



The Guide to Multilateral Development Bank Investigations - Second Edition

**Strategies for effective defence in
multinational investigations from the
private practice perspective**

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Multilateral development banks (MDBs) are foundational to emerging markets; however, it is no small task to ensure that development financing is used transparently and effectively, especially in regions where corruption and misconduct can undermine progress. Edited by Yas Froemel of MDB Integrity Professionals Association and Daniel Zapf of White & Case, the GIR *Guide to Multilateral Development Bank Investigations* provides a comprehensive analysis of MDB integrity, bringing together perspectives from legal practitioners, consultants and MDBs with the aim of fostering greater accountability and collaboration in the fight against misconduct in MDB-financed projects.

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Strategies for effective defence in multinational investigations from the private practice perspective

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Summary

DIFFICULTIES WHEN PREPARING FOR MULTILATERAL DEVELOPMENT BANK INVESTIGATIONS

LOCAL ATTORNEYS AND MDB PRACTICE ATTORNEYS NEED TO COOPERATE

COOPERATING WITH MDB INVESTIGATIONS, DIFFICULTIES IN NEGOTIATING A SETTLEMENT WITH INVESTIGATORS AND HOW TO RESOLVE THEM

INTERNAL COMPLIANCE STRUCTURE AND COMMITMENT TO MAKE FURTHER IMPROVEMENTS

PREPARATION AHEAD OF AN MDB INVESTIGATION

DIFFICULTIES WHEN PREPARING FOR MULTILATERAL DEVELOPMENT BANK INVESTIGATIONS

When entities and individuals (clients) are facing a multilateral development bank (MDB) investigation, initially they may feel anxious about the risk of incurring serious sanctions of debarment and cross debarment (which is triggered by debarment). They may also be concerned that the procedures undertaken by MDB investigators, such as World Bank Group's (WBG) Integrity Vice Presidency (INT) (MDB investigators), and the rules of decision-making bodies such as the WBG Sanctions Board are completely different from the investigation procedures and court proceedings of the country where the client is located. Generally, in respect of criminal proceedings, it is normal for (1) the judge and prosecutor to be completely separate from each other, (2) the prosecutor, who files an indictment, to have a high burden of proof, (3) due process of law to be ensured by laws and regulations such as a constitution or code of criminal procedure, and (4) either party in court proceedings to have a right to file an appeal if dissatisfied with the court decision. On the other hand, under MDB investigations, although the investigator and decision maker are different from each other, they nevertheless belong to the same organisation and, therefore, in the eyes of clients, separation of powers is not ensured. Furthermore, the decision of the relevant decision-making body cannot be appealed to courts such as the US federal court. The burden of proof of an MDB investigator is also not as high as that of a prosecutor in criminal proceedings (at the very least, the burden of proof of WBG investigators seems to be lower than that of prosecutors in criminal proceedings).

The MDB is likely to argue that these procedures and rules should not be a surprise because they would have been disclosed to clients when they executed the contract with the MDB and the clients would have executed the contract after fully understanding these procedures and rules. We would reinforce the fact that clients should have a full understanding of these procedures and rules. However, in reality, clients usually do not immediately become aware that they might become subject to sanctions under the rules, which are completely different from criminal proceedings, until the MDB investigation actually begins. Therefore, there is a possibility that clients will make a wrong initial move and it is too harsh to blame them for making such a mistake. Local attorneys from whom clients regularly seek legal advice also normally have no knowledge or experience of MDB investigations. Therefore, if, for example, an MDB investigator confronts a client with audit clauses and tells the client that if they do not immediately submit the requested documents, they will be debarred for three years for obstructive practice, it is impossible for the client not to panic. There is consequently a risk that the client will submit a large volume of documents without carefully examining them, which is likely to worsen the situation.

Therefore, a local attorney who is contacted by a client first needs to look for an attorney who specialises in the field of MDB investigations. This is an essential step as local attorneys will not be able to handle the MDB investigations by themselves. MDB investigations are quite different from investigations by judicial authorities and it is first necessary to acknowledge that fact. The MDB will allow more time to provide the requested documents while the local attorney looks for an MDB practice attorney, and will not debar or impose any other sanctions against the client during that time on the basis of obstructive practice. In fact, MDBs prefer to communicate with MDB practice attorneys because communications will be easier.

LOCAL ATTORNEYS AND MDB PRACTICE ATTORNEYS NEED TO COOPERATE

It is not sufficient that clients find an MDB practice attorney and then for the MDB practice attorney to take care of everything. For example, the MDB may take issue with a client's act that is completely legal under, or is required in order for the client to comply with, the laws of country where the client is located (local law) or that is a non-problematic customary practice. Problems may also arise if the MDB interprets the meaning of a document provided by the client differently from how the client understands it. There are also many cases where the connotation changes when a document is translated.

Although the MDB's view is that the client should comply with the MDB rules regardless of what is stipulated by local law, it is necessary for the client to argue against that view by asserting that any of their acts should be respected, whether it is a legal act or is required under local law or is a non-problematic customary local practice. Even in cases where the act in question falls under any of the charges brought by the MDB investigator, whether or not the client would be able to persuasively explain the relationship between the act and local law would affect whether sanctions would be imposed on the client. Since the MDB practice attorney may not only be unable to explain such a relationship, but may also initially view the MDB's view as correct, clients should allocate adequate resources to their staff who are in charge of MDB investigations and also retain a local attorney. Furthermore, owing to the fact that MDB practice attorneys have many opportunities to directly negotiate with the MDB, there may be times where MDB practice attorneys will have difficulty turning down the MDB's requests. In such cases, the fact that MDB practice attorneys can take time to check with the local attorney, who may have a different perspective, may work to the client's advantage even in the eyes of MDB practice attorneys.

Moreover, as stated above, since it is very likely that clients feel uncomfortable about MDB investigations to begin with, MDB practice attorneys need to explain the details of an MDB investigation carefully and thoroughly to clients. The local attorney has a vital role in acting as a liaison between the client and the MDB practice attorney, who will be familiar with the details of MDB investigations. Both attorneys need to be conscious of making efforts to ensure the client does not view the MDB practice attorney as siding with the MDB.

In terms of handling an MDB investigation, it is essential for the MDB practice attorney and the local attorney to work together. MDB investigators will request clients to cooperate with the investigations based on the audit clauses. If clients refuse to cooperate with MDB investigations, MDB investigators may claim that the refusal is obstructive practice. An MDB investigator claiming obstructive practice may be more arbitrary and difficult to handle than the US Department of Justice claiming obstruction of justice because such a claim by the DOJ can be disputed in court. Although even MDB practice attorneys may have a difficult time dealing with the audit clauses, in general, the audit clauses are based on contract and MDB investigators can only request disclosure of documents that are relevant to MDB projects. An MDB investigator may claim obstructive practice whenever a client does not submit any of the requested documents. However, requests such as 'all emails in the email accounts of employees who are or were involved in the MDB project', 'all computer files' or 'all data stored in smartphones owned by all individuals who are or were involved in MDB project' are beyond the scope of audit clauses and the client should refuse to comply.

On the other hand, if the client hesitates about disclosing any documents that are relevant to an MDB project, there is a risk that such an act will be deemed obstructive practice and therefore, it is necessary to disclose all relevant requested documents. The intervention of a local attorney who is familiar with the client's business is indispensable in this selective

process. If the submission of translations of relevant documents is also required, the local attorney, who will gather documents and sort out relevant documents, must also ensure the quality of translations. Since this is an extremely important task, the local attorney cannot just use an artificial intelligence (AI) program or a professional translator hired by the MDB practice attorney. In addition, it is impossible to check all translations and, therefore, the MDB practice attorney should check at least the main documents. For example, many elderly Japanese men love baseball and expressions commonly used by them, such as 'Who has the ball?' and 'Pass the ball to the next person' are also used in business. When these expressions are translated into English literally, a native English speaker might understand them to mean that a person is hiding something, rather than a figure of speech that is being used to describe who is responsible for what in order to expeditiously handle the issue. Hence, literal translations of idiomatic expressions by AI may cause misunderstanding.

Similarly, if the MDB investigator conducts interviews with the client's employees, it is necessary for the local attorney to carry out checks such as whether the interpreter is accurately translating and whether the client's employees are correctly understanding the questions, especially leading questions. If any of the client's employees provide an answer to a leading question after misunderstanding the question and the interpreter translates the answer as given, it will become necessary to immediately make an objection that the answer cannot be used as a fact because it is based on misunderstanding. However, unlike court proceedings, under MDB investigations, there is no formal process to file an objection and all statements made will normally be provided in the transcriptions. Therefore, if the local attorney decides to dispute any of its employees answers that were based on misunderstanding, the local attorney needs to not only make an objection but also provide reasons for that objection so that it can be correctly understood by the MDB investigator even after the objection has been transcribed.

COOPERATING WITH MDB INVESTIGATIONS, DIFFICULTIES IN NEGOTIATING A SETTLEMENT WITH INVESTIGATORS AND HOW TO RESOLVE THEM

Although clients can normally expect to receive a reduction of sanctions if they cooperate with a criminal investigation, in WBG proceedings, for example, a three-year debarment is the starting point for each violation, even a minor violation. Therefore, the INT, the WBG's investigator, is incentivised to find as many violations as possible, no matter how minor, from the documents submitted by clients who are cooperating with INT investigations. It is difficult to understand this practice, and disappointing that INT is allocating resources to look for minor violations by a client's employee, such as in a small mistake that lacked any malice, rather than identifying malicious violations, such as bribery, that should be eradicated. However, that is the reality. The documents submitted by clients to MDB investigators in response to requests made based on audit clauses, and which the clients determine to be relevant to the investigation, are normally voluminous and it is difficult to check whether each of the documents would be deemed to be in any violation by MDB investigators. Therefore, it is preferable for local attorneys to understand the categories of violation as far as possible and to make time to check whether or not there is a risk that the act in question falls under not just one category of violation, but more than one category. MDB practice attorneys are expected to explain the categories of violation to local attorneys so that the local attorneys are able to carry out such checks.

Nevertheless, even if local attorneys are able to carry out these checks, language can still be a barrier, unless all documents involved in MDB projects are in English. However, MDB

projects may include documents written in languages of emerging countries and there may be cases where local attorneys have difficulty checking whether these documents have been translated correctly. Since there is a risk that such documents will be submitted to MDB investigators without adequate checks for relevance or mistranslation, it is better for local attorneys to spend as much time as possible to carry out such checks. In many of such cases, the MDB will understand that it takes time for clients to sort out documents that were not written in English.

After MDB investigators complete their investigations, they usually make a proposal for settlement to clients. However, the INT has a policy of imposing a debarment of at least a year and a day. A debarment of a year and a day, or more, will also increase the risk of cross-debarment and if cross-debarment is imposed, it will have a serious effect on the client's business. For example, if the MDB investigator makes a settlement proposal to the client to accept a five-year debarment (1) after identifying all the acts and mistakes by low-level employees that constitute minor violations and that are practically impossible to oversee and (2) after explaining to the client that five charges are being brought against them, which would amount to a 15-year debarment, but the MDB investigator is willing to reduce it to five years, the client will probably not be able to easily accept such a settlement proposal. Since there are no sentencing guidelines on MDB sanctions, the client faces making a difficult decision as to whether to accept the settlement offer or to leave the decision up to the relevant decision-making body.

However, if the case would ultimately result in cross-debarment, the client could consider taking the case to the relevant decision-making body because the client will incur serious damage, irrespective of the length of the cross-debarment. There is no publicly available data, and no evidence exists that the decisions of decision-making bodies are certain to be worse than the settlement offers made by MDB investigators; in fact, there have been cases where the decision of the decision-making body was much better than settlement offer. It is apparent that the experts who make up the decision-making body of an MDB do not always take the side of the MDB investigator even though they are all part of the same organisation. Under the WBG, for example, the WBG Sanctions Board is the final decision-making body. Owing to the fact that presentations made in front of the WBG Sanctions Board will ultimately determine the decision of the WBG Sanctions Board, the members of management and employees representing the client before the WBG Sanctions Board need to practise the presentation several times with the MDB practice attorney and the local attorney. Furthermore, even though online meetings are now prevalent, it is better for the client, the MDB practice attorney and the local attorney to have meetings face to face even if it requires some people to travel to an agreed location.

INTERNAL COMPLIANCE STRUCTURE AND COMMITMENT TO MAKE FURTHER IMPROVEMENTS

Once an MDB investigation begins, it is very unlikely that the outcome is that none of the charges brought by the MDB investigator apply to the client because there will have been some basis for the investigation to begin. Therefore, the client, MDB practice attorney and local attorney are required jointly to look for any factors that they can discuss with the MDB Investigator to reduce the sanctions. These might include the fact that the client already has an adequate internal compliance structure and has made a commitment to make further improvements to that structure.

The client and local attorney could consider, among other things:

- establishing, or making improvements to, the internal compliance structure and compliance training programme in accordance with local law;
- preparing a message to be sent to employees by the client's president (or someone else in an equivalent position) about the compliance structure;
- checking the existence and operational status of the client's whistle-blowing helpdesk; and
- checking on past cases involving disciplinary actions taken by other companies against their employees after they have violated laws or regulations.

The message from the client's president (or someone else in an equivalent position) to employees about the compliance structure is especially important. Furthermore, since there is a possibility that the legal system used in the country where the client is located might be unique to that country, it is necessary not only to provide an English translation but also to add footnotes providing supplementary information as necessary. For example, the term 'company auditor' appears to be unique to Japan and so would take time to explain it to the MDB. It will similarly be very difficult to explain to the MDB the two corporate information disclosure rules that apply to listed companies in Japan under the Companies Act and Financial Instruments and Exchange Act of Japan.

A client's commitment to further strengthen its compliance structure might lead to a reduction of sanctions even if the client has denied the charges brought by the MDB investigator, even though MDB investigators do not typically take such a commitment into consideration. Debarments include not only immediate debarment but also conditional non-debarment and debarment with conditional release under which the MDB agrees not to debar if the client has taken prescribed rectification measures such as strengthening its internal compliance structure to the satisfaction of the MDB, within a period designated by the MDB. There is also a type of agreement similar to deferred prosecution agreements, as used by the US Department of Justice. Therefore, clients should consider strengthening their internal compliance structure starting from the MDB investigation phase in order to receive conditional non-debarments, debarments with conditional release or any other reduction of sanctions.

However, it is not a simple case of strengthening the internal compliance structure. Clients must strengthen their internal compliance structure from the perspective of whether or not it is fully compliant with the structure required by the MDB; for example, as set out in the WBG's 'Integrity Compliance Guidelines'. Although many clients may already have implemented the action points set out in these guidelines, there are many others who have only included these action points in their internal rules and regulations but have not actually put them into action. Some of these action points may also not be particular issues under the local law. There may also be cases where the client has implemented the action points but has not put them all in writing, such as in internal rules and regulations. The bottom line is that it needs to be in the form of written evidence which can be submitted to the MDB. For example, the action points in the 'Integrity Compliance Guidelines' include due diligence on the client's business partners. Clients may have conducted financial due diligence on their business partners but perhaps not from the standpoint of legal compliance and prevention of misconduct. In such cases, clients could make procedural improvements such as hiring a company that will conduct corporate investigations on business partners or having business partners agree to follow the client's code of ethics. In the case of the WBG, clients may be requested to

demonstrate that action points have been carried out in order for them to be released from conditional non-debarments or debarments with conditional release. Therefore, although it is best to avoid becoming subject to any form of debarment, even if the debarment is conditional non-debarment or debarment with conditional release, it may still not be easy for the client to satisfy all the required conditions. The client's president (or someone else in an equivalent position) must act on the commitment as stated in a message to employees and proceed with changing how all officers and employees think about compliance.

PREPARATION AHEAD OF AN MDB INVESTIGATION

MDB rules are agreements entered into between clients and MDBs through MDB contracts and are not laws and regulations. Local law does not apply to MDB projects and legal common sense does not always apply. Therefore, persons in charge of MDB projects should have a good understanding of all applicable MDB guidelines and review relevant past sanctions cases that are available. If a client cannot handle all the necessary work or allocate the costs and human resources for such work, the client should carefully consider whether they really should get involved in MDB projects. It is not possible to reap the benefits without taking risk into account.

If the client's legal department or local attorney is more familiar with civil law systems than common law systems, it is important to be aware of the possibility that the MDB's personnel's way of thinking will be completely different, as it is based on the common law system. Some countries with civil law systems and some Asian countries do not have the mindset that fiduciary duty and whistle-blowing are commonplace. However, even where there are differences in laws, countries can respect each other's sovereignty. However, because MDB rules are a contract between the MDB and the client and are not law, the MDB may not always respect the local law.

If a client is involved in what is deemed an overseas project in the eyes of the client's head office, the client may rely on its subsidiary, local staff or outside help, depending on the project. In such cases, compliance and the client's internal rules might not be instilled in the subsidiary, local staff or outside help and in many such cases, the subsidiary, local staff and outside help do not have any knowledge of MDB rules and may not even be familiar with the client's internal compliance rules. There may even be cases where records of using outside help are not kept. For these reasons, it is necessary for the client to:

- understand the seriousness of the risk;
- ensure that its head office is involved;
- sort out and keep all relevant records; and
- instil the need for compliance in local staff and outside help who are involved in the MDB project on site and have them comply with both internal rules and MDB rules.

If the client views that such measures cannot be taken, participation in the MDB project itself will become a serious risk for the client. Compliance is the key thing that clients need to consider when considering participation in any MDB project.

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