

The Third Suspension and Debarment Colloquium

Wednesday, December 16, 2015

Session Summaries

Welcoming and Introductory Remarks were given by:

- *Sri Mulyani Indrawati*, Managing Director and Chief Operating Officer, World Bank;
- *Anne-Marie Leroy*, Senior Vice President and World Bank Group General Counsel; and
- *Pascale Helene Dubois*, Chief Suspension and Debarment Officer, World Bank.

Roundtable 1 – First Principles: The Theory and Purpose of a Suspension & Debarment System

(9:20 – 10:35 am)

Speakers Present:

- (Moderator) *Steven L. Schooner*, Nash & Cibinic Professor of Government Procurement Law, The George Washington University Law School
- *Giuliana Dunham Irving*, Senior Counsel, Legal Vice Presidency, World Bank
- *Maria Swaby*, Suspension and Debarment Official, United States General Services Administration
- *Juan Gabriel Ronderos*, Sanctions Officer, Inter-American Development Bank Group

Session Summary:

In the first roundtable, the speakers examined the different goals of suspension and debarment systems from around the world and debated the extent to which these goals are (or are not) mutually exclusive. For example, Ms. Irving stated that the goals of the World Bank's system are to ensure that Bank funds are used for their intended purposes. The World Bank thus views sanctions as legal or administrative decisions. According to Ms. Swaby, from the U.S. federal government's viewpoint, suspension and debarment is a business decision that is viewed from the perspective of working to bring companies into compliance with U.S. rules and regulations. Mr. Ronderos noted that within the context of the work performed by MDBs, the main goals of suspension and debarment systems are to protect the funds being invested in development. He added that the purpose of sanctioning companies is to identify the people that should not be participating in development projects.

The speakers also addressed the stakeholders in their respective suspension and debarment systems, which may include the oversight community, the public administration, the legislative community, and donors or lenders. The stakeholders in, and thus the goals of, a national suspension and debarment system can differ greatly from the stakeholders and goals of a system implemented by a multilateral development bank or other international institution. These varying stakeholders can impact the extent to which a system is perceived as having a punitive, deterrent, or protective purpose.

Other questions discussed by the speakers included the extent to which small businesses are impacted by suspension and debarment, whether entities could ever be "too big to debar," and how suspension and debarment can (or should) interface with compliance and other preventive functions.

Roundtable 2 – Developing Trends and Model Systems: Is the World Ready to Move Towards Harmonization of Suspension & Debarment?

(10:50 am – 12:05 pm)

Speakers Present:

- (Moderator) *Peter Trepte*, Senior Research Fellow, Public Procurement Research Group, University of Nottingham (UK), Littleton Chambers (UK), Grayston & Company (Belgium)
- *Lisa Miller*, Integrity Compliance Officer, Integrity Vice Presidency, World Bank Group
- *Geo Quinot*, Director, African Public Procurement Regulation Research Unit, Professor, Dept. of Public Law, Stellenbosch University (South Africa)
- *Maria Vannari*, Lead Operations Officer, Operations, Safeguards, Procurement & Financial Management, World Bank Group
- *Caroline Nicholas*, Senior Legal Officer, UNCITRAL Secretariat, UN Office of Legal Affairs

Session Summary:

In the second roundtable, the speakers examined the extent to which the world is moving or could move towards harmonization of suspension and debarment systems. In this discussion, the speakers considered different definitions of the term “harmonization.” For example, the speakers discussed whether the term implies transplanting an existing system’s goals and procedures into a different context, or whether it denotes a synthesis of varying goals and ideals. The speakers also distinguished harmonization in the *processes* for suspending or debarring entities from harmonization of the *consequence* (i.e., the extent to which a debarment decision of one system should be recognized and adhered to by other systems).

Ms. Nicholas noted that UNCITRAL has recently started to consider suspension and debarment as a complement to UNCITRAL’s existing (harmonizing) model law on public procurement. Other speakers, however, were less enthusiastic about harmonization. Professor Quinot stated that conceptual definitions of suspension and debarment are not easily transferrable to other contexts and nations. Ms. Miller commented that she has observed some harmonization regarding the definitions of sanctionable misconduct and in the integrity compliance arena, while noting that the greatest divergence has taken place among existing systems’ mechanics and procedures. Ms. Vannari expressed concern that harmonization may not improve upon the existing landscape.

The speakers also addressed questions related to cross-debarment and mutual recognition of debarment decisions. While acknowledging that mutual recognition could provide more flexibility between systems, some speakers noted that “recognition” may mean something less than automatic debarment (i.e., a trigger for further investigation). Other speakers noted that automatic cross-debarment may be problematic if a debarment would not have been possible in the country’s own system.

In the end, the speakers expressed disagreement over the desirability of harmonization but agreed that harmonization is possible to some extent. The speakers also agreed that any efforts towards harmonization will take a very long time.

Roundtable 3 – How Effective is Suspension & Debarment in the Broader Anti-Corruption Framework?

(1:15 – 2:30 pm)

Speakers Present:

- (Moderator) *Hans-Joachim Priess*, Partner, Freshfields Bruckhaus Deringer LLP (Germany)
- *Christopher R. Yukins*, Lynn David Research Professor of Government Procurement Law, The George Washington University Law School
- *Akere Muna*, Sanctions Commissioner, African Development Bank
- *Elizabeth Lin Forder*, Secretary to the World Bank Group Sanctions Board
- *Frank Fariello*, Lead Counsel, Operations Policy, Legal Vice Presidency, World Bank
- *Stephen Zimmermann*, Director of Operations for the World Bank Integrity Vice Presidency (INT)

Session Summary:

In the third roundtable, the speakers examined the effectiveness of suspension and debarment. Many of the speakers agreed that a system's effectiveness depends in large part on whether the system is meeting its goals. Professor Yukins examined how the debarment function impacts corruption. In particular, he stressed that anti-corruption efforts should be just as focused on the contract execution stage as the contract award stage. He also discussed potential ways to incentivize whistleblowers to come forward with information about fraudulent or corrupt activities, analogizing to the qui tam relator system in the United States for violations of the False Claims Act. Mr. Zimmermann discussed the limited tools available to investigators at the World Bank and other international organizations to detect and investigate fraud and corruption. He noted that, at some point, speed and efficiency will run up against investigative needs. He also addressed the cross-debarment mechanism as a great example of harmonized efforts of the multilateral development banks to combat fraud and corruption.

Mr. Fariello noted that any measure of effectiveness depends on the system's goals. In the World Bank's context, these goals include: exclusion of corrupt actors from Bank-financed projects, specific and general deterrence, rehabilitation and, ultimately, reducing levels of corruption. He noted that it is very difficult to gauge the ultimate success of any effort to combat corruption, but there were clear signs that the system was creating its intended deterrent effects. He also noted that the World Bank has not yet seen a case of recidivism of a firm that has gone through the exclusion and rehabilitation process. Ms. Forder argued that it is important to check theory against practice, noting that the possibility of World Bank sanctions can have legal, reputational, and economic effects. She noted that companies are increasingly investing in compliance programs as a mitigation measure in sanctions proceedings.

Mr. Muna examined his experience as the Sanctions Commissioner for the African Development Bank. In particular, he has seen a big push towards settlements. Ultimately, he argued that effective anti-corruption efforts on the African continent can be measured only when the Bank's sanctions system is able to interface with what is actually going on in practice.

Other themes discussed by the speakers were the critical importance of transparency, the ability to measure efficiency through remedial measures being taken in response to a sanctions proceeding, and the potential for further cooperation with national authorities.

Roundtable 4 – Putting Theory Into Practice: Advice for Implementing a Suspension & Debarment System

(2:45 – 4:00 pm)

Speakers Present:

- (Moderator) *Pascale Hélène Dubois*, Chief Suspension and Debarment Officer, World Bank
- *Majed El-Bayya*, Lead Procurement Specialist, Governance Global Practice, World Bank
- *Rodney Grandon*, Deputy General Counsel (Contractor Responsibility & Conflict Resolution), Department of the Air Force (USA)
- *Hakan Arikan*, Chief Inspector, Board of Inspection, Ministry of Interior (Turkey)
- *Denis Robitaille*, Director, ITS Operations and Corporate, World Bank
- *Peter Trepte*, Senior Research Fellow, Public Procurement Research Group, University of Nottingham (UK), Littleton Chambers (UK), Grayston & Company (Belgium)
- (By Video) *Sope Williams-Elegbe*, Senior Lecturer in Law, University of Lagos (Nigeria)

Session Summary:

In the fourth roundtable, the speakers examined the implementation of a suspension and debarment system, focusing on points of advice for countries seeking to establish a system of their own. Many speakers noted that forethought and careful planning are imperative to establishing successful suspension and debarment systems. Speakers specifically highlighted determining a prospective system's purpose and goals as a key first step. Mr. Robitaille and Mr. Trepte both noted that potential consequences of certain approaches should be considered prior to establishing a system. At the same time, Mr. Grandon noted that no system can immediately achieve perfection; every system will inevitably grow and evolve.

Several speakers noted that in implementing a system, it is important to consider the remedial context. Mr. Grandon suggested that suspension and debarment in the United States has a limited remedial purpose because U.S. law provides a host of civil and criminal remedies outside suspension and debarment. Mr. El-Bayya discussed remedies in terms of debarment for non-performance, stating that the World-Bank does not debar suppliers for non-performance because there are contractual remedies available to the borrower for performance failure. The speakers also agreed with Dr. Williams-Elegbe that every suspension and debarment system should provide adequate due process protections, which may include, among other things, the provision of notice, the opportunity to respond, appeal rights, and reasoned decision-making.

The speakers also discussed the importance of transparency and increasing knowledge of how a given suspension and debarment system works. Mr. Grandon noted that a system is only effective if it is understood. Accordingly, he advised that decisions be published, along with reasoning. Mr. Arikan underlined that transparency is particularly important when the decision-maker responsible for excluding a supplier has a high-level of discretion to avoid arbitrary debarments.

Other themes discussed by the speakers were the consideration of available resources, whether debarment should be administrative or criminal, and the potential dangers of debarments (i.e., the potential for corruption in the debarment process itself).