Development-Oriented Alternatives to Debarment as an Anticorruption Accountability Tool

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The sanctions system is one of the World Bank’s primary tools for imposing accountability for fraud and corruption by private sector actors in connection with its operations.1 The system originated in 1996 in response to World Bank President James Wolfensohn’s determination to proceed forcefully against corruption in Bank-supported operations.2 The system was operationalized in 1998 as an internal administrative process, designed to assist the World Bank in upholding its fiduciary duty under the Articles of Agreement to ensure that the funds entrusted to it are used for the purposes intended, by providing a way for the Bank to exclude corrupt actors from Bank-financed procurement—a step commonly referred to as “debarment.” More precisely, debarment is a declaration that a firm or individual is ineligible for the award of Bank-financed contracts or further participation in the implementation of Bank-financed operations.

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1 An analysis of the broader World Bank Group sanctions system as it works at the Bank’s sister institutions, International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), is beyond the scope of this chapter; as of this writing, only the Bank has seen actual sanctions cases. Nevertheless, many of the same considerations apply to those institutions.

2 At the beginning of the Wolfensohn presidency, corruption was rarely mentioned in international development circles as a major obstacle to development. One year into his tenure, Wolfensohn gave a groundbreaking “cancer of corruption” speech to the World Bank/International Monetary Fund (IMF) annual meeting, citing corruption as a “major barrier to sound and equitable development.” See James D. Wolfensohn, Annual Meetings Address (Oct. 1, 1996), http://go.worldbank.org/PUC5BB8060. Since then, corruption has become widely recognized as a major obstacle to development that the Bank has tackled aggressively by supporting hundreds of anticorruption programs in its client countries and sanctioning more than 650 companies and individuals on grounds of fraud or corrupt activity. See World Bank Off. Suspension & Debarment, Report on Functions, Data, and Lessons Learned, 2007–2013 4 (World Bank 2014), http://siteresources.worldbank.org/EXTOFFFEVASUS/Resources/OSD Report.pdf.
Since 1998, the system has evolved toward a quasi-judicial model, with increasing transparency and due process protections, while retaining its administrative nature. As a result of reforms approved by the World Bank’s Board of Executive Directors in 2004 and 2006, the sanctions system now consists of a two-tier adjudicative process, with a first level of review carried out by a Bank officer and, in contested cases, a second level of review by the World Bank Group Sanctions Board, an independent body composed of three Bank staff and four non-Bank staff members who consider the case de novo and make a final, nonappealable decision.

The reforms in 2006 added a range of additional possible sanctions: debarment with conditional release, conditional non-debarment, letters of reprimand, and restitution. In 2010, the “baseline,” or default, sanction was changed to debarment with conditional release. Yet a recent review of the sanctions system found that debarment (with or without conditions for release) remains far and away the most commonly imposed sanction, accounting for 93 percent of all sanctions imposed by the system.

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4 A party that is sanctioned with conditional non-debarment remains eligible to be awarded Bank-financed contracts provided that compliance with certain defined conditions within a set time frame is met. However, failure to comply with the conditions for release results in the party’s debarment for a defined period of time. Compliance is determined by the World Bank integrity compliance officer (ICO) and is subject to the same procedure as for conditions for release from debarment. Conditional non-debarment is normally applied in cases where the respondent has already taken comprehensive voluntary corrective measures, and the circumstances otherwise indicate that the respondent need not be debarred. Conditional non-debarment may also be applied to parents and other affiliates of respondents in cases where they were not engaged in misconduct but when a systemic failure to supervise made the misconduct possible. See World Bank, Sanctioning Guidelines (Jan. 1, 2011), http://go.worldbank.org/CVUUI57HZ0 (hereinafter, Sanctioning Guidelines).

5 Letters of reprimand are generally imposed when debarment and conditional non-debarment are disproportionate to the offense. In such cases, the Bank issues a letter of reprimand to the sanctioned party. Examples include cases where an affiliate of the respondent has been found to share responsibility for the misconduct because of an isolated lapse in supervision, but the affiliate was not in any way complicit in the misconduct. See id.

6 Restitution, as well as financial and other remedies, may be used in exceptional circumstances, including those involving fraud in contract execution where there is a quantifiable amount to be restored to the client country or project. See Sanctioning Guidelines, supra note 4.

7 Of the 177 sanctions imposed through fiscal year (FY) 2012, only 5 deviated from the baseline sanction of either fixed-term or debarment with conditional release: three conditional non-debarments (one of which was accompanied by a letter of reprimand) and two letters of reprimand; all of these were imposed in the context of a negotiated resolution of the case (also referred to as a settlement). Similarly, restitution has been imposed only five times; four times in the context of settlements and by the Sanctions Board in one case. See infra note 41 and Review of the World Bank Group Sanctions Regime, 2011–2014, Phase I Review: Stock-Taking, Initiating Discussion Brief, http://consultations.worldbank.org/consultation/sanctions-reviews.
Recently, the Bank has begun to reflect on the underlying objectives that it has set for the sanctions system. Although the traditional legal basis for sanctions lies in the fiduciary duty to protect the proper use of Bank financing, one can argue that the fiduciary duty is itself merely a means to an end—and that end is the Bank’s development mandate as set out in its Articles of Agreement. Indeed, the articles provide that “the Bank shall be guided in all its decisions” by its mandate—and, although it is rarely pointed out, those decisions include sanctions decisions. As this chapter discusses, a sanctions system that is expressly aimed at supporting the Bank’s development mandate could look quite different than the system that exists today.9

Debarment: The Good, the Bad, and the Ugly

For the World Bank, debarment has served a vital function in upholding the Bank’s fiduciary duty by excluding corrupt actors from Bank financing. Other international financial institutions, including the other major multilateral development banks, have analogous sanctions systems aimed at tackling fraud and corruption in the operations they finance.10 National administrative systems, including the United States11 and the European Union12 and a growing


9 Sanctions also serve a de facto purpose, not expressly stated in sanctions policy, of protecting the Bank’s reputation from harm by association with corrupt actors. Although some commentators consider avoidance of reputational risk to be an illegitimate objective for a public institution, we disagree. See Hans-Joachim Priess, Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks, 45 Geo. Wash. Int’l L. Rev. 271, 278 (2013) (arguing that reputation “cannot be regarded as a valid aim for a sanctions and debarment regime because it is in conflict with the application of the strict rule of law”). An international organization like the World Bank depends on the goodwill and consequent financial support of its membership, without which it could not pursue its development mandate.


11 See Federal Acquisition Regulation (FAR) 48 C.F.R. subpart 9.4 (2005) (containing the regulations that control how federal agencies can administratively suspend or debar).

12 The EU procurement regime is primarily governed by Directive 2004/17/EC (the “Utilities Directive”) and Directive 2004/18/EC (the “Public Sector Directive”), which institute mandatory obligations to exclude possible contracting parties for past convictions of specified corruption offenses and the option of states excluding parties not meeting certain other criteria that involve the trustworthiness and reliability of the economic operators. See Directive
number of developing countries, including India, Colombia, Nigeria, and Tanzania, to name a few, have adopted debarment as an anticorruption tool in public procurement.

The original vision for the Bank’s sanction system was ambitious indeed. Thornburgh sets out his vision for the system thusly: “With regard to effectiveness, we believe that the goal should be to employ procedures that would have the promise of ensuring detection and debarment of virtually all firms that in fact have engaged in fraudulent or corrupt activities.”

It has become clear over time that the system has not been able to achieve Thornburgh’s vision as a comprehensive mechanism for excluding bad actors from Bank-financed operations. The Bank imposes roughly 40 to 50 sanctions per year; it finances about 20,000 to 30,000 contracts per year. Although, one hopes, only a small percentage of those contracts are tainted by corruption, the system would need to take a quantum leap in reach to fulfill its original exclusionary ambitions.

In addition to the direct protective impact of excluding corrupt actors from Bank-financed operations, the sanctions system is intended to serve as


See Tanzania Pub. Procurement Act No. 21 of 2004, sec. 57, which mandates the Public Procurement Regulatory Authority to debar a supplier, contractor, or consultant who has been declared ineligible by a foreign country, international organization, or other foreign institutions from participating in public procurement.

Thornburgh Report, supra note 3, at 8.

However, a 2007 report of the Stolen Asset Recovery (StAR) Initiative estimates that corrupt money associated with bribes received by public officials from developing and transition countries is US$20 billion to $40 billion per year—a figure equivalent to 20 to 40 percent of flows of official development assistance. United Nations Office on Drug and Crime and the World Bank, Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan 1 (World Bank 2007).
a disincentive against corrupt behavior, that is, in legal terms, to act as both a specific deterrent for the sanctioned party and a general deterrent for others who participate in Bank-supported operations.19 More broadly, the system aspires to contribute, however modestly, to the global fight against corruption through direct means but also through cross-debarment and referral of the Bank’s investigative findings with national authorities.20

The notion that debarment provides a deterrent is widely accepted in the legal literature.21 In theory, a rational actor who is prone to corrupt behavior will refrain from that behavior if its “cost” in likely penalties exceeds its likely benefits.22 Of course, this seemingly commonsense calculation hinges on an unknowable—the likelihood of getting caught or, more to the point, the actor’s perception of that likelihood. Moreover, the “cost” of engaging in corruption includes subjective factors such as the moral cost in the mind of the actor, which in turns depends on a complex set of social, cultural, and psychological factors.

19 See Thornburgh Report, supra note 3, at 60 (stating that “[c]ompliance is achieved, in broad terms, through incapacitation in the form of debarment, and through deterrence in the form of publicizing the risk of future debarment”). Compare Priess, supra note 9, at 280 (arguing that these aspects of the current sanctions and debarment systems, which Priess views as punitive, should be eliminated).


21 Debarment in national systems is generally not meant to be a punishment for misconduct. Rather, debarment is the consequence that the law attaches to the government’s lack of trust in a given player. In the US context, see FAR, Section 9.402 (b). See also Jessica Tillipman, A House of Cards Falls: Why “Too Big to Debar” Is All Slogan and Little Substance, Res Gestae Paper 7 (2012) (arguing that debarment as a “nuclear sanction” should not be utilized simply because it is politically popular), http://ir.lawnet.fordham.edu/res_gestae/7. In economic terms, however, debarment is a cost in a firm’s cost-benefit analysis. See James C. Nobles, Jr., & Christina Maistrellis, The Foreign Corrupt Practices Act: A Systematic Solution for the U.S. Multinational, L. & Bus. Rev. Am. 5, 11 (Spring 1995) (submitting that “[f]or large defense contractors, disbarment from U.S. government contracts could well be the most significant deterrent to engaging in conduct proscribed under the FCPA”); Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775, 803 (2011) (arguing that FCPA fines have little if any deterrent effect when the benefits derived from the sanctionable conduct largely outweigh the cost of getting caught). See also J. Kelly Strader, White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss, 15 Geo. Mason L. Rev. 45, 102 (2007) (“There is substantial evidence that white collar defendants are strongly deterred by civil/administrative sanctions, including debarment). For a discussion of the various objectives of procurement systems, see, generally, Steven Schooner, Desiderata: Objectives for a System of Government Contract Law, 11 Pub. Proc. L. Rev. 103 (2002).

Another problem with the debarment-deterrence equation is that debarments have an unpredictable economic impact on the debarred party. Debarment periods are calculated against a baseline that is common to all sanctionable practices, adjusted for aggravating and mitigating factors relating to the respondent’s culpability or responsibility, not on the debarment’s impact on the respondent or others. So if a debarred party does a great deal of Bank Group or multilateral development bank (MDB)—financed business, it may suffer severe loss of business or even corporate death as a consequence of debarment. On the other hand, a debarred party that does little Bank Group business may suffer very little direct loss of business from the debarment.\(^{23}\) So the same debarment may impose wildly different economic costs on the debarred party, and therefore create different degrees of specific deterrence; such disparate impact also raises questions of fairness and proportionality.

To the authors’ knowledge, there have been no empirical studies that prove or disprove the widely held belief that debarments and other such penalties have a strong deterrent effect.\(^{24}\) Some research suggests that the severity of the penalty is less important to deterrence than the mere fact that there is a credible reaction, coupled with the legal costs of defending oneself against the charge and the reputational cost of the penalty.\(^{25}\) In the Bank context, this latter view suggests that all Bank sanctions, not just debarment, could provide a degree of deterrence. Indeed, private sector stakeholders often say that they fear the cost in reputation and goodwill occasioned by the public nature of sanctions more than the sanction itself.\(^{26}\) Moreover, because Bank sanctions are part of a larger enforcement architecture, including the sanctions systems of other MDBs and national enforcement measures, Bank sanctions need not, in and of themselves, provide perfect deterrence.

Although the deterrent effect of debarment remains unclear, we do know that debarment can come at a significant cost to the Bank and its borrowers

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\(^{23}\) Indirect loss of business may ensue from loss of reputation and the fact that Bank sanctions are being used, by an increasing number of external parties, for due diligence purposes.

\(^{24}\) On the issue of corporate punishment, research has primarily focused on the doctrine of corporate criminal liability, with some scholars submitting that harsh corporate penalties provide deterrence on a massive scale. See, for example, Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. Cal. L. Rev. 1141 (1982–83) (arguing that the nature of deterrence and retribution as applied to corporations implies the need for criminal as well as civil liability); and Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1097 (2006). In contrast, other commentators believe that harsh penalties might distort firms’ incentives to monitor for misconduct and undermine the deterrence of professional firms’ members. See, for example, Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 Stan. L. Rev. 271–310 (2008) (also calling for greater reliance on purely financial corporate penalties).


in the delivery of development results. A debarred company is excluded from Bank-financed public procurement, which, in markets where willing qualified bidders are few and far between, can have an anticompetitive effect and impede the delivery of development results, at least in the immediate term. In such cases, debarments may (or may not) fulfill the system’s fiduciary objective, but they arguably come into conflict with the broader objective of promoting the Bank’s development mandate. The problem is particularly acute because debarments are applied in a way that is arguably overbroad in cases where the system’s putative fiduciary objectives may not be served. The sanctions system operates on a respondeat superior basis, which is to say that a corrupt act by any agent or employee is attributed to the principal, whether or not it can be shown that the legal entity as a whole poses a fiduciary risk to Bank operations.

Debarment may have other possible negative side effects, although these remain to be studied empirically. By reducing the number of market actors, for example, depending on the conditions of a given market, including the number of competing actors, debarment may have the effect of facilitating collusive practices among the remaining market actors, at least in smaller markets.

One problem with the system’s wider aspiration to reduce overall levels of corruption through deterrence is that corruption, broadly defined, is not subject to consistent legal standards; enforcement is similarly uneven. Similar to what has been recently argued in regard to enforcement of the Foreign Corrupt Practices Act (FCPA), because of this uneven playing field, debarments


The Thornburgh Report recognized the importance of protecting respondents against inaccurate or unjust determinations because of the Bank’s “special economic interest and responsibility” and because of the adverse significant impact of debarments on both contractors and the Bank. In fact, debarment not only cuts contractors off from a major source of funding that is available in the country but can adversely affect future competitions and the Bank’s ability to obtain needed goods or services because the number of qualified contractors may be limited. Hence, in excluding a firm from future business, the Bank “may be eliminating from future contention one of the very few firms with the characteristics required by the Bank for important projects.” Thornburgh Report, supra note 3, at 7.

28 See, for example, Sanctions Board Decisions, nos. 36, 37, 39, and 44, as cited in the World Bank Group Sanctions Board Law Digest (Dec. 2011), at 37 et seq. The Sanctions Board has recognized a possible “rogue employee” defense but, to the authors’ knowledge, that defense has never been successfully asserted. See Sanctions Board Decision no. 39.

and other deterrence-based enforcement approaches may simply drive some of the Bank’s client countries (and the private sector) toward projects financed by donors with fewer legal constraints (so-called black knights). With less scrupulous actors on both the demand and the supply sides of the equation, this uneven enforcement picture could paradoxically result in an increase in corruption levels in certain countries. This dilemma should be addressed through better and more harmonized enforcement, but that is a long-term goal.

Beyond the issue of whether debarments provide deterrence, or more deterrence than other sanctions, the authors would argue that Bank sanctions need not always be designed to deter. Given how few sanctions the Bank imposes relative to the volume of the operations it finances, sanctions need to have a demonstration effect with general impact beyond the particular case or respondent. But that demonstration effect need not always come in the form of a negative incentive like debarment; it could provide a positive incentive, for example, for self-cleaning or other comprehensive corrective actions, including—as this chapter discusses—remedial actions that mitigate the harm occasioned by the corrupt act. This approach to sanctions might not only avoid the negative consequences for development effectiveness that debarment can sometimes inflict but could also be designed in a way that actively contributes to the Bank’s development mandate.

Notwithstanding the collateral consequences and other drawbacks of debarment, the authors do not intend to argue that debarment should be done away with. For one thing, its immediate purpose—the exclusion of bad actors—remains vital. Even if the system cannot hope to catch and exclude all bad actors from Bank financing operations, that is not a reason not to exclude those that it does manage to catch. Debarment also plays an indispensable role as a “backup” sanction; given that the Bank is a non sovereign, debarment remains the only effective tool for the enforcement of alternative forms of sanction such as restitution. And although robust empirical evidence for the deterrence value of debarment appears to be lacking, one may reasonably infer that debarment does deter corrupt behavior; it should do so in principle, and, as the aphorism goes, absence of evidence is not evidence of absence.

The collateral consequences of debarment vary widely, depending on the markets impacted, the nature of the debarred party, and the length of the debarment period. If a debarred firm as an enterprise (rather than a few individuals within a firm) constitutes a corrupt actor, it can be persuasively argued that its presence distorts the market and, on balance, it is better to remove that actor even if its removal reduces competition. While debarments may have short-term negative consequences, they may well, in the longer term,
help clean markets dominated by corrupt actors (who may, through collusive behavior, freeze out other actors) and improve competitive conditions.\footnote{But see Tina Søreide, Drivers of Corruption: A Brief Review (World Bank forthcoming), where she argues that selective leniency is a better strategy for disrupting cartel behavior.}

The authors would posit, however, that the ambiguities surrounding debarment suggest that a more proportionate and nuanced approach to sanctions is not only possible but desirable, and the sanctions system’s current, almost exclusive, reliance on debarment as the sanction of choice deserves reconsideration.

Alternatives to Debarment

Against this background, the time may be ripe for study and reflection on possible alternative approaches to debarment. Debarment, whether for a defined or indefinite period, with or without conditional release, is not the exclusive reaction available to the Bank when faced with corrupt behavior by a private sector actor. The Bank may also impose conditional non-debarment (usually involving an integrity compliance program), restitution or financial remedy, and letters of reprimand, with the last being a “slap on the wrist” reserved for responsibility cases and very minor forms of misconduct (principally in the settlement context). Outside the sanctions system \textit{stricto sensu}, the Bank maintains a Voluntary Disclosure Program (VDP) that allows participants to avoid debarment or other sanctions entirely; it also refers most cases of corruption to appropriate national authorities.\footnote{Although the sanctions system targets the so-called supply side of corruption, the Bank has the discretion to exercise contractual remedies to address the demand side of corruption. \textit{See} IBRD General Conditions for Loans, secs. 7.02(c) and 7.03(c) (2012) (providing that the Bank may suspend and terminate in whole or in part the right of the borrower to make withdrawals from the loan account if it determines that any representative of the borrower has engaged in a sanctionable practice in connection with the use of loan proceeds, without the borrower having taken timely and appropriate action satisfactory to the Bank to address such practices when they occur). Additionally, the World Bank regularly refers its investigative findings to national governments and law enforcement agencies in member countries. \textit{See} Integrity Vice Presidency (INT), Annual Reports [hereinafter INT Annual Reports], http://go.worldbank.org/T40HHT3RF0.} Unfortunately, up to now, none of these alternatives has lived up to its full potential, leaving debarment in a dominant position in the system.

Integrity Compliance Programs

Integrity compliance was introduced into the Bank sanctions system as part of the 2009–10 round of reforms; these reforms were definitively incorporated into the sanctions process through the issuance of new sanctions procedures and related internal guidance in January 2011.\footnote{See Leroy & Fariello, supra note 26.} The reform was intended, first and foremost, to address the risk of recidivism by debarred parties by imposing integrity compliance as a condition for release. Integrity compliance is
also a feature of conditional non-debarment, under which a sanctioned party may avoid debarment altogether if it adopts and implements a robust integrity compliance program. This secondary function, which could be an alternative to the current heavy reliance on debarment, has been used in only five reported cases, all but one in the context of settlements.33

So far, the Bank’s Integrity Compliance Officer (ICO), a position that was established to determine whether a debarred party has met the conditions for release from debarment or non-debarment, has seen limited engagement by respondents, in particular small and medium-size entities (SMEs), raising the prospect that, contrary to intentions, debarment with conditional release will become, de facto, a road to indefinite debarment.34

The reasons for this lack of engagement are various, but one possible explanation is the potentially heavy cost that integrity compliance places on sanctioned parties. For some firms, this cost may outweigh the benefits of Bank-related business. Walmart, for example, has spent US$109 million in the past two years to enhance its global compliance program.35 Walmart, of course, is a giant multinational corporate group, but even for moderately sized multinational firms, the average cost of a compliance program has been estimated at US$3.5 million.36 Although compliance programs are widely believed to bring important benefits to firms in preventing future corruption, like debarment, robust empirical evidence for this belief is largely lacking.37 By contrast, it is

33  As of FY 2013, the only case of conditional non-debarment outside the settlement context was sanctions case no. 112, decided by the Sanctions Board in decision no. 53. See supra note 7.
34  For a discussion of the pattern of nonengagement of small and medium-size enterprises in the sanctions system, see Giovanni Bo & Frank Fariello, The World Bank Group Sanctions System and Access to Justice for Small and Medium-Sized Enterprises; and Bart Stevens & Robert Delonis, Leveling the Playing Field: A Race to the Top, in Fostering Development through Opportunity, Inclusion, and Equity, both in The World Bank Legal Review vol. 5 (World Bank 2014), which also describes the steps that the Bank is taking to ameliorate these issues.
36  In this study, the average cost of a compliance program includes the full cost of an organization’s compliance efforts, including the cost of noncompliance with laws, regulations, and policies. See The True Cost of Compliance: A Benchmark Study of Multinational Organizations (Ponemon Inst. 2011), http://www.tripwire.com/tripwire/assets/File/ponemon/True_Cost_of_Compliance_Report.pdf (estimating that the average cost of compliance among the organizations in the study was US$3.5 million compared with the nearly US$9.4 million for organizations that experience noncompliance-related problems).
37  See, for example, Nicole Sandford & Donna Epps, Compliance Program: On Everyone’s Agenda, 29(6) Financial Executive 59 (July 2013); Katharina Wulf, Ethics and Compliance Programs in Multinational Organizations 403 (Springer Gabler 2012); and Dove Izraeli & Mark Schwartz, What Can We Learn from the U.S. Federal Sentencing Guidelines for Organizational Ethics?, 17 J. Bus. Ethics 1045 (1998) (referring to a 1994 survey of the Ethics Resource Center, indicating that ethics programs appear to improve ethical behavior, and to a study by the Council of Ethical Organizations finding that “[e]mployees of companies that had implemented or fortified comprehensive ethics compliance programs in response to the guidelines . . . reported that they were less likely to violate laws and policies”). This notwithstanding, one of the major challenges with measuring compliance program effectiveness lies in the interpretation of the data obtained from the multiplicity of indicators and metrics that may be used (e.g., compli-
not uncommon for large multinational corporations that have robust compliance programs in place to face corruption scandals by corporate officers.  

Financial Restitution and Other Remedies

The Bank’s sanctions system also embraces restitution and other financial remedies as a possible sanction. The term “restitution” is an ambiguous one, with legal sources and scholars often using the word in ways that conflate at least three distinguishable concepts:

- **True restitution**, or what is known in U.S. law as the disgorgement of illicit profits. True restitution is based on the idea that a person(s) who engages in misconduct such as corruption to make a profit (the “wrongdoer”) has been unjustly enriched. Justice demands that a wrongdoer not be allowed to gain from his or her misconduct and therefore must give up those illicit profits.

- **Damages or compensation**. This can be seen as the flip side of the true restitution coin, with a focus on the person(s) who were harmed by the misconduct (i.e., the “victim”) rather than the wrongdoer. The victim is made whole by the wrongdoer with payment or action adequate to undo harm he or she has suffered. “Damages” is the term used in national tort and contract law; “compensation” is the term generally used in international law.

- **Fines**. Although often lumped together as part of restitution, fines in most legal systems are not considered restitution at all, but rather a form of punish-


See Directive 2014/24/EU, supra note 12, art. 57 (listing payment of compensation in respect of any damage caused by the criminal offense or misconduct as one of the elements evidencing the firm’s reliability); and U.S. Sentencing Guidelines, *Guidelines Manual*, ch. 8, sec. B1.1, Restitution—Organizations (Nov. 1, 2013) (stating the general principle requiring an organization to take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened).
ment that is unrelated to restoring the status quo ante of the parties involved in the wrongdoing, but related rather to the harm to the public good.  

The legislative history of the Bank’s sanctions process indicates support, at one time or another, for all three forms of restitution, particularly the first two. However, restitution has been used sparingly—in only five reported cases. The reasons for this relative nonuse of restitution, whether under a true restitution or damages concept, has to do with the inherent difficulties of calculating the quantum to be restituted and identification of the appropriate beneficiary.

In cases of true restitution under national law, the amount to be paid in restitution equals the amount that the court (or other decision maker) determines to be the value of the illicit gain to the wrongdoer, as measured, for example, by the amount of a tainted contract (plus any ancillary quantifiable benefits to the respondent arising from the misconduct) less the contractor’s costs. In practice, calculating these amounts with precision can be extremely challenging, in particular, outside the settlements context.

In cases involving damages under national law, the amount to be paid is equal to the damage done to those harmed by the misconduct. The main issue in determining the quantum of damages tends to be the extent to which “indirect” harm can be attributed to the wrongdoing, with the usual test being articulated as “proximate cause” — that is, whether it was reasonably foreseeable that the wrongful act would cause the harm. In a typical case involving a tainted contract in the Bank context, a minimum measure of damages could be calculated as the contract value less the reasonable value of any goods, works, or services received by the victim. In many cases, the secondary effects of the poor or subpar performance of the contract would clearly be a legitimate factor — but calculating and proving these secondary effects is very challenging.

In theory, fines could provide a way out of these difficulties of calculation. Typically, no attempt is made to peg the amount to a restoration of the status quo ante, with respect to the respondent or the victim. Instead, the quantum of a fine is a notional amount determined by what is needed to act as an effective deterrence against future wrongdoing and is usually graduated according to the seriousness of the wrongdoing. The idea of imposing fines for sanctionable practices has, from time to time, been floated within the

42 The U.S. Court of Appeals for the Federal Circuit in Hansen thus provided additional guidance on the computation of damages (although, confusingly, it referred in this case to “restitution” instead of “damages”).
43 Various ways have been devised under national and international systems to get around these difficulties.
Bank—indeed, the idea goes back to Thornburgh\textsuperscript{44}—but the Bank has never formally embraced fines.\textsuperscript{45} Among other things, doubts have been expressed about the Bank’s legal authority to levy fines, given that it is not a sovereign power, although, arguably, payment of a notional amount as a condition for release from debarment or non-debarment could circumvent this objection. More fundamental are the objections that fines would create the perception, if not the reality, that corrupt actors could view fines as simply another cost of doing business, allowing them to pay their way out of trouble.\textsuperscript{46} Fines would tend to favor larger firms with deep pockets over SMEs. Fines also would tend to contradict the Bank’s traditional assertion that its sanctions system is not meant to be punitive but protective in nature.\textsuperscript{47}

Besides difficulties of calculation, restitution has posed challenges for the Bank in identifying the suitable beneficiary of restituted funds. Traditionally, at least under a damages concept of restitution, funds are returned to the party harmed. In cases where the victims of the wrongdoing are clearly identifiable, there is a strong argument that financial penalties should be passed on or otherwise used for the benefit of those persons. But in the context of Bank sanctions, the harm done to development effectiveness through corruption in connection with a Bank-financed operation may be widespread, and identification of a specific victim or victims practically impossible.

More recently, the Bank has taken the view that the proceeds of restitution belong to the government concerned, as the most direct victim of corruption. This was the Bank’s commitment in its 2010 settlement with Lotti Ingenieria S.p.A., where the Bank imposed the restitution of US$350,000 to the government of Indonesia for unjustified payments received by Lotti and its partners as a result of fraudulent invoicing.\textsuperscript{48} But this approach raises its own concerns. In some cases, government officials have been complicit in the sanctionable practice at some level, so returning money to the implicated government agency may not always seem to be the most prudent course of action.

The current guidance in the Sanctioning Guidelines recognizes these difficulties when it provides that financial remedies should be used only in

\begin{footnotes}
44 See Thornburgh Report, supra note 3, at 59–60.
45 One exception was the US$100 million Siemens Integrity Initiative (SII), which was created as part of the 2009 settlement agreement between the Bank and the Siemens Group. The US$100 million figure was deemed a kind of restitution, but the payment was not calculated based on an estimate of illicit profits or damage done, nor was there any requirement that the SII be directed to the “victims” of Siemens’ wrongdoing. See World Bank, Press Release 2009/001/EXT.
46 See Stevenson & Wagoner, supra note 21, at 795–96.
47 Notwithstanding this assertion, even without fines, some stakeholders see the sanctions system as punitive in nature.
48 In one case, notwithstanding the respondent’s intent to comply with its obligation, restitution has not been paid yet because of the inability to determine which government agency is entitled to receive the funds.
\end{footnotes}
“exceptional circumstances.” Nor is it surprising that four out of the five reported cases where restitution has been imposed as a sanction came in the context of a negotiated resolution of the case. Settlement negotiations allow for an exchange between the Integrity Vice Presidency (INT) and the respondent to sort out the relevant facts and, in appropriate cases, identify and agree on reasonable proxies where precise facts are lacking. By contrast, in the absence of clear criteria by which to assess the funds to be restituted or, in most cases, clear evidence on which to base such an assessment, the Suspension and Debarment Officer (SDO) and the Sanctions Board have been quite understandably reluctant (or perhaps simply unable) to move into this delicate area. However, there has been one case to date where restitution was imposed by the Sanctions Board as a condition for non-debarment of the respondent based on the sufficiency of the evidence produced by INT on charges of overbilling.

**Letters of Reprimand**

The Sanctions Committee, which predated the Sanctions Board, imposed letters of reprimand on a fairly regular basis. It did so when a sanctionable practice was deemed minor enough for this proverbial slap on the wrist or, interestingly, in cases where the committee did not find that the respondent’s conduct amounted to a sanctionable practice but evidenced an ethical failure that merited some censure. Under the current system, letters of reprimand have been used only occasionally in the context of settlements. Letters of reprimand could be used more frequently, and their customary use as censure for unethical but non-sanctionable conduct could also be revived. It does not seem likely, however, that letters of reprimand could function as a mainstream alternative to debarments; the principle of proportionality demands that the use of such a light sanction should be limited to minor forms of misconduct.

**Voluntary Disclosure Program (VDP)**

The VDP provides another possible alternative to debarment. Under the VDP, firms not already under investigation may be spared sanction if they meet certain conditions, including self-investigation, implementation of integrity compliance, and a firm commitment to avoid sanctionable practices in the future. In the course of public consultations, private sector actors expressed dissatisfaction with what they perceived to be onerous terms and conditions, in particular the 10-year mandatory debarment for breach of VDP terms. As a result, firms’ participation in the VDP has so far not met initial expectations.

49 See Sanctioning Guidelines, supra note 4, at sec. II.F.
50 See supra note 41.
51 See Leroy & Fariello, supra note 26, at 10.
52 As of FY 2013, three letters of reprimand have been issued, all of them in the context of settlement.
53 See World Bank, Voluntary Disclosure Program Guidelines for Participants (2011), http://go.worldbank.org/T3PD4EE550. See also Stevens & Delonis, supra note 34, at 406–7, which allows that “[t]he VDP is not an appropriate fit for everyone.”
54 See supra note 7.
and—for the moment at least—cannot be seen as a viable mainstream alternative to debarment.\textsuperscript{55}

**Referral to National Authorities**

Although the Bank’s sanctions system aims at preventing bad actors from participating in future projects through its sanctions, criminal investigations remain within the jurisdiction of member-states. The Bank has had a long-standing practice of referring investigative findings to national authorities when an investigation leads INT to believe that the laws of a member country have been broken. Following a 2009 recommendation by a panel led by Paul Volcker,\textsuperscript{56} the Bank undertook to make these referrals on a routine basis.

In theory, the deterrent component of sanctions could be served by this kind of referral. Indeed, the prospect of action (typically of a criminal nature) by national law enforcement could be a far more potent deterrent than the economic and reputational price exacted by a Bank sanction. However, this assumes that a referral is likely to lead to real consequences; the track record so far in terms of follow-up by national authorities is not very encouraging. In FY 2012, the World Bank made 46 referrals of findings to agencies and authorities in more than 30 countries. In FY 2013, only 10 referrals prompted national authorities to launch their own investigations.\textsuperscript{57}

**Community Service as Restitution**

Despite its drawbacks, debarment continues to dominate the Bank’s sanctions system, partly because the Bank’s Sanctioning Guidelines enshrine it as the baseline sanction, partly because the potential alternatives to debarment have faced their own sets of issues.

One promising and innovative idea for an alternative (or complement) to debarment is the adoption of various forms of community service. For the purposes of this chapter, the term “community service” is used broadly, with a meaning that captures the provision of goods, works, or services to a community of stakeholders, preferably those who were affected by the corrupt behavior that gave rise to the sanction.

**Community Service in National Law**

Community service as a form of penalty for individuals has a long history in penal law. In its earliest days, it took the form of penal servitude and, later,

\textsuperscript{55} In fairness, it should be noted that these kinds of results appear to plague leniency programs generally, including in the FCPA context. \textit{See}, generally, Søreide, \textit{supra} note 30.


\textsuperscript{57} \textit{See} 2012 and 2013 INT Annual Reports, \textit{supra} note 31.
as a formal sentencing option in lieu of incarceration.\textsuperscript{58} Discussions about the adaptation of this form of sentence for use against corporate offenders have occurred only recently. The assumption is that imposing community service orders on corporate respondents would be superior to imposing fines in regards to the five major aims of corporate criminal law: deterrence, direction, instruction, retribution, and redress.\textsuperscript{59} In the United States, sentencing guidelines provide that community service may be ordered as a condition of probation where the service is reasonably designed to repair the harm caused by the offense, provided that the organization performs the service only by employing its resources or paying its employees or others to do so. An order that an organization perform community service is viewed as “an indirect monetary sanction [. . .] generally less desirable than a direct monetary sanction” and is warranted where “the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense.”\textsuperscript{60}

\textbf{Community Service in the World Bank Sanctions Context}

Although community service comes out of penal law traditions, the authors would argue that it can find a place in the World Bank’s administrative system and—perhaps paradoxically—help shift the system away from its current focus on negative incentives toward more positive ones.

A firm found to have engaged in corrupt acts could undertake to “give back” to the community affected by its misconduct, either by undoing the harm caused by the misconduct or, if that is impractical, engaging more generally in the provision of goods, works, or services to benefit that community. To take a straightforward case, a firm that “cut corners” on a road it built by


building the road to only 75 percent of its intended width would repair or reconstruct the road to the original specifications, even in the absence of contractual remedies available to the borrower to demand full performance. In the alternative, if the road was built to specifications but its price was inflated, community service could return to the intended beneficiaries the value of that excess cost. In less straightforward cases, where the nexus between the corrupt act and harm is more attenuated due to the lapse of time or the widespread nature of the corruption, the community service could be aimed more broadly at the project beneficiaries where the corruption took place or to the broader community, region, or country(ies) affected.

Within the existing set of Bank sanctions, satisfactory performance of this sort of community service could be deemed either a form of in-kind restitution or simply a condition for non-debarment.61 Farther upstream, an offer of community service could be considered as cooperation in mitigation or avoidance of debarment.

Advantages of Community Service

The concept of community service is particularly attractive to a development institution such as the World Bank because the concept holds a sanctioned party to account in a way that directly addresses the harm that corruption does to development effectiveness, thus contributing directly to the Bank’s mandate. And it avoids collateral consequences for Bank procurement and for the markets in which the sanctioned party operates.

Direct engagement with the affected communities could potentially give communities greater voice on the governance challenges affecting them and enhance accountability for the corrupt actor. The communities could, for example, be consulted on the extent of the harm suffered and on how that harm could be put right, as a key input into designing an appropriate community service action plan. The sanctioned party, for its part, could be called on to explain and apologize for its actions, thus holding it to account more powerfully than any mere financial penalty could. This, in turn, may open up a broader dialogue on the conditions that made the corruption possible—and what could be done about them.62

61 While well within the spirit of the language, to be used as a form of restitution, the Bank’s Sanctioning Guidelines should probably be adjusted to allow explicitly for nonmonetary forms of restitution. The current language, which talks about “financial remedies” and “amounts to be restituted,” appears to assume that restitution will come in the form of a payment.

62 In an effort to promote a culture of compliance, a proposal by external stakeholders as part of the sanctions review was made to include as a sanction the obligation to finance collective actions to prevent corruption (e.g., conferences, forums, business associations, school programs) in the country where the corrupt act took place and with the active participation of the administration that was involved in the corrupt act. See Review of the World Bank Group Sanctions System, Submission of the French Council of Investors in Africa, Paris (Oct. 28, 2013), http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsReview_CIAN.pdf.
Community service may also be a way to overcome a number of the challenges posed by financial forms of restitution discussed in this chapter. Community service does not require a precise calculation of illicit profit or damages or the precise identification of a victim or victims, which can be slippery concepts. And it avoids the need to return funds to a government agency that may have been complicit in the original wrongdoing.

More broadly, the introduction of community service into the system could help shift the system away from its current focus on negative incentives toward a system that rewards good behavior while promoting the delivery of development results. The need to revisit the balance between the negative and positive incentives in the system was raised during recent external consultations, where a number of stakeholders advocated a shift to encouraging or rewarding integrity; rehabilitation, including self-cleaning; and other corrective measures. More broadly, many external stakeholders maintained that the system is too punitive, too focused on negative incentives like debarment, and too little focused on positive incentives like rewarding integrity, rehabilitation, and self-cleaning.63

**Challenges of Community Service**

Community service as a form of restitution comes with its own set of challenges. As a threshold issue, the Bank would need to consider what forms of service would be appropriate, presumably with corrective actions that restore the status quo ante as the preferred option. The Bank would agree with the sanctioned party on an action plan, including activities and a timetable, which would then need to be monitored and assessed. Triggers and consequences would need to be articulated for late, poor, or nonperformance, with the ultimate consequence presumably being debarment, with some flexibility for force majeure and other justifying circumstances. Indeed, this form of sanction would, in essence, require a new contract, albeit one that provides goods, works, or services free of charge, with all the usual complexities attendant to contracts, beginning with the threshold issue of who the parties to the contract should be: the Bank, the relevant borrower, the affected line agency, or the community(ies) impacted—or a combination of these.

The legalities of the arrangement under local law would have to be confirmed. For example, nonpayment notwithstanding, the arrangement could be seen as a form of public procurement, with all the concomitant constraints.

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Short of legal constraints, the willingness and ownership of the initiative by local authorities would be a sine qua non.

The idea also carries some risks. Like any other contract, there is a possibility that the community service itself might become the subject of corrupt practice, which would not only defeat the putative purpose of the sanction but also create significant reputational risks for the Bank. And the arrangement might create reputational risks if the Bank were seen as merely providing a public relations opportunity for a corrupt actor, making communication of the Bank’s intentions and objectives—and those of the sanctioned party—of paramount importance. Any public airing of the underlying corruption would need to be carefully managed to ensure a candid and constructive dialogue with the affected communities, not an opportunity for the sanctioned party to engage in self-justification.

In terms of sanctions policy, the Bank would need to grapple with a number of additional issues. Perhaps most important, the Bank would need to consider whether community service could or should replace debarment entirely, or serve merely as a form of corrective action in mitigation or as a condition for a reduced debarment period.

The Bank would also need to consider in what circumstances this form of sanction would be appropriate, in particular, if it is to be limited to less serious sanctionable practices or to a certain class of sanctioned parties. This chapter does not argue for limiting the use of community service to less serious sanctionable practices—rather, the cost of the service could be scaled to the seriousness of the underlying misconduct or, better still, the damage done by that misconduct. (If the service were aimed directly at undoing that damage, the scaling would occur automatically.)

We would argue that the possibility of community service should be limited to a particular class of eligible respondents. Potential eligibility criteria include the following:

- Respondents must be willing and able to perform the community service. Willingness could be demonstrated by requiring the respondent to offer to engage in community service as an alternative to debarment. The respondent should be required to demonstrate that it possesses the knowledge, facilities, and skills to undertake the services proposed. Cases where the respondent misrepresented its qualifications or experience (a not uncommon scenario), or any other case where the sanctioned party’s ability to perform is in doubt, would not be ripe for community service.

- If a respondent continues to pose a fiduciary risk, then the exclusionary rationale for its debarment remains strong, and alternatives like community service should not be entertained, except perhaps as a mitigating factor. Whether or not current management was implicated in the underlying wrongdoing would be a key indicator of a persisting fiduciary risk for the Bank.
The respondent must manifest sincere intent to reform—and not just those who wish to take advantage of community service, either as another opportunity for corrupt behavior or simply as a public relations exercise. Although an otherwise subjective quality like sincerity would be problematic given the system's current setup, reasonable proxies could be found in the mitigating factors that are currently listed in the Sanctioning Guidelines, namely, whether the firm has begun to take voluntary, convincing corrective actions to remedy the situation, has launched an internal investigation, and/or is cooperating with the Bank in its investigation of the misconduct. (Indeed, one can argue that community service itself is a kind of further corrective action.)

To put the community service idea into practice, the Bank would need to determine how this form of sanction would work procedurally. Like monetary forms of restitution, community service seems more adaptable to the settlement context, where direct negotiations between the Bank and the respondent allow for the ironing out of the fairly complex attending issues.

The bodies that conduct sanctions proceedings—the SDO and the Sanctions Board—were set up to determine the facts of a case and to make a fairly straightforward assessment of an appropriate sanction based on those facts. Under their current configuration, they are not well positioned to negotiate the terms and conditions of community service, either with the respondent or with governments or local populations. One way around this would be to allow decision makers to make debarment decisions either reducible or convertible to conditional non-debarment, by which the respondent, within some reasonable time after a debarment is imposed, could approach the Bank (either the ICO or some other appropriate Bank official) with a proposal to reduce the debarment period or to convert the debarment into a conditional non-debarment on terms and conditions to be proposed by the respondent and acceptable to the Bank, with the principal condition being the satisfactory performance of appropriate community service in accordance with an action plan agreed to with the Bank.

To limit transaction costs, it may be preferable that community service be undertaken as a supplemental activity under an existing Bank Group operation—presumably the one that was affected by the corruption. If that is not feasible—because corruption often comes to light long after the fact, when the relevant operation is already complete—then some other project may serve as host. As a last option, the community service might be undertaken as a stand-alone miniproject. Although the full panoply of Bank project preparation cycle should be avoided, the Bank's operational policies, including appropriate consultation with prospective beneficiaries and country ownership principles, as well the Bank's safeguards and anticorruption policies, could be applied, mutatis mutandis.
Conclusion

Community service is an attractive alternative to the Bank’s almost exclusive current reliance on debarment as the sanction of choice for corrupt behavior by private sector actors in the projects that it finances. Although the Bank would need to address a number of practical, policy, and procedural issues to make the idea work, the effort would be worthwhile. Community service, as a sanction or as a complementary mitigation measure in appropriate cases, would avoid or mitigate the potential anticompetitive impacts of debarment while providing a way to compensate for, if not eliminate, the direct harms done by the sanctionable practice to development effectiveness.

Perhaps most significant, by engaging with the affected project beneficiaries, community service has the potential to provide a teaching moment on the causes and consequences of corruption while giving voice and compensation to those who, all too often, are left “out of the bargain” in sanctions cases: the populations that the Bank is ostensibly striving to help.64

64 Jacinta Anyango et al., Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery (World Bank 2014).