

Eyeing Trends In Multilateral Development Bank Enforcement

By **Michael DeBernardis and Jonathan Zygielbaum** (January 29, 2020, 5:41 PM EST)

Two decades after former World Bank Group President James D. Wolfensohn committed the World Bank to supporting international efforts to combat corruption, the World Bank and other multilateral development banks, or MDBs, have firmly established their role in the global fight against corruption and related misconduct.

The World Bank now routinely sanctions dozens of companies and individuals each year for engaging in misconduct on projects it finances. According to the World Bank's Sanctions System Annual Report, the World Bank's Integrity Vice Presidency, or INT, the unit tasked with investigating and prosecuting misconduct, submitted 37 cases to the Sanctions and Debarment Officer in fiscal year 2019, a 30% increase over fiscal year 2018.[1] Sixteen other cases were resolved through settlement agreements in fiscal year 2019.

The World Bank has not been shying from high-profile targets. In January 2019, the World Bank announced the three-year debarment of Construtora Noberto Odebrecht SA, a subsidiary of Odebrecht SA, and the largest construction and engineering company in Latin America, related to fraud and collusion on a World Bank-funded project in Colombia.[2]

In June 2019, the World Bank announced the nine-month debarment of China Railway Construction Corporation Ltd. and hundreds of its subsidiaries in connection with misrepresentations regarding personnel and equipment submitted in bid documents.[3] CRCC is a state-owned Chinese construction and engineering company that ranks 59th on the Global Fortune 500 with over \$110 billion in revenue in 2018.

Other MDBs have similarly engaged in aggressive enforcement efforts in recent years. Indeed, some of the most prominent MDB enforcement actions in 2019 involved institutions other than the World Bank.

In March 2019, for example, the African Development Bank, or AfDB, reached an agreement with General Electric Co. related to the misconduct of Alstom SA, which GE acquired in 2015. The AfDB debarred two GE power units acquired from Alstom for up to 76 months.

In September 2019, the Inter-American Development Bank, or IDB, reached a landmark settlement



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agreement with Odebrecht, imposing a \$50 million financial penalty and a 10-year conditional nondebarment on one of its subsidiaries.

It is clear from developments in the past year that the MDBs are continuing to aggressively investigate and punish misconduct related to bank-financed projects.

Background: What Is MDB Enforcement?

MDBs have contract-based jurisdiction over companies and individuals that work on bank-funded projects. This jurisdiction includes the right to audit companies that work or bid on MDB-funded projects to investigate potential misconduct, typically corruption, fraud and collusion.

Under most MDB sanctions regimes, if investigators find that a company or individual committed a sanctionable practice, the matter is referred to a first-level adjudicator to determine if the evidence is sufficient to prove the allegations and to recommend an appropriate sanction.

Most systems also establish a second-level adjudicator, often a board or committee, to resolve contested cases. The World Bank, for example, has a sanctions board that serves as the final adjudicator in any contested sanctions case. The sanctions board is comprised entirely of members who are external to the World Bank.

Most sanctions regimes also allow for the banks to resolve allegations through negotiated settlements.

The MDBs have an array of sanctions at their disposal to punish companies and individuals that engage in misconduct. These include debarment (prohibiting the company from bidding for contracts funded by the MDB), conditional non-debarment (allowing the company to remain eligible as long as it meets certain imposed conditions), letters of reprimand and financial penalties. The baseline sanction for a finding of corruption, fraud or other misconduct is a three-year debarment, which can be adjusted depending on the presence of aggravating or mitigating factors.

Trends and Developments

Settled cases, enforcement data, and published decisions provide helpful insight into MDB enforcement trends as we move into 2020.

Continued Focus on Misrepresentations in Documents

In its Sanctions System Annual Report for fiscal year 2019, the World Bank emphasized its focus on complex investigations. Throughout its history, the World Bank has in fact been involved in several complex and high profile investigations, particularly involving corruption and collusion. However, the majority of its debarments in 2019 resulted from relatively straight forward charges of fraudulent conduct premised on misrepresentations in documents.

This is a continuation of a trend that has seen the World Bank and other MDBs target relatively simple, easy to prove, misrepresentations in bidding and other documents, alleging that such misstatements constitute fraudulent practices. This approach also explains how the World Bank has continued to sanction a large number of companies and individuals each year even as it has focused its efforts on complex investigations that may take a number of years to resolve.

Guidance on Mitigating Factors From World Bank Jurisprudence

The World Bank is the only MDB to publish detailed decisions from its sanctions board. The sanctions board decisions provide helpful insight into how the sanctions board views certain issues, particularly related to mitigating and aggravating factors. The sanctions board's decisions in 2019 offer some particularly useful guidance.

For example, while the sanctions board has long identified employee discipline by the company as a mitigating factor, the sanctions board confirmed in decisions in 2019 that respondents must be willing to discipline senior staff involved in misconduct and provide evidence and specific details about such discipline in order to receive mitigating credit.[4]

Similarly, while the sanctions board consistently offers mitigating credit for companies that establish compliance programs, its decisions in 2019 make clear that it will take into account the context surrounding these efforts. In Sanctions Board Decision 120, for example, the sanctions board determined that the respondent was not entitled to full credit for implementing a compliance program when the implementation was delayed and it was apparent that the compliance program was only adopted to obtain the mitigating credit.[5]

IDB/Odebrecht Settlement Highlights Unique Nature of MDB Enforcement

The dynamic between MDBs and respondents in sanctions cases is vastly different from the one that exists between regulators and defendants in the criminal or civil context. While debarment serves as a powerful deterrent against misconduct, MDBs also recognize that it reduces competition (by taking a competitor out of the market) and potentially increases costs for their borrowers.

As a result, MDBs are often willing to approach settlements pragmatically and creatively. The IDB's September 2019 settlement with Odebrecht serves as a good example of how these considerations come into play. The settlement includes a 10-year conditional nondebarment for Odebrecht's subsidiary, Odebrecht Engenharia e Construção, or OEC; a six-year debarment for Odebrecht subsidiary Construtora Noberto Odebrecht, and a \$50 million fine for Odebrecht.

The conditional nondebarment allows OEC to continue to perform MDB-funded projects, but also gives the IDB the power to keep a close eye on the efforts of OEC and Odebrecht to implement an integrity compliance program. Odebrecht's sizeable fine will be paid directly to nongovernmental organizations and charities managing social projects in the IDB's developing member countries.

Moreover, recognizing the financial burden placed on Odebrecht as a result of its multiple recent resolutions with national authorities in the U.S., Brazil and elsewhere, the IDB agreed that payments to the nongovernmental organizations and charities will not commence until 2024.

Looking Ahead to 2020

How will a change in leadership impact the approach of the World Bank and the AfDB? Both the World Bank and the AfDB saw new leadership arrive in key positions in 2019. In January 2019, Alan Bacarese took over as the director for integrity and anti-corruption at the AfDB. In November 2019, Ethiopis Tafara took over as the acting vice president for integrity at the World Bank. It will be interesting to see how these changes might affect the enforcement strategy and approach at these banks in 2020.

Chinese companies remain a primary target. Chinese companies have flooded the infrastructure market, particularly in Africa and Southeast Asia. As more Chinese companies participate in tenders for development projects, it is unsurprising that an increasing number of Chinese companies find themselves in the crosshairs of the MDBs' sanctions regimes. In calendar year 2019, 18 Chinese group companies were sanctioned to a period of debarment by the World Bank, a 340% increase from 2018 and by far the most of any country. This is a trend we expect to continue in 2020.

Continued cooperation between the MDBs and national authorities will continue. MDBs have frequently sanctioned companies either shortly before or shortly after those companies have settled cases with national authorities. The World Bank and the IDB's 2019 settlements with Odebrecht and its subsidiaries, for example, come in the wake of Odebrecht's late-2016 settlements with authorities in the U.S., Brazil and Switzerland.

Tokyo-based conglomerate Hitachi Ltd.'s 2015 settlement with U.S. authorities was similarly followed by a settlement with the AfDB that same year. French construction group Alstom SA's 2012 settlement with the World Bank was followed by a 2014 settlement with authorities in the U.S.

The MDBs make no secret of the fact that they cooperate with national authorities, sharing the findings of their investigations and also relying on national authorities for information and referrals. Expect this type of cooperation and these overlapping enforcement actions to continue in 2020.

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[1] World Bank Group Sanctions System Annual Report FY19 at 8.

[2] World Bank Press Release, World Bank Group Announces Settlement with Brazilian Subsidiary of Odebrecht (Jan. 29, 2019), <https://www.worldbank.org/en/news/press-release/2019/01/29/world-bank-group-announces-settlement-with-brazilian-subsidiary-of-odebrecht>.

[3] World Bank Press Release, World Bank Group Debars China Railway Construction Corporation Ltd. and two subsidiaries (June 5, 2019), <https://www.worldbank.org/en/news/press-release/2019/06/05/world-bank-group-debars-china-railway-construction-corporation-ltd-and-two-subsidiaries>.

[4] Sanctions Board Decision No. 116, ¶25 (March 2019).

[5] Sanctions Board Decision No. 120, ¶56 (May 2019).