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This newsletter is intended to provide general information regarding recent developments in anti-corruption law. The views expressed are not necessarily those of the International Bar Association.

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The cross-debarment crossfire: the World Bank's debarment of SNC-Lavalin

On 17 April 2013, the World Bank Group announced its decision to debar SNC-Lavalin Inc and its 100 affiliates for ten years, the longest corruption-related debarment in the World Bank's history.[1] The World Bank found that the Canadian-based engineering company paid massive bribes to obtain a contract in the World Bank-sponsored Padma Multipurpose Bridge Project in Bangladesh, as well as an electrification project in Cambodia. In addition to World Bank debarment, SNC-Lavalin will likely be debarred from working with other multilateral development banks (MDBs) pursuant to the 2010 Agreement to Mutually Enforce Debarment Decisions (the 'Debarment Agreement'). Pursuant to internal protocol, the World Bank referred their findings to the Canadian government, which prompted a full-scale investigation in September 2011. This in turn has spawned investigations into SNC-Lavalin by Switzerland and Bangladesh.

As a result of situations like these, the anti-corruption fight is now firmly entrenched in MDBs. However, because the standard of proof is lower since this is a civil rather than criminal context – that is, preponderance of evidence versus beyond a reasonable doubt – with some of the same serious consequences, companies are facing huge challenges to ensure due process. The SNC-Lavalin debarment illustrates how the increasing anti-corruption collaboration among non-governmental organisations and states can lead to more serious and far-reaching consequences for companies operating abroad.

History of MDB cooperation

The coordination among MDBs and governments seen in the *SNC-Lavalin* case is the result of years of multilateral collaboration. In 2006, the World Bank, Asian Development Bank (ADB), African Development Bank (AfDB), European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank (IDB), and International Monetary Fund (IMF) adopted the Uniform Framework for Preventing and Combating Fraud and Corruption (the 'Uniform Framework'). This agreement standardised definitions for corrupt practices, established uniform investigation procedures and set the groundwork for sharing information with other signatories and national governments. In 2010, the MDBs went further and signed the Debarment Agreement, which provides that signatories will automatically enforce debarments of over one year made by member MDBs unless there are countervailing legal or institutional concerns. Cross-debarment has become increasingly common; in FY2011, there were only 37 jointly-recognised debarments; this grew to 122 cross-debarments in 2012.[2]

In addition to the Debarment Agreement, the World Bank has signed agreements to coordinate investigations and share information with various other state and international organisations including the UK Serious Fraud Office, the European Anti-Fraud Office, Interpol, the International Criminal Court, USAID, the Australian Agency for International Development, and the UN Office for Internal Oversight. Also, in September 2012, the World Bank signed a Memorandum of Understanding with the Nordic Development Fund (NDF) to collaborate on anti-corruption policies and the NDF adopted the 2006 Uniform Framework's common definitions as well as agreeing to the cross-debarment policies in the 2010 Debarment Agreement.

Preparing for unfair process

The World Bank has been the leading institution within this MDB network to investigate and debar international companies. However, the World Bank's two-tiered administrative review and debarment

process raises serious due process concerns, particularly in light of the broad impact such a debarment can have. Notably, the World Bank can impose preliminary debarments on individuals and companies (Respondents) without giving them notice or a chance to rebut the allegations and there are no opportunities for an in-person hearing until the second-tier appeals stage of the process. And any debarment decisions ultimately reached by the World Bank would also likely be enforced by all signatories to the Debarment Agreement.

Furthermore, as the World Bank is not a sovereign, they have no subpoena power and therefore there is no compulsory discovery. As a result, at no stage of the sanctions process do Respondents have the right to obtain documents from uncooperative third parties.

The suspension: the World Bank as the police, judge and jury

World Bank investigations can quickly escalate into MDB sanctions and national prosecutions. When the Office of the Integrity Vice Presidency (INT) has completed an investigation, they will summarise their findings in a Final Investigative Report (FIR) which will be published in a redacted form online. If INT also believes that the laws of a member country have been violated, they will send a referral report to that government and encourage them to prosecute the Respondent.

Since 2009, the World Bank has advocated using its influence to demand state enforcement of referral reports. The suggested plan contemplates direct contact between INT and local law enforcement, using diplomats to reinforce the demand to prosecute, and possibly publicising when referral reports are sent. INT would also report unprosecuted referrals to the World Bank Audit Committee, which could suspend lending to a certain sector or cut off a country's lending entirely as a result of the country's enforcement failure. This plan to urge state enforcement is gaining traction. In fact INT's 2012 *Annual Report*, World Bank President Jim Yong Kim advocated 'prodding national authorities to act upon our referrals of investigative information'.[3]

In addition to referral reports, the World Bank maintains the right to 'at any time make materials submitted by INT or the Respondent to the Evaluations Officer and/or Sanctions Board available to another multilateral development bank or other international organization, or to national development agencies or the investigative or prosecuting authorities of its member countries.'[4]

In the first phase of the sanctioning process, the World Bank can render a judgment and impose a preliminary sanction without input from or knowledge of the accused. In addition to online publication and referring the misconduct to national governments, INT will report all inculpatory and exculpatory evidence in a Statement of Accusation and Evidence to an Evaluation and Suspension Officer (EO). If the EO finds the evidence insufficient, INT may revise and resubmit the Statement. If there is sufficient evidence, the EO will temporarily suspend the Respondent. It is only upon finding of sufficient evidence and imposition of a temporary suspension that the World Bank notifies the Respondent for the first time in a Notice of Sanctions Proceeding. This includes the allegations, recommended sanction and all of the evidence INT uncovered.

The temporary sanction is not made public at this time. However, publicly-traded companies may have to disclose the sanction in public filings. For example, Siemens disclosed that it was temporarily debarred in its May 2009 6-K to the SEC, although the World Bank announcement of debarment was not issued publicly until November 2009. Similarly, SNC-Lavalin disclosed its temporary debarment in its March 2012 filings with the Canadian Securities Administrators, with the public World Bank announcement coming in April 2013.

Upon receiving Notice from the World Bank, a Respondent has three options:

- *Fail to respond to the notice:* if the Respondent fails to reply to an EO's Notice within 90 days, the EO's sanction and supporting explanation will be final and publicised.
- *Request that the EO withdraw or revise their sanction:* under the second option, the Respondent has 30 days from delivery of the Notice to provide the EO with an alternative explanation of their conduct and/or additional evidence and request that the EO withdraw or revise their decision. The EO then has 30 days from receipt of this request to alter or retract their judgment.
- *Appeal INT's allegations and/or the EO's decision:* in the third option, the Respondent may file an appeal and submit additional evidence to the World Bank Sanctions Board within 90 days of receiving the Notice from the EO, which will transition the Respondent into the second tier of

the sanctions process. Even though the World Bank's minimum debarment is a harsh three years with conditional release, and such a finding can lead to automatic cross-debarment, companies have not overwhelmingly availed themselves of this third option. Over 50 per cent of debarment decisions are not appealed and end with the EO's judgment.

An appeal to the stacked sanctions board

To the extent that a company does decide to pursue an appeal, the Respondent must present a convincing case to what is the appellate body in this process – the Sanctions Board, which has few institutional checks. The Sanctions Board consists of three World Bank employees and four external members chosen by the World Bank's president and appointed by the Bank's executive directors. Upon receiving an appeal, the Sanctions Board will notify INT that it has 30 days to submit a written reply. INT, the Respondent or the Sanctions Board may request an in-person hearing, but it is not required. The Sanctions Board reviews the case *de novo* and will make a determination of fault based upon a preponderance of the evidence standard. While the Board is bound by precedent, the current two-tier system has only existed since 2007, with only 55 decisions as of March 2013,[5] so most cases are of first impression. Furthermore, the Board is not bound by the EO's recommended sanction when choosing an appropriate penalty – they can make it more or less serious as they see fit.[6] The Sanctions Board's decision is non-appealable and is publically available on the internet-based, searchable debarment list and in the World Bank's *Law Digest*.

Self-reporting and settlements: unattractive alternatives

In addition to a World Bank-led investigation leading to debarment, companies may initiate the involvement of the World Bank by self-reporting corruption issues or settling with the World Bank. Self disclosure of misconduct to the World Bank's Voluntary Disclosure Programme (VDP) can lead to costly consequences. In order to avoid the World Bank's publicised sanctions, companies must comply with non-negotiable VDP Terms & Conditions. These standards require participating companies to disclose all misconduct detected in an internal investigation, pledge not to engage in future misconduct, implement rigorous internal controls, and allow a compliance monitor to report on the company for three years.

As to settlements, companies can petition the EO to stay proceedings for up to 90 days to allow for settlement negotiations and then can enter into a Negotiated Resolution Agreement, an option that began in 2010. All settlement agreements must be approved by the World Bank General Counsel and reviewed by the EO. Like many companies faced with the potentially damaging prospects of debarment, SNC-Lavalin settled with the World Bank in a Negotiated Resolution Agreement.

Negotiated Resolution Agreements often impose heavy burdens on companies. As in SNC-Lavalin's case, the World Bank can debar the company and its affiliates from bidding on its contracts. The World Bank frequently requires companies to engage in costly evaluations and updates of their internal compliance programmes. Respondents may also have to pay restitution, hire a third party compliance monitor, and implement World Bank recommendations during the debarment period. Furthermore, the World Bank may require the Respondent to submit to additional INT investigations of their other World Bank-funded projects and, in the case of a merger or acquisition, the Respondent may have to cooperate in INT investigations of target companies, their subcontractors, competitors, and agents alleged to have committed misconduct in a World Bank project.

Far-reaching ramifications of debarment

While MDB contracts accounted for only one per cent of SNC-Lavalin's business, the World Bank's debarment has sparked serious collateral consequences. Each of the signatories to the Disbarment Agreement has implemented procedures to refer investigative findings to interested governments. With the backing of police and subpoena powers, governments can pursue MDB leads and impose additional civil and criminal penalties. In the case of SNC-Lavalin, the World Bank's referral prompted the Canadian authorities to launch an investigation that is still ongoing. Thus far, the Canadian police have arrested two SNC-Lavalin executives and the Canadian International Development Agency (CIDA) debarred SNC-Lavalin from bidding on any future contracts with their agency, which accounted for another CA$35m worth of SNC-Lavalin's business.

The *SNC-Lavalin* case also shows that MDB and government-led corruption allegations can tarnish a company's public image and hurt its stock price. On 22 May 2013, Standard & Poor's Ratings Services reduced its long-term corporate credit and senior unsecured ratings on SNC-Lavalin Group from BBB-plus to BBB due to 'weakened profitability as high administrative costs resulting from the company's recent ethics issues will continue to affect margins'.[7]

Lastly, SNC-Lavalin has incurred additional business expenses related to the MDB and government investigations. SNC-Lavalin did not previously have a compliance officer, but has hired one in response to these corruption allegations. Additionally, the company has made efforts to update its ethics code and internal controls.

Conclusion

As *SNC-Lavalin* illustrates, a single investigation by an MDB can set off a chain reaction of collateral consequences. In addition to automatic cross-debarment under the Debarment Agreement, companies are at risk that MDB referrals will prompt government investigations. Additionally, corruption investigations can hurt a company's reputation and stock price and force the company to engage in costly remedial and defence measures. As a result, companies that receive funding from MDBs should be sure to implement adequate anti-corruption policies and procedures.

Notes

1 The World Bank, *World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 Years*, 17 April 2013: www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years.

2 The World Bank Group, *Annual Integrity Report: Finding the Right Balance, Fiscal Year 2012*, at 4 (2012), available at: www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/10/08/000356161_20121008012319/Rendered/PDF/731010AR0Box370C0disclosed010050120.pdf.

3 INT Annual Report 2012, at iv, available at: http://siteresources.worldbank.org/EXTDOII/Resources/WBG_IntegrityReport2012.pdf

4 Article 10.02 of the World Bank Sanctions Procedures.

5 Sanctions Board, World Bank Group, *Law Digest* 26 (2011) *available at* http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1342729035803/SanctionsBoardLawDigest.pdf.

6 See: http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html.

7 Reuters, *S&P Cuts SNC-Lavalin Group Ratings to BBB, Outlook Negative*, 22 May 2013: www.reuters.com/article/2013/05/22/snclavalin-rating-sandp-idUSL2N0E32IS20130522?type=companyNews.