The Guide to Multilateral Development Bank Investigations - First Edition

Maintaining business integrity: the private practice perspective

The Guide to Multilateral Development Bank Investigations - First Edition

Multilateral development banks (MDBs) are foundational to emerging markets; however, it's 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 IO 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.

Generated: February 27, 2025

GIR Global Investigations Review

Explore on GIR

Maintaining business integrity: the private practice perspective

Brandt Leibe, **Bill Gordon**, **Aaron Stephens**, **Wade Coriell**, **Margaret Nettesheim** and **Peter Hood**

King & Spalding LLP

Summary

This chapter explores multilateral development bank (MDB) business integrity issues and compliance frameworks from the point of view of private practice legal and compliance professionals. The initial focus is on how prime contractors or consultants (e.g., engineering firms contracted to build roads or water supply infrastructure) should address traditional business integrity subjects such as bribery, corruption and fraud (particularly in high-risk, fragile and conflict-affected jurisdictions). The chapter also incorporates commentary on human rights issues that may be addressed as part of the contractor's overarching compliance programme. Ultimately, however, MDB-financed projects often take place in high-risk jurisdictions for integrity and human rights breaches, and companies doing business in this sector must accept that some level of risk cannot be mitigated, which can expose them to investigation and penalties imposed by MDBs and enforcement proceedings by applicable authorities.

BUSINESS INTEGRITY: GENERAL FRAMEWORK AND INTERNAL CONTROLS

All contractors participating in MDB-financed projects are expected to observe high standards of integrity and to maintain a business integrity programme that is designed to achieve this end. A robust programme will both ensure that the contractor plays its part in fighting fraud, corruption and other misconduct causing detriment to a project or the relevant jurisdiction or community and also be considered as a potential mitigating factor if the contractor becomes subject to an MDB investigation or a sanctions proceeding.[2] Contractors should closely review the Uniform Framework for Preventing and Combating Fraud and Corruption (the Framework)[3] and all related guidelines and principles available from MDBs when designing, implementing and maintaining their programmes.[4] MDBs expect that contractors engaged on their projects are intimately familiar with the rules, including all legal and ethical obligations. Ignorance, whether intentional or not, will not be considered a defence.

A key focus for contractors should be the MDB General Principles for Business Integrity Programmes (the Principles). The Principles include the following six core principles: (1) risk assessment; (2) prohibited misconduct; (3) management roles; (4) integrity function; (5) advice; and (6) accessibility.[5] These Principles are designed to assist contractors to identify and manage integrity risks in the real world context of their day-to-day business operations. The Principles go on to identify detailed internal controls as well as expectations relating to reporting and investigation, training and communication, business partners, and collective action or external agreement. A granular study of these topics is beyond the scope of this chapter, but they are reflected in the high-level guidance that follows. A contractor's compliance programme should be reviewed regularly and updated as needed, particularly if there are changes to its operations, risk profile or applicable law. In addition, the contractor's senior management should play an active and visible role in promoting and maintaining a strong integrity culture in the business.

Practical guidance on how to apply the Principles to third-party suppliers, subcontractors and intermediaries is addressed in the next section. Third-party risks are acute in MDB-financed projects and require careful management; it is for this reason that this chapter will focus on third-party risks. However, as a preliminary matter, contractors should first look at themselves to ensure that their own employees and staff and related processes meet the standards expected by MDBs. With regard to employees and staff, this involves a multifaceted effort to (1) assess and ensure the competence and integrity of employees and staff who are directly or indirectly involved in the project; (2) implement appropriate contractual obligations to seek to ensure that employees and staff comply with the consultant's programme, act with integrity and report suspected misconduct; (3) incentivise employees and staff to act with integrity; (4) provide for investigation and disciplinary mechanisms if misconduct is suspected or occurs; (5) provide appropriate whistleblowing or 'speak up' procedures that are confidential or anonymous to the extent permitted by local law; and (6) provide appropriate training to employees and staff.

RISK-BASED APPROACH TO VETTING THIRD PARTIES

The vast majority of projects funded by MDBs will involve the use of third parties – suppliers, subcontractors and intermediaries such as agents, sales representatives, consultants, fixers and distributors – by the primary contractor. While often essential to the completion of major infrastructure projects, the use of third parties increases the risk of bribery and corruption, particularly in high-risk jurisdictions. Indeed, consistent with bribery and corruption investigations and enforcement actions worldwide, many MDB investigations into these issues relate to the use of third parties by primary contractors. The additional levels of remoteness from the primary contractor can create the opportunity for the third party to disguise the existence or purpose of improper payments. Additionally, local third parties may lack the experience or understanding of anti-bribery and anti-corruption (ABAC) compliance expected by modern-day corporations, making them vulnerable to misconduct. It is therefore critical to appropriately vet and monitor third parties before engaging them to participate in an MDB-funded project.

MANAGING EXPECTATIONS

Legal or compliance departments should implement a user-friendly procedure, in writing, for the business to follow when vetting third parties, and should train the business on this process at onboarding and annually. The business must understand that its participation in the diligence process is crucial to identifying potential ABAC compliance issues that could expose the company and the project to significant risk. Managers must be well versed in the diligence processes and procedures and understand that they are responsible for setting the 'tone at the top'. It is also critical to ensure that the business regularly engages with the legal or compliance department throughout the diligence and contracting process and shares concerns with it, rather than bringing it into the discussion only at the end for sign-off.

INFORMATION GATHERING

Effective ABAC due diligence takes time, so it is important for the business to start the vetting process as soon as it begins engaging with a potential third party. The diligence procedure should include a standard business justification form designed to elicit information from the business regarding the reason a third party is necessary to help flush out any red flags for bribery (e.g., a request from a government official to use a particular third party). The legal or compliance department should engage directly with the business to further interrogate the need for the third party if the business's responses to the form raise any questions or concerns.

The business should inform the prospective third party up front that it will be subject to a standard, mandatory diligence process. This process will include a questionnaire to be filled in by the third party, providing information that can be used to evaluate the party's ABAC risk profile, such as the party's connections to and anticipated contacts with government officials, the party's compliance policies and procedures, and other companies for whom the party has worked. In addition to the standard requests, the questionnaire should include space for the business to pose questions tailored to the specific engagement. The business should ensure that the third party responds to all questions in the questionnaire (even if the answer is simply ‘not applicable’).

In addition to gathering information from the business and the third party itself, the legal or compliance department should undertake a desktop review of publicly available information to ascertain the third party’s ownership structure and identify any adverse media regarding the party or its principals or owners. If the identity of the third party’s beneficial owner cannot be identified through open-source research, or if adverse media raises potential concerns, the legal or compliance department can engage an investigative firm to conduct further enquiries (see further below).

TOOLS TO UNCOVER POTENTIAL RELATIONSHIPS WITH GOVERNMENT OFFICIALS

In countries where bribery and corruption are endemic to the business culture, there is an elevated risk that government officials will solicit bribes in connection with the types of public sector infrastructure projects typically funded by MDBs. Consequently, an essential aspect of third-party due diligence is identifying any relationships with or exposure to government officials that the third party has. Where a third party has close connections to specific government officials, there is a greater probability that those officials may expect the third party to channel bribes to them or may even have requested or arranged for the engagement of the third party to work on the project for the purpose of obtaining bribery payments.

To flush out pre-existing relationships with government officials, the business, with assistance from the legal or compliance department, can make any agreement with the third party conditional on receiving:

- signed forms from all relevant individuals within the third party setting out relationships with government officials (including a clear definition of ‘government official’ in the form to be signed);
- notifications of relationships with government officials that arise after the contract has been executed; and
- monthly delivery of logs of contacts with all government officials during work performed under the contract.

Any names of government officials provided in response to these conditions should be run through applicable search engines and databases to identify any adverse media or legal claims involving the individuals or any sanctions lists on which the individuals appear.

CONTRACTING

The legal or compliance department should discuss the contracting process with the business and understand its phases so that together they can put markers in place for what will be required in relation to ABAC compliance at various stages. It is important that the business understands that it will likely be necessary to include anti-corruption provisions in contractual documents that may be sensitive and require negotiation with a third party. Such negotiations take time and typically cannot be completed at the last minute once the rest of the contract has been agreed; the legal or compliance department should be involved from the beginning so that ABAC clauses are part and parcel of the wider contract negotiations.

Ideally, third-party contracts will include the following provisions to help safeguard against ABAC risks, though all such clauses will be subject to negotiation:

- a clause requiring compliance with applicable ABAC laws;
- a clause prohibiting paying bribes;
- a clause prohibiting soliciting bribes;
- a clause requiring the third party to have adequate ABAC policies and procedures in place that are designed to prevent and detect bribery;
- a clause requiring the third party to comply with the primary contractor's own ABAC compliance policy or code of conduct (which should then be appended to the agreement);
- a clause requiring the third party to complete annual ABAC training provided by the primary contractor if requested to do so;
- a clause requiring the third party to sign annual certifications confirming its compliance with applicable ABAC laws, the primary contractor's compliance policy and the contract's ABAC clauses;
- a clause by which the third party represents that neither it nor any of its officers or directors are the subject of any sanctions, nor are they located in a country or territory that is the subject of any sanctions, and they have not and will not engage in any activities that constitute or may cause a violation of any sanctions;
- a clause requiring the third party to notify the primary contractor should any of its representations regarding sanctions matters cease to be true;
- a clause giving the primary contractor the right to audit the third party's books and records and inspect the third party's premises;
- a clause giving the primary contractor the right to interview the third party;
- a clause enabling the primary contractor to terminate the third party where there is evidence that the third party has engaged in bribery or corruption or violated sanctions;
- a clause requiring the third party to indemnify the primary contractor against any losses or fourth-party claims arising out of the third party's violation of any of the ABAC or sanctions clauses or a termination of the contract due to the third party's violation of the ABAC or sanctions clauses (but this clause should not give the third party the right to instruct the primary contractor's defence counsel for such claims, as is often the case in indemnification clauses); and
- a clause requiring the third party to impose equivalent contract clauses on any fourth parties in onward contracts.

Additional contractual mechanisms relevant to third-party human rights and forced labour risk are considered separately below.

OUTSOURCING

The legal or compliance department should consider whether to outsource the due diligence function. Whether outsourcing is the best strategy is a judgement call depending on the size of the in-house team. To help make this decision, the legal or compliance department should consider what it needs to do to ensure that effective risk-based due diligence is performed on all third-party engagements, as opposed to what it would want to do if resources were infinite. These essentials should be consistent with the primary contractor's written third-party due diligence procedure. If an issue arises later, the compliance record would look worse if the primary contractor had not done something it had committed to do compared with never having committed to do it in the first place. Therefore, if the legal or compliance department cannot achieve these diligence essentials without outside help, then outsourcing is an appropriate solution. A hybrid approach entailing an initial level of diligence in-house followed by outsourcing of further diligence on third parties determined to be high risk may be an effective solution. If outsourcing is under consideration, the legal or compliance department should ensure that the business is aware of the associated costs.

ADDRESSING THIRD-PARTY RED FLAGS

Red flags – indicators of potential bribery or corruption issues – can arise both pre- and post-contracting with third parties. If a red flag arises, the primary contractor must resolve it before either moving forward with contracting or continuing work with the third party, as applicable. Failure to address red flags exposes the primary contractor to liability risk in relation to the third party's potential misconduct. Resolution of a red flag will include investigation to gather further facts about the issue. All resources that can reasonably be deployed to resolve the red flag should be. For red flags involving potentially ongoing conduct by third parties already working for the business, the business should suspend the third party until the allegation against that party has been either substantiated or refuted.

If the investigation conclusively refutes the red flag (e.g., if an adverse media search turned up an article linking a third party with bribery allegations, but further investigation determines that the party in question was a similarly named but entirely different party), then no further action is required. If, however, the investigation cannot definitively rule out the risk of misconduct, that fact and the relevant evidence must be communicated to the business. The business should weigh the risk against the commercial reasons for proceeding with the third party, and if, on balance, the risk is found to be non-prohibitive, it will be crucial to put safeguards in place to mitigate the risk to the primary contractor.

When communicating with the business about these risks and corresponding safeguards, the legal or compliance department should provide options and associated costs. It is important to provide solution-oriented advice (rather than simply issue spotting) but to leave the decision of how to proceed to the business.

TERMINATING THIRD PARTIES

If investigation of a red flag or allegation determines that a third party has engaged in bribery or corruption, the primary contractor should terminate that third party. The terms of the primary contractor's ability to terminate the third party will depend on the precise contours of the termination rights included in the third-party contract. As recommended above, ideally, third-party contracts will give the primary contractor the right to terminate the third party without notice in the event that there is evidence of bribery or corruption, but contract negotiations could result in a less favourable termination clause, in which case the third party might have a right to notice or an opportunity to correct or respond to the allegation. The recommended contract provisions enabling the primary contractor to audit the third party's books and records, inspect their premises or interview their personnel will be useful tools in obtaining the evidence necessary to substantiate allegations of bribery or corruption to a level sufficient to justify termination of the contract.

HUMAN RIGHTS

MDBs do not necessarily use the language of human rights in their standards. However, in substance, human rights protections are incorporated into the environmental and social standards for all MDBs. For example, the World Bank's 10 Environmental and Social Standards include specific standards on labour and working conditions (including forced labour), community health and safety, indigenous people's rights, land use and resettlement.

While these standards apply to the 'borrower' or 'client', these terms are often broadly defined, such as to include other entities working on a bank-financed project.[6] Where there is a perceived breach of one of these standards, an affected rights holder may submit a complaint to the relevant MDB accountability mechanism.

Based on a sample taken from the accountability mechanisms of six MDBs in 2023, the most common human rights-related complaints relate to environmental harm (62 per cent), followed by resettlement (13 per cent), failure to consult with the community (13 per cent), the loss of livelihood of affected persons (10 per cent), labour rights (less than 2 per cent), and occupational health and safety (less than 1 per cent).

While MDB accountability mechanisms vary, in general, they will receive complaints relating to the breach of a standard by any party working on a project. They also provide for investigations by the MDB into compliance with the relevant standards,[7] with the compliance review including desk reviews, meetings, discussions, site visits,[8] and facilitated mediation or other form of alternative dispute resolution.[9] The MDB units tasked with investigating breaches of human rights standards typically operate separately to the units tasked with investigating ABAC breaches (e.g., the powers of the World Bank's Integrity Unit are limited specifically to fraud and corruption).[10] Nevertheless, they have similar powers,[11] and an investigation resulting in an adverse finding against a contractor or subcontractor can result in significant disruption to a project as well as reputational harm for the parties involved.

To reduce this risk, companies working on MDB projects should use a similar toolkit of measures for human rights issues as described above in relation to ABAC. There should be a clear process for vetting the human rights risk profile of third parties (e.g., in relation to the risk that they may use forced labour), coupled with adequate training of the business on how to implement this process in practice; there should be a clear set of human rights-related policies in place (including in relation to forced labour specifically); and senior managers must set the appropriate tone relating to the respect for human rights standards in their business and supply chain. Contracts should contain specific provisions incorporating human rights standards. These provisions should mandate compliance with the relevant MDB human rights standards and provide the necessary audit rights and contractual flow-down.

However, the correct approach to managing third-party human rights risks does differ from ABAC in certain respects. As described above, in the ABAC context, there are circumstances in which a breach of standards by a counterparty should result in immediate termination. In the human rights context, this could give rise to problems. The overarching international standards relating to the business respect for human rights require that businesses use termination only as a last resort. Where a company determines that it is linked to a human rights impact through a contract counterparty (e.g., an incident of forced labour associated with a contractor or supplier), its primary responsibility is to engage with that counterparty and exercise leverage over it to bring the adverse impact to an end. Only where this is not possible, and the adverse impacts associated with continuing the relationship outweigh those relating to termination (e.g., through loss of livelihoods), should a company terminate. To enable a company to meet these standards, companies should include human rights provisions that enable them to require that counterparties put in place corrective action plans. While it is important to include a contractual right to terminate for breach of a human rights standard, this right should be exercised with caution, and the business should receive adequate training on when and how to exercise it.

ENDNOTES

[1] Brandt Leibe, Bill Gordon, Aaron Stephens and Wade Coriell are partners and Margaret Nettesheim and Peter Hood are counsels at King & Spalding LLP.

[2] As noted briefly below, as well as throughout this guide, mitigation has taken on greater import in light of the Agreement for Mutual Enforcement of Debarment Decisions. Notably, a sanction short of debarment does not mandate cross-debarment among the signatory MDBs; thus, contractors are highly motivated to seek non-debarment sanctions in cases where sanctions cannot be avoided altogether.

[3] On 17 September 2006, the leaders of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, International Monetary Fund, Inter-American Development Bank and World Bank agreed on a framework for preventing and combating fraud and corruption in the activities and operations of their institutions. These institutions formally recognised that corruption undermines sustainable economic growth and is a major obstacle to the reduction of poverty. The leaders outlined joint actions to combat fraud and corruption, including (1) agreement in principle on standardised definitions of fraudulent and corrupt practices for investigating such practices in activities by the member institutions, (2) agreement on common principles and guidelines for investigations, (3) agreement to strengthen the exchange of information, (4) agreement on general integrity due diligence principles and (5) agreement to explore further how compliance and enforcement actions taken by one institution can be supported by others.

[4] On 9 April 2010, the Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and World Bank Group signed the Agreement for Mutual Enforcement of Debarment Decisions (i.e., mandatory cross-debarment) stipulating that entities debarred by one of the signatory MDBs will also be debarred on the same terms by other signatories for which the Agreement has entered force.

[5] The appendix to the Principles gives additional guidance on the core principles and related topics.

[6] See, for example, the World Bank Environmental and Social Framework (2017), available online at https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf#page=45&zoom=80 (accessed 1 October 2024) p. 3 'In this Policy, unless the context requires otherwise, the term "Borrower" means a borrower or recipient of Bank financing for an investment project, and any other entity responsible for the implementation of the project.'

[7] See, for example, the European Bank of Reconstruction and Development Independent Project Accountability Mechanism (IPAM), which is the grievance mechanism for environmental, social and disclosure matters. IPAM has a mandate to conduct 'problem-solving', focusing on the promotion of non-adversarial engagement between parties in search of consensual solutions to concerns raised by complainants, and 'compliance reviews' (i.e., fact-finding investigations to determine the bank's compliance with relevant environmental, social and disclosure matters. IPAM's mandate is set out in the 2019 Project Accountability Policy and associated Guidance on Case Handling, available online at https://www.ebrd.com/documents/occo/ipam-policy.pdf (accessed 11 November 2024).

[8] See, for example, the Asian Development Bank Accountability Mechanism Policy (2012), available online at https://www.adb.org/sites/default/files/institutional-document/33440/accoun tability-mechanism-policy-2012_0.pdf (accessed 1 October 2024) [183] 'Conducting a Compliance Review'.

[9] See, for example, the World Bank Grievance Redress Service: Annual Report (2023) available online at https://documents1.worldbank.org/curated/en/099543501102413057/pdf/ IDU1dc5 583d21f56b143ad19c411677673173c42.pdf?_gl=1*11fywq9*_gcl_au* MTYyODk4NDEwNS 4xNzI1NTIzMzcy (accessed 1 October 2024) p. 31 and the World Bank Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (2011) available online at https://documents1.worldbank.org/curated/en/551241468161367060/pdf/ 611090B R0SecM21Disclosed04113120111.pdf?_gl=1*1qrz6gn*_gcl_au* MTYyODk4NDEwNS4xNzI 1NTIzMzcy (accessed 1 October 2024) p. 3.

[10] The World Bank Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (2011) available online at https://documents1.worldbank.org/curated/en/551241468161367060/pdf/ 611090B R0SecM21Disclosed04113120111.pdf?_gl=1*1qrz6gn* _gcl_au* MTYyODk4NDEwNS4xNz I1NTIzMzcy (accessed 1 October 2024) p. 3.

[11] See, for example, the African Development Bank 'Independent Recourse Mechanism: Operating Rules and Procedures' (2021) available online at https://irm.afdb.org/sites/default/files/documents/IRM%20New%20Operating%20 Rrules%20%26%20Procedures%20-%20July-2021.pdf (accessed 1 Octoboer 2024) pp. 16–17 'Eligibility' and 'Conduct of a Compliance Review'.

[Brandt Leibe](#) bleibe@kslaw.com
[Bill Gordon](#) bgordon@kslaw.com
[Aaron Stephens](#) astephens@kslaw.com
[Wade Coriell](#) wcoriell@kslaw.com
[Margaret Nettesheim](#) mnettesheim@kslaw.com
[Peter Hood](#) phood@kslaw.com

1100 Louisiana, Suite 4100, Houston, TX 77002, United States

Tel: +1 713 751 3200

https://www.kslaw.com/

Read more from this firm on GIR