

# Hiding in Plain Sight

Anti-Corruption Enforcement Risks  
from Multilateral Development Banks

Dechert  
LLP



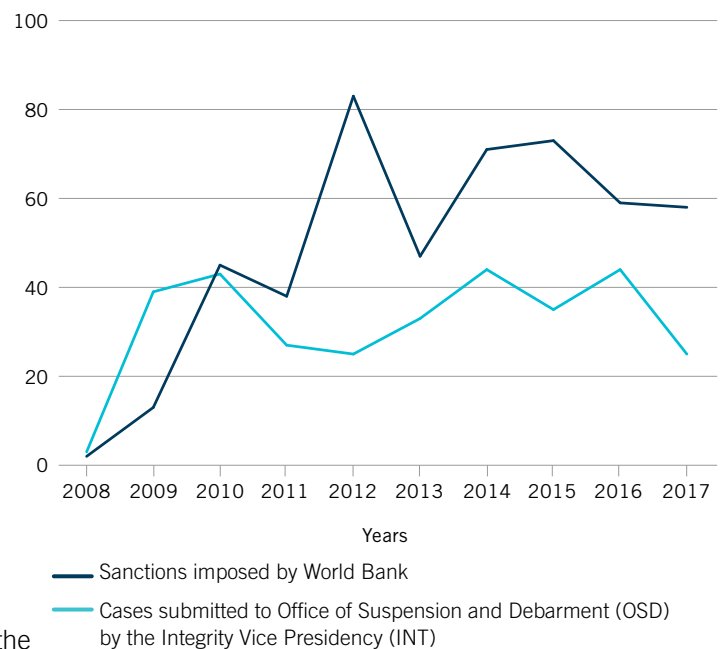
The World Bank's Office of Suspension and Debarment (OSD) recently published a report regarding the past ten years of enforcement activity that provides insight into the Bank's expanding efforts to combat fraud, corruption, and other sanctionable practices. It also illustrates the growing trend of multilateral development banks (MDBs) exercising their broad authority to investigate and sanction. Companies involved with projects funded by MDBs must understand the breadth of their enforcement authority and respective sanctions processes. MDBs not only can issue sanctions like debarment, thereby precluding participation in future bank-financed projects, but also can refer cases to national enforcement authorities. As recent cases demonstrate, an MDB investigation can quickly become a larger and more complex enforcement matter in one or more countries, resulting in a myriad of negative collateral consequences.

# Background on MDBs' Enforcement Authority

Companies involved with development projects must understand the authority of MDBs to investigate and sanction. MDBs are treaty-based, international financial institutions that provide countries, private companies, and non-profit organizations funding and technical support for development projects through the use of financing agreements.<sup>1</sup> These agreements vest MDBs with the authority to investigate and impose sanctions on the direct and indirect recipients of the financing, including third parties retained to perform work on MDB-financed projects.

For example, if an MDB loans money to a country for the completion of a national highway project and that country then contracts with an engineering company, the MDB likely will assert jurisdiction over the engineering company and over any subcontractors that the engineering company hires, regardless of whether the engineering company or its contractors have any direct interactions with the MDB. All companies must therefore be mindful of their potential exposure to MDB enforcement.

**World Bank Enforcement Activity (FY 2008 – FY 2017)**



The World Bank's fiscal year runs from July 1 of the previous calendar year to June 30 of the current calendar year. For example, Fiscal Year 2017 began on July 1, 2016 and ended on June 30, 2017.

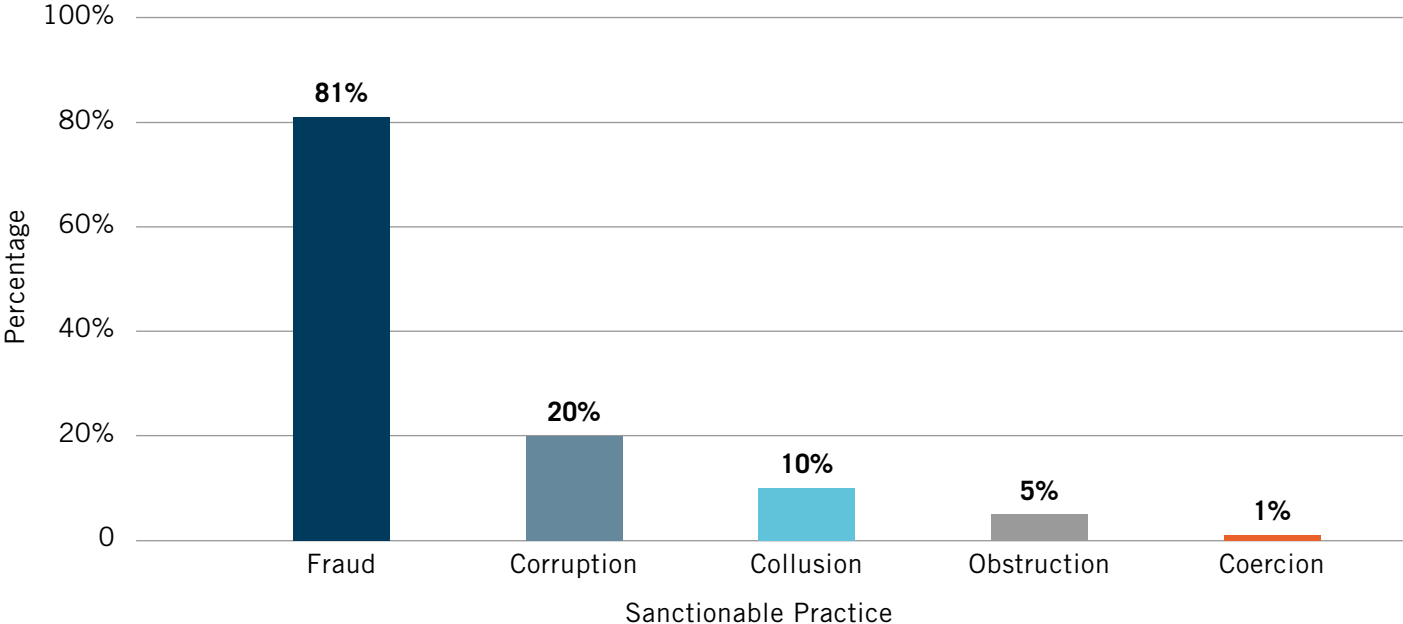
Source: OSD Report.

<sup>1</sup> There are five major MDBs: The African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group.

# Sanctions and Collateral Consequences

The *10-Year Update on Case Data & Metrics (Addendum to the Second Edition, 2007-2017) (the OSD Report)* details the World Bank’s activity in sanctioning firms and individuals over the past decade. From July 2007 to June 2017, the World Bank sanctioned almost 500 firms and individuals. Over the same period, the World Bank’s independent investigative unit submitted more than 300 cases to OSD. These cases included claims based on a variety of sanctionable practices, and many involved multiple respondents.<sup>2</sup>

## OSD Cases and Settlements Received By Sanctionable Practice



The total of the percentages exceeds 100% because a number of cases have involved claims of more than one type of sanctionable practice.

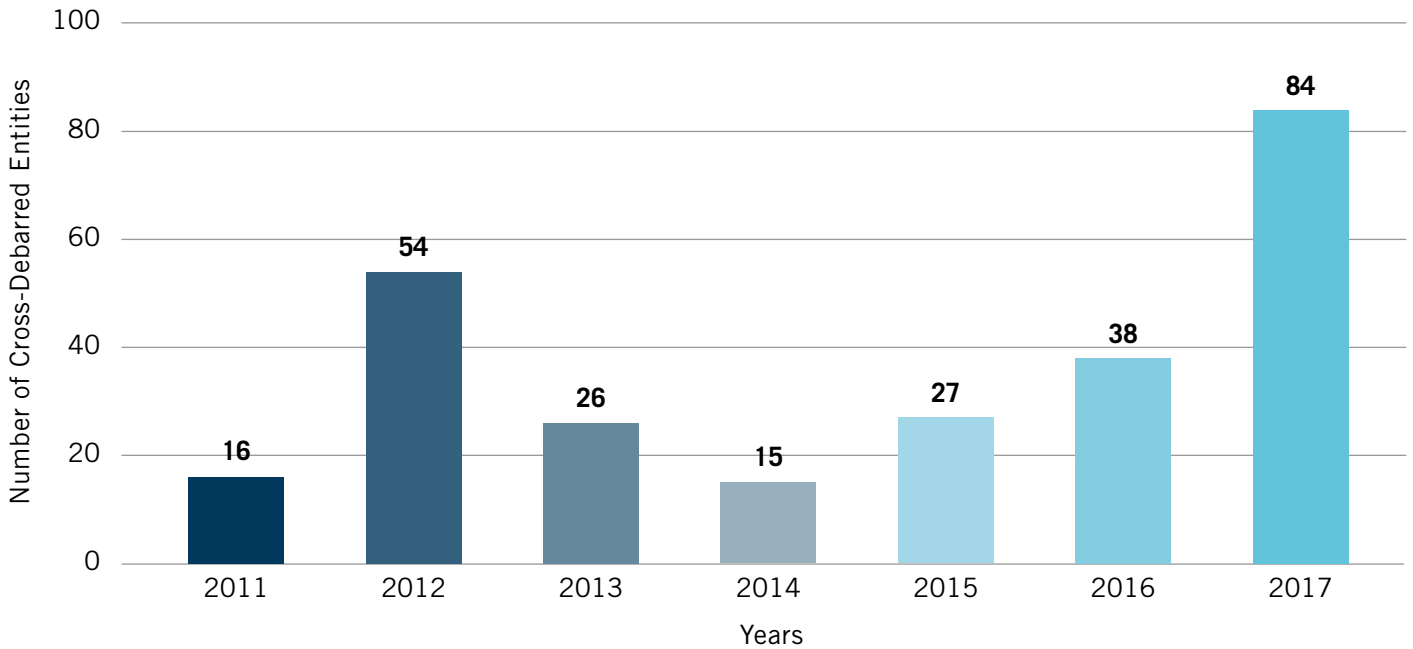
Source: OSD Report.

The most common sanction is debarment, which prohibits participation in World Bank-financed projects for a certain period. Furthermore, when one MDB debar an entity or individual for a sanctionable practice, provided that certain conditions are met, the other major MDBs automatically will cross-debar the entity or individual as well.<sup>3</sup> During fiscal year 2017, the World

<sup>2</sup> [World Bank Office of Suspension and Debarment, 10-Year Update on Case Data & Metrics \(Addendum to the Second Edition, 2007-2017\) 5 \(2017\)](#) [hereinafter 2017 OSD Report].

<sup>3</sup> The [Agreement for Mutual Enforcement of Debarment Decisions](#) provides additional conditions that must be satisfied before an entity or individual is cross-debarred: (i) the decision to debar an entity must have been based on fraudulent, corrupt, collusive, or coercive practices; (ii) the debarment decision must be made public; (iii) the initial debarment period must exceed one year; (iv) the decision to debar the entity or individual must be made after the 2010 agreement entered into force; (v) the decision to debar must be made within ten years of the date of commission of the sanctionable practice; and (vi) the decision to debar must not be based on a decision by a national authority or any international authority other than MDBs.

## Entities Cross-Debarred by World Bank (FY 2011 – FY 2017)



The sources for this data (aside from fiscal year 2013 data) can be found in the [INT annual reports for each year](#). The data for fiscal year 2013 can be found in a separate [INT report](#).

Bank Group cross-debarred 84 firms and individuals — over twice as many entities as in the previous fiscal year.<sup>4</sup> Additionally, in March 2017, the relatively-nascent Asian Infrastructure Investment Bank voluntarily adopted the cross-debarment list, joining five other major MDBs who are signatories to a cross-debarment agreement.<sup>5</sup>

In addition to debarment, entities can suffer a variety of reputational and other collateral consequences. Because the World Bank and the other major MDBs disclose the names of debarred entities, a private matter before an MDB can evolve into a matter of public record. By referencing frequently-updated lists published on MDBs' websites,<sup>6</sup> potential business partners that conduct due diligence can easily discover that an entity has been debarred. Moreover, an MDB sanction can halt a business transaction, as sanctions can also apply to affiliates, successors, and assignees.<sup>7</sup> Or, at the least, a potential business partner may infer that the sanctioned entity is irresponsible, faces potentially significant liability, and/or presents meaningful reputational risks, thereby impacting negotiations between the parties.

<sup>4</sup> World Bank Grp., [Integrity Vice Presidency, Annual Update: Fiscal Year 2017](#) 41-43 (2017) [hereinafter 2017 INT Report]; [World Bank Grp., Integrity Vice Presidency, Annual Update: Fiscal Year 2016](#) 38-39 (2016) [hereinafter 2016 INT Report].

<sup>5</sup> See [Press Release](#), AIB Says No to Doing Business with Corrupt Bidders (Mar. 7, 2017).

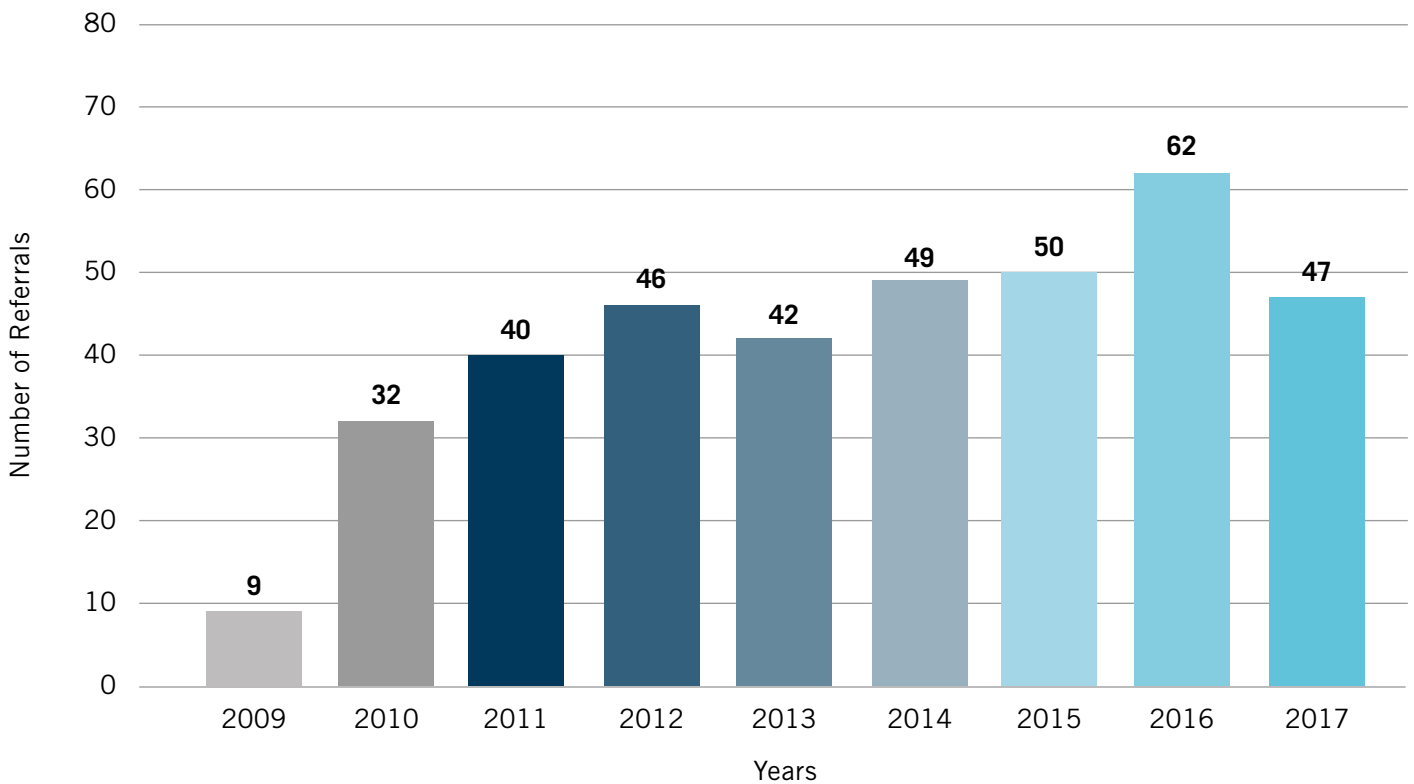
<sup>6</sup> See [World Bank Listing of Ineligible Firms & Individuals](#), World Bank; [Debarment and Sanctions Procedures](#), Afr. Dev. Bank Grp.; [Ineligible Entities](#), Eur. Bank for Reconstruction & Dev.; [Published List](#), Asian Dev. Bank; [Sanctioned Firms and Individuals](#), Inter-Am. Dev. Bank.

<sup>7</sup> World Bank Sanctions Procedures, art. IX.

# Law Enforcement Referrals

An MDB investigation can also lead to criminal and civil investigations by national law enforcement authorities. If an MDB believes that an entity has violated a particular country's laws, the MDB can refer the matter to national law enforcement authorities. The World Bank's investigative unit made 47 referrals to countries and to other MDBs during fiscal year 2017, continuing a trend of active communications among enforcement authorities over the past several years.<sup>8</sup> While the World Bank and other MDBs do not disclose many details about these referrals, several high-profile investigations by national authorities are known to have grown out of MDB investigations.

## Referrals from World Bank to National Authorities and Other MDBs (FY 2009 – FY 2017)



The sources for this data can be found in the [INT annual report for 2017](#) and [INT annual report for 2012](#).

<sup>8</sup> [2017 INT Report](#) at 27.

For example, in 2011, the World Bank Group referred an ongoing investigation involving Canadian engineering company SNC-Lavalin Inc. to Canadian authorities.<sup>9</sup> In April 2013, the World Bank Group announced that it had debarred SNC-Lavalin Inc. for 10 years for allegedly offering bribes to officials in Bangladesh.<sup>10</sup> Canadian authorities continued and expanded their criminal investigation and eventually charged the company in 2015 for allegedly offering bribes to officials in Libya.<sup>11</sup> The case against SNC-Lavalin Inc. remains in Canadian court.<sup>12</sup> The company's multi-year defense of these matters is a cautionary tale of the expensive and time-consuming collateral consequences that can result from an MDB investigation and referral to national authorities.

Likewise, in September 2015, Japanese conglomerate Hitachi, Ltd. agreed to pay \$19 million to the United States Securities and Exchange Commission (SEC) to settle Foreign Corrupt Practices Act (FCPA) charges for improper payments to South African officials in connection with power plant construction contracts.<sup>13</sup> In its press release, the SEC noted it "appreciate[d] the assistance of . . . the Integrity and Anti-Corruption Department of the African Development Bank."<sup>14</sup> Shortly thereafter, the African Development Bank announced a settlement agreement with two Hitachi subsidiaries in connection with one of the power plants at issue in the SEC case.<sup>15</sup> These matters demonstrate the budding relationship among MDBs and national authorities and the potential consequences for entities accused of engaging in sanctionable practices.

<sup>9</sup> World Bank Group v. Wallace, [2016] 1 S.C.R. 207 (Can.); [World Bank Grp., Integrity Vice Presidency, Annual Update: Fiscal Year 2015](#) 15 n.1 (2015).

<sup>10</sup> Press Release, [World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 Years](#) (Apr. 17, 2013).

<sup>11</sup> [RCMP Charges SNC-Lavalin with Fraud and Corruption Linked to Libyan Projects](#), Fin. Post (Feb. 19, 2015).

<sup>12</sup> Nicolas Van Praet, [Corporate-misconduct Laws Could Aid SNC-Lavalin](#), Globe & Mail (Feb. 23, 2018); [SNC-Lavalin Still Hoping to Resolve Criminal Charges as Hearing Set for 2018: 'Everything is Possible in Life,'](#) Fin. Post (Feb. 26, 2016).

<sup>13</sup> [Consent of Defendant Hitachi](#), SEC v. Hitachi, Ltd., No. 15-cv-1573 (D.D.C. Sept. 28, 2015).

<sup>14</sup> Press Release, [SEC Charges Hitachi with FCPA Violations](#) (Sept. 28, 2015).

<sup>15</sup> See Press Release, [Integrity in Development, AfDB and Hitachi, Ltd. Conclude Settlement Agreement](#) (Dec. 2, 2015); [Complaint](#), SEC v. Hitachi, Ltd., No. 15-cv-1573 (D.D.C. Sept. 28, 2015).

# MDBs' Investigation and Sanctions Process

Given the variety of collateral consequences from an MDB investigation and resulting sanctions, companies involved with development projects in any capacity must familiarize themselves with the unique features of these processes. Not only are these proceedings different from the litigation process with which most companies are familiar, but active participation in these proceedings may also have a positive impact on any referral report to national authorities. Each MDB's investigatory process is slightly different, but the World Bank Group's process is illustrative.

As detailed in the World Bank Sanctions Procedures, the World Bank Group's sanctions process starts with the Integrity Vice Presidency (INT), an independent unit within the Bank, investigating whether sanctionable practices have occurred in the context of a World Bank Group-financed project. Although INT cannot issue subpoenas, it can still leverage the cooperation of targeted entities. INT can exert pressure on targeted entities to cooperate because obstructing an INT investigation is itself a sanctionable practice. If INT believes it is more likely than not—a standard of proof lower than what is generally applied in the United States criminal context—that a sanctionable practice has occurred, INT prepares a Statement of Accusations and Evidence and passes the case on to OSD. OSD can then temporarily suspend the entity and recommend sanctions. At this point, the entity is notified of OSD's opinion and recommended sanctions, and the entity has the opportunity to file an Explanation to contest OSD's findings.

Entities that file Explanations can also appeal OSD's recommendation to the Sanctions Board, which will consider the matter anew. To be successful here, INT must only establish that it is more likely than not that the sanctionable practice occurred. Moreover, formal rules of evidence do not govern this proceeding. Instead, the Sanctions Board has discretion to determine the "relevance, materiality, weight, and sufficiency of all evidence." Finally, Sanctions Board decisions are not appealable, and they are made available to the public.

To avoid engaging in the entirety of a formal sanctions proceeding, entities and INT often enter into settlement agreements. These Negotiated Resolution Agreements (NRAs) typically require admissions of culpability, but they can save companies the cost and uncertainty of a sanctions proceeding. In fiscal year 2017, INT submitted 26 NRAs to OSD, an all-time high figure.<sup>16</sup>

<sup>16</sup> See 2017 [OSD Report](#) at 5.



Furthermore, companies under investigation by INT can potentially reduce an ultimate sanction by voluntarily taking remedial action and cooperating with INT. According to the World Bank Sanctions Procedures, OSD or the Sanctions Board must consider a range of factors in determining an appropriate sanction, including any “mitigating circumstances” like whether the sanctioned party “took voluntary corrective action or cooperated in the investigation or resolution of the case.” In published decisions, the Sanctions Board has taken into account when a company conducts its own internal investigations,<sup>17</sup> institutes a compliance program,<sup>18</sup> and cooperates with INT<sup>19</sup> in issuing an appropriate sanction. Thus, for some companies, choosing to take certain actions after an INT investigation has begun may have a positive impact on the ultimate outcome.

## Takeaways

The increasingly sophisticated investigative, enforcement, and sanctioning processes of MDBs like the World Bank are emerging as substantial tools to fight corruption and other illicit behavior. MDB referrals to national law enforcement authorities are increasingly common and serve to compound the legal, commercial, and reputational risks. In fact, when conducting their investigations, national law enforcement authorities may probe areas or conduct not explored by the referring MDB.

The onus is on companies to understand whether they are performing work on MDB-financed projects, their potential exposure to the risks described above, and their ability to respond rapidly and appropriately should an MDB investigation commence.

Dechert has significant expertise in helping clients comply with applicable anti-corruption laws in a manner tailored to be proportionate to their level of risk and which minimize the impact on their business. We benefit from a global network of top-ranked lawyers and former senior government officials with practical experience designing and implementing the regulations. Our experience advising clients includes assisting with investigations before MDBs and national level lending and financing authorities.

<sup>17</sup> See, e.g., [Sanctions Board Decision No. 63](#) ¶ 112, World Bank Grp. (Jan. 31, 2014) (finding mitigation appropriate for one firm that “conducted an adequate internal investigation ... and shared detailed findings with INT and national authorities”).

<sup>18</sup> See, e.g., [Sanctions Board Decision No. 71](#) ¶ 92-94, World Bank Grp. (July 9, 2014) (finding mitigation appropriate where, among other factors, the “asserted compliance measures appear to address the type of misconduct at issue in this case”).

<sup>19</sup> See, e.g., [Sanctions Board Decision No. 60](#) ¶ 133, World Bank Grp. (Sept. 9, 2013) (finding that one firm’s cooperation “constitute[d] a significant mitigating factor” where the firm “provided inculpatory evidence to INT” and “made efforts to retrieve previously deleted emails”).



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