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For further information please contact Natalie.Clarke@lbresearch.com

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Senior business development manager Nicholas O'Callaghan
GIR Insight business development manager Edward Perugia
edward.perugia@globalinvestigationsreview.com
Tel: +1 202 831 4658

Head of production Adam Myers
Deputy head of production Simon Busby
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Production editor Harry Turner

Editor, Global Investigations Review Marieke Breijer
Editor in chief David Samuels

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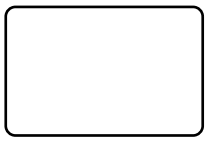

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Preface

Global Investigations Review is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. GIR gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers - the most readable explanation of all the cross-border developments that matter, allowing them they to stay (even more) on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and on the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the *GIR100*) and – after a successful court decision – obliged the US Department of Justice to release the names of unsuccessful candidates for FCPA monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. Some have focused on enforcement areas, such as sanctions and cyber breach – whereas others have taken a thematic approach (eg, looking at the mechanisms which enforcers use to interact, and how those can impact a cross-border investigation). We are also indebted to our jurisdictional rapporteurs across the region for giving us their perspective on the key trends locally. Rounding out the content, the publication also includes overviews from the World Bank and the Brazilian CGU, providing insight from the 'enforcer' point of view. All authors are leaders in their field and we are grateful to them all for their time and energy: we encourage readers and co-authors to share feedback and comments.

If you'd like to get involved in future editions or have thoughts for us, please contact edward.perugia@globalinvestigationsreview.com.

We hope you enjoy reading *The Investigations Review of the Americas 2019*.

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Enforcer Overview: World Bank



Pascale Hélène Dubois, Giuliana Dunham Irving and Jamieson Andrew Smith
World Bank

Investigation and sanctions at the World Bank: tackling fraud and corruption in World Bank–financed projects

In its 2017 fiscal year, the World Bank Group committed more than US$61 billion in financing, supporting projects in virtually every developing country and spanning nearly every sector.[1] In April 2018, the World Bank Group's shareholders endorsed an ambitious package of measures that include a US$13 billion paid-in capital increase, a series of internal reforms, and a set of policy measures to strengthen the institution's ability to deliver on its mission to end poverty and boost shared prosperity. As a fiduciary for its member countries' funds, the World Bank has a duty, as set forth in its articles of agreement, to ensure that these funds are used for their intended purposes, with due attention to economy and efficiency.[2] The World Bank Group's systems for detecting and deterring fraud and corruption are grounded in this fiduciary duty and are designed both to protect the integrity of World Bank-financed projects and to deter future wrongdoing.

This article describes the basic features of the World Bank's sanctions system from the start of an investigation through to the administrative proceedings that may lead to the suspension and debarment of firms and individuals who have engaged in sanctionable misconduct. To date, the World Bank has debarred or otherwise sanctioned more than 900 individuals and firms.[3]

Introduction to World Bank sanctions

The purpose of the World Bank's sanctions system is to safeguard the integrity of Bank-financed projects and ensure that the proceeds of World Bank financing are used only for the purposes intended.[4] To that end, the World Bank's sanctions system seeks to create both negative and positive incentives by sanctioning firms and individuals for engaging in misconduct: sanctions create negative incentives by discouraging the sanctioned party and others from engaging in future misconduct, and create positive incentives by encouraging prevention, remediation and rehabilitation.[5] Administrative sanctions imposed by the World Bank are 'intended to deter but not to punish' misconduct in Bank-financed contracts, and are not intended to replace the role of 'criminal, civil or administrative measures by national authorities.'[6]

For investment projects approved after July 2016, the World Bank's standards regarding fraud and corruption are set out in the World Bank Procurement Regulations for Borrowers (the Procurement Regulations).[7] Specifically, Annex IV of the Procurement Regulations outlines the relevant fraud and corruption provisions applicable to World Bank-financed projects, including the definitions of the five types of misconduct that are subject to sanctions: fraud, corruption, collusion, coercion and obstructive practices.[8] These are the only 'sanctionable practices' for which the World Bank can sanction firms and individuals.[9] Annex IV references another set of guidelines designed to address the risks of fraud and corruption on Bank-financed projects, known as the World Bank's Guidelines: On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (the Anti-Corruption Guidelines).[10] The Bank incorporates by reference the Anti-Corruption Guidelines into the relevant legal agreement with the borrowing country. By incorporating the Anti-Corruption Guidelines into the legal agreement, and through related provisions in the Procurement Regulations and related bidding documentation, the World Bank seeks to highlight the consequences of engaging in sanctionable misconduct to all parties involved in Bank-financed projects.

The World Bank's two-tiered sanctions system

The decision to publicly sanction an entity or individual for fraud or corruption can have a significant impact on the sanctioned party. Accordingly, the World Bank has implemented a two-tiered administrative sanctions system to ensure that every sanctions decision follows a thorough investigative process and is subject to independent adjudication.

The process starts with the Integrity Vice Presidency (INT), the World Bank unit responsible for investigating allegations of sanctionable misconduct in World Bank-financed projects. Upon receiving an allegation of a sanctionable practice, INT decides whether to launch an investigation. If, after concluding its investigation, INT believes it has uncovered evidence that a firm or individual has engaged in one of the five sanctionable practices, it may submit a statement of accusations and evidence (SAE) to the World Bank's Suspension and Debarment Officer (SDO), who heads the Bank's Office of Suspension and Debarment (OSD). OSD is the first tier in the World Bank's two-tiered adjudicative system.[11]

The SDO is tasked with evaluating whether INT's allegations as presented in its SAE are supported by 'sufficient evidence', meaning that it is 'more likely than not' that the alleged misconduct occurred. If the SDO determines that there is insufficient evidence to support one or more of the accusations, the SDO refers the case back to INT for revision or – if none of the accusations are supported – closes the case.

When the SDO determines that there is sufficient evidence for each of INT's accusations, the SDO issues a notice of sanctions proceedings (Notice) to the accused firm or individual, known as the 'respondent'. The SDO attaches INT's SAE and the evidentiary record to the Notice, giving the respondent the opportunity to review the case against it. In the Notice, the SDO also specifies a recommended sanction for the respondent, which is imposed if the respondent chooses not to appeal.

Any respondent for which the SDO recommends a debarment of six months or more is temporarily suspended, which means that, from the moment the SDO issues the Notice, the respondent is no longer eligible to receive new World Bank-financed contracts. The temporary suspension remains in place until the conclusion of the sanctions proceedings. Information about temporary suspensions

is made available to World Bank staff and member country counterparts through the World Bank's 'Client Connection' extranet, but the Bank does not publicly announce temporary suspensions.

Respondents in World Bank sanctions proceedings may be represented by legal counsel and are afforded a series of opportunities to contest INT's accusations and the SDO's recommended sanction. First, a respondent has 30 days after receiving the Notice to send the SDO a written explanation, in which the respondent may present arguments and evidence as to why the case against it should be withdrawn or the SDO's recommended sanction should be revised. The respondent also has 90 days to submit a response, including written arguments and evidence, to the World Bank Group Sanctions Board (the Sanctions Board) – the second tier in the World Bank Group's sanctions system. INT, in turn, may submit to the Sanctions Board a reply within 30 days of the submission of the respondent's response. The seven-member Sanctions Board, assisted by a permanent secretariat, conducts a de novo review of all contested sanctions cases and is not bound by the findings or recommended sanctions of the SDO or the other first-tier officers. The Sanctions Board may hold a hearing at the request of INT, the respondent, or at the discretion of the Sanctions Board Chair. In addition to resolving contested sanctions cases, the Sanctions Board reviews cases where a sanctioned party contests the Integrity Compliance Officer's determination that the party did not comply with the conditions for release from sanction. The Sanctions Board also reviews cases where a party contests a determination by the World Bank Group that it is a successor or assignee of a sanctioned entity and subject to that sanctioned entity's sanction. Since 2012, the full decisions of the Sanctions Board have been published and are made available on the World Bank's public website.

If a respondent does not appeal its case to the Sanctions Board within 90 days after receiving the Notice, the SDO imposes the recommended sanction and issues a notice of uncontested sanctions proceedings, which is posted on the World Bank's public sanctions website. About two-thirds of respondents choose not to appeal to the Sanctions Board.

The complete list of firms and individuals that are currently debarred can be found on the World Bank's public website.[12]

Recommending the appropriate sanction

When determining the appropriate sanction, the SDO or the Sanctions Board will consider the Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects (the Sanctions Procedures)[13] and the World Bank Group Sanctioning Guidelines (the Sanctioning Guidelines).[14] There are five potential sanctions:

- debarment with conditional release;
- conditional non-debarment;
- fixed-term debarment;
- letter of reprimand; and
- restitution.

The default or 'baseline' sanction is debarment with conditional release. A respondent subject to debarment with conditional release is ineligible to receive World Bank-financed contracts for a period of time,[15] and is not released from debarment at the end of that period until it fulfils certain conditions. The conditional release process generally requires the respondent to implement an integrity compliance programme. The World Bank Group Integrity Compliance Guidelines (the Integrity Compliance Guidelines) detail the elements that should be included in a respondent's integrity compliance programme, such as:

- a clear prohibition of misconduct;
- the creation and maintenance of a trust-based, inclusive organisational culture that encourages ethical conduct; and
- a commitment to compliance with the law.[16]

The Integrity Compliance Guidelines encourage the respondent to carry out a comprehensive risk assessment and address shortcomings. Other considerations listed in the Integrity Compliance Guidelines include developing and maintaining clear internal policies designed to 'prevent, detect, investigate and remediate' misconduct, implementing internal controls, providing training, establishing lines of communication, providing incentives and establishing reporting policies.

The Sanctioning Guidelines list several aggravating and mitigating factors for the SDO or the Sanctions Board to consider when determining an appropriate sanction.[17] Aggravating factors such as the severity of the misconduct, harm caused, interference with INT's investigation or a history of adjudicated misconduct may justify a more severe sanction. Applying aggravation for severity of the misconduct will depend on whether the misconduct was part of a repeated pattern, the respondent used sophisticated means, the respondent's level of involvement, management's involvement in the scheme or the involvement of a public official or World Bank staff member in the misconduct. 'Harm caused' might be considered when the misconduct resulted in harm to public safety or resulted in a degree of harm to the project. 'Interference with investigation' may mean interference with the investigative process or intimidation of a witness (interference may also constitute a stand-alone sanctionable practice of obstruction, depending on the circumstances).

Mitigating factors may include the respondent's minor role in the misconduct, evidence that the respondent has taken voluntary corrective actions and the level of cooperation with INT in its investigation. Voluntary corrective actions may include cessation of misconduct, internal action against responsible individuals, establishment or improvement of an effective compliance programme and restitution or financial remedy. Cooperation with the investigation may include assistance and ongoing cooperation with INT's investigation, internal investigations, admission or acceptance of guilt or responsibility, and voluntary restraint from bidding on World Bank-financed tenders pending the outcome of the investigation.

Settlement agreements and voluntary disclosures

A World Bank investigation or sanctions case may also be resolved through a mutually agreed settlement between the respondent and INT through a settlement agreement. The parties may enter into a settlement agreement at any point prior to, or during, sanctions proceedings, up until the SDO issues a notice of uncontested sanctions proceedings or the Sanctions Board issues a decision, as applicable. All settlement agreements must be cleared by the World Bank's Legal Vice Presidency and are submitted to the SDO for confirmation that:

- the respondent entered into the settlement freely and fully informed of the settlement agreement's terms and without any form of duress; and
- the terms of the settlement agreement do not manifestly violate the Sanctions Procedures or the Sanctioning Guidelines.

Settlement agreements can permit the resolution of matters with a smaller investment of time and resources and provide a greater measure of certainty for both parties.

The World Bank also has a voluntary disclosure programme (VDP) operating within INT. The VDP provides an opportunity for

firms to reveal and address past misconduct on their own initiative, if INT has not yet launched a formal investigation.[18] The VDP allows entities to avoid sanctions altogether by agreeing to the following actions:

- internally investigate and disclose past misconduct;
- commit to abstain from future misconduct; and
- comply with certain conditions, including the implementation of robust compliance measures.

In exchange for these commitments, participating firms retain eligibility to receive World Bank-financed contracts. Participating firms also remain anonymous, as the World Bank agrees not to publicise or share information regarding the firm's participation and disclosures. If a firm violates the provisions of the VDP, it is subject to a 10-year debarment. In circumstances in which a company proactively discloses misconduct of which INT was otherwise not aware, INT also has the option of settling the matter with a conditional non-debarment as the imposed sanction. Such a settlement also means that the company concerned remains eligible to bid on World Bank-financed contracts.

Cross-debarment with other multilateral development banks

In 2010, the World Bank entered into an agreement for the mutual enforcement of debarment decisions with four other large multilateral development banks (MDBs): the African Development Bank Group, the European Bank for Reconstruction and Development, the Asian Development Bank and the Inter-American Development Bank Group.[19] Under this agreement, if a firm or individual is debarred by one of these MDBs for more than one year, it will be debarred by the others, subject to certain limited exceptions.[20] This agreement greatly increases the impact of debarment decisions by these MDBs.

Conclusion

The World Bank continues to work diligently to prevent, detect, and deter misconduct in Bank-financed operations, and has learned and shared valuable lessons about investigating and adjudicating fraud and corruption. This is critical work, to which the World Bank remains strongly committed. After all, when development funds are diverted for fraud and corruption, it is often the poor – the intended beneficiaries of World Bank-financed projects – who suffer the most.

The authors would like to thank their colleagues Paul Haynes, Collin Swan and Christina Nelson at the World Bank Group for their assistance in preparing and editing this chapter.

Notes

1 The World Bank Group, World Bank Annual Report 2017, (available at http://hdl.handle.net/10986/27986). The 'World Bank' is comprised of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) and is one part of a larger group of institutions known as the World Bank Group. In addition to IBRD and IDA, the World Bank Group also includes the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID). This chapter describes the sanctions system applicable to activities financed by the World Bank; each of IFC and MIGA have a sanctions system that closely parallels that described here for the World Bank.

2 Articles of Agreement of the International Bank for Reconstruction and Development, article III, section 5(b), 27 December 1945, 60 Stat. 1440, 2 UNTS 134.

3 Note that this does not include cross-debarments initiated by other multilateral development banks and recognised by the World Bank Group.

4 WBG Policy: Sanctions for Fraud and Corruption, section IIIA1 (2016).

5 Id., section IIIA2.

6 Id., section IIIA3. For a brief discussion of the evolution of the Bank's sanctions system since its inception in 1996, see Pascale Hélène Dubois, Paul Ezzeddin and Collin David Swan, 'Suspension and Debarment on the International Stage: Experiences in the World Bank's Sanctions System', 25 *Public Procurement L Rev*. 61 (2016).

7 The World Bank Procurement Regulations for IPF Borrowers: Procurement in Investment Project Financing Goods, Works, Non-Consulting and Consulting Services (July 2016).

8 Id., Annex IV, Fraud and Corruption.

9 The current definitions of corruption, fraud, collusion, and coercion have been harmonised across the World Bank and its partner multilateral development banks.

10 World Bank Guidelines: On Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (July 2016) (the World Bank Anti-Corruption Guidelines).

11 The sanctions system also includes parallel procedures for cases related to the International Finance Corporation, the Multilateral Investment Guarantee Agency, and World Bank guarantees and carbon finance operations. In these cases, INT submits the case to the Evaluation and Suspension Officer (EO) for such institution, who performs a function parallel to that of the World Bank's SDO. To date, only three sanctions cases and one settlement have been submitted pursuant to these parallel procedures; all remaining sanctions cases have been handled by the World Bank's SDO.

12 The World Bank Listing of Ineligible Firms & Individuals is available online at http://worldbank.org/debarr.

13 Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects (2016).

14 The World Bank Group, World Bank Group Sanctioning Guidelines (available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf) (visited 20 June 2017).

15 The time period is generally three years, although this period may increase or decrease depending on the application of aggravating and mitigating factors.

16 The World Bank Group, Summary of World Bank Compliance Guidelines.

17 World Bank Group Sanctioning Guidelines.

18 For more information on the World Bank VDP, see www.worldbank.org/vdp.

19 The agreement is available online at http://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf (visited 19 June 2017).

20 Id.

About the authors

As the head of the Integrity Vice Presidency, Pascale Hélène Dubois manages investigations and pursues sanctions in connection with allegations of fraud and corruption on World Bank Group-financed projects, as well as allegations of significant fraud or corruption involving World Bank Group staff. The Integrity Vice Presidency also supports the operational units of the World Bank Group by mitigating fraud and corruption risks through sharing investigative findings, advising on prevention measures and outreach.

Ms Dubois has played a leading role in the World Bank's anti-corruption efforts for more than a decade, serving previously as chief suspension and debarment officer in the Office of Suspension and Debarment (OSD), where she determined whether to suspend and debar firms and individuals accused of fraud and corruption in World Bank-financed projects. Prior to her appointment as chief suspension and debarment officer, Ms Dubois managed the voluntary disclosure programme in the Integrity Vice Presidency. She also worked as an operational lawyer advising the Africa region of the World Bank for seven years. Before joining the World Bank, she was in private practice for 10 years in the United States and Belgium.

Ms Dubois is a senior adviser to the American Bar Association section of international law's anti-corruption committee, having earlier served as co-chair for three years, and is now co-chair of the International Bar Association's anti-corruption committee. She is a certified fraud examiner. Since 2009, she has been an adjunct professor at Georgetown University Law Center, where she teaches a course on international anti-corruption.

Ms Dubois received her Lic Jur, cum laude, from the University of Ghent, Belgium, and her LLM from New York University.

Ms Giuliana Dunham Irving is the current executive secretary to the World Bank Group sanctions board. She has been with the sanctions board secretariat since October 2016. Ms Dunham Irving joined the World Bank Group in 2006 as an institutional integrity officer in the institutional integrity department (now the Integrity Vice Presidency). From 2008 to 2012, she held the position of senior counsel in legal department's institutional administration unit. From 2012 to 2014, she served as senior counsel and special assistant to the general counsel and senior vice president of the World Bank Group. From 2014 to September 2016, she held the position of senior counsel for sanctions policy in the legal operations policy unit. Ms Dunham Irving received her Juris Doctor from New York University School of Law in 1992, and completed her undergraduate studies in economics at Columbia College of Columbia University in New York and Universita' Commerciale Luigi Bocconi in Milan. Ms Dunham Irving began her legal career as a litigation associate with the firm Debevoise & Plimpton in New York. Prior to joining the World Bank Group, she served as a trial attorney in the fraud section of the United States Department of Justice and as an assistant United States attorney in Washington, DC.

Jamieson A Smith is the chief suspension and debarment officer (the SDO) of the World Bank.

Mr Smith heads the World Bank's Office of Suspension and Debarment, which is an independent unit within the World Bank and is the first tier of the bank's two-tiered adjudicative sanctions system.

Mr Smith has spoken on multilateral institutions' approach to anti-corruption at various domestic and international conferences, including venues in Brazil, France, Italy, South Africa, Singapore and the United Kingdom. Prior to his service at the World Bank, Mr Smith was an attorney in private practice, where he represented corporations and individuals in a wide variety of white-collar criminal and regulatory matters, including alleged violations of the US Foreign Corrupt Practices Act. He has conducted internal investigations in China, Egypt, Indonesia, Brazil, Croatia, Italy and Czechia, and also advised clients with respect to compliance and corporate governance issues.

Mr Smith received his AB, cum laude, from Duke University, and his JD, magna cum laude, from Duke University's School of Law, where he was a member of Law and Contemporary Problems. He also earned his MA in American legal history from the University of Virginia.

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