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Cross Debarment

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A. Introduction

1 Cross debarment is a procedure established by five multilateral development banks—the African Development Bank Group ('AfDB'), the Asian Development Bank ('ADB'), the European Bank for Reconstruction and Development ('EBRD'), the Inter-American Development Bank ('IADB'), and the World Bank Group ('WB')—in order to mutually enforce their debarment actions with respect to four harmonized sanctionable practices, ie corruption, fraud, coercion, and collusion. Consequently, firms and individuals debarred by one of these banks could then be sanctioned, for the same misconduct, by the other banks. This procedure was established by the Agreement for Mutual Enforcement of Debarment Decisions ('AMEDD'), which was signed by these multilateral development banks on 9 April 2010 in Luxembourg.

1. Background

2 Blacklisting corrupt contractors and individuals became, in recent years, a noteworthy tool for the WB in its fight against fraud and corruption. The latter gained indeed pre-eminence on the bank's agenda and led to the *ex nihilo* establishment, in 1998, of a two-tiered sanctions process (→ *World Bank Sanctions Process*). The objective of this process is to exclude, at any time, a company or individual, temporarily or permanently, from any Bank-financed contract and the possibility of being selected as a subcontractor, consultant, supplier, or service provider to a company that might be awarded finance by the Bank.

3 It was however possible at that time for a sanctioned firm or individual to be financed by one of the other multilateral banks. Apart from the EBRD, which was the only bank before 2010 to have a process in place for cross-debarring, none of the other banks had the possibility to automatically debar a sanctioned party. The WB soon recognized that a consistent and harmonized strategy among the different multilateral development banks was critical to the success of the fight against fraud and corruption. This led to the creation in February 2006 of a Joint International Financial Institutions Anti-Corruption Task Force ('Task Force') in charge of shaping such strategy. In September 2006, the Task Force's recommendations were published in a document titled 'Uniform Framework for Preventing and Combating Fraud and Corruption' ('Uniform Framework'). The two main objectives were to establish a common set of definitions of sanctionable misconduct, and a common set of principles and guidelines for investigations. Article 5 Uniform Framework, on 'mutual recognition of enforcement actions', also sets the basis for the cooperation between the banks. Each of the member institutions of the Task Force was requested to establish its own mechanism for addressing and sanctioning violations of its respective anti-corruption policies, and to 'explore further how compliance and enforcement actions taken by one institution can be supported by the others'.

4 The next phase of the process took place in early 2009, when members of the Task Force pushed forward proposals for the establishment of a mutual enforcement of sanction regime. One of the first proposals was the one advocated by the WB of the creation of a Joint Sanctions Board ('JSB'), which would have been an autonomous body in charge of hearing sanctions cases from each of the participating multilateral development banks. The idea of creating a JSB was however facing major obstacles. Among them was the concern of the banks about losing control over their sanctions framework, and the potential impact of this joint mechanism on their privileges and jurisdictional immunities. It was at this moment that the proposal of the establishment of a cross debarment regime became a possible option in the process towards harmonization. Meetings took place in the course of 2009 and

2010 to discuss the elements of such a regime, and led to the drafting and signing of the AMEDD.

2. The Agreement

5 The AMEDD is divided into four sections. The first section—the preamble—contextualizes the AMEDD by placing it in the continuation of the harmonization steps previously undertaken by the participating institutions, ie the creation of a task force and the signature of the Uniform Framework.

6 The second section—core principles—is the substantive part of the AMEDD. It requires the signatories to represent that each of their sanctions regimes meets certain common core principles. First, they must adopt the four harmonized definitions of sanctionable practices as defined by the Uniform Framework. Second, they must follow the International Financial Institutions Principles and Guidelines for Investigations, a unified set of principles and guidelines to govern the way integrity offices of each of the participating institutions would execute their investigative mandates. Third, they must represent that their sanctions processes include certain key due process elements, such as the separation between their internal investigative authority and their decision-making authority, the existence of written and publicly available procedures that require notice to accused parties and an opportunity to respond, the use of a standard of proof being ‘more probable than not’ or equivalent, and the provision of a range of sanctions that takes into account the principle of proportionality, including mitigating and aggravating factors. By including these guarantees in the agreement, the participating institutions recognize that reaching a high degree of harmonization is key to ensuring a proper use of the most innovative part of the agreement, which is the procedural mechanism defined in the third section.

7 In this third section, entitled ‘Modalities for Mutual Enforcement of Debarment Decisions’, each signatory agrees to recognize and enforce any debarment decisions of another participating institution that meet a set of six criteria: (1) the debarment must be sanctioning fraud, corruption, collusion, or coercion; (2) it must be public; (3) it must be for at least one year; (4) it must have been made after the entry into force of the AMEDD; (5) it must have been made within ten years of the date of commission of the misconduct; and (6) it must not be based on a decision of a national or other international authority.

8 The fourth and last section of the AMEDD concerns the signature and entry into force of the agreement, the withdrawal from the agreement, its publication, and the designation by each signatory of a unit responsible for receiving and issuing notices. With respect to the signature of the agreement, signatories are free to rescind the agreement by sending a written notice to the other signatories. The agreement is open to other international financial institutions with the consent of the other parties and the signature of a letter of adherence. Even though no other institution has signed the agreement at the time of writing, the participating banks have started working with other multilateral development banks in order to help them to develop their own anticorruption programs. Other donor agencies, such as the Japanese International Cooperation Agency, have also indicated that they may unilaterally recognize cross debarment decisions.

9 When it comes to its legal nature, the agreement is written in a way that leaves no doubt as to its quality as a treaty concluded between international organizations, a source envisaged by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), and which finds numerous illustrations in the contemporary practice of international organizations. As a matter of fact, the WB is party to a great number of agreements with international organizations. Most of these agreements have an operational nature, and are concluded with regional development banks or United Nations programs. The WB has also signed

agreements to coordinate investigations and share information with various international organizations such as the European Anti-Fraud Office, Interpol, or the International Criminal Court.

B. Procedural Aspects

1. Conditions for Cross Debarment

10 A set of six criteria is foreseen in the AMEDD. If a debarment decision meets all of these criteria, the cross debarment by the other participating banks is as a principle automatic, unless one of these banks believes that any of these prerequisite conditions have not been met (see below sec B.4), or exercises its right to opt out (see below sec B.3). A system whereby each participating bank would have been able to review each debarment decision before cross debarring was considered but ultimately rejected. Apart from the obvious cost and time of having each bank reviewing *de novo* each potential case, this system could have resulted in the creation of inconsistency among the participating banks.

11 It is required, first, that the original debarment decision be sanctioning fraud, corruption, collusion, or coercion. One of the objectives of the Uniform Framework was to disseminate a common set of definitions of sanctionable conduct among the participating banks. These four offences were then adopted by all of the participating banks to the AMEDD. One can note that debarment for obstructive practices, eg the deliberate destroying of evidence material, was not included in the AMEDD as the WB was the only bank at that time that recognized obstructive practices as sanctionable conduct.

12 As a second condition, the AMEDD requires that the original debarment decision be made public. Behind the inclusion of such a criterion in the AMEDD is the idea of ensuring a sufficient level of transparency, and ultimately to maximize the deterrent impact of debarment decisions. In practice, however, not all of the debarment decisions of multilateral development banks are made public, the latter usually meaning that the decision is announced on the bank's website. Non-public decisions are still currently made by all five of the participating banks, but their number can vary drastically from one bank to the other. They have indeed adopted quite different policies when it comes to transparency. Debarment decisions of the WB are made public as a principle. A major reform in 2011 even expanded the scope of this policy by deciding on full publication of decisions made by WB's sanctioning bodies after 1 January 2011. At the other end of the spectrum, most debarment decisions of the ADB are not made public and thus not eligible for cross debarment. Steps towards increased transparency have been made by the ADB since the AMEDD was signed with, for example, the publication of a list of firms and individuals debarred for a second or subsequent time, or who have avoided being served notice. Be that as it may, the complete list of the ADB's debarment decisions is not made public.

13 The original debarment decision must also be for at least one year. The period of debarment imposed by the participating banks varies from case to case. Relatively short periods of time (eg one year or less) are usually proposed in cases in which the sanctioned party has in place a robust corporate compliance program, or in which the sanctionable practice is resulting from isolated acts of a former employee. In contrast, exceptional cases in which the party has no realistic prospect of rehabilitation have sometimes led to debarments for an indefinite period. The decision to create a 'safe harbor' (Zimmermann and Fariello, 2011, 198) in the AMEDD for debarment decisions of one year or less was guided by the same rationale. In cases that may justify the imposition of lesser periods of debarment, the onerous impact of cross debarment should be avoided as it could potentially put these firms and individuals out of business. The decision to limit cross debarment to decisions exceeding one year was also taken to limit litigation risks, and to serve as an

incentive for firms and individuals to cooperate with the banks in the hopes of mitigating their sanction to a level that would make them not eligible for cross debarment.

14 Cross debarment also applies only to debarment decisions made by the participating banks after the entry into force of the AMEDD. In order to become effective for the participating bank, the AMEDD requires its signature, and notice that the signatory has fulfilled all of the requirements for the implementation of the agreement. The latter entered into force on 9 June 2010 for the ADB and the EBRD, on 19 July 2010 for the WB, on 9 May 2011 for the IADB, and on 11 July 2012 for the AfDB.

15 The original debarment decision must have been made within ten years of the date of commission of the misconduct. According to Article IV (d) World Bank Sanctions Procedures, sanctions proceedings shall be closed if they involve a sanctionable practice in connection with a contract the execution of which was completed more than ten years prior to the date on which the case was submitted to the first level of the WB sanctions process. This statute of limitations is also enforced by the other participating banks, eg Article 5.14 Sanctions Procedures of the AfDB.

16 Finally, the original debarment decision must not be based on a decision of a national or other international authority. Cross debarment is only available for debarment decisions based on independent investigations conducted by a given participating bank's decision-making authority. It does not apply to decisions made by a national authority except when such decisions simply form the basis for making an independent finding and decision by one of the participating banks.

2. The Sending of a Notice of Debarment Decision

17 As soon as the sanctioning body of one of the participating banks has imposed a debarment decision that is eligible for cross debarment, this bank will provide written notice of that decision to each of the integrity offices of other participating banks. This notice of debarment decision should describe the decision in sufficient detail in order to enable the participating banks to determine whether all of the pre-requisite conditions for cross debarment have been met. The notice includes the identity of the sanctioned firms or individuals, the sanctionable misconduct for which they are sanctioned, as well as the terms of the debarment.

3. Opt-Out Clause

18 In exceptional situations, it is possible for one of the participating banks to refuse to enforce a cross debarment notice. An opt-out clause was indeed included in paragraph 7 AMEDD, allowing this where 'such enforcement would be inconsistent with its legal or other institutional considerations'. In order to use this clause, the bank is required to provide written notice of its decision to each of the other participating banks, but it does not have to provide reasons. The decision to opt-out does not have an effect on the enforcement by the other banks.

19 This written notification procedure was believed to be demanding enough to prevent extensive use of the clause, while also preserving confidentiality. One of the scenarios projected during the making of this clause was, indeed, requiring confidentiality as it involves participation in the WB's Voluntary Disclosure Program ('VDP'). Launched in 2006, the VDP allows for the cooperation with the WB of firms and individuals performing under bank-financed or -supported projects or contracts about their past wrongdoings. In exchange for their full cooperation, eg the disclosure to the bank of the results of an internal investigation about their past misconduct, VDP participants avoid debarment for disclosed past misconduct, have their identities kept confidential, and may have the possibility to compete for future bank-supported projects. In the case of a notice for cross

debarment targeting a participant to the VDP, the WB would then not enforce it unless the misconduct were to relate to a WB-supported project that knowingly was not disclosed.

20 Another scenario concerns firms with whom the WB has concluded a settlement agreement. Established in 2010, this procedure allows the negotiation of the sanction between the investigative organ of the WB (the Integrity Vice Presidency ['INT']) and the respondent firm at any time during the formal procedure, but before the Sanctions Board has given its decision. If the terms of the settlement are related to the conduct for which the other participating banks debarred the firm, the WB would not be able to enforce. Debarment that is part of a settlement agreement is however eligible for cross debarment.

21 This opt-out right has also the function for the participating banks to preserve themselves from the behaviour of one of the other banks in the case of a debarment decision that may be egregiously sweeping in scope or duration. It can also serve as a 'one-off' (Zimmermann and Fariello, 199) exception where a debarred party is playing a major development role, especially in emergency situations. At the time of writing, none of the signatories has made use of this opt-out clause.

4. Discretionary Power of the Receiving Banks

22 While the AMEDD sets out the conditions for a debarment decision to be eligible for cross debarment, it remains unclear whether the banks receiving a notice for debarment decision can refuse to enforce. Paragraph 4 AMEDD reads as follows: 'upon receipt of such notice, the other Participating Institutions will enforce such decision as soon as practicable, subject to the following criteria'. This was clarified by the WB sanctions process. A participating bank can refuse to enforce if it 'believes that any of the prerequisite conditions set forth in the [AMEDD] have not been met' (*Sanctions Case No 191, 2012, 6*). Despite the discretion afforded to the participating banks, the practice shows that a very few number of notices are not enforced.

C. The Practice of Cross Debarment

23 As of January 2016, more than 2,300 cross debarments have been cumulatively honoured by the five participating banks to the AMEDD.

Cross Debarments Honoured (2010-2015)

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
AfDB	—	—	38	284	98	61
ADB	8	49	108	324	99	99
EBRD	26	59	77	328	87	66
IADB	—	36	40	205	65	31
WBG	0	16	54	26	15	27
Total	34	160	317	1,167	364	284

Source: Multilateral development banks' Annual Reports from 2010 to 2014 and websites for FY 2015.

24 It appears that the number of cases honoured every year by each institution remains relatively stable. The total number of cases honoured did increase for the period 2010–2012 due to the delayed entry into force of the AMEDD for both the AfDB and the IADB. The exceptional number of cases honoured in 2013 has to be contextualized, being the result of the SNC-Lavalin case. On April 2013, the WB indeed announced the debarment of SNC-Lavalin Inc—a large Canadian multinational construction firm—and of 196 of its affiliates, for a period of ten years, following the company's misconduct, eg a conspiracy to pay bribes and misrepresentations when bidding for WB-financed contracts in relation to the Padma Multipurpose Bridge project in Bangladesh and a rural electrification and transmission project in Cambodia. All of these 197 entities were eligible for cross debarment, and were effectively cross debarred by the four other banks.

D. Conclusion

25 Cross debarment is an unprecedented step in the fight against fraud and corruption at the international level. While difficult to measure, its impact has been without a doubt significant. It has allowed the major development banks to protect their funds in a more effective manner. It has also multiplied the deterrence effect of the 'naming and shaming' type of processes adopted by the banks. The WB is planning to undertake a review of the overall efficiency and effectiveness of its sanctions process, and indirectly of the whole cross debarment regime. Cross debarment is also an example of successful coordination among international institutions. Being an semi-closed agreement, foreseeing adherence under certain conditions, the AMEDD allows for a further extension of the cross debarment regime in the years to come. The Islamic Development Bank has declared its intention to join the AMEDD and has taken several steps in order to meet the standard required. Other sub-regional banks such as the Caribbean Development Bank, the Black Sea Trade and Development Bank, and the Nordic Investment Bank may engage in a similar path in the future. Cross debarment is finally an important step in the harmonization process of multilateral development banks. It will probably lead to increased harmonization among the different sanctions mechanisms, although each mechanism may retain certain specificities, and ultimately promote the 'emergence of a *droit commun* in the field of development finance' (Boisson de Chazournes, 2011, 186).

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