



# Competition Community & Multilateral Development Banks: Opportunities For Further Cooperation



*By Beatriz de Guindos Talavera<sup>1</sup> and Marianela López-Galdos<sup>2</sup>*

## INTRODUCTION

Lewis noted in his famous book on the power of productivity that the “really big” distortions to competition are in poor countries.<sup>3</sup> In fact, the absence of a level playing field or even the mere perception of an anticompetitive environment undermines the capacity of countries to attract private sector investments that are essential for economic growth.<sup>4</sup> In line with this premise, the new Sustainable Development Goals (“SDGs”) place substantial importance on the private sector role to foster economic growth.<sup>5</sup>

The success of these recently adopted SDGs will depend to a high extent on the capacity of development assistance to facilitate and strengthen the private sector in the poorest countries. In this context, competition policy, as the Asian Development Bank highlighted, becomes fundamental since “appropriate enforcement of competition law both enhances the attractiveness of an economy as a location for foreign investment and is important for maximizing the benefits that flow from such investment.”<sup>6</sup>

In view of the foregoing, it seems imperative for the international organizations providing financial assistance to developing countries to work hand-in-hand with competition experts and further explore the relationship between economic development and competition policy.

To cultivate this relationship, this analysis presents a holistic perspective on the use of competition policy by Multilateral Development Banks’ (“MDBs”) as an instrument to fulfill these organizations’ mandates vis-a-vis poverty and inequality reduction and reveals the areas that could benefit from further cooperation with the competition community.

## OPPORTUNITIES FOR COOPERATION

To inform the preceding discussion, the analysis focuses on three main areas that merit further examination, namely: (i) competition policy/advocacy, (ii) anti-cartel enforcement and (iii) procurement data analysis.





## A) *Competition Policy And Advocacy Role Of MDBs*

MDBs mandates are well aligned with the overall developmental impact that the 17 SDGs pursue.<sup>7</sup> Thus, through the realization of their respective institutional strategies, MDBs will play a key role in the success of the so-called 2030 Agenda.<sup>8</sup> As such, MDBs endeavor to reduce inequality and promote economic growth through a mix of concessional and non-concessional finance to support investment projects, technical assistances and policy reforms that stand-alone banks may find too risky to invest in. Competition policy components are embedded in many of these financial instruments through the privately and/or publicly channeled financial aid.

**Public Sector.** The role of MDBs in terms of competition policy is a cross-cutting one to their advisory services and investments in different sectors. Indeed, development banks aim at increasing market efficiency through sector reforms, removing barriers to entry, improving investment climate or assisting countries in privatization processes. In all these areas, competition policy issues play a critical role. At the same time, MDBs also provide for more targeted technical assistance programs to develop the national competition systems including the legal frameworks and institutional arrangements.

The above-described approaches are complementary and necessary to ensure effectiveness and development impact. In fact, most jurisdictions count on national legislation on competition but only a few benefit from fully effective law implementation.<sup>9</sup> This is the main reason why, often, cartel structures throughout entire value chains (from primary input markets to downstream product markets and services) exist in developing countries' markets. Additionally, higher levels of public intervention in economic activities become the standardized practice in many of these developing economies.

MDBs count on a wide toolkit of analytical and diagnostic products to address such competition concerns in their client countries: from competition assessments that feed into the sector reforms to neutrality assessments of State-owned enterprises or ex post evaluations of the antitrust watchdogs to gauge effectiveness of competition policies.

Yet, it would be a big mistake to go for a one-size-fits-all approach in the MDBs advocacy role *vis-a-vis* the competition systems of the developing countries. These countries share the need for a solid private sector that contributes to job creation and reduces poverty and inequality, but local market conditions, regulatory frameworks and institutional capacity may vary widely from one country to another. That is why competition policy action from MDBs in low-income countries tends to focus more on opening markets to external competition and removing inefficient legal barriers that protect incumbents in the different sectors rather than promoting the adoption of comprehensive competition legislative and institutional packages.

For instance, in the Philippines, the World Bank has supported the Government in the revision of the maritime regulation, contributing to a clear reduction of the waiting list and times to register new ships and fostering the entrance of new competitors in each route. As a result, the domestic maritime industry traditionally characterized by high costs, low quality of service, and a poor safety record has undergone several reforms with potential savings up to 5 percent in the costs of transport and logistics.

Similarly, through technical assistance from the World Bank, Honduras has introduced a non-discriminatory register for pesticides and related products for agricultural use that has led to a triple increase in the number of products registered and an average 10 percent decrease in prices.

Differently, MDBs efforts in middle income countries are concentrated in reinforcing national competition frameworks, providing capacity building and promoting private sector development through more transparent and predictable legal frameworks to create the necessary enabling environment for private investments. Recent policy loans of the World Bank addressing competition issues in this sense have been approved for Kazakhstan, Georgia and Morocco, among others.





These differentiated approaches based on the different client needs are especially prone to South-South cooperation.<sup>10</sup> Against this background, the International Competition community could provide guidance based on its own experience on what works best according to a country's specific economic and market-culture context and help build the best tailor made solution in each case.

All MDBs pursue through their actions a developmental impact that needs to be (economically, socially and environmentally) sustainable. Therefore, cooperation among the different actors involved and sharing knowledge and best practices according to the different needs and environments seem to be the way forward to ensure transformative but at the same time sustainable solutions, including the competition policy domain.

**Private Sector.** MDBs include among their activities the so-called private sector development branches. These areas contribute to strengthen private actors through loans and/or equity projects with the private companies selected for their projects.<sup>11</sup> Hence, the MDBs private sector institutions such as the International Finance Corporation (IFC) in the case of the World Bank or the Inter-American Investment Corporation (IIC) at the Inter-American Development Bank, are especially well suited agencies to introduce efficiency and competition in the markets of developing countries in which their projects take place. Indeed, these institutions have an opportunity to address competition concerns during the three phases of their investment projects: preliminary assessment, preparation and implementation.

First, during the initial study aimed at identifying business opportunities (preliminary assessment), MDBs could pay increased attention to market structures and sectors and try to identify the possibility to contribute to the opening of otherwise foreclosed markets. This could be done through the identification of the most appropriate investment (loan, equity, guarantee, etc.) taking into consideration competition concerns as part of the analysis e.g. number of existing competitors. The apparent conflict between considering competition factors and the maximization of benefits that an investment officer might confront should be resolved by granting a higher priority to the development mission of MDBs. In fact, it is precisely the developmental mission of the MDBs what should be prioritized in all their interventions, and therefore all efforts should be channeled to maximize efficiency both in the public and the private sector in order to foster the benefits of shared prosperity in the form of competitive prices and high quality of basic products and services to these societies.

Second, during the preparation phase, once investment officers decide on the type of investment to pursue, the selection of the counterparties and sponsors could also consider competition related factors. In this respect, the selection of those players that can truly contribute to increase competition in the markets and that adhere to the highest integrity standards could bring about increased benefits from a development perspective in the long run. Therefore, the due diligence process that compliance officers perform on potential counterparties and sponsors during the preparation phase should bear in mind competition concerns and review whether the former have engaged and been sanctioned for anticompetitive practices. This "integrity review" process should become a core priority.

Finally, during the project implementation phase, MDBs must ensure that awarded contract partners adhere to and comply with the MDBs rules and procedures that include integrity standards that prohibit collusion, as it will be further explained in the following section. In this respect, it is worth noting that collusive arrangements are draining huge amounts of resources of economies that have a need to make the most efficient use of aid resources to maximize developing related benefits.

Against this background, and given the unique position of these institutions vis-a-vis private sector, MDBs should become a pivotal transformative instrument to spur corporate governance in the private sector, curbing the impact of illicit flows stemming from bid rigging in public tenders and/or abuses of dominant positions in monopolistic markets.





## B) Integrity Units- Anti-Cartel Enforcement

Inevitably, MDB's projects and operations are vulnerable to corruption and anticompetitive practices including cartel agreements, which can thwart realization of MDB's developmental goals. With a view to fulfill MDBs fiduciary duties, MDB's integrity units were created in parallel to the implementation of the so-called sanction systems that penalize collusion, among other practices.<sup>12</sup>

MDBs sanction systems share several common features such as the two-tiered structure of investigation and decision-making, the administrative nature of sanctions proceedings, and reliance on the "preponderance of evidence" as the standard of proof.<sup>13</sup> Between 2007 and 2015, 368 entities were sanctioned or debarred by the World Bank Group and 359 faced temporary suspensions.<sup>14</sup>

Despite the impact that the MDB's sanctions have on the markets for developing countries, the competition community has limited awareness of the existence of these integrity units and vice versa, which eventually results in a disadvantageous gap from a cooperation viewpoint. The closure of this gap could bring about important synergies at least from institutional, procedural and substantive angles.

**Institutional Opportunities.** From an institutional perspective, it is predictable to conclude that both the competition community and the MDB's Integrity Units could benefit equally if they establish a more intense relationship and carry out joint and parallel cartel investigations.<sup>15</sup>

The use of dawn raid powers serves as a good example to illustrate some of the benefits that enhanced cooperation could bring about. MDB's integrity units have no dawn raid powers that are key when searching for evidence to dismantle and sanction cartels. Hence, considering that the vast majority of national authorities can make unannounced inspections, MDBs investigators could carry out parallel or joint investigations that would benefit all parties involved.

MDBs Integrity Units could provide information to national authorities of possible cases of collusion based on the information MDB's have of the projects they finance and the sectors that are subject to deep analysis from these institutions for technical assistance and policy reform. In turn, the national authorities of these developing countries could carry out dawn raids to gather evidence. As a result, national authorities would have better information on possible bid rigging cases, and the MDBs could have better results in their efforts to combat collusion in the programs they finance and to reap full benefits of the sector reforms they promote through their budgetary and technical support.

**Substantive Opportunities.** From a substantive standpoint, both MDBs and competition authorities could join efforts when carrying out economic analysis to build upon the circumstantial evidence often used to substantiate cartel investigations.

MDBs as many national authorities in developing jurisdictions have the great challenge to incorporate economic analysis to the cartel investigations in order to substantiate the cases that depend vastly on circumstantial evidence. It is therefore suggested that both national authorities and MDBs sanctions systems mutually devote joint efforts to incorporating economists who work together with lawyers and investigators to build solid collusion cases.

**Procedural Opportunities.** Finally, from a procedural viewpoint, the competition community could work closely with MDBs with regards to the implementation of leniency programs and mutually assist each other by participating as *amicus curiae* in litigation phase.

Most competition systems include among its instruments to combat anti-competitive agreements leniency programs. As is known, leniency programs encourage companies to confess to the competition authorities of their participation in a cartel and to cooperate by providing information with respect thereto, in





order to obtain full or partial immunity concerning their participation in such a scheme. The effectiveness of these programs is unquestionable.

Despite the successful experience in the use of leniency programs to combat anti-competitive agreements, MDBs remain largely reluctant to use them. It should, therefore, conclude that greater cooperation between the MDBs and national authorities and endeavors to show the benefits of having leniency programs could improve the cartel detecting capabilities of MDBs that could also benefit at the end of the day national authorities capacity to detect and fight collusion in developing countries.

Additionally, once cooperation between MDBs and competition authorities is intensified, the possibility of national competition authorities to participate as *amicus curiae* during the MDB's litigation phase and vice versa could yield significant benefits. This is particularly the case in collusion cases that are based on circumstantial and economic evidence. The incorporation of amicus briefs in collusion cases could help to obtain deference from sanction officers of MDBs as well as the judiciary from developing countries and enhance the fight against cartels.

### *C) Knowledge Sharing- Data On Procurement*

MDBs count with invaluable data on public procurement as most of the contracts included in the projects they finance are publicly procured. As it is well known, one valuable tool for competition authorities and for MDB's integrity units is to analyze and identify anticompetitive pattern behaviors that take place in the procurement processes.

The systematization of the MDBs procurement data broken down by sector, markets, countries and regions could provide the competition community with superior information to work with. This would yield better results for competition authorities in their endeavors to ensure effective competition in markets, thus contributing as well to the MDBs development mission through an enabling environment for private sector growth and job creation. Indeed, the study of systematic information on public tenders could contribute to finding innovative solutions for the detection of cartels, such as the identification of multijurisdictional patterns. At the same time, the economic analysis of such data would produce more accurate estimates of the costs of collusive agreements, increasing awareness of the toll it is taking on developing economies and, therefore, reinforcing the right incentives to fight against it.

In view of the foregoing, it seems that there is a window of opportunity for MDBs and competition agencies as well as competition scholars to agree on how to share the information MDBs have from a procurement standpoint and work with the data thereof.

## **CONCLUSION**

The summary included in this article has attempted to illuminate potential cooperation opportunities between MDB's and the competition community with the aim of bringing closer together both communities and yield mutual benefits. It is expected that a closer cooperation between the two stakeholder groups would generate synergies that equally benefit the respectively pursued goals. The latter is particularly important given the fact that the MDBs shareholders are the Governments of its country members, which should be an additional incentive to engage with their national competition authorities.

This analysis has identified a few areas where cooperation could and should be enhanced. The benefits of such increased cooperation overweight the cost of implementing those cooperation efforts. Thus, it is a low-hanging fruit that would help boost shared prosperity and benefit the poorest. It is now the turn of interested parties to make such cooperation happen.





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- <sup>1</sup>Alternate Executive Director for Spain at the World Bank Group. The views expressed in this paper are the personal responsibility of the authors and should not be attributed to any of the institutions for which the authors work
- <sup>2</sup> Principal researcher at the George Washington Competition Law Center. The views expressed in this paper are the personal responsibility of the authors and should not be attributed to any of the institutions for which the authors work
- <sup>Ω</sup> This analysis is based on an article published by the same authors in the Anuario de la Competencia 2015 (Fundación ICO, Marcial Pons 2015) that provides for a holistic perspective of the use of competition policy by the MDBs.
- <sup>3</sup> Lewis, W.W., "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability", The University of Chicago Press, 2005.
- <sup>4</sup> De Guindos Talavera, B. and Lopez-Galdos M., "Derecho de la Competencia en los Organismos Multilaterales de Desarrollo: Una Perspectiva Holística," Anuario de la Competencia 2015, Fundación ICO, Marcial Pons, 2015.
- <sup>5</sup> The Sustainable Development Goals, otherwise known as the Global Goals, build on the Millennium Development Goals (MDGs), eight anti-poverty targets that the world committed to achieving by 2015. More information available at <http://www.undp.org/content/undp/en/home/sdoverview/post-2015-development-agenda.html>
- <sup>6</sup> "Asian Development Outlook 2005," p. 270, Asian Development Bank, 2005.
- <sup>7</sup> See footnote No. 3 supra.
- <sup>8</sup> All Heads of States, Governments and Institutions that gathered at the UN last September 2015 agreed on the new 17 Sustainable Development Goals and the need to scale up efforts to implement the working program ahead both at national and international levels to take this agenda forward according to the realities in each country and respecting the national policies and priorities in each case.
- <sup>9</sup> <http://blogs.worldbank.org/psd/tirole-wbg-twin-goals-scaling-competition-policies-reduce-poverty-and-boost-shared-prosperity>
- <sup>10</sup> South-South cooperation is a broad framework for collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains. Involving two or more developing countries, it can take place on a bilateral, regional, subregional or interregional basis. Developing countries share knowledge, skills, expertise and resources to meet their development goals through concerted efforts. For more information please refer to [http://ssc.undp.org/content/ssc/about/what\\_is\\_ssc.html](http://ssc.undp.org/content/ssc/about/what_is_ssc.html). When South-South cooperation is channeled through an MDB, it is sometimes known as triangular cooperation.
- <sup>11</sup> Unlike commercial banks or investors, MDBs private sector institutions bring together financial resources and developmental impact through their investments, acting as an honest broker in those countries and sectors where risk aversion and lack of financial resources can be hindering the very much needed development of the private sector.
- <sup>12</sup> For detailed history of evolution of the Bank's Sanction System, see *The World Bank Sanctions Process and Its Recent Reforms*, Anne-Marie Leroy, Frank Fariello, The World Bank Group, 2012
- <sup>13</sup> *Understanding the World Bank Group's Anti Corruption Measures in Project Financing*, Maria Barton, Bloomberg Law Reports, Risk and Compliance, Bloomberg Finance LP, Volume 4, 2011; *The Increasing Prominence Of World Bank Sanctions*, Timothy Dickinson, Corinne Lammers and Morgan Heavener, [www.law360.com](http://www.law360.com)
- <sup>14</sup> The World Bank Office of Suspension and Debarment Report on Functions, Data and Lessons Learnt, 2007-15, Second Edition, available at [http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSD\\_Report\\_Second\\_Edition.pdf](http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSD_Report_Second_Edition.pdf)
- <sup>15</sup> Lopez-Galdos, M., "Competition and Corruption: Two sides of the Same Coin Against Productivity", OECD Latin American Forum, 2016.

