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# Balancing the Scales: The World Bank Sanctions Process and Access to Remedies

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## Abstract

*The evolution over the years of the mandates and missions of international organizations has reached an important milestone with the emergence and multiplication in the last decade of procedures and mechanisms having a direct impact on individuals and companies. This has gone together with the call for the creation of international remedies with judicial features. International organizations, including the World Bank, have established sanctions mechanisms in an effort to combat corruption and fraud. They are applicable to companies and individuals involved in activities with international financial institutions through procurement or consultancy activities. The World Bank experience offers an interesting example: the decision to sanction individuals and companies entailed the need to provide access to remedies to such non-state actors. External and internal pressures have pushed the institution into putting in place very quickly a mechanism with judicial features. Due process requirements have had a substantial impact on the profile of remedies available to non-state actors in this area.*

## 1 The Context

The profile of international organizations has significantly evolved in the last few decades. International organizations have been exposed to new demands, and in response they have developed innovative rules and mechanisms, which in turn have required specific policing measures. These functions include, *inter alia*, regulatory activities and the establishment of compliance and sanctions procedures.

The ever-increasing scope of activities of international organizations has an impact on individuals and non-state actors as the activities of international organizations

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have an increasing influence on their daily lives. The rights of individuals and other non-state actors can be affected when these activities attempt to regulate their behaviour and impose sanctions in the case of misconduct. These increased regulations by international organizations have led to individuals and non-state actors challenging the decisions of international organizations, as well as making requests for access to remedies because their interests and rights may well be affected. For example, in the context of the United Nations, one of the most central issues has been the imposition of economic sanctions, pursuant in particular to resolution 1267 of the Security Council<sup>1</sup> and the request to ensure respect for the human rights of the listed individuals. The progressive transition from a traditional system of sanctions directed at states to the rise of so-called ‘smart sanctions’, and the ensuing individualization of the UN sanction process, necessitates the establishment of mechanisms that permit individuals to defend their rights. In 2009, this necessity led the UN to, *inter alia*, establish an office for an Ombudsperson, who is in charge of dealing with de-listing requests.<sup>2</sup>

As another example, international financial organizations have established sanctions systems for sanctioning companies and individuals that have been found to have engaged in fraud and corruption in activities financed by those organizations. The sanctions imposed by the World Bank on individuals and firms engaging fraud and corruption have given rise to issues that are similar in many aspects to those emanating from the UN context. In both situations there is a sanctioning institution of an international organization on the one hand, and individuals or firms targeted by sanctions on the other hand. The establishment of mechanisms allowing the sanctioned non-state actors to defend themselves counterweights the taking of decisions that negatively affect the latter.

The situation faced by these international organizations can be compared with a certain image of justice as incarnated by Lady Justice holding a sword in her right hand and the scales in her left hand. Concomitant with the ability to sanction must be a thorough process of balancing all aspects of a case, which ensures that in the end each party receives a fair and just outcome. Access to remedies is an integral part of this weighing process.

Access to remedies is a global public good. The concept of global public goods includes not only goods in a traditional sense, but also concepts like peace, legal protection, as well as human rights.<sup>3</sup> Everyone is entitled to have access to remedies. Remedies are not exclusive, in the sense that they should apply equally to anyone in a similar situation.

The provision of remedies by international organizations has received little attention in international law circles. However, they do deserve attention. Understood in a broad manner, remedies are ‘the means of enforcing rights and redressing wrongs’.<sup>4</sup> They are

<sup>1</sup> See the resolution at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> (last visited 1 Aug. 2012).

<sup>2</sup> SC Res. 1904, 17 Dec. 2009. See Boisson de Chazournes and Kuijper, ‘Mr Kadi and Mrs Prost: Is the UN Ombudsperson Going to Find Herself Between a Rock and a Hard Place?’, in E. Rieter and H. de Waele (eds), *Evolving Principles of International Law – Studies in Honour of Karel C. Wellens* (2011), at 71–90.

<sup>3</sup> See, e.g., E. Andersen and B. Lindsnaes (eds), *Towards New Global Strategies: Public Goods and Human Rights* (2007).

<sup>4</sup> *Black’s Law Dictionary* (7th edn, 1999), at 1296.

part of the broader concept of access to justice<sup>5</sup> that can be defined as ‘the individual’s right to obtain the protection of the law and the availability of legal remedies before a court or other equivalent mechanism of judicial or quasi-judicial protection’.<sup>6</sup> The concept of access to justice covers not only the right to seek a remedy before a court of law or a tribunal but also includes those ‘remedies offered by competent public authorities, which are not courts of law but can nevertheless perform a dispute settlement function’.<sup>7</sup>

Within international organizations, access to remedies can take various forms. The mechanisms established are diverse in their nature and their characteristics. There has been a blossoming of independent review and compliance mechanisms. The World Bank Inspection Panel procedure, for example, enables groups of persons affected by a Bank-financed project to seize the Panel in order to request that the Organization assess, and even correct, its own behaviour in accordance with its own standards and procedures. The Panel decides on the complaint’s eligibility, as well as on the merit of asking the Board of the World Bank for authorization to undertake an investigation of a particular action of the financial institution having regard to the application of its operational policies.<sup>8</sup> In the event of an investigation, the Bank may be prompted to implement an action plan in order to correct the situation giving rise to complaint.<sup>9</sup>

Other remedies involve internal oversight mechanisms for detecting and sanctioning staff misbehaviour including in the area of fraud and corruption, or for allowing access to information. As an example, the latest version of the World Bank’s Policy on Access to Information<sup>10</sup> of 1 July 2010 has significantly changed the institution’s attitude to transparency in acknowledging that information in the possession of the institution should be made accessible, albeit with some exceptions. In the context of the application of this policy, the Bank has created a new body, the Access to Information Committee (AI Committee).<sup>11</sup> Its mandate is to advise the management on the application of the policy, to interpret the policy, and to participate in the management of the system. It also adjudicates on appeals relating to the policy. In addition, an independent appeals board composed of ‘three outside experts on access to information’ has been established.<sup>12</sup> The Appeals Board has the authority to uphold or reverse the relevant decisions of the AI Committee. Its decisions are final. The Committee and the Board are composed of people external to the Bank.

<sup>5</sup> In this vein see *Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954*, [1954] ICJ Rep 57.

<sup>6</sup> Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’, 20 *EJIL* (2009) 729.

<sup>7</sup> Francioni, ‘The Rights of Access to Justice under Customary International Law’, in F. Francioni (ed.), *Access to Justice as a Human Right*, Collected Courses of the Academy of European Law (2007), at 4.

<sup>8</sup> IBRD Res. No. 93-10, IDA Res. No. 93-6 of 22 Sept. 1993, at paras 12 and 14 a.

<sup>9</sup> See Boisson de Chazournes, ‘The World Bank Inspection Panel: About Public Participation and Dispute Settlement’, in T. Treves *et al.* (eds), *Civil Society, International Courts and Compliance Bodies* (2005), at 187–203.

<sup>10</sup> See [/www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742\\_20100603084843/Rendered/PDF/548730Access01y0Statement01Final1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742_20100603084843/Rendered/PDF/548730Access01y0Statement01Final1.pdf) (last visited 1 Aug. 2012).

<sup>11</sup> *Ibid.*, at 15.

<sup>12</sup> *Ibid.*, at 16.

As another example, the UNMIK Human Rights Advisory Panel examines complaints of alleged human rights violations committed by or attributable to the UN Interim Administration Mission in Kosovo, but limits itself to issuing recommendations.<sup>13</sup>

In the short time-span since the establishment of these remedies, their profiles and structure have evolved, indicating a path towards due process, not to mention a preference for judicial procedure. This exemplifies the fact that due process requirements have played, and continue to play, an important role in the shaping and the evolution of the structure and function of remedies established by international organizations. Protection of the rights of non-state actors requires the setting up of remedies with judicial features.<sup>14</sup> Remedies are thus becoming more and more judicial in nature.

These developments are also linked to international organizations' respect for the rule of law. The understanding of the rule of law within international organizations cannot be limited to norms and principles. Respect for the rule of law entails a sort of continuum. Rules, norms, and principles call for means to ensure that their 'beneficiaries' are entitled to claim their respect and have access to means of redress. These issues are enshrined in the broader question of the scope of law applicable to international organizations. The work of the ILC on the responsibility of international organizations has revealed the intensity of the debate on this issue.<sup>15</sup> The *Kadi, Yusuf and Al Barakaat* case brought before the European judicial institutions has illustrated, in its various phases, the questions that can be posed with respect to decisions taken by the Security Council.<sup>16</sup>

The mechanism established by the World Bank to sanction individuals and firms committing fraud and corruption offers an interesting prism: together with the decision to sanction individuals and companies, it was felt necessary to provide access to remedies to them. In this context, it is interesting to note that the World Bank has in a short time frame put in place a mechanism with judicial features (section 2).

<sup>13</sup> See Klein, 'Le panel consultatif des droits de l'homme (*Human Rights Advisory Panel*) de la MINUK: une étape dans le processus de responsabilisation des Nations Unies?', in M. Kohen, R. Kolb, and D.L. Tehindrazanarivelo, *Perspectives of International Law in the 21st Century/Perspectives du droit international au 21ème siècle – Liber Amicorum Professor Christian Dominicé in honour of his 80th birthday* (2012), at 225.

<sup>14</sup> The establishment of administrative tribunals by international organizations is also a consequence of this need to provide access to remedies. These tribunals, such as the UN's Dispute Tribunals or the World Bank Administrative Tribunal, can be seen as a counterpart to the immunity enjoyed by international organizations. Given the impossibility for private parties, including staff members, to bring disputes before domestic courts, the need was felt to provide them with alternative access to remedies. This need is increasingly considered as a result of human rights obligations involving access to justice. See, e.g., Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', 7 *Chinese J Int'l L* (2008) 285.

<sup>15</sup> See the Draft Articles on the Responsibility of International Organizations at [http://untreaty.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf) (last visited 1 Aug. 2012).

<sup>16</sup> Case T-315/01, *Kadi v. Council & Commission* [2005] ECR II-3649; Case T-306/01, *Yusuf & Al Barakaat International Found. v. Council & Commission* [2005] ECR II-3533; Joined Cases C-402/05 P & 415/05 P, *Kadi & Al Barakaat v. Council of the European Union* [2008] ECR I-6351; Case T-85/09, *Kadi v. Commission* [2011] 1 CMLR 24.

A number of factors and events have led the Bank in this direction, in particular the fact that due process requirements have a substantial impact on the profile of remedies available to non-state actors (section 3).

## 2 The World Bank's Sanctions Process: The Establishment of a Hybrid Procedure with Judicial Features

International organizations, including the World Bank, have established sanctions mechanisms in an effort to combat corruption and fraud. These mechanisms are applicable to companies and individuals involved in activities with the World Bank through procurement or consultancy activities. The World Bank realized that there was a necessity to fight corruption so as to protect its funds. To this end, it established a sanctions mechanism on an *ex nihilo* basis.

### A Overview

#### 1. The Action of the World Bank Against Fraud and Corruption

For many years, corruption was perceived as a political problem not related to issues of economic development. One of the arguments for international economic organizations' reluctance to act stemmed from unwillingness to interfere in the domestic affairs of their members.<sup>17</sup> However, the link between the problems of corruption, governance, and development gradually gained prominence through the 1990s.<sup>18</sup> In 1996, the President of the Bank at the time, James Wolfensohn, in an attempt to stigmatize corruption, used the metaphor that corruption was like a cancer on development because it reduced the effectiveness of development assistance.<sup>19</sup> Corruption gained pre-eminence on the Bank's agenda. Corruption was perceived as a 'cost',<sup>20</sup> reducing growth and development through the diminution of investments made at the domestic and international levels.

It became clear that the fight against corruption was not in opposition to the commitment of non-interference in the political affairs of members.<sup>21</sup> Furthermore,

<sup>17</sup> Referring, e.g., to Art. IV(10) of the IBRD Articles of Agreement: 'the Bank and its officers shall not interfere in the political affairs of any members; nor shall they be influenced in their decisions by the political character of the member or members concerned'.

<sup>18</sup> See Shihata, 'Corruption – A General Review with an Emphasis on the Role of the World Bank', 15 *Dickinson J Int'l L* (1997) 451.

<sup>19</sup> Wolfensohn, 'People and Development', in J.D. Wolfensohn and A. Kircher, *Voice for the World's Poor: Selected Speeches and Writings of World Bank President James D. Wolfensohn, 1995–2005* (2005), at 50. The need to eliminate corruption was stressed already in his very first speech as President of the Bank, in 1995: see Wolfensohn, 'New Directions and New Partnerships – Address to the Board of Governors', 10 Oct. 1995, available at: <http://goo.gl/J7iaO>.

<sup>20</sup> Bhargava, 'Curing the Cancer of Corruption', in V. Bhargava (ed.), *Global Issues for Global Citizens: An Introduction to Key Development Challenges* (2006), at 5.

<sup>21</sup> I. Shihata, *The World Bank Legal Papers* (2000), at 219–244. The points developed in this book were made earlier in the legal opinion by I. Shihata entitled *Prohibition of Political Activities in the Bank's Work* of July 1995.

under its Articles of Agreement, the Bank has a ‘fiduciary responsibility’ to its shareholders. Accordingly, it must ‘make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations’.<sup>22</sup> When the Bank decided to tackle the problem of fraud and corruption, it referred to this provision as providing the legal basis for the fight against fraud and corruption.<sup>23</sup> The institution started by conducting research on the causes and economic consequences of this phenomenon, as well as offering assistance to authorities wishing to take action against it.

The Bank published a number of reports dealing with corruption, which had a significant political impact.<sup>24</sup> The instruments and legal means to tackle corruption were then identified. The anti-corruption strategy adopted by the Board of Directors in September 1997 identifies four components to the action of the Bank in this area: assisting states that ask for help in curbing corruption, incorporating its concern for corruption directly into its country analysis and lending decisions, contributing to the international effort against corruption, and, finally, preventing fraud and corruption in the projects and programmes it finances.<sup>25</sup> A normative strategy and procedures were then developed, demonstrating the clear intention of the Bank to exclude companies which engage in corruption or other sanctionable practices.<sup>26</sup>

The need to develop an effective mechanism for sanctioning companies and individuals found to have engaged in fraud or corruption was acted upon by the Bank through the establishment of a sanctions system.

## 2. *From the Need to Tackle Fraud and Corruption to the Ex Nihilo Establishment of a Sanctions Mechanism*

The action of the World Bank in fighting fraud and corruption initially consisted of defining those practices that might be sanctioned in the Procurement Guidelines and also in the Consultant Guidelines. Over time, the scope of the Bank’s activity in this context has expanded through a constant reform effort on its part. In 1999,

<sup>22</sup> IBRD Articles of Agreement, Art. III(5)(b)), available at: <http://tinyurl.com/64h2pkh> (last visited 1 Aug. 2012).

<sup>23</sup> Chanda, ‘The Effectiveness of the World Bank’s Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties’, 32 *Denver J Int’l L & Policy* (2003–2004) 349.

<sup>24</sup> See The World Bank, ‘Helping Countries Combat Corruption: The Role of the World Bank’, Sept. 1997, available at: [www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf](http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf) (last visited 1 Aug. 2012).

<sup>25</sup> The World Bank, ‘Helping Countries Combat Corruption: Progress at the World Bank Since 1997’, June 2000, available at: [www1.worldbank.org/publicsector/anticorrupt/helpingcountries.pdf](http://www1.worldbank.org/publicsector/anticorrupt/helpingcountries.pdf) (last visited 1 Aug. 2012).

<sup>26</sup> Williams, ‘The Debarment of Corrupt Contractors from World Bank-Financed Contracts’, 36 *Public Contract LJ* (2007) 280.

corruption<sup>27</sup> and fraud<sup>28</sup> were the only practices that it sanctioned. However, in 2004, the Bank added coercion<sup>29</sup> and collusion,<sup>30</sup> and, in 2006, the Bank added obstructive practices.<sup>31</sup>

The next step taken by the Bank was the adoption of procedures to sanction the condemned practices. It was framed as a technique of exclusion, or debarment, that can be defined as ‘an administrative remedy utilized to disqualify contractors from obtaining public contracts or acquiring extensions to existing contracts for alleged breaches of law or ethics’.<sup>32</sup>

The objective was at any time to exclude a company or individual, temporarily or permanently, from any Bank-financed contract and the possibility of being selected as a subcontractor, consultant, supplier, or service provider to a company that might be awarded finance by the Bank.<sup>33</sup> The institution may impose the following types of sanctions: a public letter of reprimand, debarment, conditional non-debarment, debarment with conditional release, and/or restitution.

Established in 1998, the Sanctions Process progressively evolved through four rounds of reforms successively conducted in 2004, 2006, 2007, and 2009–2010. Each round brought with it amendments and additions to the procedure.

As a first step, in 1998 a mechanism for investigating fraud and corruption activities was established. It was overseen by the Internal Auditing Department. It was responsible for gathering evidence and then transferring that evidence to a newly

<sup>27</sup> “[C]orrupt practice” means the offering, giving, receiving, or soliciting, directly or indirectly, of any thing of value to influence the action of a public official in the procurement process or in contract execution’: *Guidelines: Procurement under IBRD Loans and IDA Credits*, Jan. 1999, at para. 1.15 and *Guidelines: Selection and Employment of Consultants by World Bank Borrowers*, Jan. 1999, at para. 1.25. See all documents at: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html> (last visited 1 Aug. 2012).

<sup>28</sup> Defined as ‘a misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract’: *ibid.*

<sup>29</sup> “[C]oercive practice” means harming or threatening to harm, directly or indirectly, persons, or their property to influence their participation in a procurement process, or affect the execution of a contract’: *Guidelines: Procurement under IBRD Loans and IDA Credits*, May 2004, at para. 1.14 and *Guidelines: Selection and Employment of Consultants by World Bank Borrowers*, May 2004, at para. 1.22.

<sup>30</sup> ‘[A] scheme or arrangement between two or more bidders, with or without the knowledge of the Borrower, designed to establish bid prices at artificial, non-competitive levels’: *ibid.*

<sup>31</sup> ‘(i) [D]eliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive, or collusive practice; and/or threatening, harassing, or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or (ii) acts intended to materially impede the exercise of the Bank’s inspection and audit rights’: *Guidelines: Procurement under IBRD Loans and IDA Credits*, Oct. 2006, at para. 1.14 and *Guidelines: Selection and Employment of Consultants by World Bank Borrowers*, Oct. 2006, at para. 1.22.

<sup>32</sup> Schooner, ‘The Paper Tiger Stirs: Rethinking Exclusion and Debarment’, 5 *Public Procurement L Rev* (2004) 212–213, cited by Williams, *supra* note 26, at 284.

<sup>33</sup> *Guidelines: Procurement under IBRD Loans and IDA Credits*, Jan. 2011, at para. 1.16 (d).

created body – the Sanctions Committee.<sup>34</sup> The Bank reformed the investigation procedure in the early 2000s and investigations now fall under the responsibility of the Integrity Vice Presidency (INT).

The sanctions procedures evolved in 2004. A two-tiered structure was established. The first level consists of the Evaluation and Suspension Officer, and the second level of a Sanctions Board. This structure is still the current one.

It works as follows. Investigations are conducted by INT through witness interviews, gathering documents, site visits, exercising audit rights, etc. The investigations cover only the activities of companies and individuals. Once the evidence is collected, INT refers the case to the Evaluation and Suspension Officer by drafting a Statement of Accusations and Evidence. The Evaluation and Suspension Officer must then decide whether the evidence collected is sufficient to conclude that a sanctionable practice has been committed. If this is the case, the Evaluation and Suspension Officer shall notify the company or the individuals concerned via a Notice of Sanction Proceedings. The Evaluation and Suspension Officer also determines whether a suspension shall become effective on a temporary basis pending the outcome of the procedure. If the company or individual concerned does not contest the allegations of fraud or corruption, the sanction recommended by the Evaluation and Suspension Officer will be applied as a final decision.<sup>35</sup>

The case is otherwise referred to the Sanctions Board through an appeals procedure. The Board conducts a *de novo* review of the case before making a final decision. As part of its deliberations, the Sanctions Board may hold a hearing if requested to do so by INT or a respondent. The Sanctions Board may also sanction affiliates.

As regards the duration of the exclusion, there has been a notable relaxation on the part of the Bank. Indeed, while almost all sanctions adopted between March 1999 – the date of the first debarment order – and April 2001 were made for an indefinite period, the majority of the sanctions since then have been for an average period of three years.<sup>36</sup> This might be seen as a follow-up of recommendations made by an external panel, which issued a report known as the Thornburgh Report, which called for a sanction process that ‘could impose severe sanctions when warranted, and yet, when not warranted under all the circumstances, retain sufficient flexibility to avoid permanent preclusion of an otherwise capable company that possesses a capacity or expertise that few other firms do, and whose services may not be able to be supplied equally well by others’.<sup>37</sup>

<sup>34</sup> See [web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84271~piPK:84287~theSitePK:84266,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84271~piPK:84287~theSitePK:84266,00.html) (last visited 1 Aug. 2012). It should, however, be noted that there were at least 3 cases in which companies were sanctioned for fraudulent behaviour before the first Sanctions Committee was established. The matter was handled discreetly and the companies concerned were heard before being sanctioned. They agreed for a period of time to refrain from bidding for Bank-financed contracts.

<sup>35</sup> See <http://siteresources.worldbank.org/INTOFFEVASUS/Resources/OESFactSheetFrenchDec2010.pdf?resourceurlname=OESFactSheetFrenchDec2010.pdf> (last visited 1 Aug. 2012).

<sup>36</sup> Williams, *supra* note 26, at 298.

<sup>37</sup> D. Thornburgh, R.L. Gainer, and C.H. Walker, *Report Concerning the Debarment Processes of the World Bank*, 14 Aug. 2002, at 64, cited by Williams, *supra* note 26, at 298.

Once the sanction is pronounced, the names of the companies and individuals subject to the debarment and the details of the period of exclusion are published on the Bank's website.<sup>38</sup> In 2010, it was decided that the determinations of the Evaluation and Suspension Officer if not contested, as well as those of the Board, would be made public as of 2011.

A Voluntary Disclosure Programme (VDP) was also established in 2006.<sup>39</sup> According to this procedure, firms not being investigated by INT may report to the Bank past behaviour that may be sanctioned. If a firm is eligible for this programme, the Bank agrees not to sanction the firm and to keep its identity confidential. Consequently, the firm will have to implement a compliance plan to prevent future misconduct and run an internal investigation. In the case of the emergence of new practices, the firm would be debarred for a statutory period of 10 years. Initially motivated by the necessity for the Bank to acquire information on the functioning of corruption and also to offer potential informants the incentive of a reasonably predictable outcome for their cooperation, VDP may have undesirable consequences. More precisely, as the existence of VDP is characterized by its 'non-transparency', it could mean that the Bank keeps wrongdoing activities secret from other Bank staff, other MDBs, and from citizens of the host state.<sup>40</sup>

The efficacy and efficiency of the sanctions procedures has been tested in practice. Since 2001, 529 companies and individuals have been excluded from being awarded contracts or loan agreements funded by the World Bank.<sup>41</sup> These actions have been qualified as 'performative'.<sup>42</sup> It would be interesting to test their collateral effect on other proceedings, notably judicial proceedings. As a matter of fact, they might be used as elements of evidence in other dispute settlement fora.

In 2010, another development began to take shape with the publication by INT, the investigative branch of the World Bank, of the list of referral reports sent to member states where the evidence indicated that the laws of a Bank Group member country have been violated. The practice<sup>43</sup> is to inform the member states of the alleged practices as well as to induce them to pursue civil, criminal, or administrative cases against an individual or a company so as to determine whether any laws have been violated, and to take appropriate action under their own sovereign laws.<sup>44</sup> Ideally, national

<sup>38</sup> The list is available at: <http://web.worldbank.org/external/default/main?menuPK=2242339&pagePK=64148989&piPK=51391665&theSitePK=2242290> (last visited 1 Aug. 2012).

<sup>39</sup> The Executive Directors of the Bank adopted the programmatic elements of this Programme on 11 Aug. 2006: see World Bank Press Release n°2007/35/INT of 1 Aug. 2006.

<sup>40</sup> Kingsbury, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in H. Cissé, D.D. Bradlow, and B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review, iii (2012), at 24.

<sup>41</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/ACCUEILEXTN/NEWSFRENCH/0,,contentMDK:21935365~menuPK:1082583~pagePK:64257043~piPK:437376~theSitePK:1074931,00.html> (last visited 1 Aug. 2012).

<sup>42</sup> Kingsbury, *supra* note 40, at 24.

<sup>43</sup> This practice was put in place even before the existence of INT but remained hidden from the public until 2010.

<sup>44</sup> *INT Annual Report 2010*, p. iv, available at: [http://siteresources.worldbank.org/INTDOII/Resources/588889-1286308793420/INT\\_AR\\_2010\\_FINAL\\_DESIGN.pdf](http://siteresources.worldbank.org/INTDOII/Resources/588889-1286308793420/INT_AR_2010_FINAL_DESIGN.pdf) (last visited 1 Aug. 2012).

authorities will use this information to ‘undertake investigations, prosecutions, and adjudications’ within their countries, but ‘often [they] have not’.<sup>45</sup>

In 2011, INT issued 52 referral reports to member states and donor agencies.<sup>46</sup> In a recent case, for example, INT uncovered evidence of fraud under a 1.4 million US Dollar contract in a health project in Argentina for the supply of refrigerators for vaccine storage. According to this evidence, a fraud was perpetrated by the winning bidder, a company, by swapping a qualified manufacturer of refrigerators named in its bid for an unqualified one after winning the contract. The company was sanctioned with a three-year debarment<sup>47</sup> and INT referred its findings to the relevant national authorities to conduct their own investigation.<sup>48</sup> This development brings a political perspective to the procedure by involving the state that allegedly has jurisdiction over the private sector actor concerned. The private company may then be sanctioned both by an international organization and by the competent state authorities. The sanction, however, may differ in the two cases.

### ***B A Hybrid Procedure: the Interaction of Different Legal Traditions and Different Legal Orders***

Established in a context with no similar precedent, the World Bank sanctions system is the result of the progressive integration of principles rooted in different legal traditions and legal fields. It was created by borrowing structures and principles from different legal systems and has been described as representing a ‘synthesis of elements from four different legal disciplines that have been imported, adjusted, and combined from national systems: contract law, tort law, and adjudicative procedures similar to those in the administrative agencies of many countries’.<sup>49</sup>

National law plays quite an important role, as do general principles of law. Indeed, national law has provided and can provide a useful point of reference for the World Bank. It serves, for example, as a possible approach to a difficult legal issue for which the Bank’s framework provides no clear answer. It can also serve as a source for innovative tools in the context of amendments of the Bank’s legal framework.

One of the dominant characteristics of the procedure, stressed by the World Bank<sup>50</sup> is its administrative nature. The question then arises as to the reasons for this qualification. One answer would be that the mechanism is not intended to punish or impose responsibility in a criminal sense in respect of those companies or individuals

<sup>45</sup> *INT Annual Report 2011*, p. iii, available at: [http://siteresources.worldbank.org/INTDOII/Resources/588889-1316720250792/INT\\_AR\\_FY11\\_web.pdf](http://siteresources.worldbank.org/INTDOII/Resources/588889-1316720250792/INT_AR_FY11_web.pdf) (last visited 1 Aug. 2012).

<sup>46</sup> *Ibid.*, at 44–47.

<sup>47</sup> See the determination of the EO, available at: [http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/Notice\\_of\\_Uncontested\\_Proceedings\\_Case\\_144.pdf](http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/Notice_of_Uncontested_Proceedings_Case_144.pdf) (last visited 1 Aug. 2012).

<sup>48</sup> *INT Annual Report 2011*, *supra* note 45, at 26.

<sup>49</sup> Dubois and Nowlan, ‘Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law’, 36 *Yale J Int’l L Online* (2010) 16.

<sup>50</sup> See, e.g., <http://web.worldbank.org/WBSI/TE/EXTERNAL/NEWS/0..contentMDK:21922722~menuPK:34480~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (last visited 1 Aug. 2012).

concerned.<sup>51</sup> The sanctions imposed, though serious, are not comparable to the criminal penalties of imprisonment. They are in fact closer in nature to a sanctions regime under national administrative law or under EU law.<sup>52</sup> Admittedly, one of the consequences of such a qualification would be that this mechanism does not adhere to the same level of due process standards that may be seen in national criminal courts.

The administrative nature of the proceedings is reflected in the permissive approach to evidentiary issues adopted by the World Bank. According to the sanction procedures, 'any kind of evidence may form the basis of arguments presented in a sanctions proceeding and conclusions reached by the Evaluation Officer or the Sanctions Board. The Evaluation Officer and the Sanctions Board shall have discretion to determine the relevance, materiality, weight and sufficiency of all evidence offered. Hearsay evidence or documentary evidence shall be given the weight deemed appropriate by the Evaluation Officer or the Sanctions Board. Without limiting the generality of the foregoing, the Evaluation Officer and the Sanctions Board shall have the discretion to infer purpose, intent and/or knowledge on the part of the Respondent, or any other party, from circumstantial evidence. Formal rules of evidence shall not apply.'<sup>53</sup>

The common law 'best evidence rule' is clearly not a requirement.<sup>54</sup> In other words, if this rule applied to the World Bank sanctions procedures, secondary evidence, such as a copy of a document, would not be admissible if an original document existed but could not be submitted given that it had been destroyed or was unavailable for other reasons. INT can in fact present any evidence it can find to support an accusation or factual assertion. The Evaluation and Suspension Officer and the Sanctions Board have discretion to evaluate and weigh this evidence. They may freely decide that circumstantial evidence proffered by INT is sufficient or insufficient to support the relevant allegation.

With respect to the standard of proof, INT must prove that it is 'more likely than not' that a respondent engaged in a sanctionable practice. This standard is clearly not equivalent to 'beyond a reasonable doubt' which prevails in criminal law. According to INT's view, this standard of proof is to be interpreted as requiring 'more than 50 percent of the corpus of evidence'. The choice of such standard of proof by the World Bank stems from the same considerations that underlie the omission of an explicit *mens rea* requirement from most of the definitions of sanctionable practices, namely the administrative nature of the proceedings and INT's lack of investigative tools.<sup>55</sup>

<sup>51</sup> Leroy and Fariello, 'The World Bank Group Sanctions Process and Its Recent Reforms' (2011), at 22, available at: [http://works.bepress.com/frank\\_fariello/1](http://works.bepress.com/frank_fariello/1) (last visited 1 Aug. 2012).

<sup>52</sup> Dubois and Nowlan, *supra* note 49, at 23.

<sup>53</sup> Art. VII, Sect. 7.01 of the *World Bank Sanction Procedures*, available at: <http://sitesources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf> (last visited 1 Aug. 2012).

<sup>54</sup> For more information on the evidentiary flexibility see Leroy and Fariello, *supra* note 51, at 4–8.

<sup>55</sup> A *mens rea* requirement can be found, however, in the definitions of fraud and coercive practices made in 2006: see *IBRD Loans and IDA Credits Guidelines*, Oct. 2006, *supra* note 31, at para. 1.14 and *Selection and Employment of Consultants Guidelines*, Oct. 2006, *supra* note 31, at para. 1.22. See also Leroy and Fariello, *supra* note 51, at n. 41.

Facing pressure during the 2006 round of reforms to include an intent requirement, the World Bank argued that sanctions proceedings are not criminal in nature, and that such an intent requirement, commonplace in criminal law, has no place in this administrative law procedure. Furthermore, it argued that INT does not have a police force and, thus, should not be obligated to demonstrate intent, which can be difficult to prove in this context.

One can argue that the rules of admissibility of proof adopted by the Bank, according to which any kind of evidence may form the basis of arguments, are too permissive and might cause problems in the future. In fact, if the World Bank decides to make a referral to a state for it to begin parallel proceedings, any evidence INT may transfer may not be suitable, as most of the states have adopted a more restrictive rule of admissibility of evidence. Similar problems may arise due to the standard of proof adopted by the World Bank. A given individual or firm sanctioned by the World Bank may not be similarly condemned at the domestic level in states where fraud and corruption are criminal offences requiring a higher standard of proof.

Leaving aside issues of evidence, one may wonder what is the distinctive feature that allows us to describe the mechanism in question as ‘administrative in nature’. One may refer to French law for guidance. The difference between an administrative sanction and criminal punishment in that context is the nature of the public authority empowered to issue the sanction, which may be an administrative authority or a judge respectively.<sup>56</sup> Applied in the context of the World Bank, however, such a criterion of distinction does not answer the question adequately. We can nevertheless see, given the nature of the sanctions system, elements of a ‘quasi-judicial’ mechanism. However, owing to the fact that it does not meet all of the conditions of being a ‘judicial’ entity – principally because it is not fully composed of professional judges – it is more accurate to consider that the mechanism has more of an ‘administrative nature’.<sup>57</sup> It seems that a more decisive criterion is the nature of the sanction itself. In other words, the World Bank sanctions process can be described as an administrative mechanism as it imposes administrative sanctions. An administrative sanction in this context is principally defined by the overall goal of the system and the particular purpose sought to be achieved by the imposition of the sanction.<sup>58</sup> In contrast to a criminal sanction, administrative sanctions such as those imposed by the World Bank do not seek to punish individuals. The goal is not to reduce the impact of crime upon the citizenry to a degree that is socially tolerable.<sup>59</sup> The goal is to protect the functioning of an institution. The sanctions process aims to ‘leave a pool of honest

<sup>56</sup> See [www.legifrance.gouv.fr/html/Guide\\_legistique\\_2/526.htm](http://www.legifrance.gouv.fr/html/Guide_legistique_2/526.htm) (last visited 1 Aug. 2012).

<sup>57</sup> A similar situation can be found in the case of the Federal Acquisition Regulation (FAR) in the US when it authorizes debarment and suspension of contractors convicted of, found civilly liable for, or found by agency officials to have committed certain offences, or when other causes affect contractor responsibility. A Suspending and Debarring Official (SDO), who is not a professional judge, decides this administrative sanction. For more information see [www.acquisition.gov/far/current/html/Subpart\\_9\\_4.html](http://www.acquisition.gov/far/current/html/Subpart_9_4.html) (last visited 1 Aug. 2012).

<sup>58</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 60.

<sup>59</sup> *Ibid.*

and capable firms to undertake projects that the Bank finds useful for achieving the worldwide reduction of poverty'.<sup>60</sup> One can also argue that a secondary purpose is general deterrence, which effectively may reduce the impact of such conduct on individuals.<sup>61</sup>

### C A Process of 'Judicialization'

This being said, the sanctions procedure has progressively been judicialized. It has developed numerous features that result in its being increasingly conducted with the procedural intricacy and formality more akin to litigation in national and international courts.<sup>62</sup>

#### 1. The Procedure Before the Sanctioning Organs and the Respect of Due Process

Due process covers all rights which must be guaranteed before courts of justice, such as the provision of adequate notice and the opportunity to be heard, as well as the ability to deliver a defence in an orderly proceeding adapted to the nature of case.<sup>63</sup> In the case of a sanctions procedure established by an international organization, such as the World Bank sanctions procedure, it is noteworthy that international organizations chose to integrate, in their respective sanction processes, due process requirements similar to those imposed before courts and tribunals.

Due process requirements have been increasingly integrated into the functioning of the sanctions systems. These include the right to defence and the standard and burden of proof before these organs.

#### 2. A Two-Tier Procedure

In line with the *double degré de juridiction* technique, a procedure for appealing the decisions taken at a first stage is provided. Most of the civil law countries have adopted a two-tier or three-tier jurisdiction model. It is undoubtedly one of the main characteristics of a 'judicial model', such as it exists. If the parties do not agree with the decision made by the court of first instance, or first-tier tribunal, they can appeal the case to a higher court, or other appellate court, for final jurisdiction. The judgment made by the higher court will be final. In a nutshell, a two-tier structure consists of the establishment of two deciding organs, different from one another, and where one of these organs, the first level or the second in the case of an appeal, takes a final decision in the process.

These elements are present in the World Bank's sanctions system. As mentioned above, the sanctions process is divided into two stages with two different deciding organs, the Evaluation and Suspension Officer and the Sanctions Board. In cases where

<sup>60</sup> *Ibid.*

<sup>61</sup> Leroy and Fariello, *supra* note 51, at 6.

<sup>62</sup> See R.B. Lillich and C.N. Brower (eds), *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity* (1994), at p. xi.

<sup>63</sup> *Black's Law Dictionary* (5th edn, 1979), at 449.

the party wishes to contest the Evaluation and Suspension Officer's final determination, he or she may trigger a second tier review by filing a response with the Sanctions Board.<sup>64</sup> This appeal mechanism is available within 90 days after receipt of the Evaluation and Suspension Officer's determination. If uncontested during this time, the determination immediately enters into force.<sup>65</sup> In a case where a party contests the determination, he or she must submit to the Sanctions Board a written response to the accusations or the recommended sanction of the Evaluation and Suspension Officer, including written arguments and evidence. The Sanctions Board examines the case *de novo* and determines, based on the record, whether it is more likely than not that the respondent engaged in one or more sanctionable practices.

The determinations of the Evaluation and Suspension Officer that have not been contested and the decisions of the Sanctions Board are both binding and final.<sup>66</sup> They take effect immediately, without prejudice to any action taken by any government under its applicable law.<sup>67</sup> These features allow us to consider that decisions taken by these institutions can be assimilated to sanctions imposed by courts, especially as they are final and cannot be appealed.

The reasons that led to the establishment of such a structure appear in the Thornburgh Report issued in 2002. In the previous structure adopted by the Bank, all cases of debarment had been subject to the same process: a finding by the Sanctions Committee that a respondent engaged in fraud or corruption and a final decision by the President concurring with the Committee's recommendation.<sup>68</sup> There was no mechanism for disposing of cases without a full hearing and no provision for temporarily declaring a respondent ineligible during the period between the time that evidence was discovered and the time that the sanctioning process was completed.<sup>69</sup> From this situation a number of challenges resulted for the Sanctions Committee: a continuous increase in the number of cases, the increased complexity of those cases, an increased length of time between the referral of a matter and the final disposal of that matter.<sup>70</sup> The solution was to establish a new structure that allowed the Bank to dispose of a significant proportion of cases without the necessity of a full hearing before the Sanctions Committee and to permit the Bank temporarily to suspend a respondent from eligibility. According to the Thornburgh Report, the solution was to establish a first stage in the process composed of a designated official of the Bank: the 'Reviewing Officer'.<sup>71</sup> The expected outcome of this proposed reform was a reduction in the number of cases that go to the second tier, because 'not all decisions of the Reviewing Officer would be appealed'.<sup>72</sup> The World Bank would then be able to

<sup>64</sup> Art. IV, Sect. 4.04 of the *World Bank Sanction Procedures*, *supra* note 53.

<sup>65</sup> *Ibid.*,

<sup>66</sup> *Ibid.*, Art. VIII, Sect. 8.03 (a).

<sup>67</sup> *Ibid.*

<sup>68</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 35.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, at 36.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

dispatch cases without going through the time and expense associated with a full review and hearing. The Bank followed this pragmatic approach to make the functioning of the procedure more fluid. At the same time, it instituted an appeal procedure. Inadvertently or otherwise, the World Bank was in this way moving towards a procedure that exhibited judicial features.

### 3. The Sanctions Board as an Independent and Impartial Organ

Independence is one of the major characteristics of a judicial body.<sup>73</sup> It must be free from dependence, subjection, or control and especially from political entities.

Originally, when the sanctions procedure was first established,<sup>74</sup> the President of the Bank had the choice between two different types of composition for the Sanctions Committee that had been proposed.<sup>75</sup> One would be to have the Committee fully composed of internal members of the Bank (two Managing Directors, the General Counsel and two other senior staff).<sup>76</sup> The other one was that three persons from outside the Bank would form the Committee.<sup>77</sup> The President chose to appoint only internal members from the World Bank. This choice was justified at the time by the fact that members of the Bank were those who, on the basis of their knowledge and experience, were able to assess whether it was in the interests of the World Bank to continue to work with a company or individual about whom there existed concerns of corruption or fraud.

The above-mentioned Thornburgh Report led to a change. According to the Report, 'in light of the progressive solidification of the Bank's resolve to develop and demonstrate procedures in all of its operations that exemplify its commitment to fairness and due process and not simply good business practices ... and in light of the experience of the Bank with the operations of the Committee over the past few years, the composition of the Committee now warrants reexamination'.<sup>78</sup> The influence and importance of the principle of due process is evident. Among the reasons for the change, there was a need to avoid any conflict of interest that could result from the fact that the Committee also counts World Bank employees among its members.<sup>79</sup> The Report recommended changing the composition by including external members on the Sanctions Board.<sup>80</sup> Its composition would then be of a mixed type with members both from the Bank and outside

<sup>73</sup> See, e.g., Federal Supreme Court of Switzerland, *Gundel v. FEL*, 4P.217/1992 of 15 Mar. 1993, ATF 119 II 271. See also Federal Supreme Court of Switzerland, *Lazutina v. CIO, FIS & TAS*, ATF 129 III 425.

<sup>74</sup> On the independence of the Sanctions Committee see also Rigo Sureda, 'Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank', in L. Boisson de Chazournes, C.R. Romano, and R. MacKenzie (eds), *International Organizations and International Dispute Settlement: trends and Prospects* (2002), at 187–191.

<sup>75</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 20.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, at 21.

<sup>79</sup> *Ibid.*, at 23.

<sup>80</sup> The four external members are appointed by the Executive Directors of the IBRD from a list of candidates drawn up by the President of the Bank after appropriate consultation. They must not have previously held or currently hold any appointment to the staff of the Bank, IFC, or MIGA and shall be familiar with procurement matters, law, dispute resolution mechanisms, or operations of development institutions.

it. Later, in 2007, another external panel issued the so-called Volcker Report that made a recommendation of a similar nature. It highlighted the fact that the Chairman of the Sanctions Board could also be a member of the Bank and that this potentially posed a problem.<sup>81</sup>

Since 2004, the Sanctions Board has included four members from outside the Bank, with the other three members from inside the Bank. Since 2009, the Chair of the Board has been one of the external members.<sup>82</sup>

Independence and impartiality are two requirements contained in the code of conduct for members of the Sanctions Board.<sup>83</sup> It is required that ‘each member of the Sanctions Board shall consider each case fairly, impartially and with due diligence [and] shall act independently and shall not answer to or take instructions from Bank management, members of the Board of Executive Directors, member governments, Respondents or any other entity’.<sup>84</sup> This highlights the need to have the organ composed of persons who should act like judges. In this regard, it is noteworthy that a majority of the external members of the current Sanctions Board are – or were – judges or arbitrators with international and domestic courts.<sup>85</sup> This does not come from the Sanctions Board Statute, which requires the members only to be ‘familiar with procurement matters, law, dispute resolution mechanisms, or operations of development institutions’,<sup>86</sup> but presumably from the willingness of the Executive Directors and of the President of the Bank, the latter being the appointing authority for the members of the Board. This tendency is however recent. It was not the case indeed at the time of the initial Sanctions Committee which was established in 1998. Moreover, the Thornburgh Report recommended that ‘circumspection should be employed in evaluating former judges and litigating attorneys – persons whose careers have been steeped in the mastery of formal hearing procedures of particular national jurisdictions and who are thus more likely than others (for example those whose primary experience has been with informal arbitration proceedings or administrative proceedings) to

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The three internal members of the Sanctions Board are appointed by the President from among senior Bank staff with knowledge of Bank procurement and/or operational processes: Art. V, sects 2 and 4 of the Sanctions Board Statute, available at: [http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/SanctionsBoardStatute\\_9\\_15\\_2010.pdf](http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/SanctionsBoardStatute_9_15_2010.pdf) (last visited 1 Aug. 2012).

<sup>81</sup> Volcker, Gaviria, Githongo, Heineman Jr., Van Gerven, and Vereker, ‘Independent Panel Review of the World Bank Group Department of Institutional Integrity’, 13 Sept. 2007, at 26, available at: [http://siteresources.worldbank.org/NEWS/Resources/Volcker\\_Report\\_Sept.\\_12.\\_for\\_website\\_FINAL.pdf](http://siteresources.worldbank.org/NEWS/Resources/Volcker_Report_Sept._12._for_website_FINAL.pdf) (last visited 1 Aug. 2012).

<sup>82</sup> Report of the Working Group, ‘Implementing the Recommendations of the Independent Panel Review of the World Bank Group’s Department of Institutional Integrity’, 23 Jan. 2008, available at: [http://siteresources.worldbank.org/NEWS/Resources/volcker\\_report\\_response.pdf](http://siteresources.worldbank.org/NEWS/Resources/volcker_report_response.pdf) (last visited 1 Aug. 2012).

<sup>83</sup> See [http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/SanctionsBoardStatute\\_9\\_15\\_2010.pdf](http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/SanctionsBoardStatute_9_15_2010.pdf) (last visited 1 Aug. 2012).

<sup>84</sup> *Ibid.*

<sup>85</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:21272308~menuPK:3601081~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html> (last visited 1 Aug. 2012).

<sup>86</sup> Art. V, sect. 2 of the Sanctions Board Statute, *supra* note 80.

<sup>87</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 27.

exhibit a penchant for procedural formality and rigidity'.<sup>87</sup> This did not prevent the Bank from relying on the criteria of judicial experience when appointing new members. This underlies the vision it has of the profile of the organ, an organ which should decide on the basis of law.

#### 4. *Publicity, Predictability, and Consistency*

Publicity also contributes to the 'judicialization' of the sanctions process. In January 2011, a decision was taken by the World Bank to publish the full text of the Evaluation Officer's determinations in uncontested procedures as well as the decisions of the Sanctions Board for Notices of Sanction Proceedings issued after 1 January 2011.<sup>88</sup> Such an evolution will significantly impact on the sanctions process. As noted, 'if the Sanctions Board makes a questionable decision, either because its reasoning or its assessment of the evidence is flawed, that will be a matter of public record and judged in the court of public opinion'.<sup>89</sup> The publication of these decisions will contribute to the ability of external actors to assess the overall functioning of the procedure. Discrepancies in the decisions will be scrutinized. In these circumstances, legal certainty and predictability in the sanctions process will become more prominent.<sup>90</sup> Noteworthy in this context is the fact that the new procedure specifies that 'the Sanctions Board issue fully reasoned decisions, including both the basic facts of the case as well as the legal reasoning underpinning their decision'.<sup>91</sup>

The Evaluation Officer's determinations are also published, albeit in a different format.<sup>92</sup> They include a brief recital of the case, including the accusations against the respondent, the fact that the Officer has found sufficient evidence to support the accusations, and that the respondent has not contested the case. They also set out the recommended (and now definitive) sanction to be imposed on the respondent and the aggravating and mitigating factors underlying the recommendation.

Additionally, in December 2011, the Sanctions Board started to publish a Law Digest.<sup>93</sup> Updated on a periodic basis, this document describes 'aspects of [the Sanctions Board's] decisions that it deems illustrative of the legal principles it has applied in reaching its decisions'.<sup>94</sup>

The permanence of the Sanctions Board is another factor which contributes to consistency and predictability. The Sanctions Board was created through an international act which defines the scope of its functioning or, to quote the words of the

<sup>88</sup> Art. X, Sect. 10.01 (b) of the *World Bank Sanction Procedures*, *supra* note 53. 7 decisions of the Sanction Boards have been available online since May 2012. See <http://goo.gl/1bgSE> (last visited 1 Aug. 2012).

<sup>89</sup> Leroy and Fariello, *supra* note 51, at 65.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, at 64.

<sup>92</sup> Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:22911816~menuPK:7926949~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html> (last visited 1 Aug. 2012).

<sup>93</sup> See the full text of the Law Digest at: <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/LawDigest2011WebVersion.pdf> (last visited 1 Aug. 2012).

<sup>94</sup> Art. X, Sect. 10.01 (b) of the *World Bank Sanction Procedures*, *supra* note 53.

International Court of Justice, through an ‘international instrument defining its jurisdiction and regulating its operation’.<sup>95</sup> Consistency and predictability are favoured by such an approach. The decisions of the Board benefit from the continuity of its mandate. The (re-)appointment of its membership ‘in different phases’ contributes to this continuity.<sup>96</sup>

### 5. *Problems Raised by the Exemption of Public Officials*

In assessing the judicial character of the World Bank’s Sanctions Process, more problematic is the fact that the sanctioning organs have no competence to sanction member countries and government officials at any level or individuals working in state-owned enterprises. Although this exclusion is not explicitly stipulated in the Procurement and Consultant Guidelines, the practice of the World Bank is a ‘long-standing policy not to sanction governments or government officials’.<sup>97</sup> The World Bank invokes as justifications for this stance its cooperative structure and respect for the sovereignty of its members. This exemption is furthermore justified by the Bank by the presence of alternative means to address these cases, such as the obligation of the borrower to take timely and appropriate action and the Bank’s ability to exercise contractual remedies in the event that the borrower fails to do so.<sup>98</sup>

This position may potentially allow unpunished public officials to influence Bank-financed projects and highlights a weakness of the procedure, despite its increased judicialization. It is indeed going against the principal objective that led the Bank to establish such a sanctions system, which is to protect the funds entrusted to the World Bank. From a pragmatic point of view, one can admit that it is difficult for the Bank to sanction public officials, as it would have neither the authority nor the capacity to handle such matters, especially when the state involved is one of its members.

An alternative was suggested by the Thornburgh Report. It recommended ‘at a minimum [to make] referrals to, cooperate with, and provide evidence to law enforcement agencies and prosecutors in affected nations’.<sup>99</sup> The purpose of these measures would be to sanction the individual or firm through domestic authorities. Such measures offer better protection of the Bank’s funds, but subject to a given state’s willingness to act in the requisite way.

Another option would be to waive this exemption when a public official is engaged in fraud and corruption in his or her private capacity. Although the World Bank seems to agree on the principle,<sup>100</sup> it is still unclear how it would define such private capacity. One way to define it would be, for example, to consider that the distinction operated

<sup>95</sup> *Nottebohm case (Preliminary Objection)*, Judgment of 18 Nov.1953, [1953] ICJ Rep 119.

<sup>96</sup> See Art. V, sect. 5 of the Sanctions Board Statute, *supra* note 80.

<sup>97</sup> *The World Bank Group’s Sanction regime: Information Note*, at 19, available at: [http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The\\_World\\_Bank\\_Group\\_Sanctions\\_Regime.pdf](http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf) (last visited 1 Aug. 2012).

<sup>98</sup> *Ibid.*

<sup>99</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 13.

<sup>100</sup> *The World Bank Group’s Sanction regime: Information Note*, *supra* note 97, at 19–20.

in the context of state immunities between *acta jure imperii* and *acta jure gestionis*. However, the adoption of such a definition would probably lead to difficulties in terms of proof. In such a process of definition, the World Bank might find it useful to refer to the notion of conflict of interest. In most of the cases of corruption of public officials, there is indeed a prior private interest that improperly influenced the behaviour of the public official. This is arguably the reason the UN Convention against Corruption identifies the prevention of conflict of interest as one way to prevent corruption.<sup>101</sup>

### 3 Between Self-Commitment and External Pressure: the Influence of the External World

Several factors have led to the reform trend in favour of the increased integration of due process guarantees. Such an evolution is the result of decisions taken by the World Bank. It acted this way in many respects due to pressures coming from outside the Bank.

#### A *The Impact of External Reviews on the Development of the Procedure*

On several occasions, the sanctions system of the World Bank has been subjected to evaluations by external panels and audit reports. These evaluations have played an important role in shaping its structure and functioning. They have served the integration of new 'values' into the mechanism. These panels have discussed the functioning of the procedure and recommended possible ways to increase its legitimacy as well as its efficiency. Two panels had a very significant influence on the evolution of the mechanism over time: Richard Thornburgh's 'Report Concerning the Debarment Process of the World Bank' (The Thornburgh Report)<sup>102</sup> of August 2002 and the Independent Panel Review of the World Bank Department of Institutional Integrity (The Volcker Report)<sup>103</sup> of September 2007.

The Thornburgh Report by former Under-Secretary General of the UN and Attorney General of the US, Richard Thornburgh, was 'intended to provide an encapsulated view of the experience – and the possible future course – of the World Bank in

<sup>101</sup> Art. 12, sect.2 (e): 'Measures to [prevent corruption involving the private sector] may include, inter alia: ... Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure'. The text of the Convention is available at: [www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) (last visited 1 Aug. 2012). See also Trebilcock, 'Implications of the UN Convention against Corruption for International Organizations: Oversight, Due Process, and Immunities Issues', [2009] *Int'l Orgs L Rev* 513.

<sup>102</sup> See <http://siteresources.worldbank.org/INTDOII/Resources/thornburghreport.pdf> (last visited 1 Aug. 2012).

<sup>103</sup> See [http://siteresources.worldbank.org/NEWS/Resources/Volcker\\_Report\\_Sept\\_12\\_for\\_website\\_FINAL.pdf](http://siteresources.worldbank.org/NEWS/Resources/Volcker_Report_Sept_12_for_website_FINAL.pdf) (last visited 1 Aug. 2012).

attempting to identify and sanction, through the process of debarment, organizations and individuals believed to have engaged in fraudulent or corrupt activities in relation to Bank-financed and Bank-executed projects'.<sup>104</sup> Its report resulted in a major reform of the sanctions system in 2004. As mentioned earlier, it led to the establishment of the two-tiered structure that continues to operate today.

The Independent Panel headed by former Federal Reserve Chairman Paul Volcker was appointed by the World Bank in 2007 with the mission to review the work of the Bank's Department of Institutional Integrity (INT). The Volcker Report has made 18 recommendations, among them the need to increase the transparency of INT's investigatory policies, practices, and procedures and the externalization of investigations on staff misconduct not related to fraud and corruption. It also stressed the need to appoint as Chair of the Sanctions Board a member of the Board who would be external to the Bank. Most of these recommendations have already been implemented by the Bank or are in the course of being implemented.<sup>105</sup>

The establishment of an Independent Advisory Board, an outcome of the Volcker Report, should also be seen as means of exercising a sort of 'external pressure' on the Bank. Established in September 2008, it is composed of experts on governance issues and anti-corruption measures.<sup>106</sup> It provides advice to the World Bank and plays a role as exercising pressure 'from within'. As an example, the Independent Advisory Board had criticized the practice of settlements as initiated by the investigative branch. Established in 2010, this procedure allows the negotiation of the sanction between INT and the Respondent at any time during the formal procedure, but before the Sanctions Board has given its decision.<sup>107</sup> This practice was perceived as a means used by the investigation branch to bypass the sanctions procedure, without abiding by the transparency and accountability requirements.

The various external reviews of the sanctions process have had a great impact on its functioning. Procedural principles and techniques developed in other institutional contexts have also played a role in the shaping and strengthening of the legitimacy of the procedure.

<sup>104</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOI/0,,contentMDK:20646594~menuPK:588937~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html> (last visited 1 Aug. 2012).

<sup>105</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/ACCUEILEXTN/NEWSFRENCH/0,,contentMDK:21963028~pagePK:64257043~piPK:437376~theSitePK:1074931,00.html> (last visited 1 Aug. 2012).

<sup>106</sup> As of May 2012, the Board is composed of Peter Costello (Australia's Treasurer from 1996 to 2007), Chester Crocker (US Assistant Secretary of State for African Affairs 1981–1989), Simeon Marcelo (Philippines' Ombudsman), and Mark Pieth (Professor at Basle University).

<sup>107</sup> This procedure may lead to a suspension of the proceedings for 60 days if a joint request is made by INT and the respondent to the Evaluation and Suspension Officer. The agreement can take two different forms. In one procedure a Negotiated Resolution Agreement is signed. It ends or replaces the formal sanction by a penalty agreed between INT and the respondent. In the other procedure, a Deferral Agreement is signed, freezing the current procedure for a given period during which the respondent must comply with a number of conditions. See *The World Bank Group's Sanction Regime: Information Note*, *supra* note 97, at 8. For a recent example see the Negotiated Resolution Agreement between Oxford University Press and the World Bank Group at <http://goo.gl/Le5SO>.

## **B Due Process, Transparency, and Accountability in the Shaping of the World Bank Sanctions Process and the Strengthening of its Legitimacy**

Due process, transparency, and accountability have been progressively integrated into the World Bank's Sanctions Procedure and their influence is indeed noteworthy. These principles have contributed to the development of the sanctions system and provide a basis for its legitimacy. The World Bank has indeed attempted to legitimize the sanctions system by integrating elements of procedural fairness, as well as institutional safeguards, such as the autonomy between the organs of investigation and sanction.

### *1. Investigation and the Demand for More Transparency and Due Process*

The investigation procedure provided for in the Operational Memorandum of 1998 included several steps. Where there existed serious suspicion of a company an investigation would be launched. Two avenues were then possible. The investigation was assigned either to an investigative body outside the Bank or to the State authorities, which in a sense were victims of the actions of the company.<sup>108</sup> In the second case, the investigation followed the relevant national procedures. In the first case, the Operational Memorandum of 1998 provided that the investigation conducted by an external body would be 'conducted in a manner that fairly protects the privacy of the accuser and the rights of the accused firm; in particular, (a) the accused firm has the right to be assisted by legal counsel; (b) if the accuser is willing to submit to cross-examination, the Bank arranges for the accused firm to question the accuser in the presence of Bank staff; and (c) the accuser may also be requested to answer under oath questions submitted by the accused'.<sup>109</sup> It is evident here that the Bank sought to integrate into the investigation process the principle of due process and the right of reply.

From 2001, following significant developments regarding the investigative capacity of the Bank, the tendency was to reduce the number of investigations carried out by external organs and rather to rely on the staff of INT, the internal investigative department of the World Bank.

The Volcker Report of 2007, responsible for evaluating the functioning of INT, highlighted that in the functioning of an organ of this kind there must be a balance between confidentiality on the one hand, and transparency on the other.<sup>110</sup> On this question, the Report states that 'there are important legitimate reasons for maintaining confidentiality, some of which relate to overall Bank disclosure policies. However, it is apparent to the Panel from its interviews of Bank personnel that INT at times acts in excessive secrecy'.<sup>111</sup> The Volcker Report continues, 'INT's policies, practices, and procedures should be transparent. To enhance INT's relations with Operations

<sup>108</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 14.

<sup>109</sup> *Ibid.*

<sup>110</sup> On these aspects see Fromageau, 'Collaborating with the United Nations: Does Flexibility Imply Informality?', 7 *Int'l Orgs L Rev* (2010) 439.

<sup>111</sup> Volcker *et al.*, *supra* note 81 at 20.

staff and to facilitate appropriate disclosures, INT in consultation with the Legal Department should re-evaluate some of its practices that are taken under perceived concerns of confidentiality'.<sup>112</sup> This entailed that the World Bank's investigative body had to integrate elements of transparency into its functioning, even if its investigative function *per se* implied a high level of confidentiality.

Under the applicable policy, which entered into force in February 2011, INT is committed to promoting greater transparency in its functioning.<sup>113</sup> The policy also identified four guiding principles on maximizing access to information, safeguarding the deliberative process and the integrity of INT's investigations, providing clear procedures for making information available, and recognizing a requester's right to an appeals process.<sup>114</sup>

Hence substantive changes were made. INT has gradually incorporated the principles of transparency and due process in its working methods, and this trend is also evident at the level of the sanctions organ.

## 2. *The Sanctions Procedure and the Demand for More Transparency and Due Process*

The presence of procedural safeguards regarding the application of sanctions was not really discernable in the Operational Memorandum of 1998. It rather emerged as a result of a document published in August 2001 on the procedure of the Sanctions Committee.<sup>115</sup> This envisaged a notification procedure for sanctions. The notification contained the accusation, the sanction that may have been imposed, and the manner by which a respondent could contest the accusation.<sup>116</sup> The company or individual had a period of 60 days in which to respond to the proposed notice of sanction proceedings, after which INT had 20 days to submit a reply. At the end of this exchange, a file was sent to the Sanctions Board members. During an 'informal hearing',<sup>117</sup> the company and its legal counsel were presented with an opportunity to present evidence, except for the calling of witnesses.

These notification guarantees are also present in the current procedure, whether through the reference procedure of allegations to companies or individuals (Notice of Sanctions Proceedings<sup>118</sup>) or through the opportunity to respond in person to the Sanctions Board of the World Bank. Similarly, an opportunity was given to respond in writing to the allegations made by the Evaluation and Suspension Officer. All of these procedural safeguards strengthened the legitimacy of the sanction proceedings, making it ultimately more effective.

<sup>112</sup> *Ibid.*

<sup>113</sup> Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:20646594~menuPK:588937~pagePK:64168445~piPK:64168309~theSitePK:588921.00.html> (last visited 1 Aug. 2012).

<sup>114</sup> *Ibid.*, at 2.

<sup>115</sup> Thornburgh, Gainer, and Walker, *supra* note 37, at 15.

<sup>116</sup> *Ibid.*, at 17.

<sup>117</sup> *Ibid.*, at 18.

<sup>118</sup> See <http://siteresources.worldbank.org/INTOFFEVASUS/Resources/OESFactSheetFrenchDec2010.pdf?resourceurlname=OESFactSheetFrenchDec2010.pdf> (last visited 1 Aug. 2012).

The process followed by the World Bank to strengthen the legitimacy of the functioning of its sanctions process is one of the examples of the concerns of international institutions in general to shore up their legitimacy and to enhance the effectiveness of their regulatory activities. One of the means to this end is to apply procedural norms such as those developed by the Global Administrative Law project, that is to say transparency, participation, reasoned decision-making, and legality, and by establishing mechanisms of review and accountability.<sup>119</sup> Over the years, the World Bank had used these principles, and continues to do so, in order to comply with its commitment to a fair and accountable sanctions process. Although great efforts had already been made, the current sanctions process as it stands today can still be improved from a procedural point of view.<sup>120</sup> Developments of the sanctions process in the future are likely to be towards improved procedural protections modelled on the domestic structures. By this token, legitimacy and ultimately confidence in the adjudicatory process will be increased. This is fundamental for the World Bank as a condition for the collaboration of other multilateral institutions and member states in, for example, acquiring evidence to impose sanctions.

### ***C Challenging the Decisions of the World Bank? The Lifting of the Immunities of the World Bank for Due Process Reasons***

The immunities of the World Bank and its staff have several consequences with respect to the sanctions process. They can be perceived as obstacles to obtaining remedies at the domestic level. Given the fact that the World Bank enjoys privileges and immunities, there is theoretically no remedy against the Bank when it exercises its discretionary powers in making decisions concerning actions against fraud and corruption.

This said, when it comes to the potential review of an act of an international organization, courts and tribunals might decide in certain circumstances not to resort to the 'avoidance technique',<sup>121</sup> or in other words to recognize immunity. As an emerging practice indicates, regional and domestic courts have started to take into account the 'human rights impact' of their immunity decisions.<sup>122</sup> This constitutes an attempt to subject international organizations to the rule of law by waiving their immunities. This can happen when courts consider that an organization has failed to provide adequate means for aggrieved individuals to protect their rights, as for example with respect to staff employment cases.<sup>123</sup>

<sup>119</sup> Kingsbury, *supra* note 40, at 9. See also Boisson de Chazournes, Casini, and Kingsbury (eds), 'Symposium on Global Administrative Law in the Operations of International Organizations', 6 *Int'l Orgs L Rev* (2009) 315.

<sup>120</sup> Dubois and Nowlan, *supra* note 49, at 25.

<sup>121</sup> A. Reinisch, *International Organizations Before National Courts* (2000), at 127.

<sup>122</sup> Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals', [2008] *Chinese J Int'l L* 295.

<sup>123</sup> Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obligees', in Cissé, Bradlow, and Kingsbury (eds), *supra* note 40, at 118.

In these cases, European and domestic courts have shown a willingness to exercise judicial review where acts of international organizations directly conflict with human rights obligations. They are searching for ‘alternative remedies’, such as administrative or arbitral tribunals, which may be available to the plaintiffs before immunity is extended to international organizations. In the absence of such alternative remedies, they may deny immunity based on the fact that an opposite decision may breach claimants’ fundamental right of access to court. In the *Waite and Kennedy* case, the European Court of Human Rights held, for example, that ‘a material factor in determining whether granting ... immunity from ... jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention’.<sup>124</sup>

Some domestic courts have gone quite far in their assessment of the features of such reasonable alternative remedies. For example, the Belgian Cour de Cassation adjudged, with respect to the Appeals Commission of the Western European Union, that if ‘it had effectively been invested with a jurisdictional role and the competence to settle disputes’, its composition and the modes of designation permitted doubt as to its independence.<sup>125</sup> According to the Belgian court, this mode of designation and the short period of time of the mandate ran the risk that the members of the Appeals Board were too closely linked to the organization.<sup>126</sup> During its investigations, the Belgian court also found that there were no provisions for the execution of the judgments of the Commission,<sup>127</sup> no public hearing, and that the publication of decisions was not guaranteed.<sup>128</sup> These doubts arose from the fact that members of the Appeals Commission are designated for only a two-year mandate by an intergovernmental committee. Consequently, it found that the procedure did not offer the guarantees necessary to secure a fair trial. Granting immunity would thus have been incompatible with Article 6(1) of the European Convention of Human Rights, as it would have restricted access to domestic courts.

Similarly, in 2005, the French Cour de Cassation waived the immunity of the African Development Bank by declaring admissible a case concerning a dispute with one of its employees.<sup>129</sup> The Court justified its decision on the basis that, by not giving a party access to a court of law that rendered binding decisions, a denial of justice would ensue and as such this violated the international public order.<sup>130</sup>

<sup>124</sup> App. No. 26083/94, *Waite and Kennedy*, 18 Feb. 1999, 13 ECHR at para. 68.

<sup>125</sup> Belgian Court of Cassation, *Western European Union v. Siedler*, judgment S.04.0129.F, 21 Dec. 2009, at 21–22 (author’s translation).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, at para. 59.

<sup>128</sup> *Ibid.*, at para. 60.

<sup>129</sup> French Court of Cassation, *Banque Africaine de Développement v. M.A. Degboe*, judgment 04-41012, 25 Jan. 2005.

<sup>130</sup> According to the court, ‘Attendu que la Banque africaine de développement ne peut se prévaloir de l’immunité de juridiction dans le litige l’opposant au salarié qu’elle a licencié dès lors qu’à l’époque des faits elle n’avait pas institué en son sein un tribunal ayant compétence pour statuer sur des litiges de cette nature, l’impossibilité pour une partie d’accéder au juge chargé de se prononcer sur sa prétention et d’exercer un droit qui relève de l’ordre public international constituant un déni de justice’: *ibid.*

This review test can be applied to the World Bank's sanctions system as it deals with access to justice issues. As an example, a domestic court could question its qualification as a 'reasonable alternative remedy'. As it stands, four of the seven members of the Sanctions Board are external members appointed from a list of candidates drawn up by the President of the Bank<sup>131</sup> and three are chosen by the President of the Bank from among senior Bank staff.<sup>132</sup> They are all appointed for a period of three years, subject to reappointment.<sup>133</sup> There is no hearing before the Evaluation and Suspension Officer. Another point is that the hearings before the World Bank's Sanctions Board 'shall remain confidential and not open or available to the public'.<sup>134</sup> There are risks in seeing the immunities of the Bank waived by domestic courts because the procedure would not be considered compatible with jurisdictional requirements.<sup>135</sup> Law firms have indicated their interest in attempting to challenge the Bank's action in the courts.<sup>136</sup>

These developments are known to the World Bank. The outcome of the audit of the procedure conducted in 2011–2012 may lead to further judicialization of the procedure, perhaps with respect to the composition of the Sanctions Board. For instance, a recommendation could be made that it should be composed only of members external to the Bank.

There is no doubt that this factor, as well as other means of pressure, contributes to a stronger trend towards more accountability regarding international organizations.<sup>137</sup> In cases where there is no control mechanism provided for by the organization concerned, a 'decentralized review' can prevent gaps in accountability.<sup>138</sup> Judicial review contributes to the protection of human rights. However, it cannot by itself ensure a sufficient level of protection of the rights and interests of individuals when they are negatively affected by the decisions of international organizations.<sup>139</sup> An adequate level of protection can be achieved only through the establishment of adequate remedy mechanisms by the institutions concerned.

<sup>131</sup> Art. V, sect. 2 of the Sanction Board's Statute, *supra* note 80.

<sup>132</sup> *Ibid.*, Art. V, sect. 4.

<sup>133</sup> *Ibid.*, Art. V, sect. 5.

<sup>134</sup> Art. VI, Sect. 6.03 (a) of the *World Bank Sanction Procedures*, *supra* note 53.

<sup>135</sup> On these risks see Wouters, Ryngaert, and Schmitt, 'Western European Union v. Siedler; General Secretariat of the ACP Group v. Lutchmaya; General Secretariat of the ACP Group v. B. D.', 105 *AJIL* (2011) 560.

<sup>136</sup> Freshfields Bruckhaus Deringer have, e.g., released a note in July 2010 stating that they are currently 'developing legal theories to challenge [the Bank's] actions in domestic courts': Freshfields Bruckhaus Deringer US LLP, 'Sanctions investigations by the World Bank and other multilateral development banks', July 2010, at 3, available at: [www.freshfields.com/publications/pdfs/2010/July10/28402.pdf](http://www.freshfields.com/publications/pdfs/2010/July10/28402.pdf) (last visited 1 Aug. 2012).

<sup>137</sup> De Wet, 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review', in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), at 855–882.

<sup>138</sup> Reinisch, 'Conclusion', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (2010), at 273.

<sup>139</sup> De Wet, *supra* note 137, at 881.

Another issue is that the potential lifting of immunities is linked to the human rights features of the sanctions procedure that can lead to a debarment decision. Issues of human rights not directly linked to the procedure would not be able to be the object of a potential lifting of immunities. As an example, allegations of discriminatory practices between an entity that has been sanctioned and another entity engaged in fraud and corruption – but which had not been investigated – would not be amenable to the lifting of immunities.<sup>140</sup> One can see there a limit to the application of the concept of access to justice as only some issues can be contested while others cannot be contested.

## 4 Concluding Remarks

The ability to sanction individuals and firms did not form part of the initial powers of the World Bank. However, following a practical need to debar those who commit fraud and corruption, the Bank, on an *ex nihilo* basis, created a mechanism to this end which was progressively transformed and shaped into a mechanism with judicial features.

The sanctions process contains endogenous aspects that are linked to the peculiarities of the organization within which it was established. The World Bank's structure, together with the type of activities it conducts, has influenced the shaping of the mechanism. However, the mechanism has progressively emancipated itself from the World Bank. International law requirements and pressures from outside have prompted this procedure to evolve. Access to justice within international organizations is under increasing pressure to meet the requirements of a right to a fair trial. This has come into sharp focus following the decision of the organization to sanction individuals, or more generally non-state actors. Judicial guarantees have had to be put in place.

Other Multilateral Development Banks (MDBs) have developed a sanctions process.<sup>141</sup> Although the World Bank has at present the most developed process, it is interesting to note that the other MDBs are following the Bank in a similar direction. Since 2011, the Inter-American Development Bank's Sanctions Process has for example had a two-tier procedure composed of a Case Officer and of a Sanctions Committee.<sup>142</sup> It must, however, be noted that substantive differences between the various sanctions processes of the MDBs remain. As an example, in the context of the Asian Development Bank there is no two-tier mechanism. Complaints or allegations are investigated by an Office of Anti-corruption and Integrity (OAI) and then transmitted to a sanctioning organ, the Integrity Oversight Committee (IOC).<sup>143</sup> Neither personal appearance nor legal representation is accorded to the respondent before the sanctioning organ.<sup>144</sup>

<sup>140</sup> Williams, *supra* note 26, at 302.

<sup>141</sup> For a comparative point of view see Seiler and Madir, 'Fight Against Corruption: Sanctions Regimes of Multilateral Development Banks', 15 *J Int'l Economic L* (2012) 5.

<sup>142</sup> See the Sanction Procedures of the Inter-American Development Bank at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36233155> (last visited 1 Aug. 2012).

<sup>143</sup> See <http://beta.adb.org/site/integrity/faqs> (last visited 1 Aug. 2012).

<sup>144</sup> *Ibid.*

In April 2010, an agreement for mutual enforcement of debarment decisions was signed between the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank.<sup>145</sup> According to this agreement, each Bank will enforce debarment decisions made by another of the parties, except in circumstances 'where each enforcement would be inconsistent with the institution's legal or other institutional considerations'.<sup>146</sup> This agreement demonstrates the fact that, although each organization carries out its own investigation, in some cases a given organization may need to share information with another one.<sup>147</sup> To avoid duplication of their work through parallel investigations these institutions may coordinate or, alternatively, one may take the lead in an investigation.<sup>148</sup> This agreement seeks harmonization<sup>149</sup> among the various sanctions processes. Deeper and broader harmonization is expected in the future although for the present there are some important differences.

One of the important aspects of this agreement is related to the due process requirements to be followed by each institution. The parties agreed on the necessity to include as one of the common core principles that the sanctioning institution has sanctions processes with certain key due process elements, such as the existence of an internal investigative authority and a distinct decision-making authority,<sup>150</sup> written and publicly available procedures that require notice to be provided to accused parties as well as an opportunity to respond,<sup>151</sup> a 'more likely than not' standard of proof or equivalent,<sup>152</sup> and a range of sanctions that take into account the principle of proportionality, including aggravating and mitigating factors.<sup>153</sup>

In future the agreement will probably lead to increased harmonization among the different sanctions mechanisms, although each mechanism may retain certain specificities. The World Bank experience has demonstrated the need for due process and access to appropriate remedies when sanctioning individuals and companies. The other international organizations cannot escape from this logic either. In the fight against fraud and corruption, international organizations have to abide by principles of justice, equity, and fair treatment. These principles are crucial in strengthening the effectiveness and legitimacy of the activities of these organizations.

<sup>145</sup> See the full text of the agreement at: <http://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf> (last visited 1 Aug. 2012).

<sup>146</sup> *Ibid.*, at para. 7.

<sup>147</sup> Boisson de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a *Droit Commun* in the Field of Development Finance', in Cissé, Bradlow, and Kingsbury (eds), *supra* note 40, at 185.

<sup>148</sup> *Ibid.*

<sup>149</sup> Zimmermann and Fariello, 'Coordinating the Fight against Fraud and Corruption – Agreement on Cross-Debarment among Multilateral Development Banks', in *ibid.*, at 185.

<sup>150</sup> Art. 2, (c) i. of the agreement, *supra* note 145.

<sup>151</sup> *Ibid.*, Art. 2, (c) ii.

<sup>152</sup> *Ibid.*, Art. 2, (c) iii.

<sup>153</sup> *Ibid.*, Art. 2, (c) iv.