In search of a tailored approach to anti-corruption sanctions in the international development context: financial remedies by the multilateral development banks[1]

Abstract

When anti-corruption sanctions are imposed by a multilateral development bank (MDB), factors relating to the institutions' overarching developmental goals must be reconciled in the process of a sanction determination. This article looks at the sanctioning policies and practices of five major MDBs to date and analyzes the importance of connecting and adapting the evolution of the sanctions regimes to the broader international development context. It examines the panoply of available sanctions and reflects on the use, or perhaps underuse, of financial sanctions, such as restitution and other financial remedies. Identifying a lack of consensus among MDBs and divergent approaches to imposing financial sanctions, the article further discusses the MDBs' options going forward – maintain the status quo, with its shortcomings; undertake harmonization efforts; or undertake an innovation effort similar to the series of reforms that have, over the past two decades, shaped the MDBs' remarkable sanctions systems. In this context, the research looks across leading common and civil law jurisdictions for principles and concepts from various disciplines that could be merged and kneaded into an alternative basis for the use of financial sanctions. The article envisages the formulation of an MDB-specific contractual clause that captures elements from two similar yet distinct concepts: "liquidated damages" from common law and a "clause penale," or penalty clause, from civil law jurisdictions. An anti-corruption "remedial clause" constructed of selected principles specific to the concepts of liquidated damages and penalty clauses, to be included in MDBs-financed contracts, might help overcome the sanctions systems' current challenges with imposing financial sanctions, thus leading to a more effective protection of MDB funds.

Introduction

While the concept of international development can be described in several ways, all definitions include the notion of addressing some of the toughest challenges of global society: poverty and inequality. Annually, ample financial contributions are made by development institutions toward improving the well-being of the poorest and most vulnerable people from around the world. Among the international development organizations, the multilateral development banks (MDBs) have specific features which have influenced the evolution of their responses to corruption. Once corruption was explicitly recognized by interdisciplinary research as a major hindrance to socio-economic development in the mid-1990s, MDBs acknowledged that corruption was an issue they needed to address through various entry points. Thus, MDBs began to assist countries that requested help to curb corruption by enabling them to build capable, accountable and transparent institutions, and with assistance on tackling tax reform, illicit financial flows, procurement reform, legislation and recovery of stolen assets, among others. But the MDBs also turned inward and established administrative mechanisms aimed at curbing fraud and corruption under MDB-financed projects.

[1] The observations, interpretations, and conclusions expressed herein are those of the authors and do not necessarily reflect the views of the World Bank Group or its Board of Directors. The authors would like to thank Frank Fariello, Leonardo Sempertegui, Collin Swan, Haiyue Xue, and Caroline Nagel Wachtell for their invaluable help in the preparation of this article.

These anti-corruption mechanisms sanction private entities that engaged in specific forms of corruption while competing for or implementing MDB-financed contracts. Over time, these early mechanisms evolved into formal administrative sanctions systems with the explicit purpose of protecting MDBs' funds from corrupt actors. The World Bank Group (WBG) and the Asian Development Bank (ADB) were the first two MDBs to establish anti-corruption sanctions systems in the late 1990s, followed by the Inter-American Development Bank (IDB), the European Bank for Reconstruction and Development (EBRD) and the African Development Bank (AfDB) in the next decade.[2] Since then, the MDBs have invested significantly in the evolution of their sanctions systems, including the diversification of the applicable sanctions, in an effort to achieve proportionate justice and enhance protection of the institutions' funds.[3] With more than 3,000 sanctions cases adjudicated across the MDBs to date, a key challenge remains how to design sanctions that provide flexibility and uphold proportionality while contributing to the MDBs' development mandate.

This article looks at the MDBs' sanctioning policies and practices to date and analyzes the importance of connecting and adapting the evolution of the sanctions regimes to the broader international development context. It seeks to examine the panoply of available sanctions and to reflect on the use, or perhaps underuse, of financial sanctions, such as restitution and other financial remedies. Identifying a lack of consensus among MDBs and divergent approaches to imposing financial sanctions, the article discusses the MDBs' options going forward – maintain the status quo, with its shortcomings; undertake harmonization efforts; or undertake an innovation effort similar to the series of reforms that have over the past two decades, shaped the MDBs' remarkable sanctions systems. In this context, the research looks across leading common and civil law jurisdictions for principles and concepts from various disciplines that could be merged and kneaded into an alternative basis to be used to operationalize the high-potential instrument of financial sanctions.

Financial sanctions are notable in that they reach beyond ineligibility (which is the typical result of MDB sanctions) and may ensure greater deterrence by providing a measurable consequence of misconduct and by minimizing the profitability of wrongdoing.[4] Importantly, in contrast with other available sanctions, financial remedies are forward-looking measures that many views as capable of providing a meaningful reaction to harmful misconduct by redirecting resources to attenuate, directly or indirectly, the harm done

[2] For the purpose of this article, the term multilateral development banks (MDBs) refers to the ADB, AfDB, EBRD, IDB and WBG. The WBG is composed of five institutions: International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA), International Financial Corporation (IFC), Multilateral Investment Guarantees Agency (MIGA), and International Centre for Settlement of Investment Disputes (ICSID). Together, IBRD and IDA make up the "World Bank."

[3] Inter-American Development Bank, 'Sanctions System: Overview' <www.iadb.org/en/about-us/idb-sanctions-system%2C8619.html> accessed 19 November 2018; African Development Bank, 'Sanctions System: Overview of the Sanctions System' <www.afdb.org/en/topics-and-sectors/topics/sanctions-system> accessed 19 November 2018; Asian Development Bank, 'Office of Anticorruption and Integrity' <www.adb.org/site/integrity/overview> accessed 19 November 2018; European Bank of Reconstruction and Development, 'Integrity and Compliance' <www.ebrd.com/integrity-and-compliance.html> accessed 19 November 2018; World Bank Group, *Sanctions System: Annual Report FY18* (2018) <http://pubdocs.worldbank.org/en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf> accessed 20 November 2018.

[4] Richard Thornburgh, Ronald L. Gainer, and Cuyler H. Walker, Report Concerning the Debarment Processes of the World Bank, (2002) < https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/ThornburghReport.pdf > accessed 19 November 2018, 63; Eugenia A. Pyntikova, "Exclusion and Rehabilitation: How Multilateral Development Banks Address Corrupt Behavior" (2018) 9 Jindal Global L. Rev. 43, 51.

in furtherance of developmental objectives. Underscoring the MDB's positive role as facilitators of loss recovery, an efficient use of financial remedies could close the loop on an effective protection of the institutions' funds which should be used as intended, to improve standards of living across the developing world.

MDBs-specific characteristics influencing the evolution of the MDBs' sanctions systems

Three MDB-specific characteristics influenced the origination, subjects and nature of the MDBs' sanctions systems. The MDBs were chartered to promote economic growth and thus have an apolitical character, with a specific mandate to not be influenced in their decisions by the political character of the governments that request funding.[5] Until the early 1990s, corruption was mainly perceived as a moral and political problem without any relation to economic development. This understanding of corruption traditionally precluded the MDBs from tackling the issue in any of its forms. By the mid-1990s, however, research in economics and sociology recognized a direct and negative correlation between corruption and economic growth.[6] In 1996, the then-President of the WBG, the largest MDB, gave a ground-breaking speech officially rejecting the old belief that corruption was a political problem and recognizing that corruption inhibits socio-economic growth.[7] This moment placed the issue squarely on the development agenda for the first time for a multilateral institution. It also marked the starting point of the WBG's response to corruption[8] fifty years into its history, including the adoption of measures intended to tackle corruption in WBG-financed projects, which subsequently evolved into a robust sanctions system, which the other MDBs have similarly instituted.[9]

Secondly, the MDBs' clients are mostly sovereign governments, which has two-fold implications ultimately leading to the MDBs' sanctions system limiting the parameters of who can be sanctioned to mainly private sector entities.[10] Some MDBs deem public entities, such as state-owned enterprises, or

[5] International Bank of Reconstruction and Development, Articles of Agreement, (2012) art. IV(10): "the Bank and its officers shall not interfere in the political affairs of any members; nor shall they be influenced in their decisions by the political character of the member or members concerned".

[6] Andrei Shleifer & Robert W. Vishny, "Corruption" (1993) 108 Q.J. OF ECON. 599, 600; Paolo Mauro, "Corruption and Growth" (1995) 110 QJ. OF ECON. 681; Ibrahim F.I. Shihata, "Corruption - A General Review with an Emphasis on the Role of the World Bank" (1997) 15 Penn State Int'l Law Rev. 454.

[7] James Wolfensohn delivered what is now known as the "Cancer of Corruption" speech during the WBG-International Monetary Fund Annual Meetings. James Wolfensohn, 'People and development: annual meetings address' (WBG-International Monetary Fund Annual Meetings, Washington, DC, 1 October, 1996) <http://documents.worldbank.org/curated/en/135801467993234363/People-and-development-annual-meetings-address-by-James-D-Wolfensohn-President> accessed 19 November 2018.

[8] The WBG anchored the legal basis for its sanctions regime in its 'fiduciary duty' to protect the use of the institutions' financing, set out in its Articles of Agreement which require the institution to make arrangements to ensure that financing provided by the Bank is used for its intended purposes and with due attention to economy and efficiency. International Bank of Reconstruction and Development Articles of Agreement (2012), art. III, § 5(b); International Development Association Articles of Agreement, (2012) art. V, § 6.

[9] World Bank, *Helping Countries Combat Corruption: Progress at the World Bank since 1997* (2000) <http://documents.worldbank.org/curated/en/280381468739163146/pdf/multi-page.pdf> accessed 19 November, 2018.

[10] Anne-Marie Leroy, *Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases*, No. 2010/1 (2010) < www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/AdvisoryOpinion.pdf> accessed 20 November, 2018, 32.

public officials susceptible to sanctions when they act in their individual capacity.[11] Thirdly, MDBs are international organizations dedicated to promoting socio-economic development. As such, these organizations have neither the power nor the mandate of sovereign jurisdictions to investigate and impose criminal sanctions when dealing with misconduct like fraud and corruption. Mindful of these limitations and in contrast to national criminal systems, the MDBs' sanctions systems are characterized as "administrative," having the primary purpose of protecting the institutions' funds.[12] This administrative nature implies that the system can be assessed and updated by the stakeholder institutions in a shorter period of time than national systems, which brings significant benefits. The administrative nature is also reflected in a series of elements that compose the system, including the range of applicable sanctions.[13]

With the narrowly-stipulated goal of protecting the institutions' funds, the MDBs adopted a general utilitarian, as opposed to punitive, approach in developing the sanctions toolbox. In the first phase of evolution, advanced by the WBG in a context with no similar precedent, the only available sanction was the exclusion, or debarment, of a sanctioned entity from the pool of eligible entities for Bank-financed contracts. This approach sought to simply render the contractor incapable of obtaining the institution's funds for a period of time. As the volume of sanctions cases and the associated impact increased, the institution acknowledged the need to better connect its sanctions regime to its overarching international development goals and expanded, as well as gradually calibrated, the range of applicable sanctions to a set reflecting all the elements of a utilitarian approach: deterrence, rehabilitation and restitution.

At different points in time, the other MDBs followed the WBG's model and developed similar sanctions systems as a formal tool against corruption and other harmful practices.[14] In 2006, the MDBs embarked in a harmonization effort starting with the adoption of a "Uniform Framework for Preventing and Combating Fraud and Corruption," which standardized the definitions of corruption and three other sanctionable practices,[15] and continuing with a 2010 landmark "Cross-Debarment Agreement," agreeing to mutually recognize and enforce the debarments of the other MDBs when they are longer than one year.[16] The MDBs further harmonized their systems by agreeing on "General Principles and Guidelines

[11] Another rationale lies in the doubtful deterrence effect exacted by an MDB-specific sanction over a public official. Instead, some MDBs make referrals of findings of misconduct by public officials to the national authorities, in an assumption that the prospect of national law enforcement would have a stronger deterrent effect. Frank A. Fariello, Jr. and Giovanni Bo, 'Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool' (2015) 6 World Bank Legal Rev. 415, 429.

[12] For a discussion regarding the "administrative nature" of the WBG's sanctions system, Laurence Boisson de Chazournes and Edouard Fromageau, 'Balancing the Scales: The World Bank Sanctions Process and Access to Remedies' (2012) 23 EJIL 972, 972-75.

[13] Eugenia A. Pyntikova, "Exclusion and Rehabilitation: How Multilateral Development Banks Address Corrupt Behavior" (2018) 9 Jindal Global L. Rev. 43 (note 4).

[14] The Asian Development Bank implemented its first Anticorruption Policy in 1998; the Inter-American Development Bank approved its first sanctions framework in 2001; the European Bank for Reconstruction and Development began investigating external contractors' misconduct in 2005; the African Development Bank established its integrity and anti-corruption system in 2006.

[15] The agreement harmonized the definitions of "corrupt practice," "fraudulent practice," "coercive practice" and "collusive practice." Asian Development Bank, 'Uniform Framework for Preventing and Combating Fraud and Corruption' <www.adb.org/publications/uniform-framework-preventing-and-combating-fraud-and-corruption> accessed 19 November , 2018.

[16] Asian Development Bank, Uniform Framework for Preventing and Combating Fraud and Corruption' <www.adb.org/publications/uniform-framework-preventing-and-combating-fraud-and-corruption> accessed 19 November ,

for Sanctions" and on "Harmonized Principles on Treatment of Corporate Groups," thus setting common sanctioning standards to ensure consistent treatment of entities in the determination of sanctions.[17] While differences among the MDBs' sanctions systems do exist, mainly with respect to procedural steps constituting each process, the overall approach remains common: a mainly adversarial system with both parties presenting evidence to at least one independent decision-maker who decides if the suspected misconduct occurred and if so, determines an appropriate sanction.

The MDBs' range of sanctions

All the MDBs have a shared range of applicable sanctions in accordance with the "General Principles and Guidelines for Sanctions."[18] The Guidelines highlight from the outset the administrative nature of the sanctions process and stipulate a non-exhaustive range of applicable sanctions:

- *Debarment*, involving a definite or indefinite period in which the sanctioned party is ineligible for the award of MDB-financed contracts.

- *Debarment with Conditional Release*, which involves a period of debarment after which the sanctioned party may become re-eligible for MDB-financing only if it complies with a set of defined conditions.

- *Conditional non-debarment*, allowing the party to remain eligible for MDB-financed contracts, subject to defined conditions it must fulfil within a determined period.

- *Letter of reprimand*, consisting of a letter of reprimand addressed to the sanctioned party.

- *Restitution and other financial remedies*, requiring the sanctioned party to make a restitution payment or provide other financial remedies to an identified party, or to take other actions to remedy the harm it perpetrated.

The Guidelines recommend a default sanction of "three years debarment (with or without conditional release)," adjustable depending on applicable mitigating and/or aggravating factors. Sanctions may be imposed singly or in combination, and some of them – letter of reprimand and restitution – may be applied as a condition that the sanctioned party needs to fulfill in order to avoid or be released from debarment. The Guidelines also recognize that MDBs may choose to add other types of sanctions. While

2018. Steve S. Zimmerman and Frank A. Fariello Jr., 'Coordinating the Fight against Fraud and Corruption: Agreement on Cross-Debarment among Multilateral Development Banks' (2011) International Financial Institutions and Global Legal Governance 189, 189-204.

[17] Inter-American Bank, 'Harmonization efforts with other International Financial Institutions' <www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/harmonization-efforts-with-other-international-financial-institutions%2C2708.html> accessed 20 November, 2018.

[18] African Development Bank, 'General Principles and Guidelines for Sanctions' <www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/General_Principles_and_Guidelines_for_Sanctions_2015.pdf> accessed 19 November, 2018.

some of the MDBs developed their own more detailed sanctioning guidelines[19], the MDBs' approach to sanctions remains generally harmonized, with two exceptions embodied by "private debarments" applied by the ADB and "fines" applied by the AfDB, which are discussed in more detail below.[20]

The MDBs' sanctions evolution and practice

The WBG, ADB and IDB have each sanctioned hundreds of entities, and the AfDB and EBRD have each imposed dozens of sanctions to date. The proportions of specific types of sanctions also vary across the MDBs' practice, with debarment in its various forms being by far the most commonly applied sanction. The early stages of the sanctions systems – particularly at the WBG and the ADB which started sanctioning in the 1990s – favored flat debarment (sometimes indefinite) considering that this was the only available sanction for misconduct. Under flat debarment, however, MDBs were left without any discretion as to whether sanctioned entities may become re-eligible for MDBs-financed activities upon the expiration of their debarment period and without any avenue to assess whether these entities have been rehabilitated or will simply re-engage in misconduct once they are allowed back into the pool of contractors.[21] These considerations have led the MDBs to explore further instruments that would help mitigate such residual fiduciary risks and ensure a better protection of the institutions' funds.[22]

The MDBs initially considered addressing this risk by establishing a "reinstatement" procedure upon expiration of the debarment period, whereby sanctioned parties would apply for re-eligibility and the relevant MDB would determine whether the party demonstrated "present responsibility" by considering all relevant factors before it regained eligibility. This potential approach was seen as providing the MDBs with the highest possible degree of assurance that a reinstated party would not engage in misconduct again. However, the first two MDBs to implement sanctions systems acted divergently on this idea. The ADB went ahead and added "debarment with conditional reinstatement" to its range of sanctions, making reinstatement possible upon a determination that the sanctioned party appears to be compliant.[23] The ADB may define conditionalities for reinstatement, such as improvements to the sanctioned party's ethics

[19] World Bank, 'The World Bank Sanctioning Guidelines' <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf> accessed 19 November, 2018.

[20] African Development Bank, 'AfDB levies $17 Million in Financial Penalties in Corruption Case'<www.afdb.org/en/news-and-events/afdb-levies-us-17-million-in-financial-penalties-in-corruption-case-12923/> accessed 19 November, 2018.

[21] Frank A. Fariello, Jr. and Anne Marie Leroy, *The World Bank Group Sanctions Process and Its Recent Reforms* (World Bank Group 2012).

[22] F. A. Fariello, Jr. and A. M. Leroy, *The World Bank Group Sanctions Process and Its Recent Reforms* (World Bank Group 2012), 14. The authors describe the WBG's experience with considering addressing this risk by establishing a procedure upon expiration of the debarment period whereby sanctioned parties would apply for "reinstatement" of their eligibility for World Bank-financed contracts. Such procedure would aim at demonstrating the party's "present responsibility" prior to becoming re-eligible.

[23] Asian Development Bank, 'Anticorruption and Integrity Strategy' (2010) <www.adb.org/sites/default/files/institutional-document/31317/anticorruption-integrity-policy-strategy.pdf> 22 November, 2018, 17-18; Asian Development Bank, 'Office of Anticorruption and Integrity Annual Report 2017' (2017) <www.adb.org/sites/default/files/institutional-document/408321/oai-ar2017.pdf> 22 November, 2018, 19.

and business controls, but parties who petition for reinstatement may be evaluated against a holistic look at their businesses beyond their compliance with the defined imposed conditions.[24]

The WBG, however, opted not to establish such a procedure, citing as problematic the highly discretionary nature of the reinstatement decision and the potential absence of defined conditions for reinstatement, as well as considering that an exclusive focus on the present responsibility of a party might alter the general deterrent effect of its sanctions.[25] In pursuit of a greater emphasis on rehabilitation, the WBG instead adopted a new sanction of "debarment with conditional release," whereby before a sanctioned party is released from a minimum period of debarment, the party is required to meet a defined set of conditions intended to incentivize remedial actions and mitigate the chances of recidivism.[26] In practice, the conditions focus mainly on requiring the sanctioned party to undertake remedial measures addressing the misconduct and to implement or improve an integrity compliance program tailored to its risks and profile.[27] Over time, the IDB, AfDB and EBRD have also included debarment with conditional release in their sanctions arsenals, and have further diversified the potential conditions. For example, in a few cases, the AfDB has required that sanctioned parties make a financial contribution to the institution to be used in anti-corruption initiatives as a condition to regain eligibility.[28] Additionally, the ADB has solicited some sanctioned parties to sponsor integrity compliance seminars for other companies in an effort to "promote integrity in the industry and/or region in which they operate."[29] IDB and EBRD appear to have limited their conditionalities to integrity compliance improvements, restitution and other remedial measures.

Conditional sanctions were deemed suitable in the development context to the point that stakeholders have suggested to shift the default sanction from debarment with conditional release to conditional non-debarment. However, the MDBs appear to have agreed that in cases of serious misconduct, the assumption is that a sanctioned party needs some time to change its culture to one of integrity; therefore

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[24] Asian Development Bank, 'Anticorruption and Integrity Strategy' (2010) <www.adb.org/sites/default/files/institutional-document/31317/anticorruption-integrity-policy-strategy.pdf> accessed 22 November, 2018, 17-18; Asian Development Bank, 'Office of Anticorruption and Integrity Annual Report 2017' (2017) <www.adb.org/sites/default/files/institutional-document/408321/oai-ar2017.pdf> accessed 22 November, 2018, 19.

[25] F. A. Fariello, Jr. and A. M. Leroy, *The World Bank Group Sanctions Process and Its Recent Reforms* (World Bank Group 2012) 15 (note 21). The authors also highlight that this approach might have endangered the World Bank's reputational risk if it decided to reinstate a party that subsequently engages again in misconduct, since "reinstatement" could be seen as the institution's "seal of approval."

[26] World Bank, 'World Bank's Sanctioning Guidelines' <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf> accessed 19 November, 2018.

[27] World Bank Group, 'Sanctions System: Annual Report FY18' (2018) <http://pubdocs.worldbank.org/en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf> accessed 22 November, 2018, 27.

[28] African Development Bank, 'Integrity in Development Projects: AfDB and SNC-Lavalin Settle Corruption Allegations' (2015) <www.afdb.org/en/news-and-events/integrity-in-development-projects-afdb-and-snc-lavalin-settle-corruption-allegations-14760/> accessed 22 November, 2018; African Development Bank, 'Integrity in Development: AfDB and Hitachi Ltd Conclude Settlement Agreement' (2015) <www.afdb.org/en/news-and-events/integrity-in-development-afdb-and-hitachi-ltd-conclude-settlement-agreement-15118/> accessed 22 November, 2018.

[29] Asian Development Bank, 'Office of Anticorruption and Integrity Annual Report 2017' (2017) <https://www.adb.org/sites/default/files/institutional-document/408321/oai-ar2017.pdf> accessed 22 November, 2018, 19.

debarment remains a vital sanction.[30] Moreover, the MDBs considered it important to get the balance of incentives right (by penalizing wrongdoing but rewarding self-cleaning and corrective actions) and to strike this balance, the MDBs try to incentivize the establishment of better compliance systems and increased recognition of remedial actions as a mitigating factor.[31]

Nevertheless, when evaluating the rate of sanctioned parties' compliance with conditions, the available data shows less than ideal overall rates of successful engagement with the system. This is particularly concerning given that absent the fulfillment of conditions attached to a debarment, an otherwise temporarily debarred party (with conditional release) becomes *de facto* permanently debarred. For example, at the WBG, which has the most experience with conditional sanctions, about one-third of the 328 parties debarred with conditional release by mid-2018 have failed so far to engage with the institution's Integrity Compliance Officer, which determines whether imposed conditions have been met.[32] The reasons for this lack of engagement may vary: some entities may be uninterested in receiving MDB-financed contracts in the future and therefore might not be disturbed by their ineligibility, while other entities may face difficulties in complying with conditionalities because of a lack of familiarity with integrity compliance standards.[33] Or possibly, the type of imposed conditionalities – requiring mostly the adoption of an integrity compliance program – need to be further diversified. Integrity compliance programs are believed to bring important benefits to companies in terms of preventing future corruption, but robust evidence for this belief is largely absent. Nevertheless, conditionalities seek to promote such programs based on a reasonable inference that, at the minimum, such programs do increase awareness that misconduct will have consequences and that "clean business" is good business when handling MDB financing.

While the impact of mainstreaming the adoption of integrity compliance programs as a condition to avoid or to be released from debarment remains to be empirically studied, from among the conditions identified so far in the MDBs' practice, financial conditionalities (i.e., restitution, fines) also stand out as resulting in tangible beneficial results for development effectiveness. According to all MDBs' sanctioning guidelines, a financial measure can be imposed as an independent sanction or as a conditionality to the more complex sanctions of debarment with conditional release or conditional non-debarment. The latter option might be more effective as debarment remains the only enforcement mechanism of other type of sanctions, given that MDBs' are non-sovereign organizations lacking the specific enforcement powers of

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[30] World Bank Group, 'Review of the World Bank Group Sanctions System, Global Multi-Stakeholder Consultations, Phase I: July–October 2013, Feedback Summary' (2013) <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/FeedbackSummaryPhaseI.pdf> accessed 22 November, 2018.

[31] World Bank Group, 'Review of the World Bank Group Sanctions System, Global Multi-Stakeholder Consultations, Phase I: July–October 2013, Feedback Summary' (2013) <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/FeedbackSummaryPhaseI.pdf> accessed 22 November, 2018, 8.

[32] The Integrity Compliance Officer (ICO) reaches out to debarred entities and assists them with meeting the conditions of their release from debarment. It monitors the entities' efforts and determines whether they have met the conditions and therefore are able to be released from debarment. World Bank Group, 'Sanctions System: Annual Report FY18' (2018) <http://pubdocs.worldbank.org/en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf> accessed 22 November, 2018, 15.

[33] F. A. Fariello, Jr. and G. Bo, 'Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool' (2015) 6 World Bank Legal Rev. 415, 424-25 (note 11).

national authorities. In practice, however, notwithstanding their obvious benefits, the use of financial sanctions by MDBs has proved to be challenging.

Use of restitution and financial remedies

As the MDBs' sanctions systems have matured and the impact of sanctions has increased, particularly with the advent of the 2010 Cross-Debarment Agreement, the MDBs have moved toward a framework allowing for more tailored sanctions to the point of today's range of applicable sanctions pliable to the circumstances of each case. A survey of the MDBs' practices to date shows that the prevalence of each type of sanction varies among the institutions. The IDB and ADB apply the sanction of fixed-term (or "flat") debarment most commonly, while the WBG and the AfDB use debarment with conditional release for most cases. The EBRD has imposed mostly conditional non-debarment so far.[34] Letters of reprimand and restitution appear to be the least utilized from among the range of common available sanctions. While the underuse of reprimands can be easily seen as having a symbolic value in the face of serious misconducts of the type investigated, the reasons underlying the underuse of restitution or "other financial remedies" are much more complex.

As briefly noted earlier, "restitution" and "financial remedies" are explicitly recognized as possible sanctions under the MDBs' harmonized sanctioning guidelines.[35] These terms are, however, rather ambiguous and the existing public guidelines do not offer much clarification. A review of the concepts of restitution and financial remedies across common and civil law jurisdictions indicates three different understandings of the concepts:

- *Compensation or damages (or civil penalty).* This view focuses on the party harmed by the misconduct and requires the wrongdoer to undertake payments or actions to repair the harm. This non-punitive understanding of the concepts, specific to national tort and contracts law, generally tends to limit restitution/financial remedies to the cost of restoring the status quo prior to the misconduct.[36]

- *Disgorgement of illicit profits.* Focused rather on the wrongdoer who is considered to have engaged in misconduct to obtain a profit and has thus been unjustly enriched, disgorgement is not designed to punish but as a tool for preventing unjust enrichment.[37] Justice considerations mandate that the wrongdoer give up the illicitly obtained profits, which means that disgorgement is limited to the amount earned through the illicit activities.[38]

[34] European Bank of Reconstruction and Development, 'Integrity and Anti-Corruption Report 2017' <www.ebrd.com/integrity-and-compliance.html> accessed 22 November, 2018, 22.
[35] World Bank, 'General Principles and Guidelines for Sanctions' <http://lnadbg4.adb.org/oai001p.nsf/0/CE3A1AB934F345F048257ACC002D8448/$FILE/Harmonized%20Sanctioning%20Guidelines.pdf> accessed 22 November, 2018, para. 3(f).
[36] Restatement of Torts (Second), (US 1979), § 901; Restatement of Contracts (Second), (US 1981), § 344; David Pearce and Roger Halson, 'Damages for Breach of Contract' (2008) 28 Oxford J. Legal Studies 73.
[37] For example, in US law, disgorgement is an equitable remedy authorized by the Securities Exchange Act of 1934 that is used to deprive wrongdoers of their ill-gotten gains and deter violations of federal securities law.
[38] Ewoud Hondius and Andre Janssen, *Disgorgement of Profits: Gain-Based Remedies Throughout the World* (Springer 2015).

- *Fines.* The imposition of fines focuses on the harm caused by the wrongdoer to the public good and is unrelated to either the harmed party or the wrongdoer. As such, the limits for fines are determined by the system employing them depending on the type of offense they address and often take the form of mere punishment.[39]

While support for the first two forms of "restitution" and "financial remedies" can be easily distinguished in the MDBs' sanctions theoretical frameworks, only the IDB mentions explicitly "fines" in its sanctions procedures, however, limiting them as "reimbursement of the costs associated with the investigations" and sanctions proceedings.[40] As discussed in more detail below, the AfDB's procedures have come to be interpreted as also providing a basis for the use of fines under an "other sanctions" provision.

According to available data, financial sanctions have been rarely used in the MDBs' practices to date. Although this type of sanction became an option more than ten years ago, the WBG has applied restitution and other financial remedies in only 12 of its 580 cases,[41] the AfDB has applied fines in 7 of its 15 cases[42] and the IDB has requested restitution in 2 of its 437 cases.[43] The ADB, which has applied 1629 sanctions[44] and the EBRD, which has applied 28 sanctions[45], have not imposed any financial sanctions to date. This arguable underuse of financial sanctions raises two main questions. The first question relates to the degree to which the MDBs intended to mainstream such sanctions into their systems in the first place. The second, depending on the first, seeks to clarify whether financial sanctions are indeed "underused," and if yes, what could be the underlying reasons for such underuse.

One indicator in gauging the MDBs' openness to employing financial remedies could be the level of effort invested in the evolution of their sanctions systems, including the upgrading of the applicable sanctions. The MDBs' sanctions processes have been through a series of iterations and reforms aimed at providing the system with a variety of instruments to tackle corruption and other misconducts in their development projects. The MDBs devoted significant resources toward the improvement of their

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[39] The U.S. Sentencing Commission provides guidelines both on how to calculate fines for organizations operating mainly for criminal purpose and for all other organizations. United States Sentencing Commission, 'Primer: Fines under the Organizational Guidelines' (2017) <https://www.ussc.gov/sites/default/files/pdf/training/primers/2017_Primer_Organizational_Fines.pdf> accessed 18 November, 2018.

[40] Inter-American Development Bank, 'Sanctions Procedures' (2015) § 8.2.5, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39676437> accessed 22 November, 2018.

[41] As of October 31, 2018. The figure represents the total number of sanctions cases since restitution and other financial remedies were adopted as potential sanctions in 2006. The total number of sanctions cases since the system was established (in 1998) is 912.

[42] African Development Bank, 'Sanctions Office Annual Report 2017' (2017) <www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Sanctions_Office__SNSO_-Annual_Report__2017.pdf> accessed 22 November, 2018, 19.

[43] Inter-American Development Bank, 'Office of Institutional Integrity and Sanction System Annual Report 2016' (2016) <https://publications.iadb.org/bitstream/handle/11319/8434/Office-of-Institutional-Integrity-and-Sanctions-System-Annual-Report-2016.pdf?sequence=3&isAllowed=y> accessed 22 November, 2018, 36; Inter-American Development Bank, 'Office of Institutional Integrity and Sanction System Annual Report 2017' (2017) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1138756496-150 accessed 22 November, 2018.

[44] The figure represents the total number of sanctions cases since the system's inception, thus not necessarily since restitution and other financial remedies became an applicable sanction. Asian Development Bank, 'Anticorruption and Integrity: Sanctions' <www.adb.org/site/integrity/sanctions> accessed 19 November, 2018.

[45] European Bank of Reconstruction and Development, 'Integrity and Compliance' <www.ebrd.com/integrity-and-compliance.html> accessed 19 November, 2018.

sanctions systems, with the overall objective of maximizing their effectiveness and efficiency, including by enhancing their independence and transparency, and with the more specific objective of achieving proportionate justice, by expanding the range of sanctions beyond debarment to include other four sanctions in an effort to provide tools that uphold flexible and proportional sanctions. If the range of sanctions has been diversified and upgraded to achieve proportionate justice, then it can be reasonably expected to see at least some more than marginal percentages of cases resulting in restitution and other financial remedies, even in the case of the MDBs that explicitly indicate that restitution and other financial remedies, may "be used in exceptional circumstances," such as the WBG.[46]

Financial sanctions are notable in that they reach beyond ineligibility and can potentially ensure greater deterrence by providing a measurable consequence of misconduct and by minimizing the profitability of wrongdoing.[47] Importantly, in contrast with some other available sanctions, financial remedies are forward-looking measures capable of providing a meaningful reaction to harmful misconduct by redirecting resources in furtherance of developmental objectives. Underscoring the MDBs' positive role as potential facilitators of loss recovery, an efficient use of financial remedies may close the loop on an effective protection of the institutions' funds.

Notwithstanding their positive potential, in practice, financial remedies have been rarely used, likely mainly due to the challenging nature of two key issues: calculating the quantum of the sanction and identifying the appropriate beneficiary of the amount.[48] The challenge of identifying an appropriate beneficiary has been addressed in different ways by the three MDBs with experience in imposing financial sanctions – in most cases, the WBG has redirected the funds to the governments that implemented the project affected by the misconduct; the AfDB has collected the fines into a trust fund, the African Integrity Fund, with the intent of disbursing the funds for regional integrity initiatives; and the IDB, in one case, redirected the funds to the community affected by the misconduct.[49] An analysis of the broader issue of identifying the appropriate beneficiary of the payment and the mechanics of the transaction is beyond the scope of this paper, but it merits further study in the context of the MDBs' divergent responses to the issue and the thought-provoking questions it poses.

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[46] World Bank, 'World Bank's Sanctioning Guidelines' § II(F) <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf> accessed 19 November, 2018.

[47] R. Thornburgh, R. L. Gainer, and C. H. Walker, Report Concerning the Debarment Processes of the World Bank (2002) < https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/ThornburghReport.pdf > accessed 19 November 2018, 63 (note 4); E. A. Pyntikova, "Exclusion and Rehabilitation: How Multilateral Development Banks Address Corrupt Behavior" (2018) 9 Jindal Global L. Rev. 43, 51 (note 4).

[48] F. A. Fariello, Jr. and G. Bo, 'Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool' (2015) 6 World Bank Legal Rev. 415, 426 (note 11); Inter-American Development Bank, 'Office of Institutional Integrity and Sanction System Annual Report 2017' (2017) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1138756496-150> accessed 22 November, 2018, 63.

[49] As of mid-2018, AfDB collected USD 55 million in fines. African Development Bank, 'Establishment of the African Integrity Fund' (2016) <www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Establishment_of_the_African_Integrity_Fund.pdf> accessed 22 November, 2018. In 2017, for example, upon a settlement with the World Bank Group in relation to findings of corrupt practices in the Democratic Republic of Congo, the Seves Group agreed to pay a financial remedy of Euro 6.8 million to the DRC government. World Bank, 'World Bank Settles with Seves Group, Debars Sediver SAS' (*World Bank*, 5 December 2017) <www.worldbank.org/en/news/press-release/2017/12/05/world-bank-group-settles-with-seves-group-debars-sediver-sas> accessed 22 November, 2018.

The MDBs have responded to the greater challenge of calculating the quantum of financial sanctions by employing different views of the financial remedies concept. The WBG and IDB's practice could be best described as applying financial sanctions in the form of "compensation or damages" and "disgorgement of illicit profits." This view of financial remedies, however, comes with a series of associated problems that may often prove insurmountable in practice. When viewing financial sanctions as a form of compensation or damages (or civil penalty), the payable quantum equals the costs of the harm done. However, the extent of the harm is often extremely difficult if not impossible to determine, especially if indirect harm such as unfulfilled potential (typical to acts of corruption) is to be taken into consideration. When looking at financial sanctions as a form of disgorgement, the amount to be paid equals the value of the wrongdoer's illicit gain. Determining such an amount requires distinguishing between licit and illicit profits and identifying a causal link between the illicit activity and the profit to be disgorged. But, in practice, proving such a causal link and calculating the illicit profits can involve complexities that may be beyond the scope of the sanctions systems' decisionmakers, especially where an uncooperative party may refuse to provide documentation regarding profits made. In the absence of clear assessment criteria, the MDBs' sanctions systems' decisionmakers have rarely issued financial sanctions. Most likely this explains why virtually all cases involving financial remedies have been resolved through settlements.[50] The settlement mechanism provides a platform for determining a quantum acceptable to both parties, rather than an MDB decisionmaker attempting to measure the harm done by a sanctionable practice or the illicit profit made by the sanctioned party. Given the absence of clear and more granular public guidance on how to overcome such calculation challenges and the relatively uncommon resolution of cases through settlements, the MDBs have made little use of a potentially effective sanction, with the exception of the AfDB.

The AfDB has appeared to embrace the use of fines. Under this view of financial remedies, the amount is not calibrated to either the harm caused or the wrongdoer's illicit profit. The AfDB's use of fines relies on a provision of its Sanctions Procedures which stipulates that "other sanctions" may be applied, including "but not limited to" reimbursements of the costs associated with the investigations and proceedings.[51] As of mid-2018, the AfDB has collected approximately USD 55 million in fines pursuant to settlements in seven cases, but the guidelines for setting each fine have not been published.[52] The idea of imposing fines has been discussed by other MDBs as well in the past, emphasizing that fines could be an effective way to sanction contractors without the anticompetitive effects of debarments affecting various markets and without the unpredictable economic impact of debarments on excluded parties.[53] But

[50] Out of the World Bank's 12 sanctions involving financial remedies, only 1 case was resolved through sanctions proceedings. *See* World Bank Group Sanctions Board, 'Decision No. 53' (involving overbilling, where the contractor admitted to overbilling by a certain amount). AfDB's 7 cases involving financial sanctions were all settled through negotiated agreements. For more information about case resolution through settlements, see, *i.e.*, World Bank Group, 'Sanctions System: Annual Report FY18' (2018) <http://pubdocs.worldbank.org/en/227911538495181415/WBG-SanctionsSystemARFY18-final-for-web.pdf> accessed 22 November, 2018, 22.

[51] African Development Bank, 'AfDB Sanctions Procedures' § 11.2(g) <www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/AfDB_Sanctions_Procedures_-_November_2014.pdf> accessed 18 November, 2018.

[52] African Development Bank, 'AfDB establishes Africa Integrity Fund' <www.afdb.org/en/news-and-events/afdb-establishes-africa-integrity-fund-16359/> accessed 11 November, 2018.

[53] For a discussion about the downsides of debarment, Tina Søreide, Linda Gröning, and Rasmus Wandall, 'An Efficient Anticorruption Sanctions Regime? The Case of the World Bank' (2016) 16 Chicago J. Int'l L; E. A. Pyntikova, 'Exclusion and Rehabilitation: How Multilateral Development Banks Address Corrupt Behavior' (2018) 9 Jindal Global Law Review, 53-54

a set of concerns ultimately discouraged the other MDBs from applying fines. Among other things, concerns included the perception that corrupt contractors might view fines as an attractive way to "buy their way out" of debarments. MDBs also noted that fines might lead to inequities for smaller companies and individuals who do not have the abundant financial resources of large companies. On the other hand, for companies with rich coffers, fines might not have as much deterrent effect as debarments, although, to increase deterrence, fines could be attached to a debarment period (to be calculated mindful of the proportionality principle). Concerns elated as well to a lack of legal basis for MDBs – as non-sovereigns – to levy fines, but this could be avoided by using fines as a component of a more complex sanction including debarment.[54]

More fundamental – and top among the reasons for lack of consensus among MDBs – are the concerns related to the punitive connotation of fines, which possibly contradicts the MDBs' consistent assertion that their sanctions systems are not meant to be punitive but protective and of an administrative nature.[55] As was noted in the report of former U.S. Attorney General Richard Thornburgh, which has guided the evolution of the WBG's sanctions regime, in any sanctions system, the nature of the available sanctions depends upon the overall goal of the system, and the particular purposes sought to be achieved by the imposition of sanctions in individual cases passing through the system.[56] In an utilitarian system, such as that employed by the MDBs, the broader goal can be characterized, arguably, as segregating out actors that engage in harmful practices so as to leave a pool of honest firms to undertake MDB-financed project. The system is not intended to achieve its goal through punitive measures but rather through administrative measures such as incapacitation, rehabilitation and deterrence.

Recognizing the MDBs' relative disuse of restitution and other financial remedies and the evident lack of consensus among MDBs regarding the use of fines, the MDBs can be viewed as having three options: (1) continue the currently divergent practices with all the associated challenges, (2) reflect whether to support the harmonization of guidelines on the use of restitution and fines across the MDBs, or (3) explore further options in the area of financial remedies via innovation. The first two options are relatively unattractive due to multiple reasons, partly discussed above. The third option opens the door to innovation, perhaps by designing entirely new instruments, or more prudently, by rethinking the basis for applying financial sanctions which would lead to their enhanced use.

Alternative basis for financial remedies

(note 4). Arguably, the threat of fines might still negatively affect the competition in some markets. In markets where few companies wish to enter, the risk of sanctions – including fines - reduce the number of interested companies and therefore make those markets more vulnerable to anti-competitive conduct.

[54] F. Fariello and G. Bo, 'Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool' (2015) 6 World Bank Legal Review 415, 427.

[55] F. Fariello and A. Leroy, *The World Bank Group Sanctions Process and Its Recent Reforms* (World Bank Group 2012) 15 (note 21); L. B. de Chazournes and E. Fromageau, 'Balancing the Scales: The World Bank Sanctions Process and Access to Remedies' (2012) 23 European Journal of International Law, 972-75 (note 12); E. A. Pyntikova, 'Exclusion and Rehabilitation: How Multilateral Development Banks Address Corrupt Behavior' (2018) 9 Jindal Global Law Review, 47, 51 (note 4).

[56] R. Thornburgh, R. L. Gainer, and C. H. Walker, 'Report Concerning the Debarment Processes of the World Bank' (2002) <www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/ThornburghReport.pdf> accessed 23 November, 2018, 59.

In consideration of the foregoing, experience suggests that there may be an opportunity to rethink or expand the MDBs' sanctions "toolkit" with a view towards complementing the MDBs' broader developmental goals. While remaining mindful of the sanctions systems' administrative nature and protective role, including by deterring future wrongdoing, this section discusses a potential alternative basis for rendering the instrument of financial sanctions more functional.

Following the MDBs' practice of creating administrative law by importing and adjusting concepts and elements from various legal systems and disciplines, one idea could be the formulation of an MDB-specific contractual clause that captures elements from two similar yet distinct concepts: "liquidated damages" from common law and a "clause penale," or penalty clause, from civil law jurisdictions.[57] Rooted in contract law, both clauses respond to the parties' difficulties in anticipating, calculating or proving losses likely to flow from a subsequent breach of contractual obligations.[58] Parties seek to eliminate dealing with these often insurmountable difficulties by agreeing ahead of time on the amount to be paid to the non-breaching party in case of breach. Such clauses are fundamentally justified by the non-feasibility or inconvenience of otherwise obtaining an adequate remedy and are not intended to provide a basis for the parties to pay their way out of contractual obligations.

Notwithstanding their common elements, liquidated damages and penalty clauses differ in scope, although recent research has suggested that the former would benefit from adopting a scope more similar to the latter's.[59] A liquidated damages clause is designed in an attempt to provide for just compensation in case of contractual breach. To the extent that it is not merely compensatory and might have punitive intent or effect, the clause becomes unenforceable.[60] In other words, liquidated damages are not allowed as a punishment and, in common law practice, have been deemed enforceable "as long as 'the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression.'"[61]

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[57] One dilemma in the comparison between common and civil law is the confusion of terminology regarding these clauses. This confusion arises because in some countries, whether under civil code or doctrine or case law, both concepts are recognized and the terms are used interchangeably. In the UNICITRAL uniform rules relating to liquidated damages and penalty clauses, this problem has been solved by simply referring to both as "contract clauses for an agreed sum due upon failure of performance." J. Frank McKenna, 'Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison' (*Lexology* 2008) <www.lexology.com/library/detail.aspx?g=d413e9e1-6489-439e-82b9-246779648efb> accessed 18 November, 2018.

[58] Charles R. Calleros, 'Punitive Damages, Liquidated Damages, and Clauses Penales in Contract Actions: A Comparative Analysis of the American Common Law and the French Code Civil' (2006) 32 Brooklyn Journal of International Law 67.

[59] Solene Rowan, *Remedies for Breach of Contract* (Oxford University Press 2012) 175.

[60] The U.S. approach is illustrated by the Uniform Commercial Code § 2-718 and the Restatement of Contracts (Second) § 356: the key feature for upholding the validity of a liquidated damages clause is whether the amount of damages specified is "reasonable." The purpose of liquidated damages under both is to compensate the injured party, but not to penalize the breaching party. Thus, only a "reasonable" amount of liquidated damages will be enforceable. Under the Restatement, the two factors to consider when making a judgment of reasonableness are (1) anticipated or actual loss caused by the breach, and (2) the difficulty of the proof of loss. The first factor examines whether the compensation provided by the liquidated damages is reasonable as compared to the loss which occurred as a result of the breach. The second factor looks at whether the loss would be difficult to prove given the elements that must be met to claim compensatory damages in general (i.e., under Restatement § 351 damages must be foreseeable and certain). Similarly, under the UCC, whether liquidated damages provisions may be upheld depends on (1) the anticipated or actual harm caused by the breach, (2) the difficulties of proof of loss, and (3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

[61] *DF Mfg. Corp. v. United States*, 86 F.3d 1130, 1134 (Fed. Cir. 1996) (quoting *Wise v. United States*, 249 U.S. 361, 365 (1919)).

However, where actual damages are proved, the fact that they may be less, or more, than the amount specified in the liquidated damages clause is insufficient by itself to render the clause unenforceable.[62] Moreover, liquidated damages may be collected even if actual damages are not proved. [63]

The approach is quite different in civil law jurisdictions, inspired by the Napoleonic code, where a penalty clause is inserted in a contract with the intention of encouraging the fulfillment, or deterring non-fulfillment, of obligations, rather than merely ensuring compensation in case of a contractual breach.[64] Unlike the case of liquidated damages, a penalty clause may establish the amount independently of the estimated damages and remain enforceable even if the amount appears to be disproportionate to the actual damage when this can be proved. However, no proof of any real damage is needed to enforce a penalty clause. In practice, civil law judges will reduce penalty amounts, based on factors similar to those considered in common law for determining whether a liquidated damages clause is penalizing, if part of the main contract obligation has been performed and the penalty thus appears to be "manifestly excessive."[65]

Variations can be found, for example, in Chinese and Indian law. The latter provides for an interesting mix of elements from common and civil law by not making a distinction between liquidated damages and penalties, and thus allowing for contractual damages in case of breach even if the intention is to deter non-fulfillment of obligations, and regardless of evidence of actual loss. [66] According to a similar type of clause in Chinese law, parties may prescribe that if one party breaches a contract, it will pay a certain sum to the other party in light of the degree of the breach or prescribe a method for calculation of damages for the loss resulting from the party's breach.[67]

An anti-corruption "remedial clause" in the MDBs sanctions context

A "remedial clause" built on selected principles specific to the concepts of liquidated damages and penalty clauses, to be included in MDBs-financed contracts, might help overcome the sanctions systems'

[62] *Sun Printing & Publishing Ass'n v. Moore*, 183 U.S. 642 (1902).

[63] Despite the longevity of the view that punitive damages are not available in common law for breach of contractual obligations, there is growing academic research supporting a reconsideration. Solene Rowan, *Remedies for Breach of Contract* (Oxford University Press 2012) 175 (note 59).

[64] Before April 2018, the Article 1226 of the French Civil Code stipulated the following: "La clause pénale est celle par laquelle une personne, pour assurer l'exécution d'une convention, s'engage à quelque chose en cas d'inexécution." ("The penalty clause is the one by which a person, to ensure the execution of an agreement, commits to (to) something in case of inexecution.") Upon the enactment of the Law 2018-287 of April 20, 2018, the penalty clause is regulated in Article 1231-5 of the Civil Code. The Italian legislative provisions pertaining to penalty clauses are based on the French Civil Code. Harriet N. Schelhaas, 'The Penalty Clause in European Contract Law' (2004) <www.trans-lex.org/128555> accessed 26 November, 2018; Francesco Paolo Patti, 'The New English Law on Penalty Clauses: An Italian Perspective' (2017) 25 European Review of Private Law 227.

[65] For a brief overview of court decisions across European jurisdictions, J. Frank McKenna, 'Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison' (*Lexology* 2008) <www.lexology.com/library/detail.aspx?g=d413e9e1-6489-439e-82b9-246779648efb> accessed 26 November, 2018.

[66] Section 74 of the Indian Contract Act: "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for." Indian Contract Act,§ 74 (India).

[67] Contract Law of the People's Republic of China, Article 114(1) (China 1999).

current challenges with imposing financial sanctions, thus leading to a more effective protection of MDB funds. The envisaged "remedial clause" would require the contractor to pay a specific percentage of the contract's value in the event that the MDB finds that the contractor engaged in a sanctionable practice.

A particularly attractive advantage of such a "remedial clause"– and what may make this approach superior to the current status quo and other prior proposals – is its practicality. The use of the "remedial clause" would eliminate the burden of quantifying the damages caused by the wrongdoing or the illicit profits of the wrongdoer. In the same vein as liquidated damages and penalty clause provisions, this "remedial clause" would be justified by the often-insurmountable difficulties of proving actual loss resulting from corruption and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. Inspired by the common law approach, the "remedial clause" would seek to compensate for the loss presumed to result from a corrupt act, although, designed along the principles found in civil law, the clause would allow for the imposition of financial remedies even if proportionality cannot be established between the stipulated amount to be paid as remedy (quantified as a percentage of the contract value) and the actual damage.

Other ideas to help boost the use of the entire range of MDBs' sanctions, especially of restitution, include a proposal to request "community service" as a form of in-kind restitution. A company found to have engaged in corrupt acts would be required to serve the community affected by its misconduct by repairing the harm caused or by providing goods, works or services to benefit the community.[68] The idea is particularly meritorious in that it holds the sanctioned party accountable in a way that directly addresses the harm done to development effectiveness, thus contributing directly to the MDBs' goals. Notwithstanding its many other merits, the value of the service to be provided to the community remains a difficult issue. In most cases where the actual harm cannot be quantified, the cost of the community service would be a notional value calibrated to the seriousness of the wrongdoing according to what is considered needed to act as effective deterrence against future wrongdoing. But such an approach renders the sanction riskily akin to applying a fine and, as discussed above, applying fines does not currently appear to be considered a feasible option across MDBs.

Using a "remedial clause," however, would address the persistent issue of determining the value of the remedy to be paid, along with most challenges associated with applying financial sanctions discussed above. In contrast with applying fines, using a "remedial clause" as a basis for financial sanctions shift the focus away from punitive connotations of financial sanctions other than amounts involving strictly the direct actual loss or the exact illicit gain. The underlying intention of the "remedial clause" would subscribe to a more comprehensive protection of MDBs' funds by not only excluding corrupt actors from MDB financing but also ensuring that they contribute to tackling, in one way or another, the harm done by their misconduct. In furtherance of this, debarment would still have a central role in directly protecting the MDBs' funds from contractors that have engaged in misconduct, as paying remedies pursuant to a "remedial clause" would generally be coupled with debarment. Wealthier contractors would therefore not find this to be an attractive alternative to debarment. Less wealthy contractors could perhaps make the payments in installments over a period in which they could transition to conditional non-

[68] F. Fariello and G. Bo, 'Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool' (2015) World Bank Legal Review 415 (note 11).

debarment, in order to avoid creating inequities, although, to some extent, such difficulties are attenuated by the remedy consisting of a percentage of the contract's value.

An equally desirable effect would be an arguable increase in deterrence. A "remedial clause" would communicate more effectively the risks of engaging in sanctionable practices and would make the consequences of being sanctioned tangible to any MDB contractor. Deterrence and punishment are often thought of together, but the latter sanctions the culpability of the wrongdoer usually in proportion to the seriousness of his misconduct, while the former attempts to influence the future behavior of the wrongdoer and others.[69] The effect of the financial sanctions, as supported by a "remedial clause," would be deterrence, not punishment. Deterrence is particularly important for the effectiveness of sanctions as an anti-corruption tool in the international development context. The MDBs' sanctions systems likely do not reach close to all contractors that engage in fraud and corruption on MDB-financed projects. In this context, the overall effectiveness of an MDB sanctions system depends on the demonstration effects of the imposed sanctions and on the level of general deterrence it generates against wrongdoing. For purposes of deterrence, debarment is considered, generally, to be a potent sanction in view of the potential loss of future MDB-financed business, as well as because of the collateral reputational costs debarment may involve.[70]

In terms of sanctions policy and a more specific framework, the MDBs would need to tackle several challenges, among which a primary one would be whether paying the remedy enshrined in the "remedial clause" would serve as a separate independent sanction from restitution as currently used, or serve as a backup and be triggered based on a principle of subsidiarity (thus used only when restitution cannot be calculated as disgorgement or compensation). Other primary concerns include whether such a "remedial clause" should be inserted in all MDB-financed contracts and attached to all sanctionable practices and all types of respondents, or reserved for a certain category of contracts, selected sanctionable practices and a particular class of respondents. For example, MDBs could limit the use of such clause to contracts implemented in areas of the world or industries categorized as "high-risk" based on internal indicators. In terms of the value set in the "remedial clause," MDBs could set a fix percentage of the contract's value in all cases, or set different percentages depending, for example, on the sanctionable practice and the applicable aggravating or mitigating factors. Essentially, each MDB could tailor its method of putting this idea into practice, depending on varying objective and subjective limitations.

In terms of procedural advantages, such a "remedial clause" would remove the burden of calculating financial sanctions from the MDBs' sanctions systems' decision-makers. The quantum of a financial sanction is difficult to measure, except in the limited cases of fraudulent overbilling, which explains why most of the MDBs' cases involving financial sanctions to date have been settled through negotiated agreements. But based on a "remedial clause," the quantum of financial sanctions would be already calculated before a sanctions case even began. To ensure enforcement, MDBs could consider requiring contractors to cause "remedial bonds" to be issued in the relevant MDB's favor. Such a "remedial bond" bond would be designed along the principles of performance bonds required to guarantee the performance of contracts. In case a sanctionable misconduct occurs, the MDB would then be guaranteed payment of

[69] Solene Rowan, *Remedies for Breach of Contract* (Oxford University Press 2012) 172 (note 59).

[70] For a discussion about the deterrence value of potential reputations costs, arguing that financial sanctions are a more effective threat to control misconduct, Scott Baker and Albert H. Choi, 'Reputation and Litigation: Why Costly Legal Sanctions Can Work Better than Reputational Sanctions' (2018) 47 The Journal of Legal Studies 45-82.

the remedy by the guarantor. Arguably, in the current context of a globally uneven playing field, a strict enforcement aspiring at reducing overall levels of corruption through deterrence might result in clients moving away toward lenders and donors with less related constraints. However, the MDBs can address this challenge by increasing harmonization of standards and enforcement with other financiers and donors, in the same vein as they managed to coordinate their systems and prompt others, such as the Asian Infrastructure Investment Bank, to establish similar ones.[71]

Conclusion

Each year, the MDBs commit hundreds of billions of dollars in loans, grants, equity investments and guarantees to their partner countries and private businesses in pursuit of a world without extreme poverty and deep inequality [72] The MDBs have built remarkable sanctions systems in an effort to protect the efficient and effective use of these funds. Notwithstanding such efforts, the MDBs need to enhance their positive role as facilitators of loss recovery. Restricting access of a corrupt contractor to further financing through debarment removes the risk of further waste of resources by this contractor, but it leaves the harm done by the misconduct, often severe, unaddressed. Although the MDBs have acknowledged the importance of financial remedies by integrating them into their sanctions toolbox, difficulties relating to determining an appropriate quantum have led to their relative disuse. Including an anti-corruption "remedial clause" in the MDBs-financed contracts may help overcome the sanctions systems' current challenges with imposing financial sanctions, thus leading to a more comprehensive protection of MDB funds. While the envisaged idea might not provide for a perfect mechanism or solution, it tackles in an efficient and predictable (for all stakeholders) manner issues that have been so far challenging for all MDBs.[73] Considering the high stakes of addressing the harm done to development effectiveness, it might be worth discussing how to further refine the idea and exploring whether this could be feasible, and if yes, how to best tailor it, in the MDBs' specific context.

[71] The Asian Infrastructure Investment Bank (AIIB) has recently established an Integrity System aimed at investigating and sanctioning misconduct, including corruption, in the projects it finances. Pascale Hélène Dubois et. al., 'The World Bank's Sanctions System: Using Debarment to Combat Fraud and Corruption in International Development' (2018) AIIB Yearbook of International Law 129, 133-35.

[72] "Dollars" refer to United States dollars. For example, in fiscal year 2018, the World Bank Group committed 66.9 billion dollars. World Bank, 'Annual Report 2018' (2018) <http://www.worldbank.org/en/about/annual-report> accessed 26 November, 2018.

[73] For some of the MDBs, such as the WBG, a "remedial clause" partially inspired by and adapted from a civil law jurisdiction concept also responds to external suggestions that the WBG should make sure that its system is not "Americanized," as it must be understood by different legal traditions and systems around the globe. World Bank Group, 'Review of the World Bank Group Sanctions System, Global Multi-Stakeholder Consultations, Phase I: July–October 2013, Feedback Summary' (2013) <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/FeedbackSummaryPhaseI.pdf> accessed 26 November, 2018.