
Multilateral Development Bank Enforcement

Investigator, Judge and Jury

Multilateral Development Banks (“MDBs”), like the World Bank or African Development Bank, are international institutions, set up by nation states to provide financial assistance to developing countries to promote economic and social development. They predominantly lend support to governments and public bodies for projects in jurisdictions and sectors perceived to be high risk from a corruption perspective. In an average year, they lend around USD 190bn across the main MDBs but in times of economic crisis, this figure can exceed USD 200bn. It is not surprising then, that they have substantial apparatus in place for investigating and sanctioning what they term “prohibited practices” in connection with projects they fund – fraud, corruption, collusion, coercion or obstruction at any stage in the bidding for or delivery of the project. And over recent years they have become more active and effective in rooting out and sanctioning wrongdoing.

Why should this be on your radar?

There is real jeopardy for businesses and individuals who service public sector projects, particularly in developing countries:

- Such businesses may not even know that they are working on a project funded by MDBs as the funding is provided to the Government or public body customer.
- The MDB will treat any such business, including sub-contractors, as within their jurisdiction.
- The MDBs investigate, prosecute, judge and sanction those suspected of breaches of their rules.
- They have motivated and often well-resourced investigation teams who can and do work with relevant law enforcement, sharing information and evidence.
- They determine wrongdoing on a “balance of probability” test, rather than the more stringent and typical “beyond reasonable doubt” test for criminal wrongdoing.
- Because they are supra-national bodies, there are essentially no external rights of appeal to any court.
- Most publish the names of sanctioned persons and the potential sanctions include lengthy and wide-ranging debarment, which will be recognised and cross-applied by all the major MDBs.

So one breach could be reputation and business-destroying.

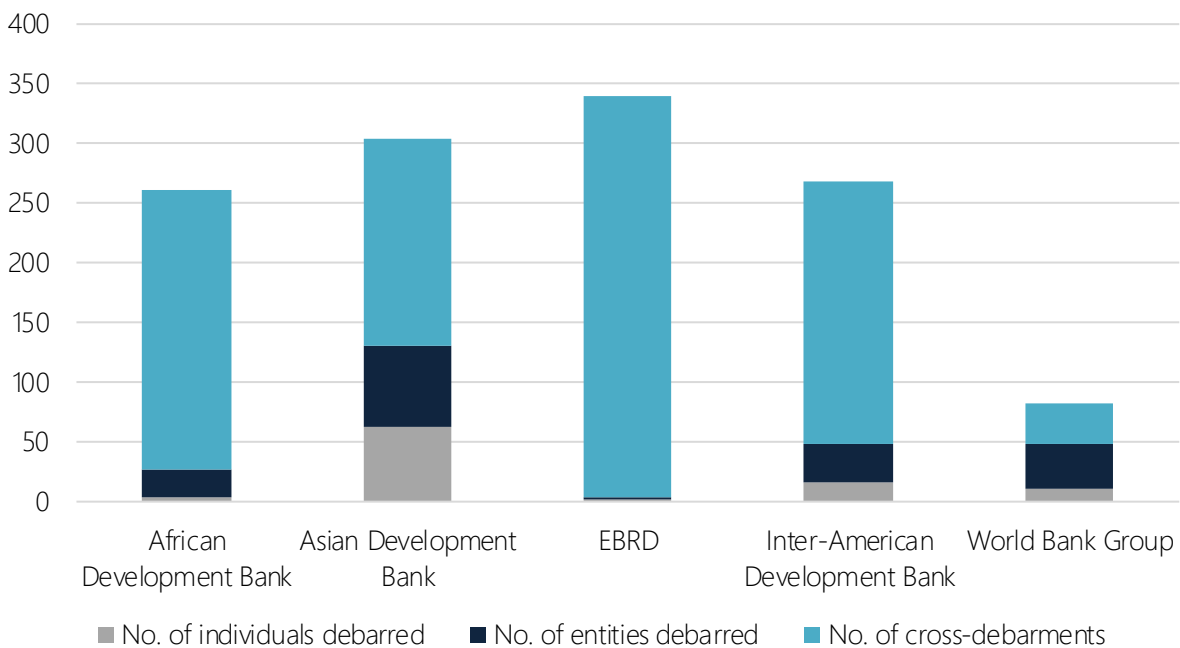


MDBs may begin an investigation of their own volition, or as a result of concerns being raised by a whistleblower. Increasingly, MDBs are proactively auditing projects to root out potential wrongdoing. In the event that the MDB's investigation function determines, on the balance of probabilities, that a prohibited practice occurred, an enforcement process may follow pursuant to its own procedural rules and a sanction imposed (the most onerous being debarment from participating in MDB-funded projects).

The enforcement appetite and approach of different MDBs varies, but across the main MDBs (the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group), sanctioning activity has grown steadily over the last decade. For example, in 2019 the Asian Development Bank debarred 62 individuals and 69 companies from participating in its projects.

And as noted above, debarment of an individual or company by one MDB will result in cross-debarment for the same period by all these main MDBs if the debarment is for a period of more than 12 months. This can have a devastating financial impact on anyone reliant on MDB-funded projects.

Debarments and cross-debarments in 2019



All figures are taken from MDB annual reports for 2019. But not all cover the same 12-month period or treat affiliates debarred in the same action as separate debarments, which may explain why the total cross-debarment figures across all five MDBs are not consistent.

How could this affect you?

If you have been involved in any project funded by one of the MDBs, you may be subject to the jurisdiction of their investigation and enforcement, should concerns be raised about your conduct in winning or performing a contract related to the project. The risk remains for years after the project may have ended (for example, both the World Bank and EBRD can investigate acts up to ten years prior). Investigations can be lengthy, albeit they are usually quicker than many law enforcement investigations (e.g. the average length of an investigation of financial crime by the SFO is more than 4 years; on average, a World Bank investigation lasts almost 12 months).

Investigations can also be expensive for the person under investigation, as many of the MDBs may ask for documents and information as part of their investigation process, which can take up management time and involve legal costs. While MDBs lack any statutory powers to compel provision of documents or information, failure to do so can be seen as uncooperative and may lead to negative inferences. There may also be contractual obligations to cooperate and provide documents, failure of which could result in a breach of contract.

In the event that an MDB decides there has been a prohibited practice, it will begin its enforcement process. The suspect will typically be offered the chance to respond and to provide any further information or evidence they may wish to submit. Again, this can be lengthy and expensive, as it may require you to make submissions or contest the proceedings, enter into negotiations for settlement or, in the event of an adverse finding, appeal a decision (through the MDB's internal appeal mechanisms).

MDBs have wide investigation, determination, review and sanctioning powers and while there is generally a harmonised approach, there do remain some variations between the banks (for example, some do not allow negotiated settlements, like the Asian Development Bank). The most draconian sanction is debarment (sometimes referred to as suspension or exclusion) from involvement in any bank-sponsored project in any capacity, which may be indefinite or for a specified period and/or with specified conditions for release from debarment, including early release. Other sanctions may include:

- rejection of a proposal for an award of contract to the respondent;
- cancellation of a portion of MBD finance allocated to the respondent but not yet disbursed;
- issuing a formal letter of reprimand;
- imposing a conditional non-debarment (which may require the respondent to engage a compliance monitor or otherwise improve its compliance programmes to prevent issues recurring); and/or
- issuing an order to make restitution to another party or the MDB in an amount representing the diverted funds or economic benefit that the respondent obtained



as a result of having committed the prohibited practice. In practice, this would likely require the MDB to issue court proceedings to enforce any order it makes, in the absence of voluntary payment.

The level of sanction is intended to reflect the level of culpability and seriousness of the wrongdoing. Even where a prohibited practice has occurred, where the suspect can show that it took steps to prevent such wrongdoing and even that it has since improved its internal controls to prevent re-occurrence, this can assist in mitigating the final sanction. However, it should be noted that different MDBs have a different perspective on the purpose and need for sanctions with some MDBs taking a more punitive approach than others, who may be more focused on ensuring that the outcome ultimately results in a business that will in future be better managed, more ethical and able to compete for further MDB-sponsored work. In some cases, this is a very pragmatic approach as certain sectors and geographies have limited quality contractors available and willing to perform the project work in question; debarment for lengthy terms may thus prove counter-productive to the banks' strategic aims.

However, even if the MDB sanction does not result in debarment, the fact that a company or individual has been investigated and sanctioned may be disclosable in tenders for MDB and non-MDB funded projects and/or other situations (e.g. during acquisitions or in respect of funding applications). MDBs may also refer the issue on to relevant country authorities to investigate and prosecute, if appropriate (although this can sometimes depend on the perceived respect for the rule of law and human rights in the relevant jurisdiction). All of which can have a negative impact on relationships with third parties.

How can you mitigate your risk?

Through careful and rigorous implementation of effective policies and procedures and project oversight mechanisms, businesses can both reduce the risk of a prohibited practice occurring and reduce the risk (if it does occur) of the most severe sanctions being imposed.

Businesses should seek to identify at the outset of any project if it is funded in any way by MDBs and if so, which one(s). This may be disclosed in tender documents, or may be apparent from the terms included in the tender or contract which indicate the involvement of MDBs. Businesses should also familiarise themselves with the relevant MDB's enforcement procedures and understand what powers they have, both under those procedures and pursuant to any contractual arrangements entered into directly or indirectly.

Businesses should aim to implement proportionate, risk-based financial crime controls. At very least, when involved in activities that may be perceived as high risk from a corruption perspective, exercise caution and document all steps taken to identify and mitigate those perceived risks. For example, if you are using a local agent to assist in the procurement process: (a) conduct appropriate due diligence on that agent and record the steps taken; (b) ensure payment terms are reasonable and benchmark fees against delivered work product;



(c) insist on a written contract, outlining the scope of services to be provided and containing suitable ethics clauses with audit rights; and (d) monitor the agent's activities to ensure compliance with their contractual and ethical obligations.

If you are notified you are under investigation by an MDB or an enforcement process has begun, act quickly to ensure any deadlines are met and make sure you have obtained assistance and advice from specialists with experience of MDB-enforcement processes. Many of the MDBs have set timetables under their procedural rules and a failure to comply, for example, with a deadline to provide written submissions may result in adverse findings being made against you with limited rights to challenge such findings.

Contact us

If you are subject to MDB scrutiny or would be interested in learning more on this issue, please contact our expert team.



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