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Understanding Exclusion Systems Around the World

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Research on Exclusion Systems

- **Desk Reviews and Open-Data Research:**
 - Reviewed exclusion provisions of at least **36 countries**
- **Global Exclusion Survey:**
 - Project of the Debarment & Exclusions Subcommittee of the International Bar Association's Anti-Corruption Committee
 - Goals:
 - Gather **knowledge and comparable data** on exclusion systems worldwide
 - Create a **consultative resource** for various stakeholders
 - Develop a **comprehensive framework** of how exclusion is used worldwide
 - Obtain contributions from local experts, like you!



The Global Exclusion Survey

- Questionnaire covers six topics:
 - Legal & Institutional Framework
 - Functioning & Enforcement
 - Substantive Grounds
 - Scope & Effect of Exclusion
 - Transparency
 - Limited Scope Exclusions
- Pilot study conducted in 2018 (covered **11 jurisdictions**)
- Next survey round launching Fall 2019

Exclusions and Debarment

- Many terms used:
 - “blacklist” “debarment” “sanction” “suspension” “exclusion” “disqualification” “deselection” “ineligibility”
- Two possible scenarios:
 - Exclusion of a supplier from all (or set of) public tenders for a specific period of time (*i.e.*, “debarment”)
 - Disqualification of a supplier from a particular tender or procurement process (*i.e.*, “disqualification”)





Why Exclude?

- Many purposes to excluding:
 - Risk mitigation / protection of public funds
 - Punishment
 - Deterrence
 - Integrity / Maintain public trust in government
- A system's purpose is not always clear



Grounds for Exclusion

- Many different grounds exist
 - Common integrity-based offenses (e.g., fraud, corruption, etc.)
 - Capacity-related grounds (e.g., bankruptcy, **poor past performance!**)
 - Miscellaneous grounds (e.g., failing to sign contract, withdrawing bid before award)
- Court Judgment v. Administrative Fact-Finding



Automatic v. Discretionary Exclusion

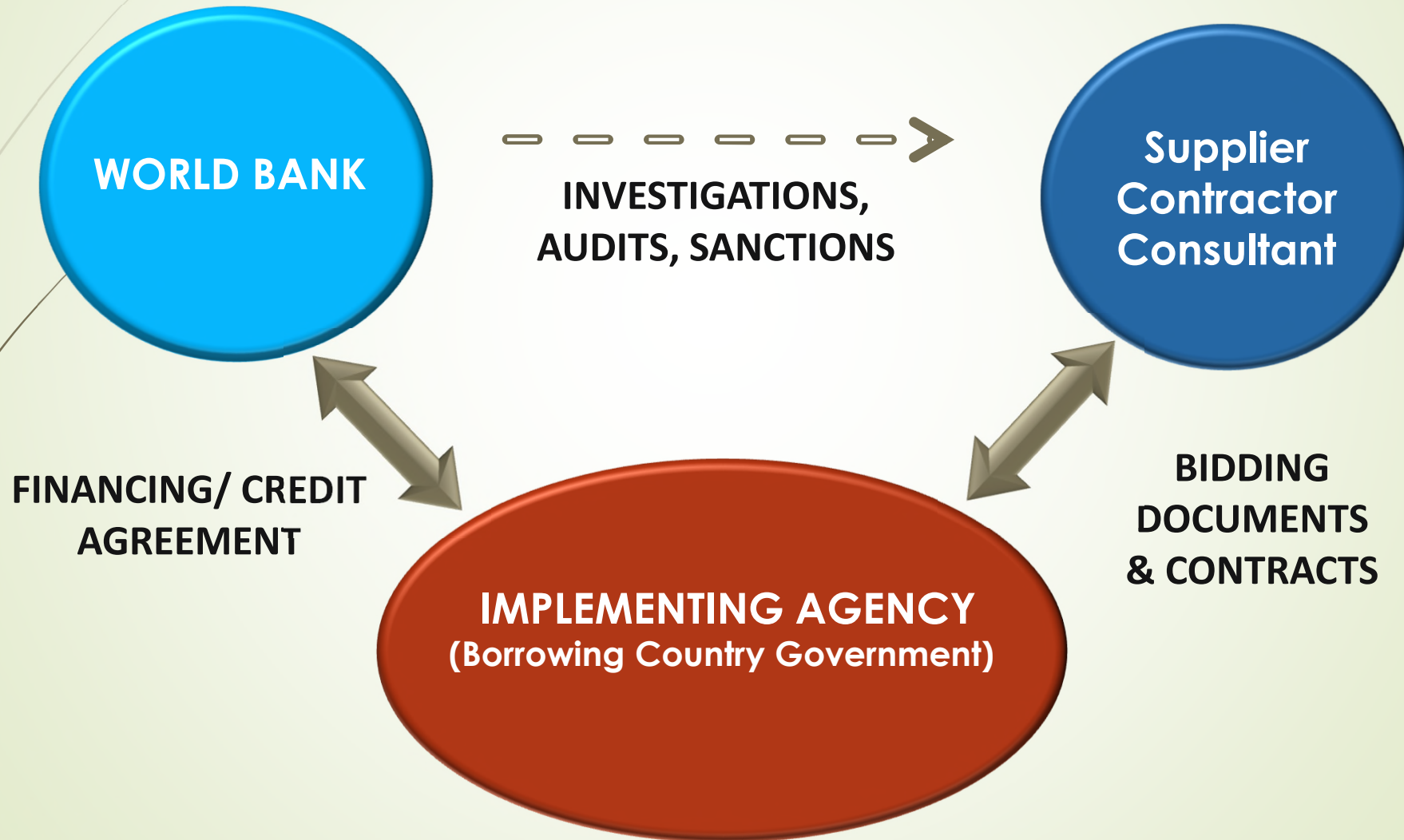
- If an exclusion ground exists, two possibilities:
 - Automatic – Exclusion ***must*** be imposed, no discretion
 - Discretionary – Exclusion may, ***but need not***, be imposed
 - Other factors considered, like remedial measures, government interest, possibility of imposing a different sanction, etc.
- Could vary depending on decision-maker (court, agency official, etc.)



The World Bank's Sanctions System

- At the World Bank, sanctions = debarment (generally)
 - A **quasi-judicial process** to adjudicate cases against suppliers accused of engaging in misconduct on Bank-financed projects
 - **Administrative remedies**, not criminal sanctions
 - Sanctions create “**negative incentives**” to discourage misconduct and “**positive incentives** to encourage prevention, remediation and rehabilitation.”
 - Intended to “**deter** but not to punish.”
- Other International Financial Institutions have similar systems (e.g., EBRD, ADB, AfDB, IDB, AIIB, EIB etc.)

Contractual Relationships





National Exclusion Systems

- Unlike World Bank, national government is the **buyer / end user**
- Exclusion may be **one of several** possible remedies
- Key question – How often do exclusions actually occur (and for what purpose)?
- Exclusion exists in **many** procurement systems

2018 Global Exclusion Survey Pilot

JURISDICTIONS REVIEWED

- Australia
- Brazil
- Chile
- Germany
- Italy
- Spain
- Tunisia
- United Kingdom
- United States
- European Commission
- World Bank

- Key Findings:
 - All but one jurisdiction (Australia) had some form of exclusion system
 - All jurisdictions provide for some form of **notice** and an **opportunity to respond / appeal**
 - Many differences across systems (exclusion length, grounds, process, public listing, etc.)



2018 Global Exclusion Survey Pilot

- Different **decision-makers** (several jurisdictions had multiple)
 - Central debaring agency (*4 jurisdictions*)
 - Designated official within each agency (*5 jurisdictions*)
 - Individual contracting officers (*4 jurisdictions*)
 - Courts (*4 jurisdictions*)
- **Provisional exclusion** (“suspension”) pending investigation or proceedings (*5 jurisdictions*)
- **Public listing** of excluded suppliers (*7 jurisdictions*)
- Exceptions to exclusion (e.g., “emergency situations,” “public interest,” or “urgent and compelling circumstances”) (*3 jurisdictions*)

What's Next for the Global Exclusion Survey?

- ▶ Revised Survey Tool
- ▶ Formal launch in Fall 2019, but responses are welcome anytime!
- ▶ Goal – Increase participation, expand range of jurisdictions covered



Go to www.worldbank.org/exclusionsurvey for more information,
and to access the survey!

Lessons and Questions

- The Purpose of the System Must Be Clear:
 - Is the system **punitive**? Or is the focus on **rehabilitation/self-cleansing**?
 - Is it focused on the **past** (adjudicating misconduct), or the **future** (looking at present responsibility)?
 - What is the balance between **deterrence** and fostering maximum **competition**?
 - Is a suspension/debarment seen as a “**good result**” or a “**bad result**”?
- Context Matters:
 - Is suspension and debarment **one among a number of available remedies**? Or is it your **only available remedy**?
 - MDBs: Tension between **fiduciary obligations** and anti-corruption “**enforcement**” efforts
 - MDBs: Tension between **competing legal systems/standards of member countries**

Lessons and Questions

- Practical Questions:
 - What is the right balance between **certainty** and **efficiency**?
 - How many **levels of review**?
 - Who is the **decision-maker**? Is authority/accountability clear?
 - What are the **grounds**? Fraud and corruption? Poor Performance?
 - What is the **evidentiary standard**? Other key criteria?
 - What **due process rights** are afforded to the accused party?
 - What are the right **performance measures** for the system?
 - “gotchas” vs. “success stories”

Additional Resources

- Global Suspension & Debarment Survey
 - <http://www.worldbank.org/exclusionsurvey>
- World Bank Group Sanctions System Annual Report FY2018
 - <http://pubdocs.worldbank.org/en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf>
- The Fourth Colloquium on Suspension & Debarment (2017)
 - Website includes written summaries and recordings of the panel presentations
 - Fifth Colloquium scheduled for spring 2020
 - <http://www.worldbank.org/suspensiondebarment2017>
- Research Paper: *Does Debarring Poor Performers Mitigate Future Performance Risk?*
 - Co-authored with Belita Manka, Senior Counsel, Procurement, WBG's Legal Vice Presidency
 - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287348