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THE 2010 "AGREEMENT ON MUTUAL ENFORCEMENT OF DEBARMENT DECISIONS" AND ITS IMPACT FOR THE FIGHT AGAINST FRAUD AND CORRUPTION IN PUBLIC PROCUREMENT

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ABSTRACT. A remarkable example of coordination between IGOs to deal with corruption and fraud in public procurement is the "Agreement for the Mutual Enforcement of Debarment Decisions" signed by the World Bank and the main regional Multilateral Development Banks (MDBs) in 2010. This article will try to examine the characteristics of the MDBs' cross debarment agreement and its significance for the MDBs that adhered to it in terms of the process of harmonization that resulted from it. Secondly, the article discusses the potential benefits and challenges connected to the extension of this agreement to other MDBs or to other initiatives that have been initiated in parallel to, or in imitation of, the MDBs' cross debarment agreement.

INTRODUCTION

Public procurement is extremely vulnerable to instances of fraud, corruption or waste due to the amount of money circulating between the public and the private sector. The procurement activities undertaken by International Governmental Organizations (IGOs) are generally related both to their internal needs (we will refer to it here as "corporate procurement" for ease of reference) and to their projects or operations (we will refer to it here as "operational procurement" for ease of reference). Operational procurement usually represents the large majority of the procurement activities of IGOs.

In recent years, many IGOs have become increasingly concerned with the risks of corruption in their procurement activities.[1] Different IGOs have developed specific strategies for countering fraud

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corruption in public procurement in different ways. Some IGOs, particularly the main MDBs, have also increased the complexity and predictability of their sanctioning procedures in order to provide a stronger justification for their remedial measures against vendors or consultants who were found to have incurred in any corrupt or other irregular practice. This action, has, in some cases, shifted the assessment of the eligibility of an entity to do business with an IGO from a typical private business decision to a quasi-judicial process based on predictability, transparency, due process and, in certain cases, publicity (Williams, 2007).

Remedial actions against sanctioned vendors or consultants have been often summarised under the term "debarment", also defined as "the exclusion of a contractor who is or has been involved in corruption from competition for contracts" (Dervieux, 2005, p. 207). Debarment has been analysed in different studies (Schooner, 2004). and it is considered more and more as an effective dissuasive tool by different IGOs.

Another aspect that saw concrete progress in the actions undertaken by IGOs is connected to the mutual recognition of the debarment decisions or sanctions applied to fraudulent or corrupt vendors. The most important example in this respect is the Agreement for the Mutual Enforcement of Debarment Decisions signed by the main MDBs in 2010.[2] This article will analyse the achievements and challenges that resulted from the implementation of the 2010 Agreement and the potential developments that the agreement will have for the participating MDBs or other IGOs.[3]

THE 2010 AGREEMENT: MUTUAL RECOGNITION AND PUSH FOR HARMONIZATION

The "Agreement for the mutual enforcement of debarment decisions", was signed in 2010 by five MDBs: the World Bank Group (WBG),[4] the African Development Bank Group (AfDB);[5] the Asian Development Bank (ADB); the European Bank for Reconstruction and Development (EBRD); and, the Inter-American Development Bank Group (IaDB).[6]

Since 1996, the WBG has been at the forefront of anticorruption initiatives by progressively reviewing and reforming its policies and procedures to ensure the correct use of the funds entrusted by its

member states. This included the improvement of its procurement guidelines, the creation of an independent Investigation Office (INT) and the establishment of a two-tier sanction system.[7] The WBG sanction system is characterized, inter alia, by:

- A Sanctions Board (SB) composed by three World Bank staff and four external members.[8]
- The use of the standard of proof "More likely than not."[9]
- A range of sanctions foreseeing the consideration of aggravating and mitigating factors. A debarment with conditional release for a minimum period of three years is considered the baseline sanction.[10]
- The inclusion of the sanctions of debarment with conditional release and conditional non-debarment, stressing the importance of rehabilitation measures by the sanctioned entity/individual.[11]
- Principles for the application of sanctions to corporate groups, affiliates, successors and assigns.[12]
- A Voluntary Disclosure Programme (VDP) to allow entities or individuals like vendors or consultants to come forward and disclose past misconduct to the World Bank Group.[13]
- The possibility to reach settlements.[14]
- The publication of the list of the debarred firms and individuals and, as of 2011, of the full text of the Evaluation and Suspension Officer (EO) determinations (if not contested) and of the SB's decisions.[15]

The degree of public access to the information along with the other aspects, as mentioned above, justify the identification of the World Bank's sanction regime as a best practice in the area of anti-corruption in public procurement.[16] Additionally, the volume of the money distributed by World Bank through loans, credits or grants makes it the largest development bank in the world and, as such, the actions of this institution receive an impressive attention by other international organizations, borrowers or entities involved in projects financed by the Bank.[17]

All of the other mentioned MDBs faced similar constraints (such as balancing their fiduciary duty with the avoidance of political interference[18]) in fighting fraud and corruption to the ones met by the

World Bank.[19] They also had a similar evolution in terms of developing clauses against fraud and corruption in their procurement guidelines, creating functionally independent investigation offices and setting up sanction systems foreseeing the possibility to debar corrupt entities or individuals.

The sanction systems of the main MDBs contain differences in regard to the composition of and the level of external participation to the sanctioning body; the range of sanctions available; and the treatment of corporate entities, successors and assigns. Additionally, there are differences in relation to the publication of the sanction decisions taken by each MDBs. None of the above-mentioned MDBs has so far followed the World Bank's approach (since January 2011), wherein the full texts of the decisions of the WBG Sanctions Board or of the determinations of the Evaluations and Suspension Officer in uncontested proceedings are published. The EBRD, AfDB and IaDB only publish a list of debarred entities with an indication of the prohibited practice that lead to the sanction. The ADB instead, does not publish the names of all debarred entities or individuals on account of possible legal implications.[20]

The Uniform Framework of 2006

In September 2006, the World Bank Group, AfDB, ADB, EBRD and IaDB decided to agree "on a framework for preventing and combating fraud and corruption in the activities and operations of their institutions".[21] This step, which followed the creation of an International Financial Institutions Anti-Corruption Task Force in the February of the same year, also saw the participation of the European Investment Bank Group (EIB) and the International Monetary Fund (IMF).[22]

Among the actions to fight fraud and corruption the institutions that participated in the Joint Statement agreed to undertake the following ones, which are particularly relevant in the context of this article:

- Agreeing on a set of standardized definitions of fraudulent and corrupt practices in order to facilitate the collaboration between their investigating offices.[23]
- Following a set of common principles and guidelines for investigations. These principles constitute a set of comprehensive

guidelines touching upon a wide range of aspects, including the establishment of an investigative office (IO), separate and independent from the decision-making authority; the publication of the IO's terms of reference and of an annual report on the IO's activities; and provisions granting the entity/individual against whom the allegations are made (subjects) with the opportunity to explain their conduct and present evidence.[24]

- Strengthening their exchange of information in connection with investigations of the above practices.
- Exploring further how to support compliance and enforcement actions taken by any of the institutions as part of the initiative.[25]

The Mutual Agreement of 2010

In April 2010, the World Bank Group, AfDB, ADB, IaDB and EBRD took a step further to strengthen their coordination in fighting fraud and corruption by agreeing that "[e]ach Participating Institution will enforce debarment decisions made by another Participating Institution."[26] The Agreement for the mutual enforcement of debarment decisions (henceforth, "the 2010 Agreement") was the result of long discussions and negotiations among the main MDBs.[27]

Each participating MDB subscribed to a list of principles as pre-conditions for the mutual enforcement of sanction decisions, including: the adoption of the four harmonized definitions of prohibited practices (fraudulent, corrupt, collusive and coercive practices) that were listed in the 2006 Uniform Framework, described above; adhering to the Principles and Guidelines for Investigations included in the 2006 Uniform Framework; and, a sanctioning process characterized by the following elements:

- Investigation of the allegations undertaken by an internal entity that should be separate and distinct from the body tasked with decision-making authority on the determination of whether a prohibited practice occurred and which sanction would be more appropriate to address it.
- Availability of written and publicly accessible investigation and sanctioning procedures foreseeing specific due process guarantees: issuance of a notice to the subjectand opportunity for the latter to respond to the allegations.

- Use of the standard of proof "more probable than not" or equivalent.
- A range of sanctions that takes into account the principle of proportionality, including mitigating and aggravating factors (this aspect was developed further in 2012).

The 2010 Agreement also described the modalities and content of the notice that each participating MDB should send to the other ones to allow for the mutual enforcement of debarment decisions. Additionally, the 2010 Agreement listed different criteria limiting the automatic mutual enforcement of sanctioning decisions to the following cases:

- A sanction based in whole or in part on a finding of one or more of the four prohibited practices mentioned in the 2006 Uniform Framework.[28]
- The sanction decision issued by the participating MDB is made public. This aspect has limited the amount of the cross-debarment of sanctions issued by the ADB since this MDB does not normally publish its sanction decisions.
- The sanction consists in a period of debarment of more than one year. This provision has the effect to make cross-debarment not applicable in situations where the sanctions decided by a participating MDBs is a letter of reprimand or a period of debarment of less than one year or a conditional non-debarment satisfactorily addressed by the sanctioned entity or individual.[29]
- The sanction decision was issued after the 2010 Agreement entered into force for the MDB that is issuing the sanction (no retroactivity).
- The sanction decision was made within ten years from the date the prohibited practice was committed (statute of limitations).

The 2010 Agreement stipulated that the period of debarment (or any modification of the same) would be determined solely by the sanctioning MDB. However, it foresaw that each participating MDB could, in the event of other/separate prohibited practices, pursue independent sanctioning proceedings against the same entity or individual already sanctioned by another MDB.

Finally, the Agreement included an opt-out clause, giving each participating MDB the possibility not to enforce a debarment decision taken by another participating MDB on account of specific legal or institutional considerations. The participating MDB using such a prerogative, has the duty to promptly notify the other MDBs of such decision.

Main Results and Effects of the 2010 Agreement - Statistics

The 2010 Agreement constitutes an unprecedented step in the fight against fraud and corruption in the context of public procurement and of cooperation for development. First of all, it has allowed the major MDBs to apply consistent standards to vendors, consultants and other entities/individuals, who would have otherwise posed a reputational risk to the same MDBs by being able to be awarded contracts funded by an MDB while being debarred by another. Additionally, the 2010 Agreement also multiplied the deterrence effect already created by the risk of being publicly debarred by one of the main MDBs through the extension of the debarment to all other MDBs.[30] Deterrence also took the form of raising awareness on the importance of creating or improving integrity compliance systems among international contractors, firms or other entities. This effect is further strengthened by the existence of sanctions such as conditional non-debarment or debarment with conditional release or by the availability of initiatives such as the World Bank's Voluntary Disclosure Programme.

The 2010 Agreement was implemented at different times by the participating MDBs (June and July 2010 for ADB, EBRD and WBG; 2011 for IaDB and 2012 for AfDB).[31] In terms of figures, as of November 2012 (two years and a half from the signing of the agreement), more than 150 entities or individuals were cross-debarred, including major companies like Alstom and Macmillan. As of November 2012, none of the participating MDBs has made use of the opt-out clause foreseen by the 2010 Agreement.

Table 1 summarizes the figures regarding cross-debarment by the participating MDBs. As far as the participating MDBs' experience with the 2010 Agreement is concerned, some of the comments[32] received in the context of this research touched upon the following aspects:

- The importance of progressively establish a harmonized playing field for the participating MDBs.

- The strengthening of the sanction process in each participating MDB by way of increasingly comprehensive provisions.
- Further harmonization of practices in relation to aspects such as, types of sanctions, the factors considered when deciding on sanctions to issue, how to apply sanctions to corporate groups.
- Good general results in terms of better safeguard of development funds and a strong message conveyed to firms and stakeholders on high standards adopted by main MDBs in the fight against fraud and corruption.

Potential risks of legal litigation with entities/individuals that were publicly cross-debarred and may raise issues of defamation.[33]

TABLE 3
Figures Cross-Debarred Entities/Individuals Listed by Originating MDB*

MDBs	Entities	Individuals	Total
World Bank	69	19	88
AfDB	0	0	0
ADN	11	16	27
EBRD	4	0	4
IaDB	19	39	58

Note: * The figures include all entities that were cross-debarred since the 2010 Agreement came into force for at least a participating MDB (data from the World Bank's and the ADB's lists of debarred entities/individuals).[34]

Harmonization Efforts after the 2010 Agreement

The 2010 Agreement was meant to allow for the mutual recognition and enforcement of debarment decisions taken by participating MDBs that had different procedures and structures to investigate and sanction prohibited practices in public procurement and in the use of lending for development purposes. As such, the agreement was not an instrument of harmonization per se.

However, the pre-conditions required in order to implement the agreement were instrumental in bringing reforms in the accountability systems of most participating MDBs. The World Bank and the ADB, for example, made further changes to their anticorruption policies,

investigation guidelines and/or sanctions procedures to further exploit the advantages of the 2010 Agreement or eliminate loopholes present in their accountability system. The AfDB reviewed almost entirely its sanction system in order to comply with the pre-conditions of the 2010 Agreement and be able to fully implement it from July 2012. The IaDB, on the other side, built on changes recommended by previous reviews[35] and introduced new provisions in its policies for the selection of consultants or the procurement of goods and works, and in its anti-corruption clauses in relation to a large range of issues.

The harmonization effects of the 2010 Agreement among the participating MDBs had a further concrete result in September 2012, when the five MDBs agreed on two further documents concerning their sanctioning practices. The first of these two documents concerned the attempt of the five participating MDBs (plus the EIB) to "harmonize their respective sanctioning guidelines, to ensure consistent treatment of individuals and firms" (World Bank Group, 2012, p. 1). After reiterating specific aspects of the 2010 Agreement, the document identifies a range of sanctions that may be imposed singularly or in combination. The list includes: debarment; debarment with conditional release/reinstatement; permanent or indefinite debarment; conditional non-debarment; letter of reprimand; restitution/financial remedies.

It is important to note how this document introduces for all participating MDBs the sanctions of conditional non-debarment and debarment with conditional release, two particularly important sanctions because they contain a strong incentive for vendors/contractors and other entities or individuals to improve their accountability by requiring them to introduce integrity compliance measures. It is possible to imagine that the possible future harmonization steps by the participating MDBs could be the adoption of a common set of integrity compliance guidelines, something that would greatly improve the predictability of the application of rehabilitation measures among vendors/bidders and other entities.

Another interesting feature of the document is the identification of debarment for three years (with or without conditional release) as the base sanction, a step that will also help harmonize the way the sanction bodies of the participating MDBs apply their procedures. Additionally, the document contains a table listing the possible increases or decreases to the base sanction that could result from

the consideration of aggravating circumstances[36] or mitigating factors[37]. Finally, the document contains a specific section on settlements, leaving the door open for the introduction of this important instrument also by other MDBs besides the WBG. While these General Principles and Guidelines for Sanctions are not to be considered prescriptive in all areas (such as with settlements), it is explicitly foreseen that the standards set out by them should be incorporated by each participating MDB in its sanctioning policies.

The second document contains harmonized principles for the treatment of corporate groups; these principles "are intended as guidance to the Institutions as they develop their own applicable policies and procedures" (World Bank Group, 2012, p. 1). This document provides guidance on the application of sanctions to entities controlled by the party responsible for the prohibited practice (the Respondent). Similarly these principles explain how sanctions normally apply to entities controlling the Respondent or entities under the same control as the Respondent; in this case, however, the participating MDB has the burden of proof of demonstrating the involvement of these entities in the prohibited practices. Furthermore, the harmonized principles provide guidance on how to extend a sanction to successors and assigns in cases of acquisitions, mergers or reorganizations.[38]

The principles also contain a specific section on the sanctioning of corporate groups in the context of cross-debarment explaining that only the entities within a corporate group that are identified by name by the sanctioning MDB can be subject to cross-debarment. These harmonized principles are extremely important because they address specific challenges posed by the different application of the concept of liability of corporations for their staff's conduct in the context of the US or similar legal traditions as opposed to the traditions existing in other regions where some of the main regional MDBs are based and operate.[39]

Certainly the process is still far from completion. There are several areas where the 2010 Agreement can still bring further results, such as the possibility by the participating MDBs' investigation offices to achieve a higher level of cooperation and exchange of information or to undertake joint investigations. Another aspect is related to an increase in the amount of publicly available information among regional MDBs to align them to the World Bank

Group, a step that would further increase the predictability of the process.

Nevertheless, it can be said that the 2010 Agreement and the further steps toward harmonization taken by the main MDBs in 2012 are operating a shift from an initially predominant view of the sanction process as a set of procedures related to what comes down to a business decision concerning the entities with whom MDBs choose to do business, to a new view of this process which clearly anchors procurement activities funded by MDBs to public procurement as it can take place at the national level and views the sanction process as a quasi-judicial process requiring due process and guarantees of independence and transparency of the sanctioning body.

INTEREST FOR THE 2010 CROSS-DEBARMENT AGREEMENT BEYOND ITS CURRENT PARTICIPANTS

In this section, the Agreement will be discussed in relation to its appeal (either in terms of joining it or imitating its framework) for other MDBs. The analysis will focus first on other, sub-regional, MDBs and then look at the harmonization efforts undertaken by UN System Organizations. Finally, the idea of a global sanction mechanism to be shared by MDBs and/or other IGOs will be analyzed.

Extension of the 2010 Agreement to other MDBs

In the above section, a description was provided of how the main regional MDBs' investigation and sanctioning frameworks evolved to adjust to calls for further harmonization that resulted from the 2006 Uniform Framework and the 2010 Agreement. There are, however, other MDBs of lesser importance (either in terms of lending capacity or because of their sub-regional coverage) that could be potentially interested in joining or implementing the 2010 Agreement.

An analysis of the information available in those MDBs' websites was attempted in order to verify which of them would be well positioned to join the 2010 Agreement.[40] The Islamic Development Bank (IsDB) seems to be the only MDB that could be able to join the agreement. This MDB took substantial steps in order to align itself with the MDBs participating to the 2010 Agreement.[41] Specifically, the IsDB adopted an anti-corruption policy and amended its procurement guidelines to incorporate the same definition of

prohibited practices included in the 2006 Uniform Agreement (adding also the definition of "Obstructive Practice"); it created an investigation office (Group Integrity Office – GIO) equipped with publicly accessible procedures for the investigation of allegations of prohibited practices and with guarantees of due process for subjects of the investigations; it also issued publicly accessible sanctions procedures (the IsDB uses a two-tier sanctions system) including a range of sanctions, to be applied taking into consideration mitigating and aggravating factors. Both investigation and sanction procedures foresee the use of the standard of proof "more probable than not" as is the case with of the 2010 Agreement.

Additionally, the IsDB's sanctions procedures include the possibility of temporary suspension of subjects of investigations, the possibility of settlements and a range of sanctions including conditional non-debarment or debarment with conditional reinstatement (which implies the use of specific integrity compliance measures for the reinstatement of sanctioned entities or individuals). In conclusion, the IsDB would be fully compliant with the pre-conditions set by the 2010 Agreement and could therefore join the participating MDBs.[42]

Harmonization Efforts in the UN System

The UN System is perhaps the most important engine of development work, besides MDBs, and represents the most important and widespread group of International Governmental Organizations. Hence, it is considered useful to discuss how UN System organizations address fraud and corruption in their public procurement activities (according to the website of the UN Global Marketplace, the United Nations represents a global market of over USD 14 billion annually for all types of goods and services).[43]

However, when we talk about the UN System we mean a vast galaxy that includes several institutions, such as the UN Secretariat (inclusive of its peacekeeping missions, special offices or economic commissions), separately administered Funds and Programs, Specialized Agencies and other entities (such as research and training institutions).[44] The World Bank, for example, is also considered a specialized agency along with IMF, the Food and Agriculture Organization (FAO) or the World Health Organization (WHO).

The UN took inspiration from the 2010 Agreement in the context of the harmonization effort undertaken by several UN organizations to reach an agreement on a Model Policy Framework (MPF) concerning vendor sanction procedures. In 2009 a project was initiated by the High-Level Committee on Management - Procurement Network (HLCM PN) under the lead of the United Nations Development Programme (UNDP).[45] The UN Secretariat pilot programme based on the establishment of a Senior Vendor Review Committee was considered as a possible example to follow (United Nations, 2010).

The MPF is based on the idea of having participating UN System organizations to agree on a set of guiding principles to be applied in accordance with the legal framework of each organization, while maintaining flexibility in the implementation and adaptation of a set of suggested procedures.[46] Similarly to the sanction system in place at the UN Secretariat, the MPF suggest the possibility of rehabilitation of an ineligible vendor upon or prior to expiration of the sanction term (on the basis of specific corrective measures).

The 2010 Agreement was surveyed as a best practice and the definitions of prohibited practices included in the 2006 Uniform Framework were used in the MPF, although, in the case of the latter, the definition of unethical practice and obstructive practice were also included. A specific difference between the 2010 Agreement and the MPF is that the latter foresees the use of the standard of proof "clear and convincing evidence" (which is higher than "more likely than not") for the prohibited practices listed above. This approach might create a mismatch between investigation and sanction proceedings since the standard of proof used by most UN System's investigation offices is the preponderance of evidence (" more probable than not").

Another important feature of the MPF concerns its practical implementation. Communications between UN System organizations would take place through the exchange of information on sanctioned vendors through already existing platforms that are part of the UNGM. This means that the sanction decisions of each participating organization would not be made public.

In 2011 the Joint Inspection Unit (JIU)[47] prepared a note on "Procurement reforms in the United Nations system", recommended UN System organizations to establish a vendor sanction policy as a matter of priority and mentioned the World Bank's sanctioning system as an interesting example for UN System organizations (Joint

Inspection Unit, 2011). Additionally, the JIU noted the effort undertaken by the HLCM PN in the development of the MPF. The MPF was initially endorsed by the Procurement Network in September 2010 and then by the HLCM in March 2011. Progress in the implementation of the MPF has been limited so far in terms of number of participating organizations.[48] The UN Secretariat is one of the organizations that have begun the implementation of the MPF. It is clearly premature to assess the success of this promising initiative.

Future Scenarios: Would a Global Sanction Mechanism Be Desirable?

In this last paragraph we will try to look at possible developments that may take place in future years as a result of the progressive harmonization of business practices among MDBs and UN System organizations. The first possible development would be related to a potential extension of mutual enforcement agreements. The UN Secretariat is already implementing a form of cross-debarment by considering as ineligible the vendors that have been debarred by the World Bank. It is possible that in the future an understanding may be reached between the MDBs participating to the 2010 Agreement and the UN System organizations implementing the MPF to harmonize any possible difference in their processes in order to ensure that entities or individuals sanctioned or declared ineligible by one group of organizations may be cross-debarred by the other group. One aspect that seems quite challenging in this respect is not so much the issue of the different standard of proof adopted under the two frameworks, but rather the publicity of the sanction decisions, a requirement that might find a lot of resistance among UN System organizations.

A second development could entail the mutual enforcement by other actors, such as national governments or cooperation agencies (such as USAID, GIZ, NORAD or DFID) of debarment decisions taken by the main MDBs or by UN System organizations. A strong interest for such a coordinated approach has emerged by initiatives such as the work of OECD on Donors and Anti-Corruption, the G20 Agenda on corruption, the UN Convention against Corruption, or the International Corruption Hunters Alliance promoted by the World Bank Integrity Vice Presidency (INT).

Another development, which could initially be limited to the MDBs participating to the 2010 Agreement and then expand to other MDBs and IGOs, would be the creation of a Joint Sanction Board (JSB). The

main MDBs would have to agree on a common two-tier sanction procedure foreseeing, for example, that until the first tier the process would work exactly the same way it works now under the 2010 Agreement, while the second tier (the review of appeals filed by Respondents) would be administered by a common sanction body. The JSB could be composed by five members, three of them, including the Chairperson, would be external members common for all MDBs, while two of them would be assigned by the relevant MDBs whenever a case originated from that MDB was considered.

This option was already explored in detail during the negotiations that brought to the 2010 Agreement but it was set aside (Zimmerman & Fariello Jr., 2011, p. 67). More than two years later and after several reform initiatives, undertaken individually (see the reform of the AfDB's sanction system) or jointly (see the recent agreement on the imposition of sanctions and the treatment of corporate groups) by the participating MDBs, it it is evident that the progressive harmonization of sanction procedures is the natural result of the 2006 Uniform Framework and the 2010 Agreement. The participating MDBs will perhaps be available to re-discuss their positions in favour of creating a JSB. This option would have several advantages:

- Ensure consistency in the application of the procedures (such as the interpretation of the standard of proof "more likely than not") and of the definitions of prohibited practices (for example, how much evidence is needed to prove recklessness or knowledge in relation to fraud?).
- Create higher visibility for the cross debarment initiatives, which in turn will have several positive outcomes: higher attention for issues such as integrity compliance procedures, stronger incentives for mechanisms such as the Voluntary Disclosure Programme or the possibility of settlements.
- Bring an enhanced sense of fairness, due process and predictability of the process.
- Ensure a fair sharing of costs (in terms of secretariat to the JSB and external members).

Several of the elements listed above could provide higher incentives to other MDBs or IGOs to join the agreement. On the other hand, some IGOs may fear that their reputation would be at risk if

they do not apply due diligence and rigour in the first tier of the process (under their control) and the JSB does not confirm their conclusions. This argument, however, can be balanced by the fact that transferring the final decision in the process (e.g. the second tier) to an independent body will not only enhance due process and transparency but also shield IGOs from adverse litigation in relation to the publication of a list of sanctioned entities and individuals since the argument of bias or lack of due process by the relevant IGOs would no longer be available.

CONCLUSIONS

This article's analysis of the 2010 cross-debarment Agreement (mutual recognition) raises few specific points on the challenges to ensure integrity in public procurement activities:

- **"Walk the Talk."** Several MDBs and UN System organizations have in place specific programs to support, educate and coach governments in improving their action to fight fraud and corruption in their activities (among which, procurement has a prominent position in terms of risks of waste, abuse or unethical practices). In order to be credible, these IGOs need to show that they have in place procedures complying with the principles or best practices they would like others to adopt. The evolution of the World Bank's Governance and Anticorruption strategy is a good example in this respect.
- **A fair and effective sanction system is not only instrumental in providing a strong deterrent against fraud and corruption…** The investment made by the World Bank and the other main MDBs in creating structured processes to handle allegations of prohibited practices against vendors or consultants is a notable one. This included not only the establishment of functionally independent investigation offices with technical skills to detect fraud and corruption in procurement and other lending activities, but also, the careful drafting and issuance of complex sanction procedures to ensure a proper disposal of these allegations. These systems, along with clearly-worded anticorruption policies or clauses in procurement guidelines ensure that vendors and other entities are on notice that when they do business with money coming from one of the main MDBs, they are subject to a high level of

scrutiny. Particularly so when their debarment may become public information.

- **… but can also be helpful for prevention purposes**. The inclusion of sanctions like conditional non-debarment or debarment with conditional release and the use of specific integrity compliance measures that sanctioned vendors have to take in order to be considered again to do business with an IGO do a great deal to promote the importance of the prevention of fraud and corruption among companies. Additionally, other measures, such as voluntary disclosure programmes and settlements, besides saving money and time that would be needed for investigations and sanction proceedings, have the advantage of shifting the stress from detection and punishment to cooperation, corrective measures and self-restraint.

- **Coordination and mutual enforcement multiply positive effects**. The 2010 Agreement shows that its impact is higher than the sum of the sanction activities of each participating MDBs. The possibility that a firm debarred by one of the participating MDBs become automatically (and publicly) cross-debarred by a range of institutions covering the whole globe and a large share of funding for development ("contracts" in vendors' language) is an enormous boost in terms of deterring effect. This is further proven by the high level of attention that the 2010 Agreement received at different levels: from researchers in terms of its implications for the ongoing debate about IGOs as creators of international law; from governments and their cooperation agencies in terms of using the list of entities/individuals cross-debarred under the 2010 Agreement in order to decide on the eligibility of vendors or contractors for their activities; from other MDBs as an incentive for them to reform their investigation and sanction systems to be able to join the agreement; from other IGOs in terms of best practice to imitate.[49]

- **Harmonization calls for further harmonization**. Harmonization of practices and procedures is not a static all-inclusive event where you go from zero to 100%. The harmonization among the main MDBs started from some informal exchanges and evolved through the 2006 Uniform Framework until the 2010 Agreement. However, the agreement itself was not the final product, but only another step in a process that, once started, progressively calls

for more coordination for its best functioning. The agreements of 2012 among the main MDBs in relation to common standards for the measurement of aggravating or mitigating circumstances in deciding the most appropriate sanction (starting from a common baseline) or in relation to the sanctioning of corporate groups is an indication that the implementation of the 2010 Agreement itself showed to the participating MDBs that there were further benefits to be enjoyed from it by simply moving further in harmonizing their practices.

As indicated in the paragraph describing the possible evolutions of the 2010 Agreement, this process might bring further results, such as the harmonization of sanction procedures or the creation of a joint sanction mechanism among the participating MDBs.

- **The more visible, the more scrutinised.** Some IGOs are more visible than others, because of their mandate, the amount of resources they can mobilize, or their presence in the world. The World Bank is certainly one of the better known IGOs and the most important MDB. It is not difficult to understand why it had such an important role in leading the way in establishing an accountability system to deal with fraud and corruption in the projects or activities it funds. The decision of the World Bank to have the full text of its Sanction Board's decision published on line is already creating a lot of attention among other MDBs, firms or borrowers interested in understanding the rationale behind the decisions of this body. Contrary to the concerns of other IGOs, this move has not exposed the World Bank to major criticism or attacks but it has greatly enhanced its reputation as a development agency and as an IGO.

NOTES

1. See, for example, the creation of the UN Global Compact (http://www.unglobalcompact.org).
2. Useful information on this topic is available through the website "www.crossdebarment.org".
3. The relevant information was sought through document's search in the website of specific IGOs and the administration of questionnaires to three groups of IGOs: MDBs already participating to the 2010 Agreement, MDBs currently not part of

the 2010 Agreement and UN System Organizations. The information provided by the IGOs that responded to the questionnaire were used to complement other sources of information.

4. The World Bank Group is a generic term that refers to five institutions—the International Bank for Reconstruction and Development (IBRD), the International Development Agency (IDA), the International Financial Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). However, strictly speaking, the term "World Bank" refers to the IBRD and the IDA. With 188 member states, IBRD is the largest among these five institutions.

5. The African Development Bank Group consists of the African Development Bank, the African Development Fund and the Nigeria Trust Fund.

6. The Inter-American Development Bank Group consists of the Inter-American Development Bank, the Inter-American Investment Corporation and the Multilateral Investment Fund (MIF).

7. The WBG sanction system was revised in several occasions. For a detailed historical review of the World Bank's sanction system, see "World Bank Group sanctions regime: an overview", The World Bank Group, 8 October 2010. In September 2013, the World Bank as initiated a review of its current Sanction System.

8. On the latest reforms of the WBG Sanction System, see: Anne Marie Leroy and Frank Fariello, "The World Bank Group sanctions process and its recent reform", The World Bank, 2012.

9. On the rules of evidence followed by the Sanctions Board, see: Matteson Ellis, "World Bank Sanctions: Formal Evidentiary Rules Don't Apply", article appeared in the Blog FCPAméricas, August 2012.

10. The WBG Sanction Procedures foresee five different kinds of possible sanctions: letter of reprimand; conditional non-debarment; debarment for a fixed term; debarment with conditional release; restitution.

11. More information on this topic can be found in: Matteson Ellis, "The World Bank Harmonizes Global Anti-Corruption Compliance

Standards", article appeared in the Blog FCPAméricas, October 2011.

12. The WBG Sanctions Procedures define an Affiliate as "any legal or natural person that controls, is controlled by, or is under common control with, the Respondent, as determined by the Bank."

13. See for more details on the VDP: the "VDP guidelines for participants", The World Bank Group and "Voluntary Disclosure Programme terms and conditions", The World Bank Group.

14. Settlements are dealt with at Article XI of the Sanctions Procedures; this avenue was formally included in 2010 after two successful settlements in complex sanctions cases.

15. In IBRD/IDA, the name has been changed to Suspension and Debarment Officer (SDO). See the list of the decisions at http://go.worldbank.org/G9UW6Y0DC0.

16. The identification of the World Bank Sanctions Regime as a best practice is confirmed also by: Nolan A Kulbiski, "Another perspective on too big to debar: BP, the Environmental Protection Agency, and the World Bank", Public Contract Law Journal, Vol 41, No. 4, 2012.

17. In the Fiscal Year 2011, the World Bank provided $46.9 billion for 303 projects in developing countries worldwide, aimed at intervening in several different sectors (including health, education, infrastructure, public administration reform, private sector development and natural resources management) in order to help those countries reduce poverty (general information from the website http://go.worldbank.org/15WVJKN2N0, last visited on 10 October 2012).

18. For a discussion on this aspect, see Hassane Cissé, "Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank" in Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury (ed.), International Financial Institutions and Global Legal Governance, (The World Bank Legal Review, Vol. 3, 2012), p. 59.

19. For a review of the challenges faced by the main MDBs see the article: "Multilateral development banks' integrity management

systems", U4 Expert Answer, U4 Anti-Corruption Resource Centre, 21 December 2010.

20. However, the ADB publishes a summary comprehensive statistics in relation to its sanction regime and a case summary for every case (withholding the name of the sanctioned individual or entity). Information available at the website www.adb.org/site/integrity/case-summaries, last visited on 13 November 2012.

21. "Joint Statement by the Heads of the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank Group, Inter-American Development Bank Group, International Monetary Fund, and World Bank Group; Singapore 17 September 2006. This document contains a "Uniform framework for preventing and combating fraud and corruption" (henceforth, the "2006 Uniform Framework").

22. Both the EIB and the IMF did not take part to the 2010 Agreement on the Mutual Enforcement of Debarment Decisions. The IMF is not an MDB. The EIB instead is an MDB but its sanctions regime differs fundamentally from that of the other five main MDBs, because EIB's debarment decisions are subject to review by courts and institutional bodies within the European Union.

23. Specifically the agreed definitions were:

- Corrupt practice: the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party.
- Fraudulent practice: any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.
- Coercive practice: impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.
- Collusive practice: is an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party.

The four practices agreed upon by the participating International Financial Institutions (IFIs) are not the only ones adopted separately by the main MDBs as part of their sanctions procedures. For example, the ADB, the IaDB and the World Bank also foresee the concept of "obstructive practice".

24. The IFIs' principles and guidelines for investigations can be considered a best practice and were incorporated by several other agencies after inspiring the 2009 Conference of International Investigators at the time of issuing a revised version of the "Uniform Principles and Guidelines for Investigations". The Conference of International Investigators is an annual gathering of the investigative offices of several international organizations, many of which belong to the UN System or are MDBs. The first version of the "Uniform Principles and Guidelines for Investigations" was adopted at the 2003 Conference.

25. The EBRD was a precursor in this respect since, before the 2010 Agreement on mutual enforcement of debarment decisions, it was the only MDBs that foresaw the possibility of debarring entities that had been sanctioned by other leading MDBs. The first instance where this took place was in February 2007, when the EBRD debarred Lahmeyer International following a debarment by the World Bank as a result of its involvement in the Lesotho Highland Waters Project.

26. "Agreement for mutual enforcement of debarment decisions", African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group and World Bank Group, 9 April 2010.

27. For an insightful background of the challenges addressed during these discussions, see, generally: Stephen S. Zimmerman and Frank Fariello Jr, "Co-ordinating the fight against fraud and corruption: agreement on cross-debarment among multilateral development banks" in Harry Travers (ed.), Serious Economic Crime, a boardroom guide to prevention and compliance, (White Page Ltd 2011), p. 65.

28. This means that cross-debarment concerns only sanctions related to those four practices and not other possible violations identified

as prohibited practices by one or more participating MDBs (such as obstructive practices, retaliation or conflict of interests).

29. The objective of this provision was to avoid the heavy effects of cross-debarment for minor violations and to provide an incentive to vendors and consultants under investigation to cooperate with the investigation in order to mitigate the sanction they might receive.

30. This multiplied deterrence effect has brought some to describe the 2010 Agreement as a form of "internationalization of punishment". See: "Sanctions investigations by the World Bank and other multilateral development banks", Briefing prepared by Freshfields Bruckhaus Deringer US LLP, July 2010.

31. See information from ADB on http://www.adb.org/site/integrity/news/articles-case-studies/after-cross-debarment-agreement (Accessed November 13, 2012).

32. The relevant information was sought through document's search in the website of specific IGOs and the administration of questionnaires to three groups of IGOs: MDBs already participating to the 2010 Agreement, MDBs currently not part of the 2010 Agreement and UN System Organizations. The information provided by the IGOs that responded to the questionnaire was used to complement other sources of information.

33. This aspect was studied in 2009 by the World Bank Audit Committee, which concluded that the risks of litigation were outweighed by the more significant benefits to be gained from increased transparency (also in consideration of the use of specific 'notice' language in the MDBs' Standard Bidding Documents). See specifically: "The World Bank Group: mutual enforcement of debarment decisions among multilateral development banks", The World Bank Group, 3 March 2010, page 5.

34. See the website http://lnadbg4.adb.org/oai001p.nsf/Home.xsp, last visited on 13 November 2012.

35. See specifically: "Report concerning the anti-corruption framework of the Inter American Development Bank", prepared

by Dick Thornburgh, Jorge Santistevan de Noriega, Ronald L. Gainer, Cuyler H. Walker for The IADB, 21 November 2008.

36. For example: the severity of the prohibited conduct, the harm caused by it, an interference with the investigation or obstruction of the investigative process, a past history of sanctions or the violation of a previous sanction or temporary suspension.

37. For example: a minor role of the sanctioned entity/individual in the prohibited conduct, a voluntary corrective action taken by the sanctioned entity/individual or the cooperation by the latter with the investigation.

38. The MDB Harmonized principles on treatment of corporate groups provide specific guidance on the means and procedures for the prevention of attempts to circumvent sanctions by the creation or acquisition of a new entity. The document also clarifies which factors should be considered in determining the type and severity of the sanction to be imposed on any Respondent or other entity subject to a sanction (different sanctions may be imposed to different entities within a corporate group).

39. See, on this and other legal challenges for the implementation of the 2010 Agreement: Matteson Ellis, "Cross-Debarment and conflict of laws: the next big challenge for World Bank and MDB sanctions", article appeared in the website of Legal Ethics Compliance, October 2012.

40. The websites of 14 sub-regional MDBs were visited. Information relevant for this research was found in the websites of the following five MDBs: Caribbean Development Bank (CDB - http://www.caribank.org/); Black Sea Trade and Development Bank (BSTDB - http://www.bstdb.org/); Council of Europe Development Bank (CEB - http://www.coebank.org/); Nordic Investment Bank (NIB - http://www.nib.int/); Islamic Development Bank Group (IsDB - www.isdb.org/).

41. See, in this respect, the "IDB Group integrity enhancements to meet the standards of the MDB's cross debarment agreement", Islamic Development Bank, January 2012 and the steps described in the webpage www.isdb.org/irj/portal/anonymous?NavigationTarget=navurl://ec6671231a3b38c98ffa04954416c869.

42. The only unclear aspect concerning the IsDB's recently reformed sanction system is related to the publication of the main aspects of each sanction decisions (identity of the sanctioned entity/individual, prohibited practices committed by the sanctioned entity/individual, sanction imposed). Although the IsDB's sanction procedures state that such information would be published on the IsDB website, no such information is available so far. This of course would not prevent the IsDB to join the 2010 Agreement but it would prevent it from having its debarment decisions automatically enforced by other participating MDBs (as it is already the case with most ADB sanction decisions, which are not published).

43. The United Nations Global Marketplace – UNGM (www.ungm.org) - is the procurement portal of the UN System. The UNGM acts as a single window, through which potential suppliers may register with the 20 UN Agencies using the UNGM as their supplier roster. These agencies account for 95% of the total UN procurement spent. The UNGM is accessible to all UN and World Bank procurement staff.

44. See the webpage: www.un.org/en/aboutun/structure/pdfs/un_system_chart_colour_sm.pdf

45. The HLCM PN is a network of UN System procurement officials working on aspects of common interest for UN System organizations. It is established as part of the High Level Committee on Management, which is part of the UN System Chief Executives Board for Coordination (CEB). See the website http://www.unsceb.org/ceb/brochure/overview/ceb/hlcm/pn (last visited on 8 November 2012).

46. These optional procedures include: the terms of reference and responsibilities of a Sanction Board that each participating organization may decide to set up; the possibility to temporarily suspend a vendor; the steps and instruments to formally notify a vendor of allegations of prohibited practices against it and to provide the vendor the possibility to respond to the allegations; sanction proceedings (including the consideration of mitigating and aggravating circumstances and the possibility to hold hearings); the option to establish a voluntary disclosure program and to negotiate a settlement; a range of sanctions including

reprimand, debarment for a definite period of time, suspension or conditional reinstatement.

47. The JIU is the "independent external oversight body of the United Nations system mandated to conduct evaluations, inspections and investigations system-wide." (see the website www.unjiu.org for reference).

48. For more details, see Chief Executive Board, United Nations (2011a, 2011b).

49. An example is seen in Aldana, Wee, Bossman, Quinones, Smith, & Zimmerman (2012).

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