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A Briefing Guide to

Multilateral Development Bank (MDB) Investigations

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What are Multilateral Development Banks?

Multilateral development banks (MDBs) are non-governmental organisations that provide financial assistance to developing countries for large infrastructure projects and health and education initiatives. The most prominent MDBs are the World Bank and its four region-specific siblings: the Asian Development Bank (AsDB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IADB), and the African Development Bank (AfDB). Together, these MDBs operate throughout the world and control trillions of dollars in assets. MDBs are also sometimes referred to as international financial institutions (IFIs).

In times of economic crisis or when commercial credit markets are otherwise facing problems, the MDBs act as a critical source of liquidity and lending capacity. As an example, in response to the 2008-2009 financial crisis MDB's played a key role in stabilising the global economy by providing over \$222 billion in financing.

In response to the economic devastation caused by the COVID-19 pandemic, MDBs were once again poised to spearhead recovery efforts. After the outbreak began in earnest in early 2020, the World Bank and the other main MDBs announced plans to deploy upwards of a quarter of a trillion dollars in coronavirus-related funding by the summer of 2021. These commitments are

expected to be used to finance, among other things, the construction of sanitation systems, medical supply production facilities, hospitals, and testing centers. MDB funds will also be directed to local banks to support trade and increase the availability of credit for small and medium-sized businesses affected by the virus. While this flood of MDB cash generates much-needed economic activity in many countries struggling to mitigate the economic pain of the outbreak, it also inevitably creates ample opportunities for corruption and fraud. The investigatory arms of the MDBs can be expected, therefore, to strengthen their efforts to identify and punish wrongdoing related to bank-financed projects.

MDB Investigations

MDB investigators have become increasingly sophisticated and well-resourced in recent years. In 2019 alone, for instance, the World Bank sanctioned 53 firms and individuals, which is a figure similar to the number of Foreign Corrupt Practices Actions initiated by the US' Department of Justice that year. MDBs continue to be a major force in global anti-corruption efforts and effectively act as "shadow" regulators, unrestricted by national boundaries and operating in parallel with national law enforcement agencies.

The scope of the investigatory jurisdiction of MDBs is extremely broad. It covers virtually any entity or individual that receives MDB money, even if they are unaware that a particular project is MDB-funded (as could be the case with sub-contractors)). Once an investigation is initiated, MDBs often rely on many of the same aggressive techniques used by law enforcement: extensive documentation demands, requests for access to company emails, employee interviews, and unannounced site visits.

What anyone involved with an MDB or considering involvement with an MDB should know is that the potential repercussions for those found by an MDB to have engaged in misconduct are severe. The sanctions that an MDB can impose include reprimand, restitution, reimbursement of the costs of an investigation, and imposition of a compliance monitor. But the primary

sanction is usually debarment: the subject of the investigation is excluded from bidding on the investigating MDB's projects for a period of time (usually three years for the subject's first wrongdoing) or indefinitely. Since 2010, the main MDBs have been party to a Mutual Enforcement Agreement that calls for a debarment decision from one MDB to be automatically applied by all the other MDBs. Such debarments can also be extended to affiliates within a corporate group, such as the subject's parent company or its subsidiaries.

For many firms, the financial damage caused by being frozen out of consideration for MDB projects can be devastating. As MDBs publicise the firms and individuals they have debarred, various additional consequences may follow, including reputational damage and enhanced scrutiny from banks and contractual counterparties. Most importantly, MDBs can, and often do, refer their findings to law enforcement agencies in the country where the conduct occurred as well as where the company in question has its headquarters. Where misconduct involves UK or US citizens or businesses (or otherwise touches these jurisdictions), there is a risk that an MDB investigation will lead to a related action under the US Foreign Corrupt Practices Act or the UK's Bribery Act.

So although the huge amount of MDB funding in the pipeline can be a prime economic opportunity, companies and individuals that are (or may be) involved in MDB-funded projects must proceed with caution.

The purpose of this briefing note is to provide those who may be on the receiving end of an MDB investigation with an overview of:

- how MDBs operate
- the MDB investigation process
- possible sanctions and available appeal mechanisms
- basic defensive measures that should be considered even before receiving notice that an investigation is underway

How An MDB Operates

What MDBs do and how they are funded

MDBs provide financial assistance for specific investment projects and policy initiatives in the developing world. These organisations are each comprised of member countries (called shareholders) that can be borrowers, donors or a combination of the two. Donor countries provide the MDBs with capital through annual payments and provide additional support through commitments to make further contributions as necessary.

While MDBs will sometimes offer grants and equity investments, they generally supply funds to governments in the form of long-term loans which are either non-concessional or concessional. These must ultimately be repaid from the governments' treasuries. For non-concessional loans, MDBs issue debt through international capital markets and re-lend the capital raised to borrowers on market-based terms. Because of the financial backstop provided by their donor countries, MDBs are able to borrow at the

lowest available market rates and, in turn, offer such rates to their borrowers. In contrast, concessional loans are provided on below-market terms and are funded directly by the member countries.

Most MDB loans are provided directly to governments although certain MDBs (such as the EBRD and the International Finance Corporation, which is an affiliate of the World Bank) focus almost exclusively on loans to the private sector.

The Project Cycle

MDB-funded projects are implemented by the borrowing countries or entities, not the MDB that is providing the funds.

The stages in a typical project cycle are:

- Identification: The MDB and the borrower work together to identify projects that are suitable for MDB support.
- Preparation: Once a proposed project has had preliminary approval, the borrower and MDB conduct a detailed technical study of the plans. While the design and preparation of the project are ultimately the borrower's responsibility, the MDB will generally offer assistance in the form of feasibility studies and technical advice.
- Appraisal: MDB staff conduct an in-depth assessment of the technical and financial elements of the project and work with the borrower to finalise the project plan.
- Negotiation: The MDB and borrower negotiate the funding agreement, which is then presented to the appropriate MDB board for approval.

- **Implementation and Procurement:** Once funds are released to the borrower, implementing the intended project is the responsibility of the borrower. It is done with minimal MDB involvement. The MDB will, however, regulate and oversee all major procurement decisions made by the borrower (see next section).
- **Evaluation:** After the project is complete and all funds have been dispersed, the project is assessed by the MDB in detail.

The Procurement Process

MDB-financed projects require borrowers to spend billions of dollars each year to buy equipment, hire contractors and engage consultants.

While procurement is the responsibility of the borrower (which is usually an agency within a developing country's government), the funding agreement with the MDB requires this process to proceed according to the specific procurement guidelines of that MDB. These guidelines are designed to ensure that MDB funds are properly spent by fostering competition, transparency, and fairness.

Most MDBs require the borrower to draft a procurement plan, which states in general terms what products and services are needed, their approximate costs and the procurement methods to be used. After which, MDB guidelines generally require procurement to proceed as follows:

- **Notice:** Bids are sought for the business opportunities on MDB-financed

projects, usually via a notice on MDB websites and in local publications in the host country. This notice is intended to generate competitive bidding between private-sector companies in the host country and internationally.

- **Prequalification:** Bidders are required to prequalify for any large and/or complex contracts (usually those involving more than \$10 million). Prequalification requires firms to demonstrate they meet specific criteria for financial capacity and experience. MDBs will review and approve the prequalification process conducted by the borrower.

- **Bidding:** All firms that prequalify are invited to submit a detailed bid specifying technical details, a list of goods needed and an anticipated completion schedule. Bids will also be solicited from consultants (such as engineering firms, auditors and scientists) to offer assistance on project management, training, and construction supervision.

- **Bid Evaluation and Selection:** Contracts are awarded to the lowest-evaluated bid. While this will usually be the lowest-cost bid, other factors will also be taken into account (such as past performance and technical expertise). Preference may also be given to bidders from the borrowing country or for plans that call for using domestically-manufactured goods.

The MDB Investigation Process

Investigatory Powers

The investigatory powers of MDBs are derived from contractual audit rights. The standard terms of the funding arrangements between MDBs and borrowers require all companies

that benefit from MDB funding to submit to the investigative jurisdiction of that particular MDB and grant it unfettered access to employees, documents and relevant financial records. The scope of this authority broadly extends to any individual or company that receives any amount of MDB money, even if the party is not in contractual privity with the MDB or is unaware that a particular project is MDB funded.

Reflecting the importance they place on rooting out corruption, all of the main MDBs have their own internal investigatory departments headed by senior bank executives. At the World Bank, for example, investigation resources are centred within the Integrity Vice Presidency (INT), an independent unit that reports directly to the World Bank President and the Audit Committee of the Executive Board.

Unlike law enforcement agencies, MDB investigations departments like the INT are unrestricted by domestic legal systems and are able to pursue investigations in accordance with their own rules. MDB investigators also have diplomatic immunity, which allows them to travel freely and interview anyone they think might have relevant information; including government officials. In other words, MDBs are not subject to the geographic restrictions that can impede law enforcement investigations.

The Investigation Stages

Preliminary Investigation

Most MDB investigations are prompted by whistleblower complaints or the discovery of potential wrongdoing during the bank's post-project assessment process. In either case, the MDB will first examine whether the conduct at issue constitutes a sanctionable practice – whether it is appropriate for MDB investigation and sanction.

The main sanctionable practices are:

- Corruption (awarding contracts in exchange for a bribe)
- Fraud (winning a contract on the basis of a material misrepresentation)
- Coercion (intimidating competing bidders or government officials)
- Collusion (rigging bids)
- Obstruction (refusing to cooperate with an MDB investigation).
- Conduct that is not classed as a sanctionable practice will be referred to another bank department or to external bodies when this is appropriate. If not, the investigatory wing of the bank will conduct a preliminary investigation to determine whether the allegation is credible and sufficiently serious to warrant a full investigation.

Full Investigation

Once a full investigation has been decided upon, the first step taken by the MDB is usually to issue a letter announcing that the bank is exercising its audit rights against a particular company or individual involved in the project in question. Relying on traditional law

enforcement techniques, these audits can be extremely aggressive and invasive. An MDB may well, for example, demand documents, expect access to company emails and financial records, interview employees (with and without the company's permission or knowledge), speak with competitors and conduct unannounced site visits.

As the investigation proceeds, the parties being audited have no access to evidence from the MDB via the right to discovery. They also have no right to be present at employee interviews and no right to receive details of the allegations. The overall goal of an MDB investigation is to determine whether there is sufficient evidence to substantiate the alleged wrongdoing. This determination is made under a “balance of the probabilities” standard of proof - that is, whether it is more likely than not that the wrongdoing took place.

Final Investigative Report

When an investigation is substantiated, the MDB will produce a Final Investigative Report (FIR), containing information about the allegations, the methods of investigation used and the findings. This is then circulated to relevant staff for comment before being finalised. Finalised FIRs are then submitted up the chain of command, usually to the president of the MDB.

In addition, FIRs are sent to relevant national authorities if the evidence indicates that a country's laws may have been violated. Because such

communications are to a sovereign government, they are immune from discovery; preventing the target from seeing it or challenging its allegations.

Sanctions and Appeals

The Sanction Process

Once allegations have been substantiated, the FIR will be independently evaluated by a designated official within the MDB - usually called an evaluation officer (EO) - who is responsible for deciding on the appropriate sanction, if any is to be imposed.

The most common punishment is debarment from bidding for a certain period of time on future contracts that the MDB funds. The period is usually between three and seven years for a first offence. Because the main MDBs collaborate on their investigations, a debarment from one will automatically result in a debarment from all of them (subject to certain limited exceptions). In some cases, debarments may not be limited to the specific target: the EO has discretion to extend the punishment to any of the target's affiliates within the same corporate group, such as parent and subsidiary companies. The effects of debarment can be further multiplied since there are a number of governments—including India and the European Union—that will refuse to do business with debarred companies as a matter of policy.

In addition to debarment, EOs can impose sanctions ranging from simple reprimands to payment of restitution and the reimbursement of the costs of the investigation. EOs can also issue conditional non-debarments and

debarments with conditional release; which operate like deferred prosecution agreements. In either case, targeted companies may be required to overhaul their compliance programmes under the oversight of an MDB compliance officer or an independent monitor.

MDBs are not required to take into account whether the sanction they are imposing will potentially force the company out of business. They usually do not consider it. There is also no prohibition on double jeopardy, so that conduct can be punished by the MDBs even if it has already been punished by a domestic government (and vice versa).

Appeals

Once a sanction has been imposed, the subject of it may appeal. In most MDBs, appeals will be heard by a sanctions board which reviews the EO's decision. Following this review, the sanctions board will make its final decision; which becomes immediately binding upon the parties concerned once it is delivered.

There are generally no further avenues for appeal within the MDB, and an MDB's decisions are not subject to judicial review. In other words, no authority outside of the MDB can reverse its sanction decision, even if the MDB violated its own rules or the domestic laws of the country in which it sits.

Voluntary Disclosure Programmes

For parties wishing to avoid a potentially harsh sanction, most MDBs offer a

voluntary disclosure programme. This allows for credit to be given to the party in exchange for full and timely disclosure of suspected wrongdoing and the meeting of certain non-negotiable conditions (e.g. implementing a compliance monitor). These programmes let parties that have engaged in sanctionable practices in the past avoid sanction and any publicising of their misconduct. Importantly, those already under active investigation by an MDB are usually ineligible to get voluntary disclosure credit. It is, therefore, critical to pursue this option as soon as problematic conduct is identified.

Settlements

Like most investigators, the anti-corruption offices of the MDBs prefer to save time and resources by reaching a settlement agreement with the subject of an investigation.

Settlements can be reached at any time prior to a final decision from the sanctions board. But to encourage early settlements, MDBs can put pressure on subjects by imposing temporary suspensions on them bidding on additional MDB projects while an investigation is ongoing.

While targets who pursue settlements will, of course, hope for a lesser sanction than would be expected if they fought the case and lost, settlements can still be onerous. For example, in 2009 the World Bank and Siemens AG reached settlement regarding a probe into a project in Russia involving a Siemens subsidiary. The terms of the agreement required Siemens to pay \$100 million towards global anti-corruption efforts, agree not to contest a debarment of up to four years for Siemens' Russian subsidiary and give a voluntary undertaking to refrain from bidding

on World Bank-financed contracts for two years.

While settlements provide certainty and possibly a lighter sanction, they do not prevent the MDB from referring the matter to national law enforcement. This is obviously an important consideration that any party considering a settlement must take into account.

Defensive Measures

There are a number of pro-active defensive measures that companies and individuals who may become subject to an MDB investigation should consider.

For example, even before receiving notice that an investigation is underway it will usually be advantageous to:

- Gain an understanding of MDB guidelines and investigatory processes
- Update compliance programmes as necessary to meet MDB requirements
- Conduct a risk assessment of existing MDB-related contracts and how due diligence is done on sub-contractors and other commercial relationships
- Implement internal whistle-blower procedures
- Ensure all relevant documents are preserved and easily retrievable

Once an MDB investigation is instigated, targeted firms should remain mindful of the risk that it may spill into a civil or criminal case brought by law enforcement. To forestall (or limit the damage from) this risk, MDB investigations should be treated

as seriously as a law enforcement action from the outset.

Targeted firms should appoint outside legal counsel to guide them through the investigation process and take all steps necessary to ensure that communications regarding how to respond to an MDB inquiry are privileged. It is also advisable to keep a close eye on what documents are turned over to investigators and ensure that no employees are interviewed without a legal representative being present.

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