QUESTIONABLE ASSUMPTIONS: THE CASE FOR UPDATING THE SUSPENSION AND DEBARMENT REGIMES AT THE MULTILATERAL DEVELOPMENT BANKS

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The World Bank and other multilateral development banks (MDBs)¹ have introduced sanctions and debarment systems, under which a company or individual can be sanctioned if it engages in one or more of the sanctionable practices which have been agreed upon by the MDBs.² The MDBs, as well as their staff, have published several documents explaining and justifying their sanctions regime.³ This Essay aims to address certain underlying considerations on which the MDBs rely in shaping those legal regimes, and


² In September 2006, the MDBs, together with the European Investment Bank Group and the International Monetary Fund, established a Joint International Institution Anti-Corruption Task Force and agreed on four prohibited practices: corruption, fraud, coercion, and collusion. See *Int’l Fin. Insts. Anti-Corruption Task Force, Uniform Framework for Preventing and Combating Fraud and Corruption 1 (2006) [hereinafter Uniform Framework], available at* http://siteresources.worldbank.org/INTDOI/Resources/FinalFTaskForceFramework&Gdlines.pdf. The sanctions and debarment system examined in this Essay does not apply to procurement carried out by the MDBs themselves, which have different systems.

³ See supra note 2; infra notes 6, 10, 14, 16, 23, 25, 32, 51, 84 85, 95, 103.
will question these considerations in light of international legal standards and principles.

Rather than modeling the MDBs’ sanctions and debarment systems on U.S. law, the MDBs should have considered international standards such as the principles of the World Trade Organization (WTO) and the rules of the Government Procurement Agreement (GPA). An example of MDB reliance on U.S. law can be seen in the World Bank’s establishment of its sanctions and debarment system. Indeed, a sanctions and debarment decision should strictly follow the rule of law and, in particular, apply the principles of equal treatment and proportionality, bedrock principles of the WTO’s procurement regime. Notwithstanding the valid goals and purposes of the sanctions and debarment systems of the MDBs, which are described in Part III, there are numerous questionable aspects of the current system. Part IV describes these aspects and argues that the sanctions and debarment decision should not allow any room for business considerations. It also argues that early release from debarments must be possible where sufficient self-cleaning measures have been undertaken.

The concept of proportionality must have a more pivotal role. Additional efforts must be made to ensure procedural justice in the MDBs’ sanctions and debarment regimes. Moreover, the subsidiaries of sanctioned or debarred respondents seem to be treated unfairly. Finally, it is noted that the cross-debarment regime lacks harmonization and creates several legal difficulties that preclude an effective cross-debarment.

I. WORLD BANK SANCTIONS REGIME MODELED AFTER U.S. LAW

The World Bank sanctions regime was significantly influenced by the U.S. Foreign Corrupt Practices Act of 1998, as well as the nature of the procurement approach found in the U.S. Federal Acquisition Regulation, especially subpart 9.4. Although the two systems have their differences, particularly with regard to the

4. The Essay will refer to the Government Procurement Agreement (GPA) which is still in force as GPA 1994; the newly agreed upon GPA, which has not been ratified nor entered into force yet, will be referred to as GPA 2012.

5. Importantly, the World Bank’s reforms were shaped, in part, by an August 2002 report prepared for the Bank by former Under-Secretary General of the United Nations and U.S. Attorney General Dick Thornburgh. See infra note 10 and accompanying text.

World Bank’s limited sanctionable practices, they are similar in many respects.\(^7\)

There are, of course, obvious differences between the U.S. and World Bank systems. The U.S. federal debarment system, for example, is avowedly not designed for punishment,\(^8\) while the World Bank system is designated, already by its name, as a sanctions system. That said, many fundamental aspects of the World Bank system, such as sanctions that are not bound by principles of proportionality, reflect the system’s grounding in the U.S. system, rather than in the norms of the European Union or the WTO.\(^9\)

The similarity is a result of the recommendations made by the Thornburgh Report, which stated as follows:

The debarment practices of national agencies that would be the most pertinent from the Bank’s standpoint would probably be those of the U.S. government, for the reason that those are the practices that are most familiar to the majority of lawyers appearing before the Bank as counsel for respondents in debarment proceedings.\(^10\)

However, the Thornburgh Report’s reasoning is not a convincing justification for modeling the World Bank sanctions regime on U.S. law. A law should be modeled and created having primary regard to the aims and purposes to be achieved. Therefore, given the international nature of the MDBs, international agreements and principles should be considered first. Further, the national legal systems of the stakeholders should be observed and, as an overarching point, regard must be given to efficiency, transparency, and comprehensibility.

The MDBs’ systems seem, in part, to be shaped by the uniquely American experiences of the lawyers most likely to represent clients before the MDBs in Washington, D.C.\(^11\) As a matter of principle, however, first regard should not be given to the nationality of the attorneys potentially appearing to defend the respondents. It is not only lawyers educated and practicing U.S. law who must be able to understand the World Bank sanctions regime, but also law-

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7. Id. at 234–35.
9. For a detailed analysis of the similarities between the World Bank sanctions regime and the U.S. system, see Dubois, supra note 6. For a discussion regarding the degree of proportionality within the World Bank sanctions regime, see infra Part IV.C.
11. Id. The World Bank’s sanctions regime was the first of its kind among the MDBs and thus has been a model that has strongly influenced the other sanctions regimes.
yers around the globe and their respective clients facing sanctions or debarment. The presumption that it would be mostly U.S. lawyers acting on behalf of respondents in World Bank sanctions proceedings seems to have been made without considering the broad range of companies and individuals targeted by the sanctions regime.\textsuperscript{12}

The sanctions regime of the World Bank, and all MDBs, should be based on universal standards that are of common understanding to all stakeholders. Indeed, for the World Bank and the other MDBs, these standards ideally should be based upon the rules of the WTO in general and, in particular, the rules of the GPA. By adopting this approach, the World Bank would advance coherence in international trade agreements and the adoption of emerging international procurement standards among borrowers, which will also lead to increased harmonization.\textsuperscript{13} For these reasons, the decision to model the World Bank sanctions regime upon U.S. law is flawed; it fails to properly account for international standards and the legal systems of other major stakeholders.

The decision does not create a coherent global legal system or reflect the common understanding of the stakeholders. A multilateral, multinational system can be considered legitimate only if it does not favor any one legal system or the firms and individuals already familiar with it. Yet there is no need to create a completely new regime, rather more regard should be given to common principles when applying the current sanctions and debarment system.

### II. International Legal Principles

International legal principles require that any sanctions and debarment decision must be subject to a strict rule of law approach that gives precedence to the principles of equal treatment, non-discrimination, and proportionality. It is also essential that the procedural rights of the respondents are safeguarded.

WTO law, Article III of GPA 1994, and Article IV of GPA 2012 require equal treatment and non-discrimination.\textsuperscript{14} The principle

\begin{itemize}
    \item 14. General Agreement on Tariffs and Trade arts. 3, 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1154, 1867
\end{itemize}
of equal treatment requires that comparable situations not be treated differently, and that different situations not be treated similarly unless such different or similar treatment can objectively be justified. The principle of equal treatment is also universally reflected in the procurement guidelines of the MDBs.16

GPA provisions also reflect the principle of proportionality by requiring a sufficiently serious reason to justify an exclusion.17 The principle of proportionality is also provided for in a variety of other WTO provisions18 and decisions by several Appellate Bodies and Arbitrators at the WTO level.19 Proportionality is also one of the


The basic principles of law in Europe and the United States and is, *inter alia*, recognized by the European Court of Human Rights and the U.S. Supreme Court. The European Court of Justice regards proportionality as one of the fundamental principles underlying public procurement systems.

The sanctions and debarment regimes of the MDBs also reflect the concept of proportionality—it is the primary reason for limiting cross-debarments to debarments exceeding one year. Section 2(c)(iv) of the cross-debarment agreement among the MDBs also requires that MDBs provide for a wide range of sanctions, and sets forth a list of aggravating and mitigating factors to ensure that the sanctions applied comply with the proportionality principle. A similar reference to the principle of proportionality is found in Section 2 of the General Principles and Guidelines for Sanctions.

The GPA also embodies several principles concerning legal proceedings. Article XX of GPA 1994 and Article XVIII of GPA 2012 require a judicial review procedure that must be non-discriminatory, timely, transparent, and effective. These provisions also contain the basic requirements of due process (i.e., access to all relevant documents), the right to a hearing before a decision is made, and the right to a public hearing and timely decision.

Further, under E.U. law, companies and individuals even have a fundamental right to engage in business with the public agencies.
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in the course of an open procurement process. As a result, every sanction or debarment decision in Europe is governed by the strict rule of law discipline, which requires a precise legal basis and application of the principles of equal treatment and proportionality.

III. Goals and Aims of a Sanctions and Debarment System

As evidenced by the GPA, it is a general goal in procurement to exclude bidders only if there is reasonable doubt as to their capability and reliability. Not just any misconduct may be regarded as a reason for an exclusion; rather, the misconduct must be sufficiently serious. Similar provisions are found in the respective MDB procurement guidelines, which stipulate that the reason for the exclusion must be essential to the performance of the contract. An exclusion may very well be justified in cases of prohibited practices, as this reflects the MDBs’ special responsibility to ensure good governance in all their projects as a way to ensure the sustainability of the projects. In line with these goals is the aim to incentivize rehabilitation.

The sanction and debarment systems are also intended to ensure that MDB funds are used in accordance with their fiduciary duties. The fiduciary duties of the MDBs require them to apply a competitive procurement process. Generally, the principles of

28. *See* Arrowsmith, Priess & Friton, *supra* note 15, at 11–12. The fundamental freedoms under the Treaty on the Functioning of the European Union require the member states to not apply quantitative restrictions (i.e., the exclusion of bidders) to the procurement process. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 34–35, Dec. 13, 2007, 2010 O.J. (C 83) [hereinafter TFEU]. However, a restriction can be justified under the TFEU on several grounds—listed or recognized by case law—that are proportional to the restriction imposed. *See* Zimmermann & Fariello, *supra* note 23, at 194 (raising the question of the underlying principles for procurement in MDB projects).


advancing open competition and of eliminating trade barriers are also the core purposes of the WTO\textsuperscript{36} and are some of the primary aims in international procurement law and the GPA.\textsuperscript{37} The principle of open and fair competition in procurement for contracts under MDB projects is also embodied in the procurement guidelines of the MDBs.\textsuperscript{38}

Competition is regarded as the “foundation for good procurement practice.”\textsuperscript{39} The more bidders that take part in a procurement process, the better and more efficient the competition and the procurement process becomes, which in turn benefits the public funds.\textsuperscript{40} Enabling effective competition is also one of the main aims of the European procurement system.\textsuperscript{41} This common understanding is based on the fact that public procurement is financed with public funds. This creates a special responsibility for public agencies to spend the funds in a non-discriminatory manner and to provide for a competitive procurement process, which protects the public funds invested, as well as the public interest in their spending.

The World Bank also argues that one of the purposes of its sanctions and debarment regime is to protect the World Bank against damage to the institution’s reputation.\textsuperscript{42} While concerns for one’s reputation may be a constant consideration, it cannot be regarded as a valid aim for a sanctions and debarment regime because it is in conflict with the application of the strict rule of law.

It is also one of the overall aims that the process shall not lead to erroneous findings, as an inaccurate or unjust debarment can be costly for the MDB, as well as for the debarred company.\textsuperscript{43} There-

\textsuperscript{36.} See Arrowsmith, supra note 30, at 171.
\textsuperscript{37.} See id.
\textsuperscript{38.} E.g., EBRD Procurement Policies, supra note 16, §§ 2.6, 3.1; World Bank Guidelines, supra note 16, §§ 1.2(b), 1.3; AIF Guidelines, supra note 16, § 1.3; ADB Guidelines, supra note 16, § 1.3; IADB Guidelines, supra note 16, § 1.3.
\textsuperscript{39.} EBRD Procurement Policies, supra note 16, § 3.1; World Bank Guidelines, supra note 16, § 1.3; AIF Guidelines, supra note 16, § 1.3; ADB Guidelines, supra note 16, § 1.3; IADB Guidelines, supra note 16, § 1.3.
\textsuperscript{40.} See Hermann Pündler, Self-Cleaning: A Comparative Analysis, in Self-Cleaning in Public Procurement Law, supra note 15, at 187, 204.
\textsuperscript{42.} Leroy & Fariello, supra note 32, at 15; Thorburn, Gainer & Walker, supra note 10, at 82; Zimmermann & Fariello, supra note 23, at 195.
\textsuperscript{43.} Thorburn, Gainer & Walker, supra note 10, at 6.
fore, fair sanctions and debarment procedures must be put in place.44

Punitive considerations are not admissible in the MDBs’ sanctions and debarment systems. The MDBs have not been given any authority to impose punitive measures on individuals or entities. The mandate provided for in the MDBs’ Articles of Agreement makes no reference to powers to penalize individuals or companies.45 Punitive aspects are also absent in the relevant international agreements. Article VIII(h) of GPA 1994 and Article VIII(4) of GPA 2012 reflect only the concept of excluding a bidder in the qualification stage of a procurement process for reasons of incapability and unreliability.46 With regard to the World Bank sanctions and debarment regime, this was also observed by the Thornburgh Report, which stated that “[t]he system is not intended to fulfill its goal through employment of a punitive purpose.”47 In the E.U. as well, the exclusion of a company or individual in public procurement does not serve a punitive objective.48 Neither is the U.S. suspensions and debarment system under the Federal Acquisition Regulation punitive in its nature.49

Further, it is one of the express aims of the World Bank sanctions regime to leverage its sanctions in order to create a disincentive for fraudulent and corrupt behavior.50 This is to be achieved by specific and general deterrence.51 The concept of deterrence originates from the attempts to theoretically define the purpose of criminal punishment.52 In light of the restriction on punitive considerations, the aim of deterrence should be reviewed critically and subordinated to the other aforementioned aims. Specific deter-

44. Id. at 7.
46. See GPA 2012 art. 8.4; GPA 1994 art. 8(h); cf. Priess & Pitschas, supra note 29, at 189.
47. THORNBURGH, GAINER & WALKER, supra note 10, at 60.
49. 48 C.F.R. § 9.402(b); see also Jessica Tillipman, A House of Cards Falls: Why “Too Big to Debar” Is All Slogan and Little Substance, 80 FORDHAM L. REV. RES GESTAE 49, 50–51 (2012) (explaining that debarment is an administrative remedy to protect the government from immediate harm).
50. LEROY & FARIELLO, supra note 32, at 1.
51. WORLD BANK, WORLD BANK SANCTIONS PROCEDURES § 1.01(a) (2012) [hereinafter WORLD BANK SANCTIONS PROCEDURES]; WORLD BANK, WORLD BANK SANCTIONING GUIDELINES [hereinafter WORLD BANK SANCTIONING GUIDELINES]; THORNBURGH, GAINER & WALKER, supra note 10, at 61; LEROY & FARIELLO, supra note 32, at 15.
52. See GENNARO F. VITO & JEFFREY R. MAHIS, CRIMINOLOGY 51–52 (3d ed. 2012) (explaining how deterrence theory grew out of the classical theorists’ assumption that people are “rational pleasure-seeking, pain-avoiding creatures”).
rence is aimed at dissuading the individual from engaging in prohibited practices in the future. General deterrence is aimed at dissuading others from engaging in future prohibited practices. General deterrence is a (de facto) result of publicizing the risk of future debarments. As debarments can have severe impacts, the risk of such a sanction creates an incentive for companies and individuals to be compliant. Therefore, general deterrence is only a side effect or a mere reflection of the debarment decision. It cannot be regarded as an underlying purpose.

IV. CONSEQUENCES FOR THE SANCTIONS AND DEBARMENT REGIME

This Essay argues that the MDBs should subject their sanctions and debarment regimes exclusively to the aforementioned principles and goals. The MDBs’ sanctions and debarment system should strictly follow the rule of law and incorporate the principles of equal treatment and proportionality. It should also provide for fair, effective, and transparent proceedings.

The systems should aim only to exclude persons or companies on grounds of unreliability or incapability. Corresponding with its fiduciary duties, competition should be enhanced. Good governance and sustainability should be promoted. Deterrence should only be a side effect and not an underlying purpose. Punitive aspects of the current sanctions and debarment systems must be eliminated. Safeguarding the MDBs reputation should not be an underlying purpose of the sanctions and debarment systems. Erroneous findings are to be avoided by putting fair and effective proceedings in place. The following Sections analyze the effects of fully recognizing and implementing these principles and goals.

A. Business Decision or Rule of Law Decision

It is the World Bank’s view that the sanctions and debarment process is in essence an internal administrative, quasi-judicial process. However, “most other MDBs view the decision to impose a

56. Id.
57. See Leroy & Fariello, supra note 32, at 2.
58. See Dubois, supra note 6, at 197, 217–18.
sanction as a business decision.59 The business decision approach is an untenable position and must change.

Consistent with the principles outlined above and the rule of law, a sanctions or debarment decision should be made only at the end of a judicial process. The MDBs are not private business entities that can make decisions without any restrictions. On the contrary, they are international organizations based on multilateral treaties for clearly delimited purposes. As states and governments are bound by the rule of law, so must international organizations. This is especially true in cases where they take actions that affect a company or an individual, both positively as well as negatively. Further, the MDBs deal with public funds, and this obliges them to spend the funds in a non-discriminatory manner and provide for a competitive procurement process.60 For these reasons, the decision in the course of a sanctions and debarment proceeding cannot be a business decision, but must be a determination to which the strict rule of law is applied.

B. Early Release in Cases of Effective Self-Cleaning Measures

Currently, the MDBs do not sufficiently recognize the concept of self-cleaning and early release. According to Section 6 of the General Principles and Guidelines for Sanctions, evidence of self-cleaning and cooperation may be taken into account only as a mitigating factor.61 As such, it allows for the reduction of the debarment period if self-cleaning measures have been taken before the debarment decision.

This Essay argues that allowing a reduction of the debarment period on grounds of self-cleaning measures installed before the debarment decision contradicts denying early release if the same measures have been installed after the debarment decision. According to Section 9.03 of the World Bank Sanctions Procedures, the implementation of effective compliance mechanisms is only a factor for deciding whether a company can be released after

59. LEROY & FARELLO, supra note 32, at 26; see also Zimmermann & Fariello, supra note 23, at 194 (noting that MDBs diverge on whether sanctions should be viewed as simply a business decision).

60. See, e.g., EBRD PROCUREMENT POLICIES, supra note 16, §§ 1.2, 3.1; WORLD BANK GUIDELINES, supra note 16, § 1.3; AfDB GUIDELINES, supra note 16, § 1.3; ADB GUIDELINES, supra note 16, § 1.3; IDB GUIDELINES, supra note 16, § 1.3; see also supra Parts II–III.

61. See GENERAL PRINCIPLES AND GUIDELINES FOR SANCTIONS, supra note 25, § 6; see also WORLD BANK SANCTIONING GUIDELINES, supra note 51, § 5 (listing voluntary corrective action and cooperation as mitigating factors).
its original debarment has expired.\textsuperscript{62} The World Bank had considered whether to assess the present responsibility of companies before they were reinstated.\textsuperscript{63} Although this option would have provided the World Bank Group with a complete view of the company, and the greatest degree of certainty that the debarred firm would not reengage in misconduct, concerns were highlighted regarding the highly discretionary nature of the reinstatement decision and how the lack of defined conditions for reinstatement could lead to uncertainty and may have given bigger or more important firms an advantage over smaller firms or individuals.\textsuperscript{64} However, these considerations do not contradict the principle of self-cleaning and the introduction of an early release possibility in the sanctions procedures. In the E.U., strict standards have been developed for self-cleaning that could be applied by the MDBs as well.\textsuperscript{65}

Considering the principle of proportionality, the baseline sanction of debarment for a period of three years\textsuperscript{66} without a possibility for early release seems unjust and unnecessary. Rather, the specific sanction which affords the adequate measure for safeguarding the MDBs’ interests should be assessed on a case-by-case basis. The principle of proportionality requires that once there are no more reasons for debarment, it is no longer justified. This is supported by the rationale behind debarments, which is to exclude unreliable or incapable bidders.\textsuperscript{67} Once a company has proven its re-established reliability through effective self-cleaning measures, there is no longer any reason to exclude it from tenders.\textsuperscript{68}

Neither can reasons of deterrence justify a debarment in cases of effective self-cleaning measures. Specific deterrence has been achieved as the self-cleaning measures exclude or minimize the risk of future engagement in prohibited practices. General deterrence has already been achieved through the publication of the debarment. In any case its purpose is outweighed by the following considerations.

\begin{itemize}
\item\textsuperscript{62} World Bank Sanctions Procedures, \textit{supra} note 51, § 9.03.
\item\textsuperscript{63} Leroy & Fariello, \textit{supra} note 32, at 14.
\item\textsuperscript{64} Id. at 15.
\item\textsuperscript{65} See generally Self-Cleaning in Public Procurement Law, \textit{supra} note 15 (providing an overview of the E.U. standards for self-cleaning).
\item\textsuperscript{66} General Principles and Guidelines for Sanctions, \textit{supra} note 25, § 4.
\item\textsuperscript{67} See Hans-Joachim Priess, Hermann Pünder & Roland M. Stein, Self-Cleaning Under National Jurisdictions of EU Member States: Germany, in Self-Cleaning in Public Procurement Law, \textit{supra} note 15, at 51, 82; see also supra Parts II–III.
\item\textsuperscript{68} See Priess, Pünder & Stein, \textit{supra} note 67, at 82.
\end{itemize}
Additionally, the aim of advancing competition also dictates that self-cleaning measures must result in early release, provided there is effective self-cleaning. If a company undertakes such measures, it no longer has an unfair advantage over its competitors that justifies a sanction or debarment to ensure fair competition. Moreover, denying a company the right to re-establish its reliability is tantamount to denying the company its right to fair and equal treatment.

The argument advanced by the World Bank, that such early release or reinstatement would be a major reputational risk as it could be seen as “providing . . . a seal of approval,” is not compelling. MDBs should not be concerned with the risk to their reputation, especially if strict self-cleaning standards are required, as MDBs are primarily bound by the rule of law. Further, the imposition of strict self-cleaning measures allows for credible rehabilitation in the eyes of the public. A credibly rehabilitated company cannot endanger the reputation of a MDB because it has fundamentally changed. Participation of such a company in the competition for a contract enhances the competitive nature of the tender process and will consequently lead to a better commercial result for the contracting authority.

The possibility for early release would also be a powerful incentive for rehabilitation. As rehabilitation and good governance are some of the aims of the sanctions and debarment regime, credible self-cleaning measures should lead to an early release.

Not providing a self-cleaned company with the possibility for an early release violates more than just the principle of proportionality. Not considering self-cleaning measures is also an indication of punitive aspects underlying the MDBs sanctions and debarment systems. Sanctions and debarments which are tied to reasons of deterrence or retribution and are imposed as a result of past conduct without considering the present integrity may be regarded as punitive. There are no more pragmatic considerations which can justify a debarment in case of effective self-cleaning measures

70. Priess, Pünder & Stein, supra note 67, at 82.
71. Leroy & Fariello, supra note 32, at 15.
72. See supra Part III.
73. See supra Part III.
besides retribution, which allows for punishments on moral grounds.75 However, this would make the baseline sanction of three years debarment a punitive measure76 and therefore it has to be rejected given that such systems are not designed to be punitive.

Finally, if strict self-cleaning measures are taken before a sanctions decision is rendered, the result must be that no sanction is imposed at all. In such a case the incentive to avoid a sanction—general deterrence—has already worked.

C. **Overall Application of Proportionality**

The General Principles and Guidelines for Sanctions as well as the World Bank Sanctions Procedures provide for a list of aggravating and mitigating factors so that the individual circumstances of every case and the principle of proportionality can be taken into account.77 While the list is not exhaustive—leaving open the possibility of a general proportionality principle being accepted—the World Bank Sanctions Board has not accepted such a general constraining principle.78 Only in cases where one respondent has not contested the findings of the Evaluation Officer and another respondent has contested them has it been held by the World Bank Sanctions Board that the sanctions imposed may be disproportionate.79 However, having regard to the adverse effects for each sanctioned or debarred individual or company, it is self-evident that every sanctions and debarment decision must comply with a general proportionality requirement in all respects.80

D. **Procedural Requirements: Transparency**

The rule of law also encompasses procedural requirements that must be respected. These procedural requirements are of particular importance in the sanctions and debarment process and require strict adherence to equal treatment, due process, and transparency.

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75. *See David Boonin, The Problem of Punishment* 85 (2008); *Gobert & Punch, supra note 53, at 216; Singer & La Fond, supra note 53, at 27*.
76. *See Case C-240/90, Germany v. Comm’n, 1992 E.C.R. I-5404, ¶ 11; Williams-Elegbé, supra note 74, at 34; Tomko & Weinberg, supra note 74, at 363*.
78. *See World Bank Sanctions Procedure, supra note 51, § 9.02*.
The World Bank has determined, at least for its purposes, that “[c]ertain procedural principles of the rule of law, such as the conduct of hearings by an impartial tribunal that provides reasons for its decisions; and the rights of Respondents to representation, to present evidence on their own behalf, and to appeal” are essential to its sanctions proceedings.81

The level of transparency in most of the MDBs sanction and debarment systems is particularly unsatisfactory. Transparency is an important factor for equal treatment,82 as only the publication of sanctions and debarment decisions allows for predictability through case law to be established. The current measures for enhancing transparency are insufficient. The World Bank has made some advancements with the publication of the Sanctions Board Law Digest, the publication of Sanctions Board Decisions, and the publication of the determinations of the Evaluation Officer in uncontested proceedings.83 Although these efforts are not yet entirely sufficient, they stand out in comparison to the other MDBs who are yet to reach even a similar standard of transparency. At the moment the other MDBs do not publish any sanctions or debarment decisions84; the Asian Development Bank does not even publish a complete list of all the debarred firms or individuals.85

To further increase the degree of transparency, all official hearings before the deciding committee or tribunal should be held in a public forum, so independent third parties are given the chance to assess the fairness of the hearings. This is the standard in national court proceedings and is also required by the GPA.86 There is no reason why this should not be possible for the MDBs’ sanctions and debarment decisions.

81. See Leroy & Fariello, supra note 32, at 7.
82. Arrowsmith, supra note 30, at 169, 453.
83. See World Bank Sanctions Procedure, supra note 51, § 10.01.
86. GPA 2012 art. 18.6(c); GPA 1994 art. 20.6(d).
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E. Independence of Deciding Tribunals

Although the MDBs have agreed to separate their investigation offices from the evaluation officers or tribunals, this mere separation is not sufficient. Deciding tribunals and officers should enjoy greater independence from their respective MDBs. Currently, an independent rule of law approach to cases is undermined by the fact that many of the tribunal members are MDB officials. Employment may constitute a dependency, or create an unconscious conflict of interest or tendency to rate the interests of the MDBs higher than the interests of the respondent. This is not in the interest of fair and just proceedings. It is presumably for these reasons that current and former World Bank staff members are also ineligible to become members of the World Bank Administrative Tribunal, members of which, in turn, may also not become World Bank staff afterwards. A Joint Sanctions Board of the MDBs, as has already been discussed, could become a properly independent body if staffed accordingly.

F. Standard of Proof and Rules of Evidence

As a standard of proof in the MDBs sanctions proceedings, it has to be established that it is “more likely than not” that the respective respondent engaged in a sanctionable practice. This standard is equivalent to the standards of “preponderance of the evidence” or “balance of the probabilities.” However, taking into account that the current system applies punitive measures, and considering the fact that the consequences of a debarment are so severe, this Essay argues that the standard of proof should be “beyond reasonable doubt.”

With regard to the rules of evidence applied, these are intangible, as the decision makers “may both consider any form of evidence, including circumstantial evidence, and draw inferences they

87. General Principles and Guidelines for Sanctions, supra note 25, § 1; cf. MDB Agreement for Mutual Enforcement, supra note 24, § 2(c)(i).
91. MDB Agreement for Mutual Enforcement, supra note 24, § 2(c)(iii); Leroy & Fariello, supra note 32, at 4.
deem reasonable therefrom.” 93  This guidance is insufficient for securing due process. Rules on the admissibility of evidence must be established, especially with regard to information that was obtained in a questionable manner.

G.  Treatment of Corporate Groups

Section 9.04(b) of the World Bank Sanctions Procedures allows for the sanctioning of affiliates of the respective respondent. 94  Similar guidance is found in the MDB Harmonized Principles on Treatment of Corporate Groups. 95  This shall prevent the “circumvention of Bank sanctions through the use of affiliates or changes in corporate forms and for the application of sanctions to the successors and assigns of sanctioned parties.” 96  The MDBs recognize, however, that the basis for sanctioning and debarring is the individual firm’s responsibility. 97  Accordingly, sanctions are to be applied to parent companies only if the MDB can demonstrate an involvement in the sanctionable practice. 98

By contrast, a different approach is taken in cases of subsidiaries controlled by the respondent. The sanctions are generally to be applied to these entities, unless the respondent can demonstrate that its subsidiaries are free from responsibility for the prohibited practice. 99  This shifts the burden of proof to the respondent in an unfair manner, as it is impossible to prove a negative fact. In a group of companies, the individual companies may or may not operate separately. Thus, automatically holding a subsidiary liable for the acts of its parent company cannot be regarded as fair and just for the same reason as children are generally not liable for their parents’ actions. Additionally this automatic sanctioning or debarment is a violation of the fundamental due process requirements. It seems that the subsidiary is not properly given the chance to represent and defend itself against the allegations and is not provided with the relevant documents.

93.  Id.
95.  See MDB, MDB Harmonized Principles on Treatment of Corporate Groups § A (2012) [hereinafter MDB Harmonized Principles].
96.  Leroy & Fariello, supra note 32, at 17.
97.  See MDB Harmonized Principles, supra note 95, § A; Leroy & Fariello, supra note 32, at 17–18.
98.  MDB Harmonized Principles, supra note 95, § A(4).
99.  Id. § A(3).
H. Cross-debarment

The cross-debarment agreement of the MDBs generally provides for an automatic cross-debarment in case of debarments that exceed one year and are made public. As the MDBs have distinctly different sanctions proceedings and standards, especially with regard to the applicability of the rule of law versus the “business decision” approach, such cross-debarment should not be automatic. Further, as there is insufficient harmonization between the debarment systems, each MDB should upon referral of the case, make its own determination.

Although Section 7 of the agreement provides for the possibility for a MDB to choose to decline enforcement of a debarment of another MDB, this was envisaged as a rare exception. A standard process had been discussed between the MDBs, but was refused on grounds of possible inconsistencies in the findings, as well as risks of litigation being brought against the MDBs. However, the possible inconsistencies would only emerge as the result of insufficient harmonization.

Furthermore, the effect of cross-debarment on a company or an individual must be considered when determining its appropriate sanction or debarment. This is required by the principle of proportionality. The effect of a debarment upon a company depends on the degree of its involvement in MDB-funded projects: some companies or individuals might rely heavily on such projects and so would be disproportionately affected by cross-debarment, while others would not. This should be taken into account as a matter of general proportionality in the MDBs’ sanctions and debarments regimes.

One of the main reasons why the European Investment Bank (EIB) did not sign the Mutual Enforcement Agreement was its reservations that the cross-debarments regime would lead to litigation before the European courts. Such litigation would have had a distinct chance of success, as the EIB does not possess immunity and is subject to the jurisprudence of the European courts, which

100. MDB Agreement for Mutual Enforcement, supra note 24, § 4.
102. See id. at 197–98.
would then have had to rule on the original debarment decision.104 Taking into account the different standards, the insufficient degree of harmonization, and the lack of observance of core rule of law principles, it is unlikely that an EIB decision to impose a cross-debarment would survive the scrutiny of the E.U. courts. This shows how the current sanctions and debarment systems have not reached the high standards that would be required by the E.U. courts.

V. CONCLUSION

The sanctions and debarment system developed by the MDBs raises numerous concerns. It is in the interest of the MDBs to consider these issues seriously. Although the sanctions and debarment systems, especially the World Bank system, have evolved significantly, further reforms should be made sooner rather than later. As stated by Richard Thornburgh, an inaccurate or unjust debarment or cross-debarment can be costly both for the MDB, as well as for the debarred company.105 Therefore, instead of the current trend of reforms within the individual systems, a collective effort should be made to establish a uniform system in which all relevant international and national principles are given due regard. When reforming the sanctions and debarment regimes, more consideration should be given to the prevailing international principles of the WTO and the GPA, as well as to the legal traditions of all stakeholders.

The MDBs should be bound by strict rules of law, including the principles of equal treatment and proportionality. According to those principles, an early release must be possible where sufficient and credible self-cleaning measures have been taken, and the procedural rules must be enhanced to comply with the high standards of the GPA. Additionally, the practice of generally sanctioning subsidiaries of respondents should change. Finally, to establish a just and fair cross-debarment regime, further harmonization of the sanctions and debarment systems of the MDBs is needed.

104. This would be the consequence of the procedure before a European Court, as it would review the legality of the cross-debarment, which would in turn require reviewing the original debarment decision.

105. See THORNBURGH, GAINER & WALKER, supra note 10, at 6.