COORDINATING THE FIGHT AGAINST CORRUPTION AMONG MDBS: THE PAST, PRESENT, AND FUTURE OF SANCTIONS

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I. INTRODUCTION

These are interesting times in the fight against fraud and corruption. The principal multilateral development banks (MDBs), 1 mirroring and building upon trends in other areas of international cooperation, are converging on strategies of how to best address and encourage the development of coordinated governance and anticorruption (GAC) strategies. A growing, principles-based consensus of what the GAC agenda should be and how it should be advanced is emerging, particularly in the areas of “debarments”—that is, decisions to exclude an entity or individual from receiving contracts and/or other benefits through MDB financing—as well as sanctions at large. 3 In addition to establishing uniform, princi-

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1. The principal multilateral development banks (MDBs) are the African Development Bank Group (consisting of the African Development Bank, the African Development Fund, and the Nigeria Trust Fund), the Asian Development Bank, the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank Group (consisting of the Inter-American Development Bank, the Inter-American Investment Corporation, and the Multilateral Investment Fund), and the World Bank Group (WBG) (consisting, for the purposes of this Essay, of the International Bank for Research and Development (IBRD), the International Development Association (IDA), the International Finance Corporation, and the Multilateral Investment Guarantee Agency).


3. See generally SANCTIONS PROCEDURES, supra note 2.
ple-based standards for investigations among international financial institutions (IFIs), common definitions of sanctionable practices, and a common system of mutual enforcement of debarment or “cross-debarment,” the MDBs also are working to further integrate and coordinate their respective systems.

While room for further harmonization and improvement remains, the clear trend is towards an increasing convergence among the MDBs and, in certain respects, towards a broader convergence among a larger group of international actors. This trend should help to provide an even playing field across the market for international development work, thereby providing greater certainty to potential contractors and bidders. Harmonizing the systems regulating the international development market will help to ensure that a greater percentage of resources actually go to the sponsored development projects, which will increase the benefit to the intended beneficiaries of the projects—the poor. At the same time, such cooperation should help to further the spread of the rule of law through example and solidarity—that is, through the comportment of both the MDBs and contractors.

This Essay will be divided into three parts: First, bearing in mind that other published materials have more closely examined the evolution of the World Bank’s sanctions system,4 Part II will very briefly outline the legal basis, nature, and evolution of the sanctions system of the World Bank Group (WBG).5 Then, Part III will consider the points of coordination, commonality, and harmonization among the MDBs, with particular attention being paid to

4. See generally, e.g., ANNE-MARIE LEROY & FRANK FARIELLO, WORLD BANK, THE WORLD BANK GROUP SANCTIONS PROCESS AND ITS RECENT REFORMS (2012) (examining evolution of World Bank’s sanctions process and arguing that it is moving closer to a judicial model); Conrad Daly & Frank Fariello, Transforming Through Transparency: Opening up the Bank’s Sanctions Regime, 4 WORLD BANK LEGAL REV. 101, 101–21 (2012) (examining the evolution and “opening up” of the World Bank’s sanctions regime to encourage greater transparency and accountability).

5. The World Bank is a term used to refer collectively to two institutions: the IBRD and the IDA. IBRD began operations in 1944, with the purpose of providing loans to developing countries, while IDA was founded much later, in 1960, to provide financing on concessional terms to the poorest and least credit-worthy developing countries. See World Bank Grp. Archives, World Bank Group Historical Chronology 1, 82, available at http://siteresources.worldbank.org/EXTARCHIVES/Resources/WB_Historical_Chronology_1944_2005.pdf. The World Bank is part of the WBG, a constellation of institutions including, in addition to IBRD and IDA, the International Finance Corporation, the Multilateral Investment Guarantee Agency, and the International Center for Settlement of Investment Disputes. The World Bank Group, WORLD BANK, http://go.worldbank.org/D2ALRSK6O0 (last updated Feb. 4, 2013).
cross-debarment. Finally, Part IV will consider possible lines for future developments among sanctions systems.

II. THE EVOLUTION OF THE WORLD BANK’S SANCTIONS SYSTEM

A. Legal Basis for Sanctions

While the WBG has been at the forefront of international organizations in the fight against fraud and corruption in development projects, for many years the World Bank (Bank) hesitated to address fraud and corruption directly. The Bank has always made efforts to prevent what is euphemistically referred to as “leakage” through fiduciary systems by putting in place procedures such as procurement rules, financial reporting and audits, and controls on disbursement. At the same time, a widespread perception existed that matters of governance and anti-corruption were political issues with little or no relevance to the Bank’s mandate of economic development. More particularly, Bank involvement in these matters was construed as inevitably running afoul of the “political prohibition” in the Bank’s Articles of Agreement.

8. See IBRD Articles of Agreement art. 1, opened for signature Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 (as amended Feb. 18, 1989) [hereinafter IBRD Articles of Agreement]. The IBRD Articles of Agreement provides as follows:

The purposes of the Bank are: (i) To assist in the reconstruction and development. . . . (ii) To promote private foreign investment . . . . (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments . . . . (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels . . . . (v) To conduct its operations with due regard to the effect of international investment on business conditions . . . .

Id.; see also IDA Articles of Agreement art. 1, done Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249 [hereinafter IDA Articles of Agreement] (“The purposes of the Association are to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world . . . .”).

9. The IBRD Articles of Agreement, for example, contain a provision that states that “[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.” See IBRD Articles of Agreement, supra note 8, art. IV, § 10. The IDA Articles of Agreement contain an identical provision. See IDA Articles of Agreement, supra note 8, art. V, § 6.
prohibition exists for most of the other MDBs. Over time, however, the Bank has recognized the deleterious effects of corruption—on society at large and on economic development in particular. As a result, the Bank’s thinking has evolved: today the Bank understands that, if properly implemented, efforts to fight corruption are not only acceptable but are actually necessary to fulfilling the Bank’s mandate.

The Bank’s sanctions system finds specific legal support in the Bank’s “fiduciary duty”—its obligation under the Articles to ensure that loan proceeds are used for their intended purposes, with due attention to economy and efficiency. Fraud and corruption often lead directly to misuse and/or diversion of Bank financing.


14. See IBRD Articles of Agreement, supra note 8, art. III, § 5(b) (“The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”); IDA Articles of Agreement, supra note 8, art. V, § 6 (“The Association and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement.”); see also Sanctions Procedures, supra note 2, § 1.01(a) (outlining the World Bank’s “fiduciary duty” under the Articles of Agreement).

Moreover, fraud and corruption undermine the effectiveness of development projects in other ways, such as through the channeling of financing to sub-optimal uses.16

B. Nature and Evolution of the Sanctions System

The sanctions system’s central goal is to protect the WBG’s funds in furtherance of the fiduciary duty, which both provides its legal basis and delimits its scope.17 Thus, while the consequences of debarment are not insubstantial, the goal is not to punish per se, but rather to protect Bank financing by excluding bad actors from receiving Bank financing and, more broadly, to deter future misconduct specifically related to such financing.18 The Bank’s approach, therefore, is to combat fraud and corruption by declining to finance parties that have been found to have engaged in sanctionable practices, at least until such time as those parties are rehabilitated and once more can be considered trustworthy.

Inspired by President James Wolfensohn’s “cancer of corruption” speech,19 the institution of the Bank’s sanctions regime coincided with an increased focus on corruption as a development issue on the international stage.20 Since its creation, the Bank’s sanctions system has developed dramatically.21 The Bank defined the first sanctionable practices—fraudulent and corrupt practices—in the 1999 versions of the Procurement and Consultant Guidelines.22 The Bank added collusive and coercive practices in


17. See supra notes 14 and 16 and accompanying text.


20. See Leroy & Fariello, supra note 4, at 9.


2004.\textsuperscript{23} The Bank then added “obstructive practices” in 2006 as a fifth sanctionable practice.\textsuperscript{24} Also in 2006, the regime broadened its jurisdiction beyond the procurement process, extending its reach to fraud and corruption in any form where Bank financing in the preparation and/or implementation of Bank-financed investment projects was implicated.\textsuperscript{25} At the center of the 2006 reforms was the agreement to harmonized definitions of the first four sanctionable practices by the five leading MDBs.\textsuperscript{26}

The sanctions system began as an entirely internal process under which a committee of senior Bank officials advised the president, who was responsible for making the final decision.\textsuperscript{27} The essential elements of the Bank’s current two-tiered structure were laid out in a report by former U.S. Attorney General and U.N. Under-Secretary General Dick Thornburgh.\textsuperscript{28} Among other things, the report removed Bank management from decision-making and placed the final decision in the hands of an autonomous and independent Sanctions Committee.\textsuperscript{29} Since then, the system has evolved significantly: sanctions have been subjected to an increasingly elaborate
set of administrative rules and procedures, providing an ever-more-complete means of protecting the Bank and the projects that it finances from the corrosive effects of fraud and corruption, while also extending greater transparency and procedural protections to those accused.

Through multiple reforms over the years, the Bank has moved fairly decisively away from its original conception of sanctions as a purely business decision towards a rule of law approach. Various commentators have made very appropriate arguments that the WBG ought to develop its sanctions system upon, alternatively, theories of global constitutionalism, the exercise of international public authority, or the emerging global administrative law principles, to name a few. Through multiple reforms to its system, the Bank has attentively studied and considered all of these theories of law, as well as benchmarking key features of its system against comparable national and international systems, thus devising a sui generis form that is not dominated by any single tradition.

III. Coordinating Sanctions among the MDBs

The evolution of the WBG’s sanctions regime parallels a corresponding development of those of the other MDBs. By the early

30. See IBRD Articles of Agreement, supra note 8; IDA Articles of Agreement, supra note 8. See generally LEROY & FARELLO, supra note 4 (discussing the World Bank’s sanctions process and its recent reforms); Daly & Fariello, supra note 4 (discussing the World Bank’s reform of the sanctions system).
31. See Daly & Fariello, supra note 4, at 110–12.
32. See id. at 113.
33. See generally JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2011) (examining the extent to which international legal system takes on the constitutional features found in national legal systems).
34. See, e.g., Armin von Bogdandy, Philipp Dann & Matthias Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 German L.J. 1575, 1577 (2008) (“The legal framework of governance activities of international institutions should be conceived of as international institutional law, and enriched by a public law perspective, i.e. with constitutional sensibility and openness for comparative insights from administrative legal thinking.”).
36. See, e.g., LEROY & FARELLO, supra note 4, at 6–8.
2000s, the other leading MDBs had independently established anti-
corruption policies and procedures, including mechanisms to
investigate, to adjudicate, and to sanction fraud and corruption in
the projects they financed.37 Investigatory and prosecutorial
branches—"integrity" offices—were created to consider allegations
of violations of these anticorruption policies.38 All of these systems
placed debarment at the heart of their systems.39 Even before
recent harmonization efforts, the similarities among these systems
were striking, especially given the distinct institutional and cultural
differences of each of the MDBs, and the fact that each MDB is a
separately created international treaty organization.40

The MDBs do not operate in independent developmental
worlds. They essentially share the same development markets: they
serve an overlapping sovereign and private sector clientele, finance
a common pool of contractors, and not infrequently co-finance
development projects and programs. Their independent sanctions
systems created a situation where a contractor—be it a firm or an
individual—could be debarred by one MDB but continue to do
business with other MDBs, even one that was co-financing the same
project or program. Such a situation was doubly troubling: first,
such behavior sent worrying signals about the consequences of
debarment, and, second, there was no guarantee that the contrac-
tor sanctioned by the first MDB would not thereafter fall into recid-
ivism by engaging in further misconduct in relation to contracts
financed by the second or subsequent MDBs.

37. See Stephen S. Zimmerman & Frank A. Fariello, Jr., Coordinating the Fight Against
Fraud and Corruption: Agreement on Cross-Debarment Among Multilateral Development Banks, 3
WORLD BANK LEGAL REV. 189, 191 (2011).

38. See, e.g., Integrity Vice Presidency, WORLD BANK, http://go.worldbank.org/
036LY1EJJ0 (last visited Mar. 13, 2013).

39. See Zimmerman & Fariello, supra note 37, at 192.

40. Each of the five institutions forming the WBG has a treaty agreement as its constitu-
tional document. See IBRD Articles of Agreement, supra note 8; Articles of Agreement
117; Convention on the Settlement of Investment Disputes Between States and Nationals
of Other States, done Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; Convention Estab-
lishing the Multilateral Investment Guarantee Agency (MIGA), done Oct. 11, 1985, T.I.A.S.
No. 12,089, 24 I.L.M. 1598. Similarly, for the other principal MDBs, see Agreement Establish-
ishing the African Development Bank, supra note 10; Articles of Agreement of the Asian
Development, supra note 10; Agreement Establishing the European Bank for Reconstruc-
www.ebrd.com/pages/research/publications/institutional/basicdocs.shtml; Agreement
Establishing the Inter-American Development Bank, Apr. 8, 1959, 10 U.S.T. 3029, 389
development-bank,5999.html.
Without some form of mutual recognition of their debarments, such misconduct was uncontrollable due to the open procurement rules of the MDBs.\[41\] Recognizing that “a unified and coordinated approach is critical to the success of the shared effort to fight corruption and prevent it from undermining the effectiveness of their work,”\[42\] a joint International Financial Institution Anti-corruption Task Force (the IFI Task Force) was formed in February 2006 to work towards “a consistent and harmonized approach to combat corruption in the activities and operations of the member institutions.”\[43\] Members included the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the WBG.\[44\]

The work of the IFI Task Force culminated in September 2006 with the signing of a Uniform Framework for Preventing and Combating Corruption (Uniform Framework), which included two key components: (1) a common set of definitions of sanctionable conduct, and (2) a common set of principles and guidelines for investigations (IFI Principles) to govern how the integrity offices of the respective MDBs would execute their investigative mandates.\[45\] The Uniform Framework set the stage for progressively closer ties and harmonization among the MDBs, as the institutions responded to both integrity issues and due diligence in private sector financing activities.\[46\]

\[41\] The term “open procurement” refers to the fact that the MDBs’ borrowers—not the MDBs themselves—carry out the procurement of goods, works, and services financed by the MDBs. To ensure an open and competitive process, borrowers are required to exclude bidders based on specifically enumerated criteria for ineligibility—one of which is debarment by the particular MDB financing the project in question. Without cross-debarment, however, there was no legal basis to require exclusion of firms debarred by other MDBs.

\[42\] Uniform Framework, supra note 26, at 1.

\[43\] Id.


\[45\] The basis for the International Financial Institution (IFI) Principles was the investigative guidelines adopted by the Third International Investigators Conference; building upon that foundation, the IFI Task Force agreed upon a set of core elements: definitions of misconduct; the standard of proof (“more likely than not”); rights and obligations of witnesses, subjects, and investigative office staff; procedural guidelines on sources of complaints, receipt of complaint, preliminary evaluation, case prioritization, and investigative activity; investigative findings; referrals to national authorities; review and amendment; and publication. See Uniform Framework, supra note 26.

\[46\] See Zimmerman & Fariello, supra note 37, at 193.
The IFI Task Force reconvened in 2009 and began discussions that lead to the signing of an agreement of mutual enforcement, or “cross-debarment,” in April 2010. The cross-debarment agreement sent a clear message of solidarity and of stepping up the fight against corruption, a message that has been picked up by numerous observers.

Rather than agreeing on specific common rules and procedures, the cross-debarment agreement is principles-based. It obliges the signatories, first, to adopt the four harmonized definitions of fraud and corruption established in the Uniform Framework. Second, it states that MDBs must adhere to the IFI Principles. Third, it requires MDBs to ensure that their sanctions processes conform to certain key due process elements, including: (1) an internal investigative authority and a distinct decision-making authority, (2) written and publicly available procedures that require notice to accused parties and an opportunity to respond, (3) a “more probable than not” standard of proof or its equivalent, and (4) a range of sanctions that takes into account the principle of proportionality, including aggravating and mitigating factors.

Not every debarment by an MDB is cross-debarred by the other MDBs; instead, each signatory MDB agrees to recognize and enforce any debarment decisions of the other signatories where the following five conditions are met: (1) the debarment is for one of the four harmonized definitions of fraud or corruption; (2) the debarment is made public; (3) the debarment period exceeds one year; (4) the conduct that gave rise to the debarment occurred no more than ten years prior to the debarment decision; and (5) the

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47. See id. at 195 (“In the end, the EIB did not join the agreement. Its sanctions system is still in the development stage and, when the EIB does impose sanctions, its debarment decisions will be subject to review by courts and institutional bodies within the European Union (EU). Therefore, if the EIB were to cross-debar based on the debarments of another MDB, including the World Bank Group, the debarment could be subject to review by an EU court or institutional body. Because of these circumstances, including the EIB in the cross-debarment regime seemed premature. The EIB is continuing to participate in the discussions among the MDBs on sanctions harmonization and is reviewing how it might join the agreement at a later time.”).

48. See Cross-Debarment Agreement, supra note 44.


50. Cross-Debarment Agreement, supra note 44, § 2(a).

51. Id. § 2(b).

52. Id. § 2(c) (iii).
decision to debar is made after the cross-debarment agreement took effect with respect to that MDB.\textsuperscript{53} Where these conditions are met, cross-debarment is essentially automatic.\textsuperscript{54} There is no review by the other MDBs of the underlying decision or the reasons for it; the original debarring MDB determines the period of debarment, as well as the conditions for release from debarment, if applicable.\textsuperscript{55} Notably, each MDB has a limited right to decide not to enforce a debarment “where such enforcement would be inconsistent with its legal or other institutional considerations"—an “opt out” provision that, to date, has not been invoked.\textsuperscript{57}

Anticipating the effect of their solidarity, and wishing to leave open the possibility of further partnerships, the cross-debarment agreement also provides a means for other IFIs\textsuperscript{58} to join by consenting to adhere and meeting the core principles and standards.\textsuperscript{59} Similarly, signatories are free to withdraw from the Agreement by giving written notice to the other signatories.\textsuperscript{60}

Since 2010, MDBs have continued the dialogue, aiming to further harmonize their sanctions policies. MDBs have agreed, in principle, to common guidelines for sanctioning, with a common baseline for debarments and common aggravating and mitigating factors.\textsuperscript{61} They also have reached a common understanding on the criteria for the sanctioning of affiliates and the treatment of changes in corporate form and the application of sanctions to successors and assigns.\textsuperscript{62}

While the sanctions systems of each of the MDBs are structured along similar lines, important differences remain in approach and

\textsuperscript{53.} Id. § 4.
\textsuperscript{54.} Id.
\textsuperscript{55.} Id. § 5.
\textsuperscript{56.} Id. § 7.
\textsuperscript{57.} On the other hand, the sanctioning of an entity by one MDB does not preclude the other signatories from independently pursuing sanctions proceedings for separate sanctionable practices, and which may result in concurrent, consecutive, or subsequent periods of debarment. Id. § 6.
\textsuperscript{58.} Id. § 9. Several other regional MDBs have expressed an interest in joining a mutual-recognition-of-debarment regime.
\textsuperscript{59.} Id.
\textsuperscript{60.} Id. § 10. To date, no signatory has withdrawn from the agreement.
implementation of the common principles. The Bank’s system is situated at one end of the due-process and institutional spectrum, most closely approximating a judicial system, with a substantial and highly regulated system of checks-and-balances, and with a two-tiered structure.63 There has been a clear trend convergence among the systems of other MDBs towards a quasi-judicial model.64 For example, the African Development Bank Group, the Inter-American Development Bank Group, and the European Investment Bank all have recently made substantial revisions to their sanctions processes, notably, by introducing a two-tiered system similar to that of the Bank’s after the 2004 reforms.65 None of these other systems, however, have gone so far as to adopt subsequent Bank reforms, such as the transition to an external Sanctions Board Chair66 or the publication of decisions.67 The Asian Development Bank and the European Bank for Reconstruction and Development retain systems more akin to the Bank’s system before the 2004 Thornburgh-inspired reforms, with internal sanctions committees and final decisions taken by their presidents.68

IV. SOME REFLECTIONS ON THE FUTURE OF SANCTIONS

The sanctions systems of the MDBs operate in a fast-evolving international legal environment. There is a growing recognition

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64. The essence of a judicial system lies in having two levels, with the second body having full jurisdiction over the decision issued by the first jurisdiction.


67. Sanctions Board Decisions can be found at http://go.worldbank.org/58RCC7DVW0, and the Sanctions Board Law Digest at http://go.worldbank.org/S9PFFMD6X0; final decisions of the Suspension and Debarment Officer can be found at http://go.worldbank.org/G7EO0UXW90.

68. See Sanctions Board Statute, supra note 66.
around the world that combating the pernicious effects of corruption requires a global and concerted effort, with growing activity at both the national level and international level. In this evolving panorama, the WBG, along with the MDBs, has an opportunity to play a useful role, both as a promoter and as an example of international best practices.

The Bank’s Legal Vice Presidency (LEG) continues to look for ways to make its sanctions system more efficient and effective, as well as increasingly fair and transparent, all the while bearing in mind the special circumstances in which the Bank operates and its unique status. Although already at the forefront in the transparency of its system among not only other international organizations but also many national systems, LEG is studying ways to enhance transparency even further. Among other things, LEG is conscious of the need to reach out more proactively to various stakeholders in crafting future reforms to the system. At the same time, LEG is searching for ways to further enhance due process—caveated by the understanding that the system’s increasingly sophisticated, quasi-judicial model must remain accessible to those who may not be able to afford legal counsel.

In considering the sanctions system’s future, it is important to bear in mind that the system remains inherently administrative. The sanctions system fundamentally aims to protect Bank funds, whether through excluding corrupt actors directly from the market, or indirectly through deterring future misconduct.

69. The earliest example at the national level of anti-bribery legislation that targeted corruption abroad was the U.S. Foreign Corrupt Practices Act (FCPA) of 1977. At the international level, the first major milestone was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly known as the OECD Anti-Corruption Convention) in 1997. Since that time, the thirty-four OECD member countries and four non-member countries (Argentina, Brazil, Bulgaria, and South Africa) have adopted the Convention. With the entry into force of the U.N. Convention against Corruption (UNCAC) in 2005, the international community took another giant step forward. Recently, several more countries, including the United Kingdom, Russia, and China, passed legislation targeting corruption abroad, and several other countries, notably Brazil and India, are debating such legislation or extending existing legislation.

70. See, e.g., Daly & Fariello, supra note 4, at 113–18 (discussing increasing transparency).

71. See, e.g., Leroy & Fariello, supra note 4 at 8 (recognizing concern of respondents and other stakeholders in the operations sanctions system).

72. See, e.g., id. at 19 (discussing the Bank’s care and attention to due process and the rule of law). The Bank’s Legal Vice Presidency is currently in the process of conducting a review of the sanctions system that, among other things, considers how the system should take into account balancing these and other needs.

73. See supra notes 14–18 and accompanying text.
ver, the Bank operates under considerable constraints that have an important impact on the standards it applies. The Integrity Vice Presidency (INT), the Bank’s investigatory and prosecutorial branch, has limited powers compared to its national counterparts: for instance, it has no power to compel witnesses to provide testimony and only limited authority to inspect books and records based on contractual audit rights. When INT does obtain evidence, it is often conditioned on strict confidentiality to protect cooperating persons from harm. These limitations lead to some key features of the sanctions system, including the “more probable than not” standard of proof and the ability (subject to significant limits) to withhold certain sensitive evidence from respondents. Although some observers might criticize these features on due process grounds, these features are critical to the workability of the system.

This Essay asserts that the MDBs should continue in their efforts to harmonize their systems. Some sort of joint sanctions mechanism presently may be beyond grasp, and, given the vastly different legal and cultural environments in which the MDBs operate, may not even be a desirable ultimate goal. That said, common standards of due process are desirable, and, as noted above, the MDBs have converged considerably in the overall structure and due process afforded by their systems. While the Bank has been at the forefront of this trend, a number of other MDBs have been quick to follow suit. Further harmonization may depend on those

74. It must be recalled that the World Bank, like the other MDBs, is a treaty organization, which, notwithstanding its extensive privileges and immunities, is not a sovereign with general police powers.


77. See Cross-Debarment Agreement, supra note 44, § 2(c) (iii); see also SANCTIONS PROCEDURES, supra note 2, § 8.02(b)(i) (“more likely than not” standard); see also supra note 47 and accompanying text.

78. SANCTIONS PROCEDURES, supra note 2, § 5.04(c) (noting that evidence may only be withheld upon the Sanctions Board’s “determination that there is a reasonable basis to conclude that revealing the particular evidence might endanger the life, health, safety, or well-being of a person or constitute a violation of any undertaking by the Bank in favor of a VDP participant. In the event that the Sanctions Board denies [Integrity Vice Presidency (INT)]’s request, INT shall have the option to withdraw such evidence from the record or to request withdrawal of the Notice.”).

79. See supra note 40 and accompanying text.

80. See supra note 65 and accompanying text.

81. See supra notes 6 and 19 and accompanying text.
MDBs that continue to view debarments from a “business decision” perspective to move in this direction.

The substantive standards applied in judging sanctionable practices present another area for future development. The MDBs already have agreed on common definitions, but their interpretation remains subject to different regimes. Again, a certain degree of variation is not necessarily a negative and, in any event, is inevitable among the MDBs as it is among national courts. Transparency, then, may be the key to future convergence in this area. The Bank’s decision to publish Sanctions Board decisions and Suspension and Debarment Officer decisions (that is, in final and unappealed cases) was designed in large part to create a jurisprudence that would supplement and clarify the formal legal framework for sanctions, and to provide more contour to the Bank’s broadly defined forms of sanctionable practice. This jurisprudence will likely exert a kind of “gravitational pull” and, over time, can help to develop a more coherent corpus of “sanctions law.”

In addition to deeper harmonization among MDBs, there is also the prospect of broader harmonization beyond the current five signatories of the MDB cross-debarment agreement. As mentioned, the cross-debarment agreement already has a mechanism for other IFIs to join the arrangement, though none has done so to date. That said, some national and even private organizations and insti-

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82. Although the Cross-Debarment Agreement obliges the signatories to adopt the four harmonized definitions of fraud and corruption established in the Uniform Framework, supra note 44, the interpretation of those terms is left to the sanctions systems of each of the MDBs. No common adjudication mechanism exists. See infra notes 91–93 and accompanying text.

83. See supra note 40 and accompanying text.

84. See generally Daly & Fariello, supra note 4 (noting that the “opening up of the Bank’s sanctions regime . . . will make the sanctions system more predictable and accessible”).

85. The “Suspension and Debarment Officer” in the “Office of Suspension and Debarment” was previously known as the “Suspension and Debarment Officer” in the “Office of Evaluation and Suspension.”

86. See Thornburgh, Gainer & Walker, supra note 28. World Bank management may also wish to issue occasional guidance on key issues of interpretation; management’s issuance of such guidance is not an infringement upon the independence of either the Suspension and Debarment Officer or the Sanctions Board, or upon the decisions that have been issued.

87. Although such a statement is somewhat conjectural, at the same time the MDBs commonly look to see how each of the other MDBs has addressed common problems.

88. Cross-Debarment Agreement, supra note 44, § 9; see also supra note 61 and accompanying text.
tutions, including the Millennium Challenge Corporation\textsuperscript{89} and the Nordic Development Fund\textsuperscript{90} have opted to use the Bank’s debarment list for their own purposes. Other entities also may do so, although since these are unilateral actions we cannot know the extent of this form of “unilateral cross-debarment.”

Beyond this, the Bank mooted the possibility of harmonizing sanctions policies across a broad spectrum of international actors as early as 2008, at the first meeting of the Legal Harmonization Initiative, which includes the other MDBs, several U.N. specialized agencies, and bilateral donor agencies.\textsuperscript{91} At the time, there was receptivity to the idea, but also a general consensus that it was premature.\textsuperscript{92} Moreover, the U.N. system was itself in the process of internal harmonization; the U.N. system’s recent adoption of the Model Policy Framework on Vendor Eligibility\textsuperscript{93} may provide a possible platform for renewing dialogue.\textsuperscript{94}

Recent experience has shown that the lack of mutual recognition of debarments can be a major impediment to co-financing as well as to other forms of cooperation. As such cooperation continues to increase, the need for harmonization becomes ever more apparent. As for the MDBs, these actors also operate within essen-


\textsuperscript{92} Correspondence with U.N. Office of Legal Affairs.


\textsuperscript{94} The World Bank and several U.N. specialized agencies have already entered into a Fiduciary Principles Accord (FPA) that, among other things, addressed the treatment of fraud and corruption in projects where one institution is financing the implementation of another (more often than not, the World Bank financing implementation by a U.N. agency). See generally Fiduciary Principles Accord, U.N.-World Bank, available at http://siteresources.worldbank.org/EXTTLICUS/Resources/Fiduciary-Principles-Accord.pdf. The FPA is not a complete solution, however, as it covers only activities in fragile states and emergency situations. See INT’L DEV. ASS’N [IDA], IDA’S SUPPORT TO FRAGILE AND CONFLICT-AFFECTED COUNTRIES: PROGRESS REPORT 2007–2009 ¶ 35, at 15–16 (2009).
tially the same development market, so the same logic applies. While some short-term solutions are feasible under current structures, in the medium-to-long term, this Essay argues that the international donor community may wish to open a dialogue with a view to finding ways to harmonize and recognize each other’s debarments. Such a development would not only close the remaining gaps in the anti-corruption regimes for development markets, but also, if done properly and with due regard to general principles of law, would contribute mightily to the overall fight against corruption worldwide.