An emerging multi-polar enforcement landscape

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The allure of emerging markets has grown stronger in recent years as companies seek to capitalize on new business opportunities in burgeoning commercial centers in Latin America, Asia, and Africa. Indeed, the rate of economic growth in emerging markets over the past fifteen years has been twice that of advanced countries – a trend that CEOs ignore at their peril.[1] Along with these opportunities comes an ever-shifting array of challenges associated with doing business in developing economies, including regulatory uncertainty, reduced transparency, and rapid economic, political, and social transformation.

Successful companies must be agile, and adapt to the changing risk profile of their expanding operations. Of particular importance is the design, implementation, and maintenance of robust anti-corruption compliance programs that are capable of managing heightened legal, regulatory, and reputational risk arising from a growing array of anti-corruption regulators. Gone are the days where familiarity and compliance with the Foreign Corrupt Practices Act (FCPA) can be considered an effective anti-corruption risk management strategy. The United States is now joined by the United Kingdom, Germany, Switzerland, and other jurisdictions that are moving decisively to enforce foreign anti-bribery laws around the world, some of which contain standards that are even stricter than the FCPA.[2]

The need for a new generation of global anti-corruption compliance measures is growing in response to the emerging multi-polar enforcement landscape. Among the foremost actors shaping the new enforcement landscape are the multi-lateral development banks (MDBs) that operate extensively across a range of emerging markets – precisely the markets that leading companies are eager to enter. The MDBs have invested heavily in developing a credible enforcement capacity, and now routinely conduct complex investigations with far-reaching consequences for companies caught in the cross-hairs.

The following article will provide a brief overview of the development of the MDBs as major players in the international anti-corruption landscape and outline the key features that distinguish this source of enforcement from more traditional national enforcement mechanisms.

The New Kids on the Block

The posture of MDBs towards corruption has evolved in the last twenty years from a reluctant acceptance of a certain amount of "leakage" in Bank-financed projects, to a proactive commitment to prevent and deter corruption as part of their core operational mission. The MDBs have now developed a sophisticated approach to sanctioning misconduct that is changing the anti-corruption enforcement landscape, and challenging companies--and their legal counsel--to adapt.

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[1] Harry Broadman, "Navigating risks and opportunities in emerging markets" (PwC, 2012), *available at* http://www.pwc.com/us/en/view/issue-15/navigating-risks-opportunities-emerging-markets.jhtml

[2] Exporting Corruption, Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery, pg. 4, Transparency International, *available at* http://www.transparency.de/fileadmin/pdfs/Themen/Internationales/2013_ExportingCorruption_OECDProgressReport_EN.pdf

The MDB's authority to sanction arises contractually through financing agreements made between a bank and a borrower country.[3] Companies participating in a project that is financed, in whole or in part, by MDB funds are subject to their sanctioning authority.[4] Importantly, there is no *de minimus* exception to this authority, and therefore it is possible for companies to find themselves the subject of an MDB investigation related to a project with only marginal MDB financing. Furthermore, the extensive footprint of MDBs in developing economies makes it quite likely that a company seeking to establish a presence in an emerging market will, at some point, participate in a Bank-financed endeavor.

What's Changed?

Relying exclusively on familiar anti-corruption compliance programs that have evolved in response to the FCPA, and more recently, the UK Bribery Act, may not safeguard companies against potential transgressions with MDBs. While the trend in reform of the MDB sanctions process has been towards greater conformity with standards found in national anti-corruption regimes, there remain a number of distinguishing features that continue to pose unique challenges. For example, the definitions of sanctionable practices used by the MDBs are intentionally broad, and capture a wide range of conduct. When combined with the lower burden of proof characteristic of an administrative system, the potential vulnerability of companies subject to an MDB investigation becomes apparent.

Additional challenges include the permissive consideration of evidence by MDB sanctioning authorities, which heightens the risk of adverse inferences being made against a company based on circumstantial evidence. The scarcity of relevant jurisprudence creates further uncertainty when navigating the MDB sanctions system, and the lack of recourse to national courts reinforces the importance for companies to adopt a proactive risk management strategy. The following section will highlight a few of the key features of the MDB sanctions system that warrant special consideration by companies that may find themselves participating in a Bank-financed project.

Cross Debarment

While the harmonization of the definitions of sanctionable practices among MDBs has contributed to a welcome degree of uniformity, it has also raised the costs of misconduct. Under the April 2010 Agreement for the Mutual Enforcement of Debarment Decisions, any entity debarred by one of the MDBs may be subject to automatic debarment by the other participating institutions as well. Thus, companies found to have engaged in an isolated sanctionable practice in one country may face the loss of business opportunities across the entire spectrum of emerging markets. Importantly, the automatic nature of cross-debarment precludes a sanctioned entity from contesting the ruling of one MDB in front of the tribunal of another.[5] It is imperative that companies facing an investigation manage the process correctly from the outset since they will not have another opportunity to defend themselves.

The cross-debarment regime is not limited to the MDBs - wider institutional participation was contemplated in the original agreement, and may very well occur in the coming years.[6] Already there is evidence that other organizations, while not formally part of the cross-debarment regime, are heavily influenced by the debarment decisions made by the MDBs. For example, the Millennium Challenge Corporation (MCC), a US government

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[3] *See* The World Bank Group Sanctions Process and Its Recent Reforms, pg. 8, *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/2373/651770REPLACEMoctions09780821389690.pdf?sequence=1
[4] Guidelines on Preventing Fraud and Corruption in Projects Finances by IBRD Loans and IDA Credits and Grants (dated October 15, 2006 and revised January, 2011), ¶4, *available at* http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/AnticorruptionGuidelinesOct2006RevisedJan2011.pdf
[5] Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks, The World Bank Group, ¶22 (March, 3, 2010), *available at* http://siteresources.worldbank.org/INTDOII/Resources/Bank_paper_cross_debar.pdf
[6] Agreement for Mutual Enforcement of Debarment Decisions, ¶9 (April 9, 2010), *available at* http://www.ebrd.com/downloads/integrity/Debar.pdf

agency overseeing a portfolio worth $9.7 billion in 2013,[7] has established a de facto cross-debarment system through its internal guidelines whereby any firm debarred by an MDB will also be declared ineligible to be awarded an MCC-funded contract.[8] As the MDB sanctions regime evolves into a more formal, quasi-judicial process with broader legitimacy, watch for additional international organizations to follow the lead of the MDBs in making decisions about the allocation of their own funds.

The elevated risks associated with receiving a sanction within the context of a cross-debarment regime makes it essential that companies understand the unique legal and procedural environment of the MDB sanctions process, and develop an effective strategy to manage the potentially severe consequences of an investigation.

Referral Reports

A recent priority among the MDBs has been strengthening cross-jurisdictional cooperation between enforcement officials and fostering international collaboration on global investigations. By sponsoring initiatives such as the International Corruption Hunters Alliance, the MDBs have contributed to the creation of a global network of prosecutors, investigators, regulators and senior anti-corruption officials. MDB investigators now routinely submit "referral reports" to national authorities when they believe that the laws of a Bank member country have been violated, and this trend is likely to grow in the coming years as investigators develop closer relationships across jurisdictions. Furthermore, referral reports can be made to national authorities even before MDB investigators have substantiated allegations of misconduct, which can force companies to respond to simultaneous inquiries from multiple regulators.

Enhanced cooperation between enforcement authorities also increases the chances that a company will find itself the subject of so-called "carbon-copy prosecutions," where multiple authorities pursue a case based on the same underlying facts and circumstances, resulting in overlapping liability that is not restricted by the "double jeopardy" safeguards found within many national court systems.

As global enforcement authorities strengthen their formal and informal networks, companies will have to contend with the specter of an administrative action by an MDB leading to potential civil and criminal liability in national jurisdictions. Addressing this risk will require legal counsel to rethink litigation strategies to account for the possibility of successive prosecutions in different jurisdictions – a true manifestation of the emerging multi-polar enforcement environment.

Settlement Agreements

The recent introduction of a formal settlement mechanism to the MDB sanctions process is a welcome development that, in theory, provides a less costly, more expedient method for resolving an investigation. However, the value proposition of a settlement should be evaluated carefully on a case by case basis. The terms included in MDB settlements can often be quite onerous, with past agreements containing substantial fines, periods of debarment, commitments to align internal business processes with MDB guidelines, and the retention of costly third-party monitors.

[7] *See* Millennium Challenge Corporate, "MCC at a Glance," *available at* http://www.mcc.gov/documents/press/factsheet-2010002014712-mccataglance.pdf

[8] *See* Millennium Challenge Corporation, Program Procurement Guidance: Guidance on Excluded Parties Verification Procedures in MCA Entity Program Procurements (Feb. 15, 2008), *available at* http://www.mcc.gov/documents/guidance/mcc-ppg-eligibilityverification1.pdf.

Due to the confidentiality of these negotiated agreements, it is difficult to determine how the facts and circumstances surrounding alleged misconduct are related to the proposed terms of a settlement. Companies unfamiliar with MDB settlements may be inclined to acquiesce to unfavorable terms in order to avoid the even greater uncertainty of litigation. Furthermore, it remains to be seen whether the ability to pursue negotiated settlements will encourage MDB investigators to cast a wider net in the expectation that they will not have to shepherd every case through the entire sanctions system.

Conclusion

The recent vigor with which MDBs have pursued their anti-corruption agenda is symbolic of the emerging multi-polar enforcement landscape that confronts companies operating in a global marketplace. The compliance community can no longer rely on narrowly tailored risk management strategies that focus on the FCPA, especially when companies are seeking out opportunities in emerging markets where MDBs have a significant footprint. As opportunities for growth become increasingly concentrated in emerging markets, companies and their legal counsel will need to look beyond traditional risk paradigms, and adopt compliance programs that are capable of addressing the demands of a growing constellation of enforcement authorities.

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