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TRANSNATIONAL JUSTICE: THE WORLD BANK GROUP'S RECENT EFFORTS TO COMBAT CORRUPTION

by **Barry Sabin**, **Maria Barton** and **Matt Cronin***

The World Bank Group (“World Bank” or the “Bank”) has increasingly taken steps towards becoming one of the most agile anti-corruption organizations, building upon its multi-jurisdictional access that few national enforcement agencies can match. A gathering in World Bank headquarters in December 2010 of over 240 officials to form the “International Corruption Hunters Alliance” is a recent high-profile example of its international presence. World Bank President Robert B. Zoellick hailed the event as a “groundbreaking international initiative to tackle corruption,” comparing its importance to the Bretton Woods Agreements that created the international financial system.

The Alliance—a coalition of transnational, national, and nongovernmental anti-corruption officials—is just the latest step in the World Bank’s recent maturation to an organization that seeks to address corruption directly through global networking, investigations, training, information-sharing, asset forfeiture initiatives and sanctions. At the meeting, President Zoellick echoed former President Wolfensohn’s famous “cancer of corruption” speech, declaring that “corruption buys impunity, strangles fair opportunity, cripples competition, encourages conflict, stalls economic transformation, and chokes growth.” The World Bank, the largest multilateral development bank, estimates that 3% of the world economy—or roughly \$1 trillion out of every \$30 trillion—is paid in bribes each year. Foreign investment is especially hard hit, with approximately 20% lost to corrupt practices. Increasingly, World Bank officials have sought to capture the human impact of corruption by highlighting cases where contractors providing items below specifications have led to injury.

We are launching what I hope will prove to be a groundbreaking, international initiative to tackle corruption. – World Bank President Robert B. Zoellick

The World Bank’s Articles of Agreement creates upon the Bank a fiduciary duty to ensure bank funds are used with “due attention to considerations of economy and efficiency” and for their “intended purpose.” These clauses are now featured prominently in the World Bank’s reform efforts. These reforms, if matched by consistent and tangible results, will have a significant impact on the international business community. This article explains some of the recently created investigatory and enforcement tools publicized by the World Bank and the implications that they have for international businesses.

The World Bank’s Anti-Corruption Efforts

There are two principal components to the World Bank’s anti-corruption regime. The first is the Integrity Vice Presidency (“INT”), which investigates corruption relating to Bank projects, makes reports recommending punitive action, advises the Bank on avoiding corrupt actors, and works cooperatively with national governments to further prosecutions. The second is the

Sanctions Board, an administrative quasi-judicial body that sanctions corrupt conduct, which can lead to debarment from all large multilateral development bank projects.

The Integrity Vice Presidency

Created in 2001, and given vice-presidency status in 2008, INT is charged with investigating fraudulent, corrupt, collusive, coercive, or obstructive practices occurring on World Bank-related projects. Unlike the broad extraterritorial assertions by governmental operations such as the Department of Justice and UK Serious Fraud Office, the World Bank's enforcement regime is truly global in scope. INT has plenary jurisdiction to investigate matters relating to World Bank projects and has personnel stationed across the globe.

The World Bank is giving INT substantial independence and resources, allowing it to develop a number of procedures to deal with corrupt practices. The first is the Voluntary Disclosure Program ("VDP"). Modeled after the Department of Justice leniency programs, the VDP allows firms *not* under investigation to come forward and disclose public misconduct to the Bank. In exchange for modest reforms, the Bank agrees not to seek sanctions and to keep the disclosing party's identity confidential. Any firm that breaches a VDP agreement is subject to a ten-year mandatory debarment.

A second option available to INT is a settlement agreement. Unlike the self-disclosing VDP, a settlement becomes available only *after* an INT investigation has commenced, and up until the Sanctions Board makes a decision. Settlements are subject to numerous procedural and substantive safeguards to ensure fairness, including a requirement that the World Bank's General Counsel approve any agreements. However, like a voluntary disclosure, settlement agreements do not necessarily prevent legal action in other jurisdictions, where a party must separately negotiate for a waiver of prosecution.

A third remedy available to INT is to file a final investigatory report. Under certain circumstances, INT may recommend the removal of the contractor from bidding or from participating in an ongoing project. It may even recommend the cancellation of a contract infected by corruption. Depending on many factors, including contractual obligations, the Bank may agree with the report's findings. This sudden loss of a contract can have devastating consequences for a business. INT may also refer corrupt matters to local enforcement agencies, thereby exposing companies to criminal exposure in addition to economic losses. INT has also developed tools to protect the Bank from working with potentially corrupt actors in the first place. It has compiled a Company Risk Profile Database, containing information on all companies or individuals who were ever investigated by INT. It has also formed the Preventive Services Unit, a team of specialists who analyze Bank-supported projects for signs of corruption, develop anti-corruption compliance measures, and educate Bank personnel on how to avoid working with bad actors.

INT has recently strengthened its investigative powers by entering into cooperation agreements with numerous national and transnational organizations. These agreements have dramatically broadened the scope of the World Bank's anti-corruption practice. Previously, investigations by the Bank were often stymied by incomplete information. Now, the World Bank has sought to become a major player in international corruption investigations, having signed bilateral agreements with the European Anti-Fraud Office, the UK Serious Fraud Office, the International Criminal Court, INTERPOL, the UNDP Office of Audit and Investigations, USAID, and AUSAID in the past year alone. These agreements not only empower the World Bank through

information-sharing, but also allow INT to assist in fighting international corruption schemes. The Bank has additionally sought local ties in developing countries that are often the setting for corrupt acts, signing cooperation agreements with Sudan, Uganda, and elsewhere. These agreements obligate local law enforcement to assist the World Bank in fighting corruption and recovering lost funds.

The most powerful weapon in INT's arsenal is the decision to recommend sanctions—a penalty that debars the party from working on any World Bank and (as of 2010) any other Multilateral Development Bank's project. This recommendation, given in the form of a Statement of Accusations and Evidence, first goes to an Evaluation and Suspension Officer ("EO"). If the EO finds that the accusations are supported by sufficient evidence, he issues a Notice of Sanctions Proceedings to the respondent, temporarily suspends the party from eligibility in Bank-financed projects, and recommends sanctions to the Sanction Board. If the respondent does not contest the findings, they will automatically receive the sanction recommended by the EO.

The Sanctions Board

A party contesting the EO's findings triggers a second tier review by the World Bank's Sanction Board. The Board, composed of three Bank staff and four non-Bank staff, considers the case *de novo*. It holds hearings at the request of either the INT or the respondent. The Board typically takes one of five courses of action. The default is a debarment with conditional release. This sanction requires a minimum period of three years debarment, after which a sanctioned party *may* be released if predetermined compliance conditions are met. A second possibility is a debarment with automatic release. A third option is a conditional non-debarment. Analogous to a non-prosecution agreement, a conditional non-debarment allows a corporation to continue working on World Bank projects as long as certain compliance conditions are met within a specified period of time. It is anticipated that these conditions will be monitored by Michael Silverman, INT's new Compliance Officer, who is tasked with reviewing programs to ensure that benchmarks are met. Failure to comply with these conditions results in automatic debarment. The other two options, a letter of reprimand and restitution, do not prevent a party from working on Bank projects but may be combined with debarment procedures.

A debarred company can suffer tens of millions of dollars in lost revenues. A recent example is a British publishing firm, which had won more than \$35 million in World Bank contracts alone in the last decade, but is now debarred for six years due to bribes paid in the Sudan. Debarring usually affects parent and affiliate companies, compounding the losses exponentially.

The risk of sanctions became even more dangerous in 2010, when the World Bank joined with other multilateral development banks ("MDBs") in signing the Agreement for Mutual Enforcement of Debarment Decisions. This cross-debarment agreement, joined by the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank Group, blocks any entity found to be defrauding an MDB from participating in any banks' projects. The agreement closed the longstanding loophole in the Bank's enforcement policy, where a corrupt actor would simply shift his operations from one MDB to another during a debarment period. It also compounds the risk of lost profits, as many conglomerates derive substantial revenues from contracts involving an MDB in the developing world. President Zoellick made the implications of the Agreement unmistakable: "cheat from one of us, and you will be punished by all."

Implications for Global Businesses

The World Bank claims that it will continually bolster its efforts against global corruption. Since 1999, it has publicly debarred 415 firms and individuals. Forty-five of these entities—ranging from multinational corporations to non-profits to individuals—were punished in 2010. The Bank has referred some cases that resulted in criminal convictions.

Critics claim that the pacing of the Bank’s investigations can still be ponderous. While INT opened 194 new cases and fully investigated 117 cases in 2010, 143 cases remained unresolved from previous years. Bank officials have responded that the pace of resolving matters will increasingly accelerate thanks to additional staffing of experienced investigators to address the complexities involved in international financial investigations.

At the International Corruption Hunters Alliance meeting, the Bank announced the first cross-debarments of firms engaging in corrupt practices in development projects. The meeting highlighted the Bank’s commitment to combating corruption, with Gary Grindler, then Acting Deputy Attorney General for the United States, declaring that “the World Bank is a global leader in this fight, and we are working more closely with them than ever before.” During his speech, President Zoellick outlined the Bank’s long-term plans to amplify its anti-corruption programs. These include expanding the sanctions regime to the Bank’s carbon finance operations, strengthening the consequences of debarment by the World Bank’s General Services Department, and the (now operational) publication of all Sanction Board’s findings on corrupt practices. The Bank will also begin pushing for OECD Anti-Corruption convention member states to increase their focus on fighting bribery and other illicit practices. It is unclear when all of these proposals will actually be put into practice.

The dramatically increased scope of the World Bank’s investigations and its unique status as a transnational actor require increased care on behalf of international businesses. Recent examples demonstrate the high cost of relaxed diligence when working on Bank-related projects. In 2009, a global corporation was investigated by the World Bank for corrupt practices of its Russian subsidiary. The company ultimately entered into a comprehensive settlement, paying \$100 million, voluntarily accepting a two-year shut-out for itself and all affiliates from any Bank-related projects, and agreeing to a four-year debarment for its Russian subsidiary. The payment was used to create a global integrity initiative fund that supports anti-corruption training and collective action projects. Sanctioning can also lead to a company becoming significantly devalued. An Indian firm, for instance, lost \$150 million in value after being debarred.

I’m going to get the big guys. –
World Bank Integrity Vice President
Leonard McCarthy

It is possible that these sums will be dwarfed by the results of future World Bank investigations. World Bank Integrity Vice President Leonard McCarthy said on the record that he hopes to deal with more high impact cases. Over 40% of all corruption referrals made to the Bank accuse corporations headquartered in a developed country.

International businesses need to be aware of the significant risks posed by a dated compliance program. As Vice President McCarthy noted, it was only a decade ago when bribing foreign officials was considered an acceptable industry practice. Those days are gone. Corporations operating in developing nations or who work on any MDB-related projects will need to carefully scrutinize their preexisting compliance programs to avoid a Bank investigation which could be time-consuming and expensive.

About the authors

Barry Sabin: Mr. Sabin is a partner in the Washington, D.C. office of Latham & Watkins, where his practice is focused on white collar criminal and internal investigations, including accounting and securities fraud, healthcare fraud, Foreign Corrupt Practices Act (FCPA) matters, US congressional investigations, environmental, enforcement of sanctions and export control laws and complex civil litigation. He has significant experience with corporate investigations and enforcement matters across a range of industries, including energy, healthcare, aerospace, defense and government services. He also serves as a member of the firm's Corporate Governance Task Force. Mr. Sabin joined the firm from the US Department of Justice, where he served for 18 years, most recently as Deputy Assistant Attorney General for the Criminal Division.

Maria Barton: Maria Barton is a counsel in the New York office of Latham & Watkins. Her practice is focused on internal corporate investigations and white collar criminal defense, including accounting and securities fraud, and Foreign Corrupt Practices Act (FCPA) matters. Her practice includes representing and advising clients on anti-corruption matters with the World Bank Group. Ms. Barton has extensive experience conducting global investigations involving allegations of corruption and dealing with foreign law enforcement and governmental authorities. Prior to joining the Firm, she served as a senior counsel to the Independent Inquiry Committee investigating allegations of fraud, bribery and corruption in the United Nations Oil-for-Food Programme and lead counsel to the Volcker Committee reviewing the World Bank's anti-corruption unit.

Matt Cronin*: Matt Cronin is an associate in the Washington, D.C. office of Latham & Watkins.

* Mr. Cronin is admitted to the Virginia State Bar. All work supervised by a member of the Washington, D.C. bar.