



THE AGREEMENT FOR MUTUAL ENFORCEMENT OF DEBARMENT DECISIONS AND ITS ROLE IN TRANSFORMING THE CORPORATE GOVERNANCE LANDSCAPE

Multilateral development banks (MDBs) invest billions of euros in developing countries annually, with the EBRD investing €9.4 billion in 378 projects in 2016.¹ While many of these investment projects become success stories, MDBs inevitably investigate a number of allegations of wrongdoing, such as fraud and corruption, in their projects each year.

Following a finding of misconduct, arguably the most powerful action an MDB may take is to debar a party from conducting any business with the sanctioning MDB. The effect of this debarment is multiplied through the Agreement for Mutual Enforcement of Debarment Decisions (AMEDD), an agreement by five MDBs to recognise each other's debarments so that, broadly speaking, a party debarred by one MDB would be cross-debarred by the others on the same terms and conditions.

This article examines the impact of the AMEDD since its adoption; innovations to the enforcement mechanisms of the MDBs to strengthen their scope and impact; and how MDB debarments are shaping corporate governance reforms of corporations in developing countries.

When a multinational corporation that has obtained financing from an MDB to build new factories or open new plants engages in wrongdoing – for example, by bribing officials, transmitting funds to personal accounts, or creating invoices for work that was never done – arguably the most powerful action an MDB can take is debarment. In 2010, five institutions – the African Development Bank Group (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank Group (IDB) and the World Bank Group (World Bank), collectively the MDBs – entered into the AMEDD, whereby they agreed to recognise and enforce the sanctions decisions of the other participating MDBs.²

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CECILE DIVINO
PRINCIPAL,
INVESTIGATIONS,
OFFICE OF THE CHIEF
COMPLIANCE OFFICER,
EBRD
DivinoC@ebrd.com

Cross-debarment by the MDBs multiplies the effect of an institution's sanctions on a party and has far-reaching geographical consequences. A party debarred from obtaining financing from one MDB may find that it has been cross-debarred by the other MDBs and is therefore unable not only to obtain any financing from them, but also to act as a consultant, contractor or supplier on a project financed by them.

The MDBs adopted the AMEDD with the belief that it would be a powerful new tool with enhanced cooperation among MDBs which would prevent, detect and deter corruption at a greater level while instilling confidence and increasing investments in MDB projects.³ Since the AMEDD's adoption, participating institutions have indeed enhanced the tools available to their enforcement mechanisms. Sanctions issued by MDBs are increasingly broadening in scope, from merely "naming and shaming" to rehabilitation so as to create a sustainable and far-reaching impact. MDBs have recourse to other actions, such as referring criminal allegations to governmental authorities or invoking contractual remedies, which they may undertake in addition to or as alternatives to their internal sanctions mechanisms, but debarments themselves can have a rehabilitative focus with the aim of a longer lasting impact.

This article examines how and why debarments can be effective and argues that, while there are still areas for improvement, debarments and particularly debarments with conditional release can result in wider-reaching reforms to the landscape of corporate governance.

● "Since the adoption of the AMEDD, debarments with conditional release are the most frequently issued sanction by MDBs."

ENFORCEMENT ACTION DEVELOPMENTS SINCE THE AMEDD

When an MDB becomes aware of wrongdoing in one of its projects, enforcement action is only one course of action available. As an alternative, or in addition to enforcement action, an MDB may undertake various actions such as invoking contractual remedies against a borrower – for example, by requiring an audit of financial documents or determining that an event of default has occurred – or working closely with the client to reissue a procurement tender in which there were prior concerns of collusion. An MDB may also make a referral to governmental authorities for investigation if it believes that a party has violated the criminal or regulatory laws of a country. In successful cases, such an investigation may result in prosecution or a deferred prosecution agreement.

In comparison to MDB debarments, prosecution by governmental enforcement on regulatory or criminal grounds also serves as a deterrent. Individuals and companies may regard such prosecution, which can result in criminal sentencing, as a more severe sanction than enforcement action by an MDB.⁴ However, referrals made by MDBs may not result in any action taken by the governmental authority. Once referred to governmental authorities, matters are then within the jurisdiction of that state and are subject to that state taking any real action.⁵ World Bank commentators note that the track record by governmental authorities to follow up on referrals could be improved, as the World Bank made 46 referrals to governmental authorities in 2012 but in 2013 only 10 referrals resulted in investigations by governmental authorities.⁶ As a result, MDBs regard referral to governmental authorities as one possible course of action but not the only redress.

The World Bank recently reaffirmed its commitment to collaborating with governmental authorities. This followed a significant ruling by the Supreme Court of Canada, which upheld that the World Bank had not waived its privileges and immunities by referring a case to the Canadian authorities and cooperating with them in the ensuing investigation.⁷ The party under investigation had sought disclosure of World Bank documents and argued that the World Bank had waived its privileges and immunities to its records as a result of the referral.⁸ The Supreme Court, in making its decision, acknowledged the unique role of international organisations such as the World Bank, as well as the importance of cooperation between international organisations and governmental authorities in the fight against corruption.⁹

At present, alternatives to debarment – such as conditional non-debarment, letters of reprimand, restitution or financial remedies, and referral to governmental authorities – have their strengths and weaknesses, but have not had the same impact as a debarment.¹⁰ MDBs continue to use debarments as the main tool available to them under their sanctions regimes: the number of debarments has gradually risen since the adoption of the AMEDD and increasingly the nature of debarments issued by MDBs has broadened to include a rehabilitative focus in most cases.

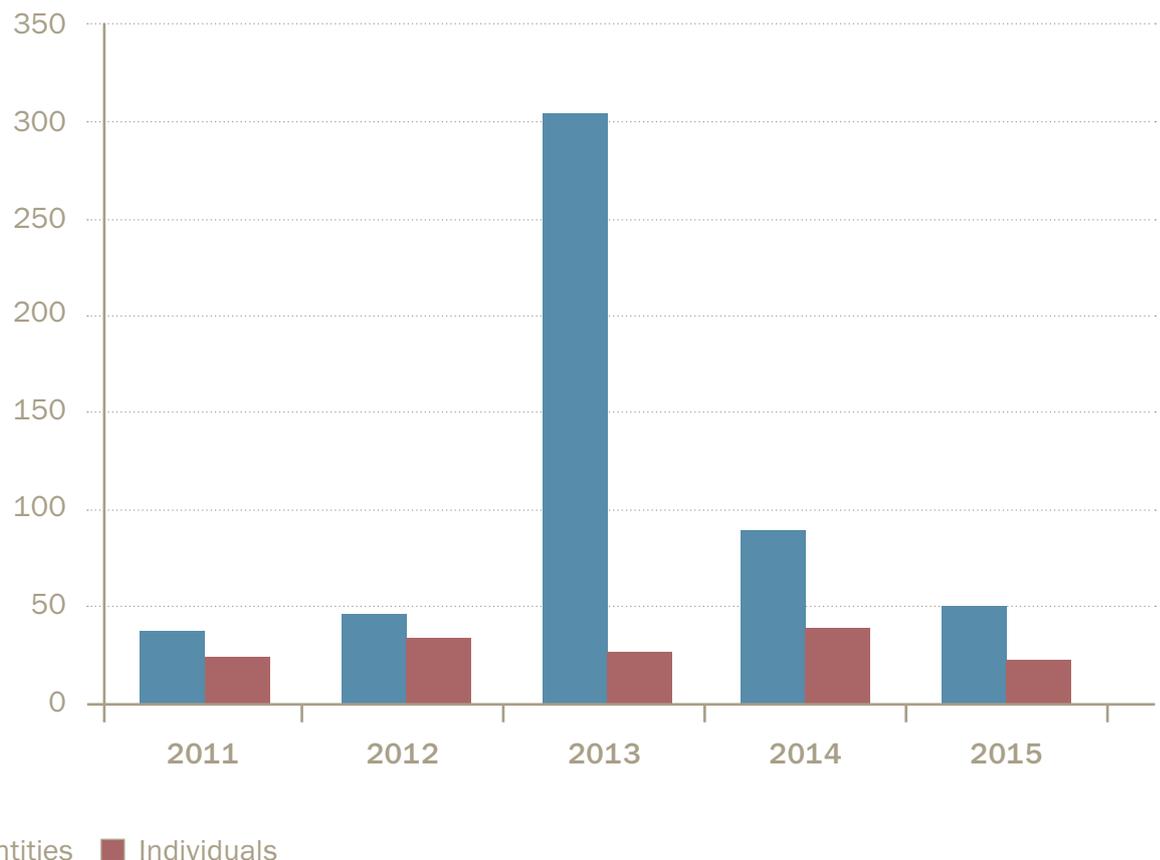
The EBRD reported that it cross-debarred 36 entities and 23 individuals in 2011; 45 entities and 32 individuals in 2012; 303 entities (over 100 with respect to the World Bank’s debarment against SNC Lavalin entities) and 25 individuals in 2013; 89 entities and 37 individuals in 2014; and 48 corporations and 20 individuals in 2015.¹¹

Since the adoption of the AMEDD, debarments with conditional release are the most frequently issued sanction by MDBs.¹² The majority of the EBRD’s

cross-debarments between 2011 and 2015 were issued for debarments with conditional release rather than debarments for a fixed or indefinite period. Debarments with conditional release, which will be discussed in greater detail below, provide MDBs with the greatest scope to incorporate a rehabilitative focus in their enforcement actions.

Negotiated settlements, which provide scope for an entity or an individual to negotiate the terms of debarment and subsequent cross-debarment, are also appearing more frequently in the enforcement landscape. Negotiated settlements may result in debarment and are eligible for cross-debarment. Along with negotiated settlements, financial remedies are also appearing as part of enforcement actions although MDBs have taken varying approaches towards financial remedies.

Chart 1 EBRD cross debarments, 2011–15



INNOVATIONS TO THE ENFORCEMENT MECHANISMS OF THE MDBs SINCE THE AMEDD

In recent years, the MDBs – with the exception of the ADB – have introduced settlement procedures into their enforcement mechanisms. The World Bank adopted its settlement mechanism in 2010, followed by the AfDB in 2012, and the IDB and the EBRD in 2015. The number of settlements submitted by the World Bank's Integrity Vice Presidency (INT) to its Office of Suspension and Debarment (OSD) has varied over the years, which may be due to the relative newness of the settlement process, the case-specific nature of each settlement, and varying scenarios being tried against the settlement mechanism.¹³

The more frequent appearance of negotiated settlements and financial remedies, ranging from restitution to financial penalties, is changing how companies and individuals investigated by MDBs engage in the enforcement process. Parties under investigation have the opportunity to negotiate the terms and conditions of proposed sanctions as part of settlement negotiations, something that did not exist before 2010. Conversely, MDBs can work more closely with parties to tailor the terms and conditions of a subsequent debarment and ultimately strengthen the scope and impact of an enforcement action.

Benefits of settlements include: conservation of resources for both parties by pre-empting a lengthier sanctions process; a known and agreed-upon

Table 1 World Bank sanctions cases issued by the Office of Suspension and Debarment to respondents and settlement agreements submitted by Integrity Vice Presidency¹⁴

	2011	2012	2013	2014	2015	2016
Sanctions cases issued by the OSD to respondents	33	33	25	46	39	40
Settlements submitted to the OSD by INT	11	16	8	6	11	18
Total sanctions cases issued by the OSD to respondents and settlement agreements submitted to the OSD by INT	44	49	33	52	50	58

¹ EBRD, *Annual Report 2016*, London.

² Agreement for Mutual Enforcement of Debarment Decisions (2010), <http://www.ebrd.com/downloads/integrity/Debar.pdf> (last accessed 25 November 2016).

³ World Bank Press Release 2010/341/INT (2010), "World Bank, Multilateral Development Banks (MDBs) Step Up Their Fight Against Corruption With Joint Sanction Accord", <http://www.worldbank.org/en/news/press-release/2010/04/09/multilateral-development-banks-step-up-fight-against-corruption-joint-sanction-accord> (last accessed 25 November 2016).

⁴ F. A. Fariello, Junior and G. Bo (2015), "Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool", *World Bank Legal Review Volume 6*, pp. 415, 429 [hereinafter "Development Alternatives"].

⁵ *Id.*



outcome for both the MDB and the individual or entity under investigation; and arguably more willingness on the part of the investigated party to cooperate during negotiations and to meet any debarment conditions that may be agreed.¹⁵

Settlement agreements have also led to self-reporting and disclosure of relevant information for current and new investigations.¹⁶ Nevertheless, while all companies and individuals under investigation have the opportunity to negotiate a settlement, there may be parties who do not avail themselves of this option if they do not have the time or resources to respond to enforcement proceedings or to consider settlement negotiations. In some cases, these may be respondents who are daunted by a legalistic process or who do not routinely use one of the MDBs' official languages.

Financial settlements result from some but not all settlement negotiations. Most notably, the World Bank and the AfDB have entered into high-value

settlements in recent years. In 2016, the World Bank announced that Nihon Koden Europe had agreed to a three-year debarment and payment of €400,000 in restitution to the government of Romania following an investigation and a settlement agreement with the World Bank.¹⁷

In 2015, the AfDB announced that Hitachi, Ltd (Hitachi) had agreed to make a "substantial financial contribution" to the AfDB, to be used to fund "worthy anti-corruption causes on the African continent" and to enhance its integrity compliance programme, as part of a 12-month conditional debarment imposed on two Hitachi entities.¹⁸ In 2014, the AfDB imposed a financial penalty of US\$ 18.86 million and a three-year debarment with conditional release on China First Highway Engineering Co. Ltd. (CFHEC), with proceeds of the penalty to fund projects and initiatives preventing and combatting corruption in Africa. In 2012 as a result of a settlement agreement between the World Bank and Alstom, Alstom Hydro France and Alstom Network Schweiz AG (Switzerland) paid US\$ 9.5 million in restitution and were debarred with conditional release for three years.¹⁹

MDBs have not yet harmonised their approach towards negotiated agreements, including financial settlements. The MDBs have agreed on harmonised principles for sanctions and treatment of corporate groups in order to ensure a consistent approach,²⁰ while their varying approaches towards financial settlements currently range from restitution to financial penalties. The MDBs provide for restitution in their enforcement mechanisms, although they have not harmonised their approach towards restitution including how it is calculated. Not all MDBs impose financial penalties and many at present do not anticipate introducing financial

⁶ *Id.*

⁷ World Bank Group, Integrity Vice Presidency (2016), *Annual Update: Integrity Vice Presidency [INT], Fiscal Year 2016*, pp 12-13, <http://pubdocs.worldbank.org/en/118471475857477799/INT-FY16-Annual-Update-web.pdf> [hereinafter "INT Update 2016"]. (last accessed 25 November 2016).

⁸ *Id.*

⁹ *Id.*

¹⁰ Development Alternatives, *supra* note 4, at 429.

¹¹ EBRD, *Annual Report 2011*, p. 67, London; EBRD, *Annual Report 2012*, p. 48; EBRD, *Annual Report 2013*, p. 49; EBRD, *Annual Report 2014*, p. 49; EBRD, *Annual Report 2015*, p. 57. All can be found here: www.ebrd.com/annual-report. (last accessed 25 November 2016).

¹² See "Cross Debarred Entities", crossdebarment.org, <https://lnadbg4.adb.org/oai001p.nsf> (last accessed 25 November 2016).

¹³ R. Schaap and C. Divino (2016), "The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape", *57 Harvard International Law Journal Online*, p.20, http://www.harvardilj.org/wp-content/uploads/January-2016_Vol-57_Schaap-Divino.pdf [hereinafter "AMEDD Five Years On"]. (last accessed 25 November 2016).

¹⁴ World Bank Group, Integrity Vice Presidency (2014), *Annual Update: Integrity Vice Presidency [INT], Fiscal Year 2014*, p. 34, *supra* note 7, at 25, <http://pubdocs.worldbank.org/en/663211449168835106/INT-FY14-Annual-Update.pdf> (last accessed 25 November 2016).

penalties into their mechanisms.²¹ MDBs may consider publishing more detailed publicly available guidance on their approaches to restitution and, if applicable, financial penalties.

The use of financial settlements to fund anti-corruption causes and initiatives may provide MDBs with the resources to take more creative or innovative measures to fight corruption through new projects and initiatives. There will likely be interest in the MDB community in coming years in how these anti-corruption funds, particularly those arising from financial penalties, are used. MDBs will benefit from sharing their experiences in this area and, if they administer the funds themselves instead of the sanctioned parties, from sharing their approach as to who administered and received the funds at the MDB; how they accounted for the funds in their financial records; and who ultimately received the funds.²²

MULTILATERAL DEVELOPMENT BANK DEBARMENTS AND CORPORATE GOVERNANCE

MDB debarments can provide redress when regulatory and national legal systems may not. While a debarment for a set or indefinite period will have a chilling effect on the sanctioned party's ability to conduct business with the MDB, or any of the other MDBs if cross-debarred, debarments with conditional release offer greater scope to have an impact on the corporate governance reforms of the sanctioned party and possibly also of peer competitors. Debarments with conditional release provide that a sanctioned entity or individual may be released from debarment or granted a reduced debarment period when it complies with the conditions imposed by the sanctioning institution at the time of debarment.



MDBs have found that debarments with conditional release promote rehabilitation by deterring misconduct and by improving the integrity and corporate governance culture of a sanctioned party.²³ The standards and principles for improvement set forth by the sanctioning institution are recognised by the MDBs as good governance and anti-fraud and corruption practices.²⁴

Most conditional debarments require improvements to corporate governance and integrity standards, such as an enhanced corporate compliance programme, and remedial measures against the parties who engaged in wrongdoing, such as reassignment or termination.²⁵ Sanctioned parties must adopt specific conditions to reduce integrity risks, such as introducing corporate governance best practices and standards as part of their corporate reforms. This has a demonstration effect for peer organisations operating in the same region or competing for similar business.

¹⁵ World Bank Group, "Review of the World Bank Group Sanctions Regime 2011-2014, Phase 1 Review: Stock-Taking", para. 28, https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctionsreview_initiatingdiscussionbrief.pdf [hereinafter "WB Phase 1 Review"]. (last accessed 25 November 2016).

¹⁶ INT Update 2016, *supra* note 7, at 4.

¹⁷ *Id.*

¹⁸ African Development Bank Group (2015), "Integrity in Development: AfDB and Hitachi, Ltd. conclude settlement agreement", <http://www.afdb.org/en/news-and-events/article/integrity-in-development-afdb-and-hitachi-ltd-conclude-settlement-agreement-15118/>. (last accessed 25 November 2016).

¹⁹ African Development Bank Group (2014), "Integrity in AfDB Projects: AfDB debars and fines China First Highway Engineering Co. Ltd.", <http://www.afdb.org/en/news-and-events/article/integrity-in-afdb-projects-afdb-debars-and-fines-china-first-highway-engineering-co-ltd-13851/>; World Bank (2012), World Bank Press Release 2012/282/INT, "Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates", <http://www.worldbank.org/en/news/press-release/2012/02/22/enforcing-accountability-world-bank-debars-alstom-hydro-france-alstom-network-schweiz-ag-and-their-affiliates>.

²⁰ See <https://www.adb.org/site/integrity/sanctions>. (last accessed 25 November 2016).

²¹ AMEDD Five Years On, *supra* note 13, at 24.

²² *Id.* at 25.

Commentators have noted that there is a cost to compliance, such as engaging a compliance monitor or obtaining guidance on corporate governance best practice.²⁶ As a result, entities that are able to pay these costs will be released from debarment whereas other entities, such as small and medium-sized enterprises (SMEs), may not be able or willing to afford these costs and may decide not to take steps to meet their release from debarment.²⁷

Sanctioned parties may also operate in regions where there is no compliance culture and may therefore have limited access to compliance monitors or to guidance on integrity and corporate governance best practices. MDBs have acknowledged that limited engagement by SMEs must be addressed and are taking steps to disseminate material and information that will assist parties to meet their conditions for release and to adopt improved integrity and good governance practices.²⁸

It is worth exploring further whether conditional non-debarment, in which an entity must comply with specific conditions in order to avoid debarment, has resulted in more entities meeting the conditions for non-debarment and, if so, whether this type of enforcement action might be more effective in achieving the imposed good governance and compliance standards. Entities may be more willing to meet the conditions for non-debarment, as they have not been debarred and have an incentive to continue their present relationship with the sanctioning institution. In addition, if a conditional non-debarment results from a settlement agreement, there may be more engagement and willingness by the entity, which has been involved in settlement negotiations, to comply with the conditions for non-debarment.

CONCLUSION

Debarments are one of the most, if not the most powerful, enforcement tools available to MDBs. Since the adoption of the AMEDD, MDBs have broadened the scope and impact of debarments by using debarments with conditional release and newly introduced settlement procedures to tailor the terms and conditions of subsequent debarments and to introduce a rehabilitative element into their enforcement mechanisms. MDB enforcement mechanisms are making an impact in environments where compliance and corporate governance cultures were previously lacking and, by introducing integrity and good governance standards, are playing a much-needed role in transforming the corporate governance landscape in developing countries.

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²³ INT Update 2016, *supra* note 7, at 26; World Bank Group, “World Bank Sanctioning Guidelines”, <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>. (last accessed 25 November 2016).

²⁴ See World Bank Group, “Summary of World Bank Group Integrity Compliance Guidelines”, <http://pubdocs.worldbank.org/en/489491449169632718/Integrity-Compliance-Guidelines-2-1-11.pdf>, at 4. (last accessed 25 November 2016).

²⁵ INT Update 2016, *supra* note 7, at 25; AMEDD Five Years On, *supra* note 13, at 8.

²⁶ See B. Stevens and R. Delonis (2013), “Leveling the Playing Field: A Race to the Top”, *World Bank Legal Review Volume 5*, pp. 413-14 [hereinafter Stevens and Delonis]; WB Phase 1 Review, *supra* note 15, at 12.

²⁷ AMEDD Five Years On, *supra* note 13, at 11.

²⁸ Stevens and Delonis, *supra* note 25, at 414.

