

Multilateral Development Banks Adopt Mutual Debarment Policy

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The five leading global multilateral development banks (“MDBs”) – the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the World Bank – have entered into a significant agreement providing for mutual and reciprocal enforcement of debarment decisions.¹ These MDBs will now debar any firm or individual debarred by other MDBs for fraudulent or corrupt practices. The Agreement for Mutual Enforcement of Debarment Decisions (the “Agreement”), effective April 9, 2010, thus affirms the commitment of the MDBs to combating fraudulent, corrupt, coercive, and collusive practices.²

The Agreement Harmonizes Antifraud and Anticorruption Enforcement

By signing the Agreement, the leading global MDBs have standardized and synchronized their antifraud and anticorruption policies across continents.³ The Agreement effectively shuts down firms and individuals who engage in fraudulent or corrupt practices while contracting with MDBs because such entities will be unable to continue existing contracts or to enter into new financing contracts with all MDB parties to the Agreement.⁴

Notably, the Agreement addresses only debarments exceeding one year, and the MDB must have taken debarment action within a functional ten-year prescription period. Debarment decisions made pursuant to a decision “in a national or other international forum” are not affected by the Agreement.⁵ An MDB may decline to enforce a debarment decision of another MDB in accordance with its own “legal or other institutional considerations”⁶

The Agreement establishes six core principles among MDBs for prohibiting fraudulent and corrupt practices by contracting entities, including:

1. employing a “harmonized definition” of conduct subject to debarment sanctions;⁷
2. adhering to a standardized investigatory procedure that ensures a “fair, impartial and thorough” investigation;⁸
3. establishing internal authorities with independent investigative and “distinct decision-making authority”;⁹
4. publishing written procedures allowing for notice of allegations of fraudulent or corrupt practices and an opportunity for firms or individuals to be heard;¹⁰

5. utilizing a “more probable than not” standard of proof for making debarment decisions;¹¹ and
6. imposing a range of sanctions that are proportional and incorporate mitigating and aggravating factors.¹²

Under the Agreement, MDBs will evaluate the debarment decision of another MDB, and if the debarment decision was rendered in accordance with the above criteria, each MDB must “enforce such decision as soon as practicable.”¹³ MDBs are also free to institute independent debarment proceedings, which could result in “concurrent, consecutive, or subsequent periods of debarment” for firms and individuals engaging in fraudulent or corrupt practices.¹⁴ The Agreement leaves undefined several terms, however, including “as soon as practicable,” which makes it difficult to assess fully how the Agreement may be implemented in practice.

The Agreement Exerts Pressure on Firms and Individuals to Cease Fraudulent and Corrupt Practices

Companies and individuals contracting with MDBs should be cognizant that the Agreement raises the profile of fraud and corruption investigations and could result in global sanctions for bad conduct in one country or region. An entity receiving financing from one MDB could find itself unable to acquire financing from any other MDB if it is involved in fraudulent or corrupt practices, even if the conduct is isolated. Sanctions against an entity on one continent could not only shut financing for that entity’s projects on another continent but also effectively foreclose the entity’s future contracting ability worldwide for a lengthy or indefinite period.

Furthermore, a company or individual contemplating a contracting opportunity with one MDB should be aware that any prior bad conduct involving a contract with another MDB, particularly if it was within the last ten years, could result in a loss of that contracting opportunity if the defrauded MDB later institutes an investigation and issues sanctions of debarment. In short, conduct in one corner of the globe will result in cross-continental punishment for fraudulent or corrupt conduct and will restrict or impede a company’s or individual’s capacity to conduct business with all leading global MDBs.

Companies and individuals are wise to conduct prompt investigations as soon as learning of potential fraudulent or corrupt practices, to remediate the bad conduct and prevent recurrence, and to communicate with all MDBs involved in order to avoid debarment proceedings. A company or individual that is able to remedy fraudulent or corrupt practices without a formal investigation or debarment by one MDB may open itself up to heightened scrutiny by other MDBs or even governmental regulators but also may avoid the harsh sanction of mutual debarment by all global MDBs.

The Agreement also reflects the increasing trend in the international community for mutual enforcement and cooperation on anti-corruption issues. The U.S. Department of Justice and U.S. Securities and Exchange Commission continue to investigate and prosecute violations of the U.S. Foreign Corrupt Practices Act at a heightened rate.¹⁵ The adoption of the United Kingdom’s Bribery Act 2010 earlier this year provides further for a new regime to address both public and commercial bribery in the United Kingdom and abroad.¹⁶ With the adoption of the Agreement by the MDBs, these anti-corruption efforts are echoed and extended. Companies and individuals engaged in dealings with the MDBs should, therefore, be aware of the penalties that can be imposed by the Agreement and consider their compliance schemes accordingly.

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¹ Agreement for Mutual Enforcement of Debarment Decisions, April 9, 2010 (the "**Agreement**").

² *Id.* at §§ 2(a) and 8. Other MDBs can later join the agreement by adhering to its precepts. *Id.* at Preamble.

³ *Id.* at § 1.

⁴ *Id.* at § 2.

⁵ *Id.* at § 4(c), (e)–(f).

⁶ *Id.* at § 7.

⁷ *Id.* at § 2(a).

⁸ *Id.* at § 2(b).

⁹ *Id.* at § 2(c)(i).

¹⁰ *Id.* at § 2(c)(ii).

¹¹ *Id.* at § 2(c)(iii).

¹² *Id.* at § 2(c)(iv).

¹³ *Id.* at § 4.

¹⁴ *Id.* at § 5.

¹⁵ See "Quarterly FCPA Report," *StayCurrent*, A Client Alert from Paul Hastings, available at <http://www.paulhastings.com/assets/publications/1564.pdf?wt.mc.ID=1564.pdf>.

¹⁶ See "No Room for Complacency in Corruption Crackdown," *StayCurrent*, A Client Alert from Paul Hastings, available at <http://www.paulhastings.com/assets/publications/1568.pdf?wt.mc.ID=1568.pdf>.