supported projects and refers to IFC's procedures for addressing allegations of fraud and corruption; (iv) refers to various provisions of the Loan Agreement that relate to sanctionable practices; (v) asserts that the Respondent Employee was prohibited from engaging in sanctionable practices as an employee of the Respondent Parent Company, and that the Respondent Subsidiary was prohibited from engaging in sanctionable practices as a

“subsidiary/Affiliate of [the Respondent Parent Company]”; and (vi) states that INT has been charged by the World Bank Group with responsibility for the investigation of fraud and corruption in World Bank Group operations, and may initiate sanctions proceedings under the IFC Sanctions Procedures if “as a result of an investigation by INT, the Integrity Vice President believes that there is sufficient evidence to support a finding of one or more Sanctionable Practices in connection with an IFC Project.”

G. Presentations at the Hearing

30. At the Sanctions Board’s hearing, INT stated a new basis for jurisdiction, i.e., even if all jurisdictional bases presented in its written submissions were discounted, the fact that the Respondents’ alleged bribe offer was directed to an individual acting on the CAO’s behalf would in itself constitute a basis for jurisdiction. INT argued that the CAO mediation process falls within the category of “other operations of IFC” as contemplated in the definition of “IFC Project” under Section 1.02(a) of the IFC Sanctions Procedures, and that the sanctions system’s jurisdiction can therefore be inferred from the connection between the alleged misconduct and the CAO mediation in which the Respondents agreed to take part. In response, the Respondent Parent Company reiterated that the mediation process was governed by a separate memorandum of understanding that did not refer to the sanctions system. In addition, the Respondent Parent Company argued that extending the application of the sanctions system to a CAO mediation process would not serve the sanctions system’s purpose of protecting the World Bank Group’s funds, and that, in any event, such extension would require advance notice to relevant parties. INT contended that no notice was required in order for the sanctions system to apply. Stating that the CAO’s website describes CAO mediation processes as sponsored by IFC, and asserting that the Respondent Parent Company was familiar with IFC’s Anti-Corruption Guidelines, INT also expressed the view that, in any event, the Respondents could be expected to be constructively aware of the sanctions system’s application to the mediation process when they agreed to take part in that process.

31. INT also reiterated its earlier argument that the mediation process was linked to the Project through the Refinery’s supposed supply chain, regardless of the amount of crude palm oil that in fact originated from the Respondent Subsidiary. In response, the Respondent Parent Company countered that, while it cannot be excluded that some crude palm oil processed in the Refinery may have originated from the Respondent Subsidiary, any amount that might have shipped to the Refinery would have been minimal, and, in any event, INT has provided no evidence of the asserted supply chain. In clarification, INT stated that it had not investigated the supply chain, but that it was relying on a confirmation from IFC that the Respondent Subsidiary was a supplier of the Refinery.

32. Given the central significance of the testimony of the Mediator and the apparent inconsistencies in it on the written record, the Sanctions Board decided to hear the Mediator as a witness, via videoconference, in accordance with Section 6.03(b)(iv) of the IFC Sanctions Procedures. INT requested that the Mediator be heard in camera. In light of the principle of fairness that suggests that, in the absence of compelling reasons to decide otherwise, litigants be afforded the opportunity to hear and respond to testimony, and the fact that INT did not

substantiate its assertions that the Mediator's life, health, safety, or well-being was at risk, as well as the fact that the Mediator did not object to testifying in the presence of the Respondents, the Sanctions Board denied INT's request. In response to the Sanctions Board's questions, the Mediator stated that he did not recall having been offered money directly by the Respondent Employee, and that he could not remember the amount allegedly offered by the Assistant General Manager. The Mediator also explained how he had obtained an electronic copy of the Map, which, according to the Mediator, he was unable to share with the parties to the mediation process due to its restricted distribution.

33. Following the Mediator's testimony, the parties reiterated their contentions regarding the merits of INT's allegations and the Mediator's credibility. INT conceded that the Mediator's responses to the Sanctions Board's questions revealed inconsistencies with his earlier interview statements, and argued that these earlier statements should be given more weight as they preceded the Respondent Employee's alleged threats to the Mediator. The Respondent Parent Company asserted that the Mediator had acknowledged the difficulty of obtaining the requisite approval to release the Map, and that his testimony was therefore consistent with the Assistant General Manager's interview statements regarding related expenses. In response to the Sanctions Board's question regarding the lack of evidentiary support for INT's assertion in the SAE that another witness had corroborated the Mediator's allegations, INT explained that the witness in question had made the relevant statement during a meeting for which INT had neither a transcript nor a record of interview.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSIONS

34. According to Article III of the Sanctions Board Statute as revised September 15, 2010 (the "Sanctions Board Statute"), the Sanctions Board shall "review and take decisions in sanctions cases and perform such other detailed functions and responsibilities as set forth in the [applicable] Sanctions Procedures." Article IV of the Sanctions Board Statute further provides that, "In the event of a dispute as to whether the Sanctions Board has competence over a particular matter, the Sanctions Board shall decide whether it has the authority to handle such matter under this Statute." The Sanctions Board therefore will address first the question of jurisdiction to review the allegations that INT has presented against the Respondents.

A. Review of Potential Grounds for Jurisdiction

35. Sanctions Case No. 265 is the first case appealed to the Sanctions Board in which INT alleges that respondents engaged in a sanctionable practice in connection with an IFC project. As a point of reference, the Sanctions Board notes that in the case of projects financed by the World Bank, the basis for initiating sanctions proceedings and imposing sanctions is generally provided by the World Bank's Procurement, Consultant, or Anti-Corruption Guidelines that apply to a given project. These documents provide the substantive definitions of sanctionable practices and identify the parties who may be subject to sanctions. In the present case, INT did not initially address jurisdiction, or submit or identify any document that would serve as the functional equivalent of the World Bank's Procurement, Consultant, or Anti-Corruption Guidelines in defining sanctionable practices or identifying parties subject to potential

sanctions. In its subsequent written and oral submissions, INT proposed multiple grounds for jurisdiction – which the Sanctions Board addresses in turn below. In the interests of transparency and efficiency, INT may in future proceedings be well advised to specify at the outset what it considers to be the basis for the sanctions system’s jurisdiction.

36. In reviewing potential grounds for jurisdiction, the Sanctions Board will take into account the views of IFC’s General Counsel consistent with Section 1.02(b)(iii) of the IFC Sanctions Procedures. IFC’s General Counsel expressed the view that sanctionable practices by an IFC Counterparty in connection with IFC projects and operations are subject to sanctions proceedings. The opinion referred to documents of IFC’s Board of Directors regarding the application of the sanctions system to IFC operations, the Sanctions Board Statute, the IFC Sanctions Procedures, IFC’s external website, and IFC mandate letters issued after January 1, 2007. Specifically, the IFC General Counsel opined that, under Section 1.01(a) of the IFC Sanctions Procedures, the subject matter of IFC’s sanctions regime covers sanctionable practices in connection with IFC projects as defined in the IFC Sanctions Procedures. In addition, according to IFC’s General Counsel, IFC’s external website “provides notice that IFC Counterparties can be sanctioned, through the World Bank Group sanctions regime, for Sanctionable Practices in connection with IFC Projects for which a mandate letter was signed after January 1, 2007.”

1. The Respondent Subsidiary’s alleged role in the supply chain for the Refinery

37. INT argues that the land dispute that arose from the Respondent Subsidiary’s activities and became the subject of the CAO’s mediation was related to the Project. In support of this argument, INT asserts in particular that the Respondent Subsidiary was a supplier (and potentially a major supplier) to the Refinery and that the supply of crude palm oil was contemplated under the Loan Agreement. As noted in Paragraph 31 above, the Respondent Parent Company acknowledged that it cannot be excluded that some crude palm oil processed in the Refinery may have originated from the Respondent Subsidiary, but asserted that any amount that might have shipped to the Refinery would have been minimal. For its part, INT did not provide any evidence to demonstrate that the Respondent Subsidiary had in fact, directly or indirectly, supplied any amount of crude palm oil to the Refinery. At the hearing, INT confirmed that it had not even taken any steps to obtain such evidence. Accordingly, the Sanctions Board finds that INT has failed to demonstrate that the Respondent Subsidiary was part of the supply chain for the Refinery. In the absence of evidence supporting INT’s factual claim, there is no need for the Sanctions Board to determine whether the asserted supply chain, even if proven, would have been sufficient to establish the sanctions system’s jurisdiction over the facts at issue.

2. The CAO’s determination of eligibility

38. INT states that the CAO found that the Complaint pertained to an IFC project, and that the basis for the CAO’s determination of eligibility “was clearly laid out and accepted by the Respondents.” At the hearing, INT suggested that the CAO’s determination revealed a connection with an IFC project that by extension could provide a basis for the sanctions

system's jurisdiction. INT further argued that, by agreeing to take part in a process sponsored by IFC, the Respondents had agreed to be bound by IFC's legal framework and submitted themselves to the jurisdiction of the sanctions system. The Respondent Parent Company contends that the Respondent Subsidiary's decision to take part in the mediation process was based on its prior experience with CAO mediation processes, and does not imply that the Respondent Subsidiary's plantations were part of the Project.

39. The Sanctions Board notes that the basis of the CAO's jurisdiction is different from that of the Sanctions Board. As set out in Paragraph 8 above, in order to determine whether it has jurisdiction, the CAO must decide, amongst other things, whether the complaint referred to it "pertains to a project that IFC/MIGA is participating in, or is actively considering." The question for the Sanctions Board is whether the alleged misconduct arising in the related CAO mediation process is subject to the jurisdiction of the Sanctions Board, which, in accordance with the applicable IFC Sanctions Procedures, would require a sufficient connection between the misconduct and the Project. Accordingly, the CAO's determination of eligibility is not dispositive of, or necessarily relevant to, the jurisdictional question before the Sanctions Board. Moreover, the record suggests that the CAO's determination of a connection between the Project and the land dispute presumed the asserted supply chain link – which, as discussed in Paragraph 37 above, was not demonstrated by INT or otherwise evident from the record.

3. Mandate Letter

40. INT notes that the Mandate Letter identified the Respondent Parent Company as the guarantor for the Loan and as one of two sponsors for the Project, and that, under the Mandate Letter, "[the Borrower] and the Sponsors shall be jointly and severally liable for the obligations to IFC under this Mandate Letter." INT does not allege that the Borrower or the second sponsor violated any obligation to IFC under the Mandate Letter. To the extent that the Respondent Parent Company was itself directly subject to obligations, the only provision of the Mandate Letter that would seem relevant to the alleged misconduct would be the following: "IFC has always worked to avoid fraud and corruption in all of its activities and continues to strengthen its governance and anti-corruption work. IFC's procedures for addressing allegations of fraud and corruption in IFC projects can be found at www.ifc.org/anticorruption." The Mandate Letter thus imposes no express obligations upon the Respondent Parent Company to refrain from corruption in connection with the Project, whether in its conduct as guarantor or in any other capacity, nor does it clearly stipulate that the Respondent Parent Company, as a guarantor of an IFC project, may be subjected to sanctions proceedings.

41. As noted above, at the Sanctions Board Chair's request, INT clarified which version of the IFC Anti-Corruption Guidelines was available on the referenced website when the Mandate Letter was signed in 2008. In addition, INT noted that the current website "includes, among other things, a link to the IFC Anti-Corruption Guidelines and Sanctions Procedures." Given that the Mandate Letter did not impose any obligations upon the Respondent Parent Company to refrain from corruption in relation to the Project, it does not, on its own, provide any basis for asserting jurisdiction notwithstanding the reference to the Anti-Corruption Guidelines and IFC Sanctions Procedures.

4. Loan Agreement

42. As mentioned above, the Loan Agreement was entered into by the Borrower and IFC in November 2008. Although the Respondent Parent Company had a 50% share in the Borrower, it did not sign the Loan Agreement. INT notes that the Loan Agreement identifies the Respondent Parent Company as the guarantor and states that the “Guarantor has agreed to guarantee the obligations of the Borrower under this Agreement.” The Loan Agreement included a representation as to the absence of past misconduct, which referred to the Respondent Parent Company in its capacity as guarantor but would not apply prospectively to the alleged misconduct.

43. In addition, INT notes that the Loan Agreement contained a negative covenant stating in relevant part:

“Unless IFC otherwise agrees, the Borrower shall not: . . . Engage in (and shall not authorize or permit any Affiliate or any other Person acting on its behalf to engage in) with respect to the Project or any transaction contemplated by this Agreement, any Sanctionable Practice.”

44. The negative covenant cited by INT expressly applies only to the actions carried out, authorized, or permitted by the Borrower – not to the conduct of the Respondent Parent Company or the Respondent Subsidiary, which bore no corresponding obligations under the Loan Agreement. The Loan Agreement cannot therefore, on its own, provide a jurisdictional basis for sanctioning either respondent entity.

5. Guarantee Agreement

45. INT noted in the SAE, and emphasized at the hearing, that the Respondent Parent Company had signed the Guarantee Agreement. The Guarantee Agreement includes a single provision regarding sanctionable practices, which reads as follows:

“The Guarantor represents and warrants that as of the date of this Agreement: . . . neither it nor any Affiliates, nor any Person acting on its or their behalf, has committed or engaged in, with respect to the Project or any transaction contemplated by this Agreement, any Sanctionable Practice.”

46. This provision refers only to misconduct in the period leading up to the Guarantee Agreement, which was signed in December 2008, whereas the alleged misconduct occurred in 2012. Accordingly, the Guarantee Agreement does not create any obligations for the Respondent Parent Company that would be pertinent to the sanctions system’s jurisdiction in this case.

6. Legal framework governing the mediation process

47. At the hearing, INT argued for the first time that the facts fall within the sanctions system’s jurisdiction on the grounds that the Respondents’ alleged bribe offer was made to an

individual acting on the CAO's behalf in the context of a CAO mediation process. According to INT, the CAO was established by the World Bank Group, and the CAO mediation is therefore included under the IFC Sanctions Procedures' definition of IFC Projects, which refers to "other operations of IFC."⁷ According to the Respondent Parent Company, the Mandate Letter made clear that the CAO was an independent mechanism. In addition, the Respondent Parent Company states that the parties' conduct in the mediation process was governed by a separate memorandum of understanding that did not refer to the World Bank Group's sanctions regime. In order to determine whether the CAO mediation process could be considered as an IFC operation subject to the sanctions system, the Sanctions Board takes into account the definitions of the terms "IFC Projects" and "IFC Counterparty" under the IFC Sanctions Procedures, as well as the relationship between IFC and the mediation process.

48. *IFC Projects and Counterparties under the IFC Sanctions Procedures:* Section 1.02(a) of the IFC Sanctions Procedures defines the term "IFC Project" to mean "investment projects, advisory services, and other operations of IFC." INT referred to this provision, but did not address the types of activities involving IFC that would constitute "other operations of IFC" subject to the sanctions system. In particular, INT did not discuss whether any mechanism established or sponsored by IFC would automatically fall within this category. The Sanctions Board notes that, under the same section of the IFC Sanctions Procedures, a respondent in sanctions proceedings has to either be an IFC Counterparty or be alleged to have engaged in a sanctionable practice together with an IFC Counterparty. In turn, the term "IFC Counterparty" is defined only with respect to three specific types of operations, namely IFC investment, technical assistance, and advisory services operations.⁸

49. *Relationship between IFC and the mediation process:* As noted in Paragraph 7 above, the CAO was created as the "independent recourse and accountability mechanism" of IFC and MIGA for environmental and social concerns. The CAO's Operational Guidelines discuss the importance and safeguards of the CAO's independence and impartiality. The Mandate Letter also refers to the CAO as the "independent recourse mechanism for people affected by IFC-supported projects." Given that the CAO's mediation in this case was based on the CAO's described role in addressing disputes arising from "IFC-supported projects," it would seem circular to deem the CAO mediation as the "IFC Project" itself. Consistent with the CAO's independence, the agreement note regarding the mediation process contains no reference to IFC, and the parties to the mediation are not referred to as IFC Counterparties.

50. In light of the above, the Sanctions Board concludes that it is not apparent from the record that the CAO mediation process is – or was intended to be – an operation of IFC subject to the sanctions system, with participants in that mediation also considered to be IFC Counterparties subject to being named as respondents in sanctions proceedings, under the IFC Sanctions Procedures as discussed in Paragraph 48 above. To be clear, participation in the CAO mediation process here does not, of itself, establish a basis for jurisdiction for the Sanctions

⁷ IFC Sanctions Procedures at 1.02(a).

⁸ See n.3 above for full definition.

Board in the absence of a demonstrated connection with an “IFC Project” within the meaning of the Sanctions Procedures. This does not mean that a party that has engaged in corrupt or other sanctionable practices in the context of a CAO mediation will be exempt from liability where there is a demonstrated connection to an “IFC Project.”

51. In addition, the Sanctions Board notes that, under the World Bank Group’s sanctions framework, the official capacity of the recipient of a bribe or a bribe offer, while potentially relevant to a determination of culpability,⁹ does not, on its own, provide a basis for jurisdiction. Nor is it necessary to a finding of jurisdiction. IFC’s definition of “corrupt practice” set out in Paragraph 13 above, including the related interpretative note, does not require that a public official be the intended recipient of a bribe or, in contrast to the corresponding definition under the World Bank’s Procurement Guidelines,¹⁰ the intended target of improper influence.

52. With respect to the Respondents’ decision to participate in the CAO mediation process, which INT suggests would support a finding of jurisdiction to sanction, the Sanctions Board observes that consent cannot be considered to extend the sanctions system’s jurisdiction beyond the mandate set out by the World Bank Group.¹¹ Accordingly, the Sanctions Board finds that the Respondents’ voluntary election to take part in the mediation process – an election not predicated on any endorsement of the CAO’s finding of a connection to an IFC project – is not relevant to the sanctions system’s jurisdiction in this matter.

53. In light of the discussion in Paragraphs 35 to 52 above, the Sanctions Board concludes that the record does not support any of the grounds for jurisdiction asserted by INT, and does not otherwise provide a basis for the sanctions system’s jurisdiction in this matter. In the absence of any primary basis for jurisdiction, there is no need for the Sanctions Board to consider INT’s additional arguments for jurisdiction predicated on the interrelationships between the Respondents (item (v) in Paragraph 29 above). With respect to INT’s argument regarding its responsibility for addressing allegations of fraud and corruption relating to IFC Projects (item (vi) in Paragraph 29 above), the Sanctions Board makes it clear that the present

⁹ See, e.g., Sanctions Board Decision No. 70 (2014) at para. 33 (applying aggravation in a case relating to a World Bank-financed project on the basis that the respondents, admittedly acting on their own, had proactively offered and paid a bribe to a public official).

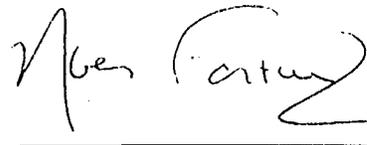
¹⁰ See, e.g., Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers (January 2011, revised July 2014) at para. 1.16(a)(i) (defining the term “corrupt practice” as “the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party” and specifying in a footnote that “[f]or the purpose of this sub-paragraph, ‘another party’ refers to a public official acting in relation to the procurement process or contract execution”).

¹¹ This is consistent with the notion that, as stated in the World Bank Sanctioning Guidelines, the World Bank Group’s sanctions system was established to “assist the [World Bank Group] in upholding its fiduciary duty under the Articles of Agreement to ensure that the funds entrusted to it are used for the purposes intended.” World Bank Sanctioning Guidelines at p. 1. It is also consistent with the World Bank’s statement that it does not need the consent of or privity with a respondent to assert jurisdiction to sanction. See The World Bank Group’s Sanctions Regime: Information Note (November 2011) at p. 20, available at: <http://go.worldbank.org/CVUUIS7HZ0>; see also Sanctions Board Decision No. 64 (2014) at para. 28.

decision does not address the scope of INT's investigative mandate, and addresses only the Sanctions Board's jurisdiction in respect of these sanctions proceedings, which, under Article IV of the Sanctions Board Statute, must be decided by the Sanctions Board.

B. Termination of Sanctions Proceedings

54. In the absence of jurisdiction to review the allegations of sanctionable practices submitted by INT, the Sanctions Board declares that the sanctions proceedings against the Respondent Parent Company, the Respondent Employee, and the Respondent Subsidiary in Sanctions Case No. 265, including the temporary suspension imposed by the IFC EO for the pendency of such proceedings, are hereby terminated.



L. Yves Fortier (Chair)

On behalf of the
World Bank Group Sanctions Board

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