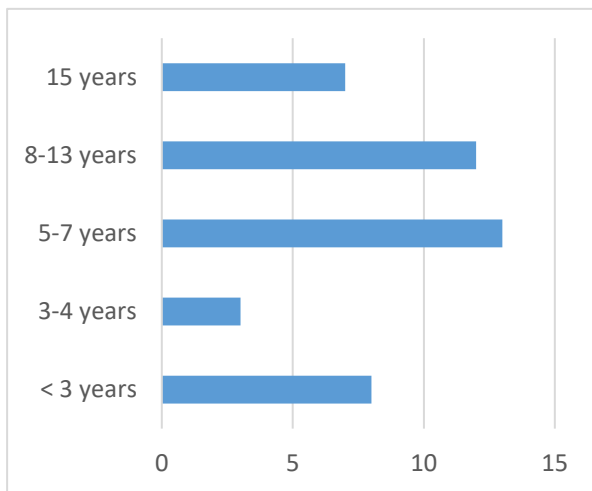


Negotiation and Cooperation with an IDB investigation

The Inter-American Development Bank ([IDB](#)) has the power to investigate suspected irregularities in projects financed by the bank (read more about the procedure [here](#)).

The most commonly applied sanction is a debarment with conditional release. This debarment makes it impossible for the company to participate in any public procurement financed by the IDB and, due to the [cross-debarment](#) agreement signed in 2010, in most cases by several other international development banks as well. In 2019, the IDB imposed 33 debarment penalties ranging from less than 3 years to up to 15 years, as shown in the graph below.



The most recent case of [sanctions](#) against a Brazilian company were those applied to the construction firm Andrade Gutierrez Engenharia S.A. (**Andrade Gutierrez**) and its 11 subsidiaries in April 2020. The grounds for penalty were irregular practices connected to sanitation projects in the northern region of Brazil (PRO-MABEN and PROSAMIM projects). The IDB has debarred Andrade Gutierrez from participating in any public procurement involving the IDB and other development banks for 2 years and 6 months.

An investigation, once initiated, affords limited reaction time. On receiving notification that a company is under investigation, it should act immediately. It has only **60 days** to assess the situation and present its defence. Should the company fail to respond or raise a defence against any of the allegations, the IDB will deem the allegations to be true. It will, as a result, apply the sanction in full.

It is crucial to be aware of the IDB's investigative competences. Because penalisation is a commercial decision made in the course of an administrative proceeding, the IDB is not restricted to the same obligations and limits as local authorities. The evidentiary burden needed for the IDB to sanction a company is only on the balance of probabilities. That is, it is '**more likely than not**' that an irregularity has occurred. This essentially reverses the burden of proof, and it is on the company to dispel any doubt as to the existence of any irregularity.

To mitigate the risk of the serious consequences that may arise from this process, and given the breadth of the IDB's investigative powers, a company involved in any perceived irregularity must make the best of all defence mechanisms available to it. The Negotiated Resolution Agreement (**NRA**) is by far the most beneficial of these.

The Negotiated Resolution Agreement (NRA)

The NRA aims to avoid, or at least greatly reduce, the prospect of sanctions on the basis that the company has cooperated in the investigation. However, in order to benefit from this, the company must act quickly. An NRA is only possible before the Office of Institutional Integrity (**OII**) submits a complaint to the Sanctions Officer (**SO**).

There are therefore three phases in which it is critical for a company to consider how to act:

- Pre-investigation phase (self-reporting). At this stage, the facts are not yet known to the IDB and the company's submission is voluntary. Here, an NRA may result in no sanction being applied. This will depend on the degree of damage involved and the volume and quality of the information supplied to the IDB in the course of negotiating the NRA;
- Initial phase of the investigation. The IDB will have commenced fact-finding, but the OII will not yet have submitted its conclusion to the SO. In this case an NRA is possible, but the resultant benefits will be limited to possibly reducing the sanction to be applied and not a complete exemption, as in the previous case; or
- Sanction procedure already initiated. Here the SO will have received the case and initiated the sanction procedure. This extinguishes the possibility of executing an NRA. Nevertheless, any cooperation may still benefit the company as will be discussed further below with regard to the topic of other forms of cooperation.

In addition to the time limits implied for the negotiation of an NRA, the IDB requires **substantial evidence of the irregularities** under consideration. The evidence must demonstrate repeated, systemic irregularities, or one irregular act committed by the interested party or by a third party, whose involvement is still unknown to the OII. One of the main prerequisites for the SO to accept the NRA request is the presentation of relevant information to the IDB that significantly contributes to its inspection activity. This can involve not only the facts under investigation but also other facts that are still unknown. It will not be enough to provide information that serves only to increase the efficiency of the investigation.

All persons and companies involved in the matter must be brought into the scope of the NDA, especially IDB members who were, to some extent, part of the irregular act themselves. In order to attain this level of cooperation, with the description and proof of the facts, the company must organise comprehensive data analyses and bookkeeping.

With the completion of the NRA, the IDB and the interested company will sign a **term-sheet** that will define the procedure to be followed and the terms of confidentiality to be respected by the parties.

The financial gains of an NRA are evident. However, the company must be aware that it involves a strenuous process, requiring **extensive and unrestricted cooperation**. It entails the assumption of guilt, and the dismissal of key personnel involved regardless of their rank in the company. Another important point to consider is that the audit process initiated by the IDB to investigate

the case has a broad scope, not being limited to the irregularity under investigation, but encompassing any related circumstances.

Coordination and a uniform line of response in any investigation or negotiation before the Brazilian Comptroller General (**CGU**), the U.S. Department of Justice (**DOJ**) and other authorities that may potentially get involved will also be essential. This is because information provided to any of these bodies is almost always shared between them. Even minor discrepancies will add to the severity of the consequences.

With the conclusion of the negotiation, the NRA will be ready for signature between the parties and will contain, in general terms:

- The facts and the company's involvement in the wrongdoing;
- Admission of fault and liability;
- The sanction; and
- The conditions to be met, such as:
 - the execution of an internal investigation;
 - the commitment to continue cooperating with the IDB, including presenting its own financial information, and that of its affiliates, employees or representatives;
 - the obligation to inform the IDB of any new irregularities that may be discovered at a later stage; and
 - the structuring or adjustment of the company's integrity system, which will generally be monitored by an expert appointed by the IDB.
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The terms of the NRA will be confidential. A brief summary will be published by the IDB, as can be seen in the case of [Andrade Gutierrez](#). In addition to the summary, the company is kept on a [public list](#) of sanctioned companies on the IDB website:

Title	Entity	Nationality	Country	From	To	Grounds	Source	IDB Sanction Type
Aktor Technical Société Anonyme	Firm	Greece	Colombia	Jan 4, 2021	Mar 14, 2022	Fraud	WBG cross debarment	N/A
Speedtech Energy Burkina Faso S.A.	Firm	Burkina Faso	Burkina Faso	Jan 4, 2021	Dec 14, 2024	Fraud	WBG cross debarment	N/A
Speedtech Energy Co. Ltd.	Firm	Taiwan (Republic of China)	Burkina Faso	Dec 23, 2020	Dec 7, 2024	Fraud	WBG cross debarment	N/A
Luxport Export Ltd.	Firm	China, Hong Kong Special Administrative Region	Uzbekistan	Dec 23, 2020	Jun 8, 2023	Fraud	WBG cross debarment	N/A
Isaac Francisco Calderón Laines	Individual	Honduras	Honduras	Dec 23, 2020	Dec 22, 2023	Collusion	IDB	Debarment
Paula Angelina Ponce Gaitán	Individual	Honduras	Honduras	Dec 23, 2020	Dec 22, 2022	Collusion	IDB	Debarment
Jesús Augusto López Rodríguez	Individual	Honduras	Honduras	Dec 23, 2020	Dec 22, 2022	Collusion	IDB	Debarment

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Other forms of cooperation

In situations where the OII has already reported the case to the SO, the company will no longer be able to execute an NRA. However, it would certainly be beneficial for the company to cooperate during the IDB's investigations as it would in the case of an NRA. The company may benefit from the following reductions in their sanctions:

Reduction	Favourable circumstances
1 to 3 years or, alternatively, up to 33%.	Voluntary actions
	Proof that irregularity has been voluntarily terminated
	Accountability of the individual who committed the irregularity
	Existence of a compliance system already in place or in progress
1 to 3 years or, alternatively, up to 50%.	Cooperation during investigation
	Assistance and continued cooperation
	Admission of guilt
	Existence of internal investigations
	Voluntary restraint

In view of the short timeframe for the company's response, the consequences and depth of the expected cooperation, it is crucial to have a timely and specialised situational analysis. Whether through the completion of an NRA or at a later stage of the investigation, it is indisputable that the extensive cooperation of the investigated company may substantially reduce the sanction to be applied.

BLOMSTEIN has a well-established [Compliance Practice](#), in particular with regards of Multilateral Development Banks (MDB) and their compliance mechanisms. If you have any questions about the IDB's sanction system or that of any other MDB, please don't hesitate to reach out to [Roland](#) or [Bruno](#), they will be more than happy to assist you.