The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape

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It has been five years since the multilateral development banks (MDBs) adopted a new initiative, the Agreement for Mutual Enforcement of Debarment Decisions (AMEDD). The AMEDD enables the MDBs to recognize and enforce the sanctions decisions of other institutions participating in the AMEDD, thereby multiplying the effect of one institution’s sanctions on a debarred party. The AMEDD has been subject to legal tests that have called into question the sanctions processes of the MDBs. This article assesses challenges faced by the MDBs when implementing the AMEDD, the range of sanctions actions taken, enforcement trends, and the impact of sanctions—particularly cross-debarment—on corporate entities and individuals. In the past five years, the MDBs have faced significant challenges to their sanctions regimes while attempting to combat fraud and corruption and to increase good governance practices and investments in their MDB programs and economies. Given the lofty goals of the AMEDD, it is timely to consider whether it has met these goals and what its achievements have been.

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Note: The content of this article reflects the personal opinion of the authors and is not the official position of the European Bank for Reconstruction and Development. The authors would like to thank Rebecca Green and the editors of the Harvard International Law Journal for their excellent editorial work and valuable insights and suggestions.
I. INTRODUCTION

When a large multinational company obtains financing from a multilateral development bank (MDB) for a project in a developing country through fraudulent or corrupt actions, such as submitting false accounting statements or paying bribes to officials involved in the project, the primary recourse available to MDBs is to sanction the entities and individuals involved. Previously, an entity or individual sanctioned by one MDB would be barred from future projects with that same MDB but could nevertheless apply for financing from another MDB. However, in the spring of 2010, five institutions—the African Development Bank Group (AfDB), the Asian Development Bank (AsDB), the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank Group (IADB), and the World Bank Group (World Bank)—entered into a landmark agreement, the Agreement for Mutual Enforcement of Debarment Decisions (AMEDD), wherein they agreed to recognize and enforce the sanctions decisions of the other MDBs participating in the AMEDD. In the past five years, a great deal has been written about the enforcement mechanisms of the participating institutions following the concerted effort to create a wider reach for sanctions.¹ This discourse has addressed the AMEDD’s significant impact in deterring and preventing corruption, as well as the efforts of the participating organizations to enhance harmonization and cooperation in their enforcement mechanisms.

Given that it has been five years since the AMEDD’s adoption, this article assesses challenges the MDBs face when implementing the AMEDD, the range of sanctions actions taken, enforcement trends including conditional debarments and settlements, and the impact of sanctions actions, in particular cross-debarment, on

corporate entities and individuals. Since the AMEDD, debarments with conditional release and negotiated settlements have appeared more frequently in the enforcement landscape. Both conditional debarments and negotiated settlements resulting in a debarment are eligible for cross-debarment, although settlements afford scope for an entity or individual to negotiate the terms of debarment and subsequent cross-debarment.

The purpose of this article is to explore areas where there has been increased harmonization with respect to enforcement actions and settlements, challenges that exist with respect to further harmonization and implementation by participating institutions, and issues faced by corporate entities and individuals who have engaged with sanctions proceedings and settlements in the five years since the adoption of the AMEDD.

II. ENFORCEMENT ACTIONS THAT MAY BE ISSUED BY PARTICIPATING INSTITUTIONS

A. General Principles and Guidelines for Sanctions

The participating institutions, along with the European Investment Bank (EIB) and the International Monetary Fund (IMF), adopted General Principles and Guidelines for Sanctions in 2006. The General Principles and Guidelines detail the range of enforcement actions envisaged by the participating institutions and ensure a measure of consistency among the participating institutions. The range of sanctions can include but is not limited to the following, more than one of which may be issued against a sanctioned entity or individual:

1. Debarment for a set minimum period of time, following which the sanctioned entity or individual may be

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3 Id.
4 Id. § 3.
released from debarment;

(2) **Debarment with conditional release or reinstatement**, whereby the sanctioned entity or individual may be released from debarment or be granted a reduced debarment period should the sanctioned entity or individual comply with conditions imposed by the participating institution at the time of debarment;

(3) **Permanent or indefinite debarment**, whereby it appears that there are “no reasonable grounds” for rehabilitation of the sanctioned entity or individual through compliance or other conditions;

(4) **Conditional non-debarment**, whereby the sanctioned entity or individual must comply with specific remedies or other preventive actions in a certain timeframe in order to avoid debarment;

(5) **Letter of reprimand**, which, in most cases, addresses minor or isolated violations or a lack of oversight; and

(6) **Restitution/financial remedies**, which may be imposed when “there is a quantifiable amount to be restored.”

In addition to the range of sanctions agreed upon in the General Principles and Guidelines, there are further sanctions that may be imposed, some of which are unique to each of the participating institutions. For example, the EBRD Enforcement Policy and Procedures specify two additional enforcement actions that may be issued by its Enforcement Committee: (1) rejection of a procurement contract that is proposed to be awarded to a sanctioned entity or individual and (2) cancellation of a portion of EBRD financing not yet disbursed to the sanctioned entity or individual for an existing procurement contract. The AfDB’s

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5 *Id.* § 3(c).
6 *Id.* § 3(f).
Sanctions Commissioner or Appeals Board and the IaDB’s Sanctions Committee may also impose fines that represent reimbursement of the costs associated with the investigation and proceedings. Furthermore, the AsDB’s Integrity Principles and Guidelines mention that its decision making body may issue a caution where a party has committed a lapse not amounting to an integrity violation, which in the case of AsDB matters is an instance of “ordinary” negligence. As of November 2015, all MDBs with the exception of the AsDB provide for settlements as part of their enforcement mechanisms.

With respect to length of the debarment term, the base sanction recommended by the General Principles and Guidelines is debarment for a three-year period, which may be increased or decreased depending on mitigating or aggravating circumstances. Aggravating circumstances that must be considered when determining the debarment period include:

- The severity of the violation as evidenced by repeated sanctionable conduct, the use of “sophisticated means,” whether the party had a “[c]entral role” in the violation, the

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involvement of management, and whether the misconduct involved a public official or staff member from an international financial institution;  
• The harm caused to public welfare or to the project;  
• Any interference with the investigation, including the intimidation or payment of a witness and the refusal to participate in the investigation; and  
• Other circumstances, such as a “[p]ast [h]istory of sanction by any Institution” or the “violation of a sanction or temporary suspension.”

Mitigating circumstances that must be considered and which may decrease a debarment term include:

• Whether the party played a minor role in the sanctionable conduct;  
• The initiation of voluntary corrective action, such as terminating the sanctionable conduct prior to the investigation (not in response to it), the payment of restitution, and the implementation of measures to prevent misconduct; and  
• Cooperation in the MDB’s inquiry into the misconduct, the initiation of an internal investigation, and “[a]dmission/acceptance of guilt/responsibility.”

The sanctioning procedures of the World Bank and the AsDB clearly state that they recommend a three-year base period of debarment for integrity violations.

B. Conditional Release as a Default Sanction

Debarment with conditional release is arguably the sanction most frequently issued by the institutions participating in the

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12 General Principles and Guidelines for Sanctions, supra note 2, § 5.  
13 Id.  
14 Id.  
15 Id.  
16 Id. § 6.  
17 Id.  
18 Id.
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Of the cross-debarments issued by the EBRD between 2011 and 2014, the majority of the sanctions imposed were debarments with conditional release as opposed to debarments for a fixed term.

Since the adoption of the AMEDD, the World Bank has issued the greatest number of debarments eligible for cross-debarment by far and is the participating institution that also provided the most financing among the MDBs to MDB-funded projects. Of the entities and individuals sanctioned by the World Bank in 2014 and who are eligible for cross-debarment, virtually all of these debarred parties are subject to debarments with conditional release. For the 2014 fiscal year, the World Bank reported sixty-four debarments, as well as seven instances of other sanctions imposed (two instances of conditional non-debarment and five letters of reprimand). Of the sixty-four debarments, the length ranged from six months to eleven years; four debarments had lengths of one year or less and were not eligible for cross-debarment. In contrast to the base sanction of three years recommended by the General Principles and Guidelines, the most frequent length of debarment issued by the World Bank for 2014 is a period of two years, followed by a debarment period of three years. The average debarment term issued for the sixty-four debarments was slightly

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20 See id.
24 Id.
25 Id.
over three years.\(^{26}\)

The AfDB and World Bank have stated that their baseline sanction is debarment with conditional release, the World Bank’s baseline sanction since 2010.\(^{27}\) This approach means that debarment with conditional release is ordinarily the sanction issued by these two institutions unless there are conditions that justify issuing another sanction.\(^{28}\)

The stated rationale behind debarment with conditional release is to encourage the rehabilitation of the sanctioned entity or individual.\(^{29}\) Under the terms of debarment with conditional release, the sanctioned party will be debarred for a minimum period of time and must demonstrate compliance with one or more remedial or preventative conditions.\(^{30}\) In most instances, this condition requires an improved corporate compliance program and remedial measures against the parties who engaged in the misconduct, such as reassignment or termination.\(^{31}\) Sanctioned parties are incentivized, if not required, to adopt specific conditions to deter misconduct, reduce integrity risks, and send a message of compliance within the company and externally.\(^{32}\)

1. The World Bank Integrity Compliance Office

Not all participating institutions have issued debarments with conditional release, which suggests that in practice it is not the default sanction of all participating institutions. In 2014, only AfDB and the World Bank issued debarments with conditional release for the consideration of other participating institutions for

\(^{26}\) Id. The average debarment period for the sixty-four sanctioned entities or individuals for 2014 is nearly three years and one month based on this data.

\(^{27}\) Id. at 18. See also World Bank Group’s Sanctions Regime: Information Note [hereinafter WBG Sanctions Information Note], http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf; AfDB Enforcement Procedures, supra note 8, § 11.1.

\(^{28}\) WB Sanctioning Guidelines, supra note 11, § II(A).

\(^{29}\) Id.

\(^{30}\) See, e.g., id. See also General Principles and Guidelines for Sanctions, supra note 2, § 3(b).

\(^{31}\) Id.

\(^{32}\) Id.
cross-debarment; the debarments issued by the EBRD, IaDB, and AsDB for cross-debarment were all debarments for fixed debarment periods.\footnote{Cross Debarred Entities, supra note 19.}

A significant consideration for institutions that have imposed or anticipate imposing sanctions of debarment with conditional release is that they have in place the function necessary to monitor integrity compliance requirements. As an example, to oversee the implementation of debarments with conditional release, the World Bank established an Integrity Compliance Office in September 2010 to have primary oversight over the satisfaction of debarment condition(s).\footnote{World Bank, Sanctions and Compliance, http://web.worldbank.org/WEBSITE/EXTERNAL/EXABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:21182440~menuPK:2452528~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html (lasted visited Nov. 15, 2015)} The complex procedures the Integrity Compliance Office has established for monitoring compliance underscore the burden such monitoring imposes on institutions:

- “As soon as practicable” after a sanction of conditional non-debarment or debarment with conditional release has been issued against a party by the World Bank Sanctions Board or an Evaluation and Suspension officer (EO), the Integrity Compliance Officer will advise the party of the specific conditions that must be met.\footnote{World Bank Sanctions Procedures, supra note 10, § 9.03(a).} The Integrity Compliance Officer is then responsible for monitoring compliance by the sanctioned party and may impose requirements such as periodic reporting, the use of an independent monitor, auditing by an external body, and inspection of the sanctioned party’s business records.\footnote{Id. § 9.03(b).}
- The sanctioned party must make an application (Application) in order to be considered for release. For example, the Application must show evidence of the implementation of an integrity compliance program or remedial actions and supporting statements.\footnote{Id.} Other pertinent information such as additional misconduct,
debarments by other MDBs, or other criminal, civil, or regulatory penalties based on similar misconduct must also be disclosed.\footnote{Id.}

- Following receipt of an Application to be considered for release, the Integrity Compliance Officer will begin a review within thirty days of receipt to assess whether the sanctioned party has met the conditions for non-debarment or release from debarment.\footnote{Id., § 9.03(d).} Once the Integrity Compliance Officer has assessed the veracity of the Application, he will make a determination and notify the sanctioned party of his decision.\footnote{Id.} If the Integrity Compliance Officer determines that the sanctioned party has not complied with the release conditions, he will extend the period of debarment for a period of time.\footnote{Id.} The sanctioned party may then re-apply for release.\footnote{Id.}

The World Bank’s review of its sanctions regime for the period 2011–2014 has raised questions concerning the implementation costs for conditional release debarments for both the sanctioning institution and the debarred party, given the time and resources implications for both parties.\footnote{World Bank Grp., Review of the World Bank Group Sanctions Regime 2011–2014, Phase 1 Review: Stock-Taking, para. 36 [hereinafter WB Discussion Brief Phase 1 Review], https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctionsreview_initiatingdiscussionbrief.pdf.} The sanctioning institution would need to have sufficient resources to engage with the debarred party and identify areas for improvement, to monitor on a regular basis compliance with the conditions imposed, and to assess whether the party has met the conditions for release. The timeframe required to complete the conditional release process, in most cases is eighteen months.\footnote{See Bart Stevens & Robert Delonis, \textit{Leveling the Playing Field: A Race to the Top}, \textit{5 World Bank Legal Rev.} 413–14 (2013).} The debarred party would have to provide information so the compliance officer can assess any integrity risks and its
corporate compliance program, if it has one. Debarred entities may be required to engage an independent auditor or compliance monitor to assess their progress, and debarred individuals may have to undertake specific integrity-related training. In order for debarment with conditional release to be most effective, there needs to be regular engagement between the compliance officer and the debarred party—a time-consuming and costly requirement.

2. Costs for Large Corporations Versus SMEs

In practice, many small and medium-sized enterprises (SMEs) subject to debarment with conditional release have not taken the steps necessary to engage with the Integrity Compliance Officer following their sanction or have not followed through with the conditions for release. Such entities may operate in an environment where there is little familiarity with compliance programs or there is no compliance “culture” to engage compliance monitors or guidance on best practices. Other entities may decide that the costs of implementing a compliance program outweighs the benefits of doing business with an MDB and may decide to remain debarred. This lack of engagement suggests that the sanctioning institution may need to consider additional strategies to engage with debarred entities. MDBs may need to consider further the types of compliance programs and measures that are “affordable” to an SME (which may not be able to pay for an independent auditor or compliance monitor). If the sanctions regime does not take into consideration the costs of compliance, entities with deeper pockets that are able to pay these costs will be released from debarment whereas entities in a different financial position will not be.

While debarment with conditional release has been the default

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45 Id. at 412–13.  
46 Id.  
47 Id. at 414.  
48 WB Discussion Brief Phase 1 Review, supra note 43, at 11–12.  
49 Stevens & Delonis, supra note 44, at 413–14.  
50 Id. at 414.  
51 Id.
sanction of the World Bank, an internal review recommends revisiting whether this should be its baseline sanction. The review considered the implementation costs for both the sanctioning institution and the debarred party, as well as the apparent limited engagement by SMEs and their lower retention rate in meeting the conditions for release when compared with other corporate entities. The fact that some entities have little opportunity to succeed in meeting the conditions for release means that the sanction is essentially a default indefinite debarment which may then result in a default indefinite cross-debarment. This suggests that smaller organizations that could not meet the conditions for release of the sanctioning MDB may have fared better before the AMEDD. To address these concerns and to increase engagement with SMEs, the World Bank has been developing corporate compliance materials, diagnostic resources, and other guidance for SMEs. Furthermore, the internal review considered whether there should be greater variety in the sanctions imposed, given that a “one size fits all” approach may not necessarily achieve the desired outcome.

III. SETTLEMENTS: AN INCREASING TREND IN ENFORCEMENT ACTION

Not all enforcement actions arise from an adjudicative determination made by the participating institution’s decision making authority. In recent years, a growing number of enforcement actions have been the result of settlement agreements made by a participating institution and the sanctioned party. Settlements have increasingly become a topic of interest in relation to enforcement actions, especially in light of recent high-value settlements announced by the World Bank and the AfDB. MDBs

52 WB Discussion Brief Phase 1 Review, supra note 43, at 12. The World Bank has completed Phase I of the review of its sanctions regime, while a Phase II of the review is planned.
53 Id.
54 Id.
55 Stevens & Delonis, supra note 44, at 414.
56 WB Discussion Brief Phase 1 Review, supra note 43, at 11.
57 Id. at 9.
58 Id. at 10.
expect that settlements will have an ever increasing role in the enforcement landscape, but their long-term effectiveness has yet to be seen.\footnote{59}{Id.}

As of November 2015, the AfDB, EBRD, IaDB and the World Bank provide for settlements in their policies and procedures, whereas the AsDB does not.\footnote{60}{Compare AfDB Enforcement Procedures, supra note 8, § 15, and IaDB Enforcement Procedures, supra note 8, § 15.4, and WB Sanctions Procedures, supra note 10, art. 11, with AsDB Enforcement Procedures, supra note 9, §§ 79–87.} The World Bank introduced a formal mechanism for settlement in 2010,\footnote{61}{FARIELLO & LEROY, supra note 1, at 20; see also WB Sanctions Procedures, supra note 10, § 15.} the AfDB formally adopted its settlement process in 2012,\footnote{62}{Interview with Anna Bossman, Director of IACD, on Settlement Agreements, AFRICAN DEV. BANK (May 28, 2014), http://www.afdb.org/en/news-and-events/article/interview-with-anna-bossman-director-of-iacd-on-settlement-agreements-13242/ [hereinafter IACD Interview]; see also AfDB Enforcement Procedures, supra note 8, § 15.} the IaDB introduced settlements into its sanctions procedures in June 2015,\footnote{63}{IaDB Enforcement Procedures, supra note 8, § 15.4.} and the EBRD introduced settlements in its revised enforcement procedures in November 2015.\footnote{64}{EBRD Enforcement Procedures, supra note 7, § XIV.} According to the General Principles and Guidelines for Sanctions, settlement negotiations may be entered into by the respondent and the sanctioning institution’s investigative office at any time prior to a sanctions decision.\footnote{65}{General Principles and Guidelines for Sanctions, supra note 2, § 8.} Once parties have reached a settlement agreement, however, it cannot be appealed by the sanctioned entity or individual.\footnote{66}{Id.} Furthermore, a sanction resulting from a settlement agreement is recognized by other participating institutions as if the sanction was decided by the decision maker’s sanctions authority.\footnote{67}{Id.} Accordingly, entities and individuals who settle with a participating institution are eligible for cross-debarment.\footnote{68}{See Press Release, World Bank, Enforcing Accountability: Italian Company Lotti to Pay US$350,000 in Restitution to Indonesia after Acknowledging Fraudulent Misconduct in a World Bank-Financed Project, World Bank Press Release 2011/279/INT (Dec. 22, 2010), http://www.worldbank.org/en/news/press-release/2011/12/22/enforcing-accountability-italian-company-lotti-pay-us350000-restitution-indonesia-after-acknowledging-fraudulent-misconduct-world-bank-financed-project. The first settlement
A. **MDB Settlement Processes**

This section explores the similarities and differences amongst the MDB settlement processes. The World Bank’s settlement process, the longest-established settlement mechanism, is set out first as a basis for comparison.

The World Bank’s settlement process is detailed within the World Bank’s Sanctions Procedures and provides for the following steps:

- A joint request to stay proceedings may be made by INT and a respondent to the EO at any time during sanctions proceedings. Requests to stay proceedings are granted in most instances.\(^6\)
- A signed settlement agreement or Negotiated Resolution Agreement (NRA) may be submitted to the EO by INT and a respondent prior to or during sanctions proceedings, so long as the settlement agreement is settled before a Sanctions Board decision has been issued.\(^7\) Both INT and the respondent must certify that they entered into the agreement freely and fully informed of its terms and without duress.\(^8\)
- Settlement agreements must first receive clearance from the World Bank’s general counsel, who reviews the terms and conditions of the settlement agreement.\(^9\) The settlement agreement is then reviewed by the EO, who verifies that the settlement agreement does not violate the Bank’s

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\(^6\) WB Sanctions Procedures, *supra* note 10, at § 11.01.

\(^7\) *Id.*, § 11.02.

\(^8\) *Id.*

procedures or guidance concerning sanctions.\textsuperscript{73}

- If the EO determines that the settlement agreement does violate the Bank’s procedures or guidance as to sanctions or that the respondent did not enter into the agreement freely and fully informed of its terms, the EO will inform INT and the respondent of this; the settlement agreement will be terminated without prejudice.\textsuperscript{74}

- INT is responsible for determining compliance by the respondent with the terms and conditions of the settlement agreement and addresses issues of interpretation and performance unless otherwise stated in the settlement agreement.\textsuperscript{75} The respondent may nevertheless appeal compliance determinations according to the procedures set forth in the World Bank Sanctions Procedures.\textsuperscript{76}

- A settlement agreement may provide for restitution to the borrower or “to any other party.”\textsuperscript{77}

- In addition to NRAs, another form of settlement may be a deferral agreement that “freezes” the sanctions proceedings for a set period of time while the respondent performs specific conditions under the terms of the agreement.\textsuperscript{78} Once the conditions have been met, the matter may be settled. However, if the respondent does not meet its conditions or breaches its conditions during the deferral period, sanctions proceedings will be reinstated.\textsuperscript{79}

The MDB settlement processes are broadly similar, with some more detailed than others. The IaDB’s sanctions procedure contains perhaps fewer details on its settlement process compared to the other MDBs, whereas the EBRD is the most recent MDB to introduce settlements.\textsuperscript{80} Nevertheless, there are a number of noteworthy distinctions amongst the MDB settlement processes:

\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} WB Sanctions Procedures, supra note 10, at § 11.02(d).
\item \textsuperscript{75} Id., § 11.04.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id., § 9.01 (e).
\item \textsuperscript{78} FARIETLO & LEROY, supra note 1, at 20.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} IaDB Sanctions Procedures, supra note 8; EBRD Sanctions Procedures, supra note 7.
\end{itemize}
• **Timing of Settlements:** A key distinction noted in IaDBs procedures is that IaDB may enter into a settlement agreement with a party prior to or during an investigation, but not after the Sanctions Officer receives a Statement of Charges. In contrast, the EBRD states that settlements should be *concluded* prior to a decision by its Enforcement Commissioner, the first-tier of its sanctions process, whereas the AfDB and the World Bank allow settlement agreements to be *submitted* prior to a decision by their Appeals Board and Sanctions Board, respectively, the second-tier of their sanctions processes.

• **Stay of Proceedings:** The respondent and the investigations unit of the AfDB, EBRD, and WB may jointly apply to stay proceedings to conduct settlement negotiations, with the WB procedures allowing for a stay application to be made even prior to the commencement of sanctions proceedings. The World Bank’s EO determines whether or not to stay proceedings, whereas at AfDB and EBRD it is the relevant decision-maker in the first or second tier of the sanctions process, depending on the stage of proceedings. Furthermore, for these MDBs, the submission of a settlement agreement for review will automatically stay proceedings. The IaDB’s procedures do not specify details on staying proceedings.

• **Review of Settlement Agreements:** At AfDB, EBRD, and World Bank, the relevant decision maker in the first tier of the sanctions process, along with the general counsel,

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81 IaDB Enforcement Procedures, *supra* note 8, § 15.4.
reviews settlement agreements. The IaDB procedures do not specify in detail who reviews settlement agreements.

B. Restitution or Remedy in Settlement Agreements

All MDBs may impose restitution or remedy on a sanctioned party as part of a settlement agreement. Although an initial review of the sanctions procedures of these institutions suggests that their restitution and remedies provisions are similar, there are distinct differences:

• Restitution: According to the World Bank sanctions procedures, the sanctioned party may be required to pay restitution to the borrower “or to any other party” or to take actions to remedy the harm done by its misconduct. With respect to the EBRD, the sanctioned party may be required to pay restitution to “another party” or to the EBRD. In contrast, the AfDB limits restitution to the AfDB, the client country, and the project or program. The IaDB and AsDB do not expressly define who may receive restitution.

• Quantifiable Amount: AfDB’s sanctions procedures state that the amount of the restitution or financial remedy must be quantifiable, whereas the IaDB and AsDB do not expressly state that restitution must be quantifiable. EBRD allows for restitution of diverted funds or the amount representing the economic benefit obtained by the respondent. While the World Bank sanctions procedures also do not expressly state that the restitution or remedy

89 See generally IaDB Enforcement Procedures, supra note 8.
90 WB Sanctions Procedures, supra note 10, § 9.01 (e).
91 EBRD Enforcement Procedures, supra note 7, § 11.2(vii).
92 AfDB Enforcement Procedures, supra note 8, § 11.2.
93 IaDB Enforcement Procedures, supra note 8, § 8.2.5; AsDB Enforcement Procedures, supra note 9, § 86(ii).
94 AfDB Enforcement Procedures, supra note 8, § 11.2; see generally IaDB Enforcement Procedures, supra note 8; and AsDB Enforcement Procedures, supra note 9.
95 EBRD Enforcement Procedures, supra note 7, § 11.2(vii).
must be quantifiable, the World Bank’s sanctioning guidelines mention that restitution and other remedies, including financial remedies, are appropriate in “exceptional circumstances” such as where there is a quantifiable amount to be restored to the client country or project.96

• Remedies: The AfDB and World Bank sanctions procedures allow for remedies, but specific remedies that may be envisaged by either participating institution are not expressly stated in their procedures.97 In contrast, the AsDB sanctions procedures detail a range of remedial actions.98 The IaDB and EBRD sanctions procedures do not expressly mention remedies.99

• Reimbursement of Costs. The AfDB expressly states that fines may be imposed to reimburse the costs associated with investigations and proceedings.100 However, the AfDB’s sanctions procedures do not clarify how the AfDB would account for such costs or whether these costs must be quantifiable in the same way as damages caused by the sanctioned party’s misconduct.101 The IaDB allows for fines representing reimbursement of costs associated with investigations and sanctions proceedings.102 The World Bank, AsDB, and EBRD do not expressly state whether they may impose fines as reimbursement for costs relating to their investigations and sanctions proceedings.103

At present, these distinct differences appear to reflect differing practices adopted by each MDB, rather than an express divergence in their approach to restitution or remedy. These practices may be areas for future harmonization, given the efforts by the MDBs in

96 WB Sanctioning Guidelines, supra note 11, § II(F).
97 AfDB Enforcement Procedures, supra note 8, § 11.2; WB Sanctions Procedures, supra note 10, § 9.01 (e).
98 See AsDB Enforcement Procedures, supra note 9, §§ 67-68.
99 See generally IaDB Enforcement Procedures, supra note 8; EBRD Enforcement Procedures, supra note 7.
100 AfDB Enforcement Procedures, supra note 8, § 11.2.
101 Id.
102 IaDB Enforcement Procedures, supra note 8, § 8.2.5.
103 See WB Sanctions Procedures, supra note 10; EBRD Enforcement Procedures, supra note 7; AsDB Enforcement Procedures, supra note 9.
recent years to establish greater uniformity in their sanctions mechanisms.

C. Admissions in Settlement Agreements

Admission of culpability is not a requirement for settlement in any of the MDB settlement processes. A World Bank study suggests that settlement may be appropriate in certain cases for a respondent who, although unwilling to admit culpability, is willing to resolve the matter. For example, the respondent may be interested in resolving the matter quickly, reducing the expenditure of resources on sanctions proceedings, or having certainty as to the outcome. Accordingly, settlements without the admission of guilt may not only be desirable for respondents who wish to resolve the matter quickly, but also for the MDB. Both parties may benefit from the certainty of outcome, greater cooperation by the respondent, as well as payment of restitution or financial remedies.

Nevertheless, in practice, there are indications that the respondent’s “full admission” of the facts amounting to sanctionable conduct and acceptance of culpability is “non-negotiable.” In instances where a respondent admits to the facts, but does not admit guilt, settlement is nevertheless possible in both circumstances. However, an MDB may view an admission of guilt more favorably when negotiating settlement. Such an admission of guilt not only underscores the MDB’s authority but may result in a more meaningful settlement because the respondent has agreed to cooperate with the MDB and has accepted culpability, a mitigating factor, which may result in a reduced debarment.

D. Settlement Trends and Current Legal Issues regarding Settlements

104 See AfDB Enforcement Procedures, supra note 8; AsDB Enforcement Procedures, supra note 9; EBRD Enforcement Procedures, supra note 7; IaDB Enforcement Procedures, supra note 8; and World Bank Sanctions Procedures, supra note 10.
105 See FAILO & LEROY, supra note 1, at 21–22.
106 Id.
107 WB Discussion Brief Phase 1 Review, supra note 43, para. 28.
108 See IACD Interview, supra note 62.
1. **Recent Settlements**

Settlements are appearing more frequently on the enforcement landscape, which suggests that they have become less of an exceptional recourse to resolve enforcement proceedings. The number of settlement agreements submitted by the World Bank’s investigative unit to the EO between 2011 and 2014 is notable when compared to the number of sanctions cases issued by the EO to the respondent. ¹⁰⁹ Nevertheless, based on data provided by the World Bank, it appears that the number of settlements submitted to the EO by INT has fluctuated in recent years, which may reflect that its settlement mechanism is a relatively new aspect of its sanctions regime and the settlement system is being tried against a number of varying situations. ¹¹⁰ Any future trends in the number of settlements will be worth exploring in upcoming years, in particular as settlements are a relatively recent development in the enforcement landscape.

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<td>EO by INT</td>
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<td>Total sanctions cases issued by</td>
<td>44</td>
<td>49</td>
<td>33</td>
<td>52</td>
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<td>the EO to respondents and</td>
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<td>settlement agreements submitted</td>
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<td>to the EO by INT</td>
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Table 2: World Bank Sanctions Cases Issued by the EO to Respondents and Settlement Agreements Submitted to the EO by INT


The AfDB and the World Bank recognize that settlement agreements can be mutually beneficial to the parties involved because they provide greater certainty of outcome and realize more efficiencies in time and resources.\textsuperscript{111} The World Bank has also found that respondents who settle are more engaged in the sanctions process and may agree to cooperate with other investigations.\textsuperscript{112} They are also more likely to meet the terms required for conditional release, such as paying restitution or implementing the specified compliance program, as opposed to those who do not enter into settlement agreements.\textsuperscript{113}

The AfDB and the World Bank have recently announced several high-value settlements, which include the following:

- In December 2014, AfDB announced that it entered into a negotiated settlement agreement with China First Highway Engineering Co. Ltd. (CFHEC), following an admission of fraudulent and collusive practices in an AfDB-financed project. AfDB imposed a “financial penalty” of $18.86 million and a three-year debarment with conditional release on CFHEC. The financial penalty will support projects and initiatives to prevent and combat corruption in AfDB’s member countries in Africa.\textsuperscript{114}

- In March 2014, AfDB entered into a settlement agreement with three entities— Kellogg Brown & Root LLC, Technip S.A., and JGC Corp.—which agreed to pay $17 million in financial penalties to the AfDB ($6.5 million, $5.3 million, and $5.2 million respectively). The three entities admitted corrupt practices by affiliated companies concerning the award of a contract for liquified natural gas production plants in Nigeria. Under the settlement agreement, three affiliated entities that made corrupt payments totaling $180

\textsuperscript{111} WB Discussion Brief Phase 1 Review, supra note 43, at 10; IACD Interview, supra note 62.

\textsuperscript{112} WB Discussion Brief Phase 1 Review, supra note 43, at 10.

\textsuperscript{113} Id.

million were debarred for three years. The overall contract volume was $6 billion, of which AfDB contributed $100 million in financing.\(^\text{115}\)

- In 2012, the World Bank entered into an NRA with Alstom. As part of the settlement, Alstom Hydro France and Alstom Network Schweiz AG (Switzerland) paid $9.5 million in restitution and were debarred with conditional release for three years. Alstom acknowledged misconduct, specifically that it made an improper payment of €111,000 in 2002 to an entity for a consultancy services contract on a World Bank-financed project. Alstom SA and other affiliates were conditionally non-debarred during the three-year sanctions period.\(^\text{116}\)

- Prior to the AMEDD, the World Bank announced a settlement agreement with Siemens AG in 2009, which related to a corruption investigation involving a Siemens subsidiary in Russia. Siemens committed to pay $100 million over 15 years to support anti-corruption work such as “providing funds to organizations and projects aimed at combating corruption through collective action, training, education. The money will also be directed to helping governments to recover assets stolen by corrupt leaders, and strengthening efforts to identify and crack-down on corrupt practices.”\(^\text{117}\) Under the agreement, the World Bank Group retained audit and veto rights over the use of these funds.\(^\text{118}\)

2. Current Legal Issues Regarding Settlements


\(^{118}\) Id.
i. Are Settlement Payments Punitive?

The MDBs that allow settlements have not harmonized their approach to settlement payments, and indeed, there is significant divergence in this area. This divergence in approach suggests that a large company may benefit from a settlement mechanism that allows for punitive damages by paying punitive damages in exchange for a reduced debarment term. Several recent settlement agreements go beyond an entirely restorative element and contain punitive measures when assessing the settlement amount. In jurisdictions that allow punitive damages, monetary compensation that exceeds what is necessary to compensate the injured party for its losses is awarded in exceptional cases to punish the wrongdoer. Punitive damages are not expressly provided for in the sanctions procedures of the World Bank. The AfDB, on the other hand, has characterized some of its financial settlements as financial penalties, which suggests that its settlements contain a punitive element. It is not clear how multimillion dollar settlements have been calculated by participating institutions and the respondent and whether the amount is intended to be restorative and/or related to reimbursement of investigation and proceedings costs, particularly as settlement agreements terms are not widely disclosed and are subject to less public scrutiny. For example, in the CFHEC settlement, the AfDB did not specify how much of the $18.86 million financial penalty was restorative and whether this amount included any other financial remedies or reimbursement of costs associated with investigations and proceedings.

To promote greater transparency, MDBs should consider disclosing their guidelines on how financial penalties—including restitution, financial remedies, and investigation costs—are calculated. For example, with respect to restitution, a sanctioning institution may attempt to calculate amounts directly lost or gained.

119 See Integrity in AfDB Projects, supra note 114; AfDB Levies US $17 Million in Financial Penalties in Corruption Case, supra note 115.
120 See World Bank Sanctions Procedures, supra note 10.
121 See AfDB Levies US $17 Million in Financial Penalties in Corruption Case, supra note 115; Integrity in AfDB Projects, supra note 114.
122 See generally WB Discussion Brief Phase 1 Review, supra note 43, para. 30.
123 Integrity in AfDB Projects, supra note 114.
For fraud this calculation may be an amount that is overpaid or overbilled. In other matters, such as corruption, collusion, or coercion, the calculation may be the profit obtained by the respondent that would not have been awarded but for the misconduct. Restitution may even be calculated as the value of the contract or award received but for the misconduct.MDBs may consider adopting a consistent approach to calculating restitution, and this may be an area for future harmonization.

Moreover, there is currently no harmonization on the terms of negotiated settlements, with these terms ranging from restitution to financial penalties. More generally, the MDBs have agreed that where restitution is possible and identifiable, it should be pursued so as to deter unjust enrichment. However, not all MDBs impose financial penalties, and many at present do not envisage introducing financial penalties into their sanctions procedures. Financial penalties not only raise the stakes in settlement discussions and overall in the sanctions process, but in order to do so, it may be argued that the corresponding sanctions process would then become more adjudicative in nature. Of particular concern is whether a debarment against an entity by one MDB may allow another MDB with an open investigation into the same entity to gain leverage from the debarment to extract maximum payment amounts if there is a settlement. Arguably, introducing a punitive element into settlement payments changes the nature of the MDB sanctions regimes, to which not all MDBs necessarily agreed when they began harmonizing aspects of their sanctions procedures. As a result, there is no harmonized approach amongst the MDBs as to financial penalties. With respect to the AMEDD, a participating

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125 See AfDB Enforcement Procedures, supra note 8, § 11.2; AsDB Enforcement Procedures, supra note 9, §86(ii); EBRD Enforcement Procedures, supra note 7, § 11.2(vii); IaDB Enforcement Procedures, supra note 8, § 8.2.5; and World Bank Sanctions Procedures, supra note 10, § 9.01(e).
126 See generally AsDB Enforcement Procedures, supra note 9; EBRD Enforcement Procedures, supra note 7; IaDB Enforcement Procedures, supra note 8; and World Bank Sanctions Procedures, supra note 10.
127 See generally IACD Interview, supra note 62.
128 See generally AfDB Enforcement Procedures, supra note 8; AsDB Enforcement Procedures, supra note 9; EBRD Enforcement Procedures, supra note 7; IaDB
institution may decide not to enforce a debarment decision that is inconsistent with its legal or institutional considerations, although in practice this determination involves assessing the impact of its cross-debarment rather than assessing the decision of the sanctioning institution to impose a financial penalty.

ii. Who Receives the Financial Penalties?

Participating institutions envision that financial penalties will be used to finance programs that fight corruption, to deprive the respondent of any economic benefit wrongfully gained, and to restore a quantifiable amount to a client country, project, or program. Participating institutions have unequivocally stated that they must avoid any suggestion that they have financially benefitted from the monetary penalties imposed from such sanctions. To address this concern, the World Bank and EIB have established protocols to keep similar funds, such as restitution funds, separate from their administrative or operating budgets for normal business operations.

Other MDBs could provide further clarification as to the protocol for how they receive, hold, and subsequently transfer restitution funds. Of note, in the Siemens settlement with the World Bank, the World Bank retained audit and veto rights over the $100 million in funds dedicated to anti-corruption work and did not collect any monetary penalties per se. MDBs will have to address tricky issues, should they decide to administer such funds instead of sanctioned parties, such as who at the MDB will administer and receive the funds, how the money will be accounted for in its financial records, and who will ultimately receive the funds. These issues may not be straightforward to address. For

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Enforcement Procedures, supra note 8; and World Bank Sanctions Procedures, supra note 10.

129 See WB Sanctions Procedures, supra note 10, art. IX; AfDB Enforcement Procedures, supra note 8, §11.2. See also IACD Interview, supra note 62.

130 See, e.g., IACD Interview, supra note 62.

131 IACD Interview, supra note 62.

example, an MDB could face a situation in which funds are to be returned to a specific entity, but that entity still employs individuals who have engaged in corrupt acts. In the future, MDBs should evaluate whether the objectives of the financial penalties are best met when the proceeds of financial penalties are administered by the participating institution or by the sanctioned party.

iii. Do Settlements Favor Those with Deep Pockets?

Given the high value of recent settlement agreements, MDBs should consider whether settlement agreements favor those with deep pockets. In particular, larger corporations may be able to pay large fines to negotiate shorter debarment periods or periods of conditional non-debarment, suggesting that settlements favor big players who can secure special deals.\textsuperscript{133} However, discourse on settlement payments suggests that MDBs look beyond the actual amount paid in restitution or financial remedy in evaluating the respondent’s actions, such as whether the restitution was offered voluntarily and in a timely manner, which may reveal genuine remorse or a calculated move to reduce a debarment term. A World Bank study states that it adheres to its sanctioning guidelines when determining settlement terms and conditions, with the appropriate levels of sanctions being applied to large corporations in distinction to small entities or individuals.\textsuperscript{134} Although not all settlements result in financial penalties, participating institutions should be aware of the perception that large corporations are able to buy their way out of lengthy debarment periods or even permanent debarments, especially given the limited information released concerning settlement agreement terms.\textsuperscript{135}

IV. TRENDS IN ENFORCEMENT ACTIONS SINCE THE AMEDD

A. Cross-Debarments Since 2010

\textsuperscript{133} WB Discussion Brief Phase 1 Review, supra note 43, at 30.
\textsuperscript{134} Id. at 10–11.
\textsuperscript{135} Id. at 30.
Cross-debarment multiplies the effect of an institution’s sanctions on a party and has far reaching geographical consequences, as debarments issued by one participating institution are eligible for recognition by other participating institution. At the time the AMEDD was adopted, the MDBs announced that it would be a powerful new “tool” to prevent, detect, and deter corruption and ultimately to engender confidence and increased investments in MDB projects and economies.\textsuperscript{136} In the years following the AMEDD’s adoption, participating institutions have also issued sanctions that have broadened in scope, from merely “naming and shaming” to rehabilitation, with a view towards creating a sustainable and far-reaching impact.

MDBs that participate in the AMEDD affirm that they will enforce debarment decisions of the MDBs, when the following conditions are met\textsuperscript{137}:

1. The sanctioning MDB’s decision is based, in whole or in part, on the finding of a sanctionable practice, specifically fraud, collusion, coercion or corruption;
2. The MDB issuing the sanction makes the decision public;
3. The initial debarment period is greater than one year;
4. The sanctioning MDB issues the decision after the AMEDD entered into force;
5. The MDB issues the decision within ten years of the date of the sanctionable practice; and
6. The MDB’s decision does not arise from a decision

\textsuperscript{136} Thomas Mirow, then-president of EBRD stated, “This enhanced cooperation among the Multilateral Development Banks is taking the fight against fraud and corruption to a new level. Dealing resolutely with corruption is key to the development of sustainable economies that will attract investment and engender confidence. This is a very important step.” Press Release, World Bank, Multilateral Development Banks (MDBs) Step Up Their Fight Against Corruption With Joint Sanction Accord, World Bank Press Release 2010/341/INT (Apr. 9, 2010), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535258--pagePK:34370--piPK:34424--theSitePK:4607,00.html.

made in a national or other international adjudicatory forum.

It is possible for an MDB not to cross-debar a particular debarment decision, provided that it determines that cross-debarment is inconsistent with its legal and other institutional considerations and promptly notifies the other MDBs of its decision.\[^{138}\] Such circumstances are not the norm and such an occurrence would be extraordinary in that an MDB’s legal or institutional considerations—for example, an MDB may decide that it will not cancel a project with an entity debarred by another MDB—would have to outweigh its commitment to cross-debar. As of December 2014, EBRD has not “opted out” of cross-debarring any entities or individuals.

Under the AMEDD, MDBs cross-debar following receipt of debarment decisions arising from both settlements and sanctions imposed by the appropriate sanctioning body. In the case of the World Bank, in 2014 the percentage of settlements submitted to the Evaluation and Suspension Officer ranged from 25% in 2011 to 12% of the overall number of settlements submitted and sanctions cases issued by the Evaluation and Suspension Officer.\[^{139}\]

Since 2010, there has been a gradual increase in cross-debarments.\[^{140}\] In 2011, the EBRD reported that it cross-debarred thirty-six entities and twenty-three individuals\[^{141}\]; in 2012, it cross-debarred forty-five entities and thirty-two individuals\[^{142}\]; in 2013, it cross-debarred 303 entities (over 100 in relation to the World Bank’s debarment against SNC Lavalin entities) and twenty-five individuals\[^{143}\]; and in 2014 EBRD reported cross-debarring eight-

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\[^{138}\] Id. at para. 7.
\[^{140}\] See Cross Debarred Entities, supra note 19. See also WB Discussion Brief Phase 1 Review, supra note 43, para. 6.
nine entities and thirty-seven individuals. Given the gradual increase in cross-debarments, it is timely for MDBs to assess how effective this rise in the number of sanctions has been in fighting fraud and corruption.

![Figure 1: EBRD Cross Debarments, 2011–2014](image)

**B. Challenges to the Debarment Process**

In July 2012, Eurotrends sued the AsDB in a European court and requested that the court set aside AsDB’s debarment decision against it. Eurotrends challenged the AsDB’s debarment process and questioned whether it afforded sufficient due process, specifically the right to access a judge or a court under the European Convention of Human Rights. Furthermore, Eurotrends argued that AsDB’s debarment process was not sufficiently independent or impartial, in part because internal AsDB personnel comprised its sanctioning body, which therefore provided insufficient due process. Through its suit Eurotrends presented a fundamental challenge to the debarment processes of...
the other MDBs—and ultimately to cross-debarment—by contesting AsDB’s assertion of jurisdictional immunity as an international organization.\textsuperscript{148}

In a judgment rendered on April 8, 2015, the Paris Tribunal de Grande Instance upheld the jurisdictional immunity granted to international organizations such as the AsDB as having a legitimate purpose in allowing these organizations to conduct their missions independent of government interference.\textsuperscript{149} The court therefore held that Eurotrends’ claims were not admissible.\textsuperscript{150} Although the court did not rule on whether AsDB’s debarment process provided sufficient due process, it acknowledged that Eurotrends received notice of the allegations, had the opportunity to defend itself before an appropriate body before the AsDB, and had the opportunity to appeal the decision.\textsuperscript{151}

The court’s decision is significant insofar as the court upheld AsDB and ultimately the MDBs’ current debarment and cross-debarment processes. Significantly, the main message to the MDBs was that the AsDB’s sanctions procedures were sufficient in this instance. Thus to the extent that the other MDBs afford substantially similar processes in their proceedings, they are likely providing proper due process protection for the sanctioned parties.\textsuperscript{152} To follow on from the court’s decision, the MDBs’ sanctions regimes and cross-debarment regimes, whose main tenets are espoused in the AMEDD, arguably do have sufficient “due process” protections.

V. CONCLUSION

\textsuperscript{148} Id. at 7. AsDB’s jurisdictional immunity is set out in the Agreement Establishing the Asian Development Bank (the Charter): “The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities . . . .” Asian Dev. Bank [AsDB] Charter art. 50, para. 1, http://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf.
\textsuperscript{149} Eurotrends Decision, supra note 146, at 6–7.
\textsuperscript{150} Id. at 7.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
Settlement agreements have become a mainstay in the enforcement landscape. There will likely be more settlements in the following years as the other participating institutions are likely to introduce formalized settlement mechanisms into their sanctions procedures. It is still not clear whether increased use of settlement agreements is the way forward, given the perception that they may favor those with deep pockets. Nevertheless, they have arguably resulted in enforcement actions that promote greater compliance, deterrence, and rehabilitation, perhaps even more so than debarment with conditional release. With this difference in mind, participating institutions should consider further means to enhance the transparency of settlements, especially with regard to any financial penalties collected and how such funds are spent. Participating institutions may also consider the levels of checks and balances in place to review settlements in order to enhance the due process afforded to sanctioned parties.

In the five years since the AMEDD, MDBs have made an increasing number of sanctions decisions available, most notably since the World Bank began publishing its sanctions board decisions. Entities and individuals subject to sanctions proceedings now have greater insight into the rationale behind sanctions decisions and the application of enforcement procedures. This data may better inform entities and individuals in their dealings with enforcement proceedings and settlements and in the decision to pursue one versus the other.