What Process is Due – Sanctions Regimes of Multilateral Development Banks

Jelena Madir

A thesis submitted in partial fulfilment of the

requirements of the University of Westminster

for the degree of Doctor of Philosophy

September 2019

ABSTRACT

Much has been written about the consequences for companies of criminal convictions for bribery and other corrupt practices. However, less attention has been paid to the sanctions regimes that have been developed by multilateral development banks in order to combat fraud and corruption in their operations. This is likely to change in view of the fact that on 9 April 2010, the heads of five leading multilateral development banks (MDBs) – the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the World Bank Group – signed the Agreement for Mutual Enforcement of Debarment Decisions, which provides for mutual and reciprocal enforcement of debarment decisions taken by any one of them against parties that engage in fraud, corruption, coercion or collusion in connection with MDB-financed projects. For parties that are seeking financing form an MDB or are competing for contracts funded by an MDB, this means that a sanctionable practice committed in a single country could result in global sanctions.

Against this background, this thesis examines the type of due process rights that should characterise MDBs' sanctions procedures. More particularly, the thesis analyses the extent to which MDBs' sanctions regimes should be bound by the rules of law, analogous to those of national judicial bodies, and the level of due process and transparency that should be required from these ever-evolving regimes. In other words, (how) can the tension between the administrative and business considerations of MDBs' sanctions regimes (coupled with their immunity from judicial review) be reconciled with due process considerations and principles of fairness that underpin a national judicial model?

TABLE OF CONTENTS

AUTHOR'S DECLARATION

I declare that all the material contained in this thesis is my own work.

LIST OF ABBREVIATIONS

ADB	Asian Development Bank
AfDB	African Development Bank
APA	US Administrative Procedure Act
CCO	Chief Compliance Officer at the European Bank for Reconstruction and Development
CMCHA	UK Corporate Homicide Act 2007
CPS	UK Crown Prosecution Service
DOJ	US Department of Justice
DPA	Deferred prosecution agreement
EBRD	European Bank for Reconstruction and Development
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESA	European Space Agency
FAR	Federal Acquisition Regulation
FCPA	US Foreign Corrupt Practices Act
FSIA	US Foreign Sovereign Immunities Act
GAL	Global Administrative Law
IADB	Inter-American Development Bank
IACD	Integrity and Anti- Corruption Division at the African Development Bank
IBA	International Bar Association
ICJ	International Court of Justice
ICO	Integrity Compliance Office at the World Bank Group
IFI	International financial institution
ILC	International Law Commission
INT	Department of Institutional Integrity at the World Bank Group

IOC	Integrity Oversight Committee at the Asian Development Bank
IOIA	US International Organizations Immunities Act
LCIA	London Court of International Arbitration
MDB	Multilateral development bank
OAI	Office of Anticorruption and Integrity at the Asian Development Bank
OCCO	Office of the Chief Compliance Officer at the European Bank for Reconstruction and Development
OAS	Organization of American States
OCFC	Oversight Committee on Fraud and Corruption at the Inter-American Development Bank
OECD	Organisation for Economic Co-operation and Development
OFAC	US Treasury Department's Office of Foreign Assets Control
OII	Office of Institutional Integrity at the Inter-American Development Bank
SCC	Stockholm Chamber of Commerce
SDO	Suspension and Debarment Officer at the World Bank Group
SEC	US Securities and Exchange Commission
SFO	UK Serious Fraud Office
SME	Small and medium-sized enterprise
UK	United Kingdom
UN	United Nations
UNAT	United Nations Appeals Tribunal
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States of America
WB	World Bank Group
WBAT	World Bank Administrative Tribunal

INTRODUCTION

On 9 April 2010, the heads of five leading multilateral development banks (collectively, "**MDBs**" and each, an "**MDB**") – the African Development Bank ("**AfDB**"), the Asian Development Bank ("**ADB**"), European Bank for Reconstruction and Development ("**EBRD**"), Inter-American Development Bank ("**IADB**") and the World Bank Group ("**WB**")[1] – signed the Agreement for Mutual Enforcement of Debarment Decisions (the "**Cross-Debarment Agreement**"), which provides for mutual and reciprocal enforcement of debarment decisions taken by any one of them against parties that engage in fraud, corruption, coercion or collusion (collectively, "**sanctionable practices**" and each, a "**sanctionable practice**") in connection with MDB-financed projects. For parties that are seeking financing form an MDB or are competing for contracts funded by an MDB, this means that a sanctionable practice committed in a single country could result in global sanctions.

The main purpose of MDBs' sanctions regimes is ensuring that MDBs' funds are used properly. Namely, each of the treaties establishing the five MDBs that are signatories of the Cross-Debarment Agreement – and subjects of this work – expressly provides that the relevant MDB has to take all necessary measures to ensure that the proceeds of its financing are used solely for the purposes for which such financing was granted.[2] The view of the MDBs has been that the sanctions and debarment process is "essentially administrative in nature."[3] As a consequence, none of the MDBs has adopted

[1] For purposes of this thesis, the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA) are collectively referred to as the "World Bank Group" or "WB."

[2] See Agreement Establishing the European Bank for Reconstruction and Development, Article 13(xiii) (1990), available at: http://www.ebrd.com/downloads/research/guides/basics.pdf; IBRD Articles of Agreement, Article III, § 5(b) (as amended effective 16 February 1989), available at: http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf; Agreement Establishing the Inter-American Development Bank, Article III, §9(b) (as amended effective July 1995), available at: http://IADBdocs.iadb.org/wsdocs/getdocument.aspx?docnum=781584; Agreement Establishing the Asian Development Bank, Chapter III, Article 14(xi) (1966), available at: http://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf; and Agreement Establishing the African Development Bank, Chapter III, Article 17(1)(h) (1963), available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/Agreement%20Establishing%20the%20ADB%20final%202011.pdf.

[3] Anne-Marie Leroy and Frank Fariello Jr.: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012), available at: http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsProcess.pdf, at 29; see also General Principles and Guidelines for Sanctions, available at:

the full range of rules that typify national civil or criminal systems, such as formal rules of evidence, cross-examination of witnesses or detailed sanctioning guidelines. WB justifies such stance by arguing that "sanctions, while serious, cannot compare in severity of result to civil penalties, let alone the deprivation of liberty that may result from criminal proceedings."[4]

However, it has also been argued that a debarment decision should be made only at the end of a quasi-judicial process. This argument is predicated on the fact that (i) first, MDBs are not private business entities that can make decisions without any restrictions (within the boundaries of the applicable laws); (ii) second, just like states and governments, international organisations must be bound by the rule of law, especially in cases where international organisations take actions that affect a company or an individual;[5] and (iii) third, the far-reaching consequences of the MDBs' sanctions proceedings, particularly in view of the Cross-Debarment Agreement, could be interpreted as a "corporate death penalty"[6] and deprivation of property. Moreover, in view of MDBs' immunity from judicial review, derived primarily from treaty law, the question arises as to what (if any) measures exist to prevent MDBs from arriving at entirely arbitrary and unjustifiable decisions.

Given that, as a result of the Cross-Debarment Agreement, a sanctionable practice committed in a single country could result in global sanctions, the hypothesis that this thesis sets out to prove is that, despite their immunity from judicial review, MDBs' sanctions regimes should be characterised by robust due process rights and would benefit from substantial improvements in the areas of respondents' discovery rights, oral hearings and right to witnesses, publication of decisions, referrals to national authorities, the use of negotiated settlements, and the composition, appointment and independence of the Sanctions Board members, as well as the treatment of corporate groups. The thesis therefore examines the extent to which MDBs' sanctions regimes should be bound by the rules of law, analogous to those of national judicial bodies and the level of due process

---

http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/General%20Principles%20and%20Guidelines%20for%20Sanctions.pdf, §1.

[4] Leroy and Fariello, *supra* note 3, at 29.

[5] Hans-Joachim Priess: *Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks*, The Geo. Wash. Int'l L. Rev., Volume 45 (2013), at 281.

[6] See Adam K. Lasky and Oles Morrison: *The Rise of the Corporate Death Penalty: Understanding Suspensions and Debarments*, Navigant (2012).

and transparency that should be required from these ever-evolving regimes. The key theme of this research is examining how the tension between the administrative and business considerations of MDBs' sanctions regimes (coupled with their immunity from judicial review) can be reconciled with due process considerations and principles of fairness that underpin a national judicial model, in view of the far-reaching consequences of MDBs' sanctions regimes.

Methodology

The main approach of this thesis is doctrinal, in the sense that the thesis provides a systematic exposition of the rules governing a particular legal category, and analyses the relationship between these rules, explains areas of difficulty and predicts future developments.[7]

The main sources of data for the doctrinal research of this thesis are MDBs' sanctions procedures, cases and decisions generated under them, as well as the discussions in treatises and textbooks on public international law, anti-corruption and sanctions legislation and due process rights. These materials are then analysed and conclusions are drawn.

Admittedly, the doctrinal approach has been subject to criticism. For example, it has been described as being too formalistic, which can sometimes lead to oversimplifying the legal doctrine and often does not provide enough of a basis on which to support the thesis and the questions it seeks to answer.[8] This thesis therefore uses the doctrinal approach merely as a starting point.

Moreover, a purely doctrinal approach would not be suitable for a project that has obvious cross-country and cross-jurisdictional elements. Rather, the determination of best practices for MDBs' sanctions regimes requires research on a comparative law basis.[9] Comparative law has been described as the "critical method of legal science", because of

[7] Desmond Manderson and Richard Mohr: *From Oxymoron to Intersection: An Epidemiology of Legal Research*, Law Text Culture, Volume 6, No. 1 (2002), at 159; and Council of Australian Law Deans: *Statement on the Nature of Legal Research* (2005), at 3.
[8] See, e.g., Michael Slater and Julie Mason: Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson 2007), at 99 and 108.
[9] Vernon Valentine Palmer: *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, The American Journal of Comparative Law, Volume 53, No. 1 (2005), 261-290.

its focus on "the juxtaposing, contrasting and comparing of legal systems or parts thereof with the aim of finding similarities and differences."[10] The act of comparison requires a careful consideration of the similarities and differences between multiple legal data points, and then using these measurements to understand the content and range of the legal material under observation.[11]

To do this, one must look quite carefully at the legal data points under review, and assess and understand their content, meaning and application. One must also understand what meaning the words have within the context of the case, statute, or other legal norm. That is, how does the legal rule fit within the broader framework of the legal system?[12] After one has undertaken the careful evaluation of the legal data points, one must proceed to the next step of comparative methodology: comparing and contrasting the similarities and differences between the legal points under review in different legal points. When analysing the similarities, this thesis considers how the multiple data points are similar (by word, rule, meaning, application, impact, or some other underlying basis), what provides the basis for the similarity, and how the similarity translates across legal cultures. The same technique is then applied to the assessment of differences, and the thesis considers how and in what way the legal data points are different, what the concrete meaning of the differences is, what the differences reveal, and how they translate across legal cultures.[13]

Once the systematic study of the similarities and differences between legal points has been completed, the thesis moves on to the next step: exploring the reasons behind these similarities or differences and evaluating their significance within their legal culture. As in all comparative analyses, one needs to compare and contrast the points so that one can arrive at a fully considered and understood conception of the object under study.[14] Once the results of the investigation have been recorded, one can start posing questions: For example, why are the legal rules or data points similar or different? What are the reasons for the substance of the data point? Have we looked only at the law on in the

[10] Esin Örücü: *Developing Comparative Law*, in Esin Örücü and David Nelken: Comparative Law: A Handbook, Hart Publishing (2007) at 44.
[11] Günter Frankenberg: *Critical Comparisons*: *Re-thinking Comparative Law*, 26 Harvard International Law Journal, 411 (1985), at 412.
[12] Edward Eberle: *The Method and Role of Comparative Law*, Washington University Global Studies Law Review, Volume 8, Issue 3 (2009), at 460.
[13] *Ibid*.
[14] John Reitz: *How to Do Comparative Law*, 46 American Journal of Comparative Law 617 (1998), at 626-27.

books, and is there a difference between the law in the books and the law in action? These are just some of the questions that need to be addressed.[15]

The comparative analysis in this thesis has been undertaken with a clear understanding that it is not possible to simply transpose solutions from another legal system, but rather that it is necessary to analyse different approaches to due process rights in order to be able to make recommendations on best practices for MDBs' sanctions systems. After all, legal rules are a product of historical and social development of the relevant country and a direct transplant of a rule or body of law may not have the same measure of success as it did in its home jurisdiction.[16] One of the aims of the thesis is to use comparative law approaches to assess how due process rights are addressed under different regimes, bearing in mind their fundamental differences with the MDBs' sanctions regimes, and to assess whether MDBs' sanctions procedures could be enhanced to provide a better solution to the same set of problems.

The thesis proves its hypothesis by examining possible sources of best practice standards for MDBs' sanctions regimes, ranging from the US and UK judicial review standards, the case law of the European Convention on Human Rights and MDBs' administrative tribunals. Specifically, the thesis first compares due process rights under the systems that most closely resemble MDBs' sanctions regimes: the United States ("**US**") Federal Acquisition Regulation (the "**FAR**"), the jurisprudence of international organisations' administrative tribunals and of the European Convention of Human Rights ("**ECHR**"), and to a more limited extent, international arbitration rules. The selection of these sources was guided by the following considerations: First, MDBs' sanctions regimes are based on the FAR. Further, in view of MDBs' supranational status, MDBs' administrative tribunals face similar due process considerations as MDBs' sanctions decision-making bodies, although they concern employment disputes, which are substantially different from sanctions cases, and this difference has to be considered when comparing the two regimes. Moreover, Article 6(1) of the ECHR is considered by many as the most influential regional treaty that addresses due process rights. Finally, international arbitration rules (such as the IBA Rules on the Taking of Evidence in

[15] Edward Eberle: *The Method and Role of Comparative Law*, Washington University Global Studies Law Review, Volume 8, Issue 3 (2009), at 461.
[16] Otto Kahn-Freund: *On Uses and Misuses of Comparative Law*, The Modern Law Review, Volume 37, No. 1 (1974), at 6.

International Arbitration (the "**IBA Rules**"), the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "**SCC Rules**"), the UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**") and the London Court of International Arbitration Rules (the "**LCIA Rules**")) may prove useful in filling specific, procedural gaps in MDBs' sanctions procedures, given there is no basis for MDBs' sanctions decision-making bodies to choose, by way of example, one country's approach towards the collection and assessment of evidence over another country's approach. Therefore, any national law rules on such procedural matters would not be applicable to the MDBs' sanctions procedures.

Second, the thesis analyses due process rights and the liability of corporate group members under the US and UK laws. The selection of these two jurisdictions was guided by two factors: (1) first, the fact that MDBs' sanctions regimes are based on the FAR and thus founded on common law principles and (2) second, the fact that three out of the five MDBs are headquartered in the US and the UK and any respondents challenging the MDBs' due process standards under their sanctions regimes are therefore likely to bring their claims in these two jurisdictions.

Structure

The thesis develops the arguments in three Chapters:

The first Chapter sets the scene by describing the negative impact that corruption has on MDBs' underlying development goals, and analyses the origins of MDBs' sanctions regimes, starting with the WB's regime. Namely, WB was the first MDB that introduced a formal sanctions regime, which was based on the FAR. Given the comparative nature of the thesis, the first Chapter compares similarities and differences between the WB's sanctions procedures and the FAR, taking into account the underlying differences between the purpose and context of the two systems: The debarment system under the FAR is an informal extension of the US federal contracting process, and the main enquiry focuses on the performance risk posed by the contractor, while reputational risk plays a relatively minor role. By contrast, the WB sanctions system does not focus on the performance risk that corrupt contractors may pose, but rather on mitigating the risks that corruption will divert development resources and cause reputational harm to WB. The Chapter then proceeds with the critical analysis of each of the five MDB's sanctions

procedures, and sets out a comparison of key elements of these five regimes. It finds that, while many similarities exist between the five regimes (for example, notice requirements, two-step decision-making process, and consideration of mitigating and aggravating circumstances), the regimes also differ on key due process issues, such as the composition of appellate bodies, right to oral hearing and to live witness testimony, publication of reasoned decisions, referral to national authorities, the range of sanctions that can be imposed, the right to settlement, etc. It is precisely these issues that are then analysed in the subsequent Chapters with the aim of proposing best practices that all MDBs should consider following.

In order to be able to propose best practices, however, it is necessary to find suitable comparator regimes. This is not easy, as MDBs are immune from court jurisdiction. The second Chapter therefore embarks on the analysis of possible benchmark regimes: It starts off by describing due process rights established under the US and UK judicial review regimes, particularly in relation to those issues where MDBs' sanctions procedures differ, such as the right to oral hearing and live witness testimony, and publication of reasoned decisions, which are later considered in the context of best practices for MDBs' regimes. As noted above, the jurisprudence from these two jurisdictions is relevant because MDBs' sanctions regimes are based on common law principles and three out of the five MDBs are headquartered in the US and the UK, so any respondents challenging MDBs' due process standards under their sanctions regimes are therefore likely to bring their claims in these two jurisdictions. The Chapter also analyses the reasons behind the MDBs' immunities from judicial review and how such immunities have been tested before the courts of the countries that host a large number of international organisations (not just MDBs). Notably, although immunities continue to be the cornerstone of the law of international organisations and thus leave little or no redress against MDBs' decisions in courts, there is a trend in the case law of domestic courts towards abandoning the traditional view of immunity of international organisations whose decisions fail to consider what courts consider to be fundamental due process rights. Finally, the Chapter examines possible benchmark regimes for MDBs' sanctions regimes: from customary law and legal principles, and Global Administrative Law, which the thesis finds to be too high-level and therefore not particularly useful for determining appropriate due process standards, to Article 6(1) of the ECHR and MDBs' administrative tribunal jurisprudence. Case law under Article 6(1) of the ECHR provides useful guidance on such

issues as the right to oral hearing, the impartiality and independence of decision-making bodies and the need to provide reasoned decisions. The same matters are also examined under the MDBs' administrative tribunal jurisprudence.

The third Chapter applies the principles articulated in the second Chapter to MDBs' sanctions proceedings and proposes enhancements in the main due process rights: from discovery rights and range of sanctions to the publication of decisions, the composition of appeals bodies, and settlements. The analysis of optimal discovery rights introduces the possibility of looking at international arbitrations rules for filling very specific, procedural gaps in MDBs' sanctions procedures, such as the treatment of experts' reports and assessment of evidence. The proposals for improvements to MDBs' sanctioning guidelines and settlement regimes are based on the analysis of the US and UK sanctioning guidelines and settlement regimes, respectively. The Chapter concludes this analysis by providing a table-form summary of concrete proposals for the enhancement of MDBs' sanctions regimes set out at the end of Chapter 3, section 1.

Finally, the Chapter also analyses the treatment of corporate groups under MDBs' sanctions regimes. Specifically, section 2 of Chapter 3 examines four main areas of corporate liability: (i) liability of a company for its employees' wrongdoing, (ii) liability of a parent company for its subsidiaries' wrongdoing, (iii) liability of a subsidiary for its parent company's wrongdoing, and (iv) successor liability under the US and UK laws, and proposes recommendations for enhancements of MDBs' sanctions regimes in this area. The reason corporate liability under MDBs' sanctions regimes was analysed in Chapter 3 is because (a) it is an area separate and distinct from the respondent's basic due process rights and (b) this part provides concrete recommendations for improvements of MDBs' sanctions regimes, which fall squarely within Chapter 3.

The thesis concludes by placing MDBs' sanctions regimes in the broader context of the global fight against corruption.

Finally, this thesis is purely academic in its intention and is in no way biased by the affiliation of the author, who serves as the Secretary of the EBRD's Enforcement Committee. The analysis and findings of this thesis are based primarily on publicly available sources.

CHAPTER 1: PURPOSE AND ORIGINS OF MDBs' SANCTIONS REGIMES

Introduction

The profile of MDBs has significantly evolved over the last few decades. MDBs have become exposed to new demands and, in response, they have developed innovative rules and procedures which in turn have required specific policy measures. These policies include, among others, sanctions mechanisms in an effort to combat fraud and corruption.

In addition to safeguarding proper use of MDBs' funds, MDBs' sanctions regimes provide meaningful support for the core development aims of the MDBs: First and foremost, sanctions regimes are primarily protective, designed to exclude proven wrongdoers from access to MDB financing in MDB-financed operations. At the same time, arguably, sanctions regimes have valuable spill-over effects: providing specific and general deterrence for would-be wrongdoers, encouraging prevention by companies and anti-corruption enforcement activities by member national governments and inspiring public confidence in jurisdictions in which fraud and corruption enforcement are still in their early stages.[17]

This Chapter starts off by putting MDBs' sanctions regimes within the broader context of the global fight against corruption by analysing the relationship between corruption and development, and the role that MDBs' sanctions regimes play as one of the possible solutions to curbing corruption and mitigating its effects on MDBs' development efforts. It then analyses the origins of MDBs' sanctions regimes, starting with the WB's regime, given that the WB was the first MDB that introduced a formal sanctions regime. The Chapter then examines the characteristics of the current sanctions procedures of each of the five MDBs and differences between them, as well as harmonisation efforts and the cross-debarment regime.

1. Relationship between corruption and development

It has been well established that corruption slows down the wheels of business and, consequently, hinders economic growth and distorts the allocation of resources. In the past few years, a number of studies have suggested that corruption has a negative impact

[17] John Coogan et al.: *Transparency, accountability and due process in multilateral development banks' sanctions regimes*, The Company Lawyer, Issue 7 (2016), at 215.

on the economic growth. For example, Mauro's study demonstrates that corruption reduces investment and this, in turn, reduces national economic growth. However, his study did not find strong proof of a link between corruption and growth.[18] In a follow-up study, Mauro examined the influence of corruption on investment, economic growth, and government expenditure using cross-country data for 101 countries and regressions for various time periods. In this study, he managed to find that corruption adversely affects economic growth largely by reducing private investment and possibly by altering the composition of government expenditure, specifically by lowering the share of spending on education.[19]

In the same vein, three IMF working papers all highlight corruption's negative impact on GDP per capita growth.[20] In particular, Tanzi and Davoodi find that corruption reduces the productivity of public investment and of a country's infrastructure. Moreover, it reduces tax revenue, mostly because of the impact that it has on the tax administration and customs, consequently reducing the ability of the government to undertake needed public expenditures.[21]

Mo finds that a 1% increase in the corruption level reduces the growth rate by about 0.72% and the most important channel is political instability, accounting for about 53% of the total effect. He also finds that corruption lowers the level of human capital and the share of private investment.[22] Akçay finds that a country-level dependent variable measuring human development (which contains a one-third weighting on GDP per capita in terms of purchasing power parity) is negatively affected by corruption.[23] Similarly,

---

[18] Paolo Mauro: *Corruption and Growth*, Quarterly Journal of Economics, 110 (1995).
[19] Paolo Mauro: *The effects of corruption on growth, investment, and government expenditure*, International Monetary Fund, Working Paper No. 98 (1996).
[20] George Abed and Hamid Davoodi: *Corruption, Structural Reforms, and Economic Performance in the Transition Economies*, IMF Working Paper 00/132 (2000); Carlos Leite and Jens Weidmann: *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth*, IMF Working Paper 99/85 (1999); and
Vito Tanzi and Hamid Davoodi: *Corruption, Public Investment and Growth*, IMF Working Paper 97/139 (1997).
[21] Vito Tanzi and Hamid Davoodi: *Corruption, Public Investment and Growth*, IMF Working Paper 97/139 (1997). See also Issac Ehrlich and Francis T. Lui: *Bureaucratic Corruption and Endogenous Economic Growth*, Journal of Political Economy, Vol. 107, No. 6 (1999), at 270-293.
[22] Pak Hung Mo: *Corruption and Economic Growth*, Journal of Comparative Economics, Vol. 29 (2001), at 66-79.
[23] Selcuk Akcay: *Corruption and Human Development*, Cato Journal, Volume 26, No.1 (Winter 2006). See also Keith Blackburn, Niloy Bose and M. Emranul Haque: *The Incidence and Persistence of Corruption in Economic Development*, Journal of Economic Dynamics & Control, Vol. 30 (2005), at 2447-67; and Fabio

using data on foreign and local direct investments in 111 countries over a five-year period (1994-98), Habib and Zurawicki demonstrated the negative impact of corruption on foreign direct investments. Interestingly, local direct investment seems to be substantially (on average 2 times) less affected than foreign direct investment.[24]

In another study, Kaufmann and Wei test the "speed money" hypothesis and conclude that there is no support for the "efficient grease" hypothesis[25] (advocated by Nathaniel Leff in the 1960s, who suggested that graft can provide a direct incentive necessary to mobilise the bureaucracy for more energetic action on behalf of entrepreneurs[26]). They demonstrate that high levels of corruption are positively associated with the amount of time the managers waste with bureaucrats, suggesting that bribe payments do not in fact result in less delays or lower administrative burden. Similarly, Aidt concludes that the evidence supporting the "greasing the wheels hypothesis" is very weak and shows that there is no correlation between a new measure of managers' actual experience with corruption and GDP growth. Instead, he reports a strong negative relationship between growth in per capita wealth (not per capita GDP) and corruption – suggesting that corruption may be associated with unsustainable wealth generation even if its effect on GDP is not certain.[27] Along the same lines, using a survey of Ugandan firms, Fisman and Svensson demonstrate that a 1 percentage point increase in the bribery rate is associated with a reduction in firm growth of 3.5 percentage points.[28]

Finally, Hostetler suggests that multinational corporations play an active role in sabotaging the development process by using fraud and corruption to circumvent bidding process and operating regulations. This, according to Hostetler, obstructs MDBs' development objectives in three ways: First, corruption negatively influences a country's economic productivity, the stability of its political institutions and democracy, and its

---

Mendez and and Facudo Sepulvedo: *Corruption, Growth and Political Regimes: Cross Country Evidence*, European Journal of Political Economy, Vol. 22 (2005), at 82-98.

[24] Moshin Habib and Leon Zurawicki: *Country-Level Investments and the Effect of Corruption: Some Empirical Evidence*, International Business Review (2001).

[25] Daniel Kaufman and Shang-Jin Wei: *Does "Grease Money" Speed up the Wheels of Commerce?*, World Bank (1999).

[26] See Nathaniel Leff: *Economic Development through Bureaucratic Corruption*, American Behavioral Scientist 82 (2)(1964), at 10.

[27] Toke Aidt: *Corruption, institutions, and economic development*, Oxford Review of Economic Policy, Volume 24, Number 2 (2009).

[28] Raymond Fisman and Jakob Svensson: *Are Corruption and Taxation Really Harmful to Growth?*, The World Bank Development Research Group Macroeconomics and Growth (November 2000).

social development. Second, corruption on large-scale infrastructure projects also creates an environment of tolerance of corruption that may instil a public conception that corruption is acceptable. And, finally, corrupt deals made to win infrastructure development projects encourage officials to seek aid money for projects that promise profits in the form of bribes and kick-backs, rather than for projects that are more beneficial but less profitable for the officials.[29] Thus, in the case of biased resource allocation, corruption may lead to unsustainably high levels of public investment financed at high costs of public borrowing – with the consequence of lower growth rates in the long run.[30]

Illustrating the fact that corruption greatly diminishes the likelihood of the project being successful, Hostetler quotes one of the WB task managers who noted:

> "If you let out a contract for $2 million, and you get the few civil servants at the top sharing $600,000 or 30 percent, do they care if the contractor puts in concrete that is just sand and water? Do they care if the contractor doesn't put reinforcing steel in the structures? They don't care. So when Bank people say we're at least getting 70 cents of good development on the dollar, no you don't. Because the contractor either has to make back the money that he's kicked back, or he just figures 'hey, it's open season, I do what I want and no one is going to challenge me.' And so you have this feeding frenzy, and the end result is you get very little development."[31]

Furthermore, mistakes during construction may require costly repairs and limit the relevant facility's operational capacity. The inferior projects then require maintenance that would not otherwise have been needed. Yet, the upfront costs of the projects tainted with corruption mean that the government may not have the resources to pay for these repairs, thus further jeopardising development.[32]

Interestingly, Sindzingre and Milelli suggest that the relationship between corruption and economic growth is difficult to demonstrate: First, the methods of measurement are usually based on the building of indices, modelling and econometrics techniques, which are inappropriate measures for a concept such as "corruption", which

[29] Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011), at 236-7.
[30] Mehmet Ugur and Nandini Dasgupta: *Evidence on the economic growth impacts of corruption in low-income countries and beyond* (2011).
[31] Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011), at 238, quoting Jeffery A. Winters: *Criminal Debt, Reinventing the World Bank* 101 (2002).
[32] *Ibid*., at 238.

reflects complex and heterogeneous phenomena that are difficult to subsume in a single and stable definition. Second, in all of these methods, causality depends on specific contexts. The effects of corruption on an economy depend on its particular history, its economic structures, its political economy and types of institutions, which is why they vary across countries and regions. For example, they argue, in East Asia, corruption exists but is controlled, channelled, and submitted to growth objectives because states have the capacity to achieve this. In contrast, in Sub-Saharan Africa, weak states, predatory political regimes, generalised corruption, commodity-based market structures and windfall gains reinforce each other.[33] Indeed, causality is something that all of the above-mentioned studies have difficulty establishing: Is corruption the main cause of any statistical relationship or also a consequence? For example, does a relationship between low public sector salaries and the level of corruption reflect the weakening of the tax base to fund public expenditure (corruption causing low pay) or does it reflect the need for bribes to provide adequate salaries for public sector employees (low pay causing corruption)?[34]

Notably, the OECD's *Issues Paper on Corruption and Economic Growth* demonstrated that, "while the direct link between corruption and GDP growth is difficult to assess, corruption does have significant negative effects on a host of key transmission channels . . . which impact significantly on economic welfare and, in the case of trust, also a country's development potential."[35] A subsequent OECD study, *Consequences of Corruption at the Sector Level and Implications for Growth and Economic Development*, provides an analysis of the impact of a range of corrupt practices on economic growth and development in four key sectors: utilities and infrastructure, extractive industries, health and education. The study shows corruption causing higher prices in all the sectors; higher prices for medicine, health services, textbooks, utility services, infrastructure, extra payments or import of inputs needed for petroleum production or mining.[36]

[33] Alice Sindzingre and Christian Milelli: *The Uncertain Relationship between Corruption and Growth in Developing Countries: Threshold Effects and State Effectiveness*, Working Paper 2010-10, Universite de Paris Ouest Nanterre La Defense (2010).
[34] Stephen Dearden: *Corruption and Economic Development*, European Development Policy Study Group Discussion Paper No. 19 (October 2000).
[35] OECD: *Issues Paper on Corruption and Economic Growth* (2013), at 1.
[36] OECD: *Consequences of Corruption at the Sector Level and Implications for Growth and Economic Development* (2015).

In addition, increasing attention is now being paid to the link between human rights and corruption, with the UN treaty bodies having concluded that, where corruption is widespread, states cannot comply with their human rights obligations,[37] and the High Commissioner for Human Rights issuing a compilation of best practices to counter the negative impact of corruption on the enjoyment of human rights developed by states, national human rights institutions, national anti-corruption authorities, civil society and academia.[38]

Undoubtedly, the relationship between corruption and growth depends on a country's institutional environment (including political system, political stability, protection of property rights, culture), and studying corruption without considering the interdependencies between corruption and other institutions, as much of the theoretical literature does, tends to downplay the cross-country variance in the relationship between corruption and growth.[39] And while institutional reform is therefore necessary, in and of itself it is unlikely be effective. Instead, it may be more useful to focus on understanding and reforming the forces that keep bad institutions in place, such as political institutions and the distribution of political power, as well as the nature of economic institutions in thinking about potential institutional reform or institution building. Understanding underdevelopment implies understanding why different countries get stuck in political equilibria that result in bad economic institutions. Solving the problem of development entails understanding what instruments can be used to push a society from a bad to a good political equilibrium.[40]

Still, no matter how tenuous the relationship between corruption and development *per se*, corruption has a negative impact on growth because it imposes very high additional costs to any economic activity, particularly in private firms, and results in inefficient allocation of public and private resources, which are diverted from productive use. As noted above, from the broadest perspective, corruption distorts prices throughout the

[37] International Council on Human Rights Policy: *Corruption and Human Rights: Making the Connection* (2009).
[38] United Nations High Commissioner for Human Rights: *Best practices to counter the negative impact of corruption on the enjoyment of all human rights* (2016).
[39] Wouter Ebben and Albert de Vaal: *Institutions and the relation between corruption and economic growth*, Radboud University Nijmegen (January 2009), at 5.
[40] Daron Acemoglu and James Robinson: *The Role of Institutions in Growth and Development*, Commission on Growth and Development, Working Paper No. 10 (2008), at 11 and 25.

economy, as the costs of bribes are passed onto the end consumer and it creates delays in economic transactions and additional uncertainty, which may be a crucial factor in deterring investment.[41]

MDBs' sanctions cases are also illustrative of the negative impact of fraud and corruption on economic development. For example, the WB's Sanctions Board Decision No. 69 arose in the context of the WB-financed Ba'albeck Water and Wastewater Project in Lebanon. The project sought to, among other things, improve access to satisfactory water supply and wastewater services, and rationalise the use of water through the introduction of water meters.[42] The WB's Sanctions Board found that the winning bidder won the contract worth USD 2.12 million by fraudulently misrepresenting its qualifications in the bid. Specifically, the bidder used the forged experience documents to circumvent an explicit bidding requirement designed to identify bidders' relevant construction experience. The wrongdoer thereby exposed the country to serious operational risks in regard to the project.[43]

Similarly, the WB's Sanctions Board Decision No. 71 arose in the context of the WB-financed Emergency Health Rehabilitation and Disabilities Projects in Iraq. The WB's Sanctions Board found that the respondent had paid an agent a 15% commission on two contracts intended as bribe payments to the government officials in exchange for contract awards, thereby steering the contracts to the respondent and away from other potentially more qualified contractors.[44]

[41] Stephen Dearden: *Corruption and Economic Development*, European Development Policy Study Group Discussion Paper No. 19 (October 2000).
[42] WB Sanctions Board Decision No. 69 (2014), available at: http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/Sanctions_Board_Decision_No.69.pdf, ¶ 5.
[43] *Ibid*., ¶¶ 7 and 22.
[44] WB Sanctions Board Decision No. 72 (2014), available at: http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/Sanctions_Board_Decision_No.72.pdf.

2. Solutions to curbing corruption and the role of MDBs' sanctions regimes in the fight against corruption

In view of a widespread recognition that corruption has a detrimental effect on the social and institutional fabric of a country, various suggestions on how to reduce corruption and mitigate its effects have been put forward. They range from paying civil servants well, creating transparency and openness in government spending, cutting the red tape, establishing international conventions,[45] to a strong civil society with access to information and a mandate to oversee the state and the presence of rule of law.[46] Notably, states themselves may exert a negative or a positive influence on corruption investigations: they may opt to protect the wrongdoers from investigations and withhold funding from anti-corruption efforts. Alternatively, they may financially or politically support corruption proceedings and share relevant financial information with the third-party states that have jurisdiction over offending corporations or other actors involved in corruption, which in turn may be willing to criminalise corrupt practices that their corporations undertake in foreign territories, the US Foreign Corrupt Practices Act (the "**FCPA**") being a prime example of such legislation.[47]

WB itself has developed a broad and elaborate set of policies aimed at reducing corruption. Huther and Shah mention four dimensions of the WB's policy:

(i) preventing fraud and corruption in the WB's projects,
(ii) "mainstreaming" a concern for corruption in the organisation,
(iii) lending support to international efforts to curb corruption, and
(iv) helping countries that request assistance to fight corruption.[48]

While (i) and (ii) focus on WB as an organisation, (iii) and (iv) focus on corruption as a general policy issue.

[45] See Augusto Lopez-Carlos (Director of Global Indicators Group at the World Bank Group): *Six Strategies to Fight Corruption*, posted on the World Bank Development Blog on 14 May 2014.
[46] See United Nations Office for Drug Control and Crime Prevention: *Prevention: An Effective Tool to Reduce Corruption*, Vienna December 1999.
[47] Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011), at 256-7.
[48] Jeff Huther and Anwar Shah: *Anti-corruption Policies and Programs: A Framework for Evaluation, World Bank Policy Research Working Paper*, No. 2501 (2000), at 1.

These types of prevention policies, however, are less effective when they do not include enforcement mechanisms, particularly when corruption is entrenched in a sector, country or corporate culture.[49] It takes time to implement anti-corruption regulations and oversight, and even longer to change a corporation's or country's culture. Thus, arguably, punishing project-based corruption can fill the gap in the effectiveness of prevention policies because when the investigations and punishments are sufficiently costly to the firm, they can be effective deterrence mechanisms that quickly change the firm's cost-benefit calculus with respect to corruption.[50]

In reality, however, MDBs are not law enforcement agencies and simply are not vested with the powers usually associated with law enforcement, such as the authority to investigate, obtain evidence and subpoena parties to court. Hence, MDBs' power to enforce laws and sanction offences independently of national criminal justice systems and sanctions regimes is limited. What MDBs can do, however, is exclude players from the financial services they provide and make their financing conditional on satisfactory integrity regimes. Despite this limited ability to use force, MDBs have attempted to develop their own sanctions regimes, and this step can be understood as an attempt to compensate for law enforcement weaknesses in recipient countries as part of the banks' strategies towards the overall goal of development.[51] This is why the sanctions regime can be seen as a pragmatic response to the risks of fraud and corruption, built on the authority that MDBs do have.

[49] Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011), at 240.
[50] *Ibid.*
[51] Tina Soreide: *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, Chicago Journal of International Law, Volume 16, No. 2 (2016), at 525-6.

3. Origins of MDBs' sanctions regimes

Given that WB was the first MDB to introduce formal sanctions procedures, the story of MDBs' sanctions regimes has to start with the development of the WB's sanctions regime.

WB was created in 1944 at the Bretton Woods International Treaty in accordance with its Articles of Agreement. Its purpose is to extend loans, grants and credits to developing and transitioning countries to assist in the reconstruction and development of various projects.[52] While the focus of WB has always been strictly economic, throughout the years issues of governance and corruption have come into play as substantial barriers to WB's goals and targets. With the wide recognition that weak legal and governmental institutions along with a high level of corruption can have devastating effects on a state's economic growth, WB has been forced to consider these factors within its own operations.[53]

As noted above, WB started paying more attention to matters involving fraud and corruption in the early 1990s. Until that point, when instances of fraud or corruption occasionally came to the attention of the WB personnel, they were more frequently considered as "irritating impediments" to the WB's principal mission than as examples of criminal conduct warranting official disapproval and condemnation.[54] No policy existed to guide procurement officers in responding to such matters. One of the arguments for this approach stemmed from the WB's unwillingness to interfere in the domestic affairs of the organisation's members.[55]

By the mid-1990s, however, the WB had undergone a dramatic change with respect to its recognition of problems of fraud and corruption. It acknowledged openly – initially through the President Wolfensohn's famous "cancer of corruption" speech to the

[52] Articles of Agreement of the International Bank for Reconstruction and Development, Article I.
[53] Susan Rose-Ackerman: *The Role of the World Bank in Controlling Corruption*, 29 Law & Pol'y Int'l Bus. 94, at 98.
[54] Dick Thornburgh, Ronald Gainer and Cuyler Walker: *Report Concerning the Debarment Processes of the World Bank* (14 August 2002), at 10.
[55] See, e.g., Article IV(10) of the IBRD Articles of Agreement.

Board of Governors in 1996 – that fraud and corruption constituted a major problem for the WB and for the nations the WB was attempting to assist.[56]

A number of developments ensued: the WB's procurement guidelines were revised, providing that if the WB determined that a bidder, supplier, contractor or consultant had engaged in fraudulent or corrupt practices in competing for, or in executing, a Bank-financed contract, the WB would declare the offending firm to be ineligible, for a stated or indefinite period of time to be awarded future WB-financed contracts.[57] During this development stage of the WB's debarment regime, several models were considered, including those of diverse national agencies, intergovernmental organisations and other development banks. A committee tasked with reviewing the WB's anticorruption procedures observed that the US government agencies' debarment practices "would be the most pertinent . . . for the reason that those are the practices that are most familiar to the majority of lawyers appearing before the WB as counsel for respondents in debarment proceedings."[58] The committee specifically referred to the suspension and debarment provisions within the FAR. Indeed, the WB's sanctions system reflects many similarities with FAR.[59] The following section describes debarment and suspension procedures under FAR, as well as due process safeguards accorded to contractors, as a result of a series of court decisions finding deprivations of due process relating to suspension and debarment.

A. Federal Acquisition Regulation (FAR)

As the world's largest buyer of products and services,[60] the US government has an interest in ensuring its funds are being used appropriately. Indeed, as a matter of policy, the federal government seeks to prevent the improper use of public funds in its contracting activities by doing business only with responsible contractors.[61] To that end, the United States employs a suspension and debarment system that seeks to preclude US government agencies from entering into new contractual dealings with contractors whose actions

[56] *Ibid*., at 12.
[57] *Ibid*., at 13.
[58] *Ibid*., at 3-4, footnote 2.
[59] Pascale Helene Dubois: *Domestic and International Administrative Tools to Combat Fraud and Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, The University of Chicago Legal Forum, Volume 2012 (2012), at 197.
[60] See GovernmentBids.com's website at: http://www.governmentbids.com/cgi/en/bidding.advice.articles/Article/federal-contract-opportunities-for-your-business.
[61] See FAR, Section 9.402(a).

suggest they are not responsible in fulfilling their legal or contractual obligations.[62] Because the system is not designed to punish contractors, debarment only applies to future contracts, task orders and options to extend existing contracts – it does not impact existing contract work with the government.[63]

(i) Causes for debarment

FAR allows agency officials to debar a contractor when, among others, a contractor is convicted of or found civilly liable for any integrity offence. Integrity offences include, among others, the following: fraud or criminal offence in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;[64] commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws or receipt of stolen property;[65]and commission of any other offence indicating a lack of business integrity or business honesty that seriously and directly affects the "present responsibility" of a government contractor or subcontractor.[66]

Broadly speaking, the concept of "present responsibility" refers to a contractor's ethical integrity and, practically speaking, focuses on the contractor's ability to perform without violation in the future, given the context of past conduct and performance.[67] Thus, the questions of whether a party acted responsibly and whether they are presently responsible are two separate issues: the former requires the agency official to analyse the alleged misconduct, while the latter requires the agency official to examine whether and to what extent the party is addressing such misconduct.[68]

---

[62] *Ibid*. See also Pascale Helene Dubois: *Domestic and International Administrative Tools to Combat Fraud and Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, The University of Chicago Legal Forum, Volume 2012 (2012), at 198.
[63] FAR, Sections 9.405-1 and 9.402(b), which states that "[t]he serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment."
[64] *Ibid*., Section 9.406-2(a)(1).
[65] *Ibid*., Section 9.406-2(a)(3).
[66] *Ibid*., Section 9.406-2(a)(5).
[67] Pascale Helene Dubois: *Domestic and International Administrative Tools to Combat Fraud and Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, The University of Chicago Legal Forum, Volume 2012 (2012), at 207.
[68] Roman Majtan: *The Self-Cleaning Dilemma*: *Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291 (2013), at 301.

Most debarments in this category have been based on conviction of criminal offences in dealing with the federal government, such as bid rigging and mail fraud, bribing public officials, perjury before a grand jury in connection with investigation of another government contractor, submitting false income tax information, taking kickbacks, in each case in violation of various laws.[69]

(ii) Suspension

Frequently, a contractor's first encounter with FAR results from the receipt of a Notice of Suspension.[70] Suspension under FAR is a mechanism that permits any agency to temporarily debar a contractor for the duration of the agency's investigation or ongoing legal proceedings.[71] It is possible when an agency official suspects, "upon adequate evidence", pending the completion of investigation or legal proceedings, when it has been determined that immediate action "is necessary to protect the Government's interest." This allows for considerable discretion, because the test is "suspicion, upon adequate evidence", rather than conviction or civil judgment. "Adequate evidence", in turn, means information sufficient to support the reasonable belief that a particular act or omission has occurred, and has been described as similar to that which is required for a finding of probable cause.[72]

Once a contractor has been suspended, the agency publicly lists its name and the fact of the suspension on the General Services Administration's List of Parties Excluded from Federal Procurement and Non-Procurement Programs.[73] This appears quite harsh, given that, at this stage, the contractor's culpability has not been established, but is based on a mere suspicion.

(iii) Debarment procedures

If the contractor is not suspended, then its first encounter with FAR is a Notice of Proposed Debarment, which informs the recipient that debarment is considered, provides notice of the conduct on which the proposed debarment is based, states the causes for the

---

[69] See Ralph C. Nash, Jr., John Cibinic, Jr. and Christopher R. Yukins: Formation of Government Contracts, Wolters Kluwer, 4th edition (2011), at 464.
[70] *Ibid*., at 203.
[71] FAR, Section 9.407-1(b)(1).
[72] See Steven A. Shaw: Suspension and Debarment in a Nutshell 4 (2011), available at: http://www.safgc.hq.af.mil/shared/media/document/AFD-110314-018.pdf.
[73] See http://www.epls.gov/.

proposed debarment, explains that the contractor may submit, within 30 days after receipt of the Notice, information and arguments contesting the allegations, informs the contractor of the agency's procedures governing debarment decision-making and explains the effects of the issuance of the Notice and the potential effect of debarment.[74] The Notice immediately excludes a contractor from procuring additional government contracts.[75]

In any action in which the proposed debarment is not based on a conviction or civil judgment, the cause for debarment must be based on "preponderance of evidence."[76] If a cause for debarment exists, the burden of proof then shifts to the contractor, who has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not warranted.[77]

The contesting entity will only be entitled to a hearing where (1) material facts are in dispute, (2) the action was not based on an indictment, conviction or civil judgment, and (3) substantial interests of the government in pending or contemplated legal proceedings will not be prejudiced by a hearing.[78] Agencies have been granted considerable discretion in deciding whether there is a genuine dispute of fact to justify a hearing.[79] The debarring official may also refer the matter to a fact-finder who conducts an independent proceeding.[80]

FAR provides that debarment should be commensurate with the seriousness of the cause(s) forming the bases for the debarment, but that "generally" debarment should not exceed three years.[81] In considering debarment, agency officials should consider such mitigating factors as (1) the presence of effective standards of conduct and internal control systems in place when the misconduct occurred or adopted before any government investigation, (2) whether the contractor timely brought the misconduct to the agency's attention, (3) whether the contractor fully investigated the misconduct and provided the

[74] FAR, Section 9.406-3(c).
[75] *Ibid*., Section 9.405(a).
[76] *Ibid*., Section 9.406-3(d)(3).
[77] *Ibid*., Section 9.406-1(a)(10).
[78] *Ibid*., Section 9.407-3(2).
[79] See *Robinson v Cheney*, 876 F.2d 152 (D.C. Cir. 1989), affirming the agency's denial of a hearing on the grounds that the alleged factual disputes were minor in nature and did not go to the central issues in the case; see also *IMCO, Inc. v United States*, 33 Fed. Cl. 312 (1995), affirming the debarring official's denial of a hearing on the basis that there were no seriously contested facts.
[80] FAR, Sections 9.406-3(d)(2)(ii) and 9.407-3(d)(2)(ii).
[81] *Ibid*., Section 9.406-4(a)(1).

results of the investigation to the agency, (4) the contractor's cooperation, (5) payment of fines, restitution, and reimbursement of the government's investigation costs by the contractor, (6) whether the contractor has taken appropriate disciplinary action against the responsible individuals, (7) implementation of remedial measures, (8) institution of a new or revised review and control process and ethics training programmes, (9) whether adequate time has passed to eliminate the cause of the misconduct, and (10) management's recognition of the seriousness of the misconduct and role in implementing programmes to prevent recurrence.[82]

Finally, notice of the final decision must be promptly provided to any debarred entity and involved affiliates, and if debarment is imposed, the notice must state the reasons for debarment, the period of debarment, and explain that the debarment is effective government-wide.[83]

Once a contractor is either suspended or debarred, its status as a blacklisted company is made public through the Excluding Party Listing Service (EPLS),[84] and the Federal Government maintains the Federal Awardee Performance and Integrity Information System (FAPIIS),[85] which adds deterrence since the information is readily accessible to all parties and hence the reputational impact is widespread.

(iv) Judicial review and due process rights

An agency suspension or debarment decision is reviewable in federal district court under the Administrative Procedure Act.[86] The scope of review, however, is deferential to the agency and a court will not set aside an agency decision unless it finds that decision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[87] Moreover, before judicial review is available, an excluded entity must have exhausted all available administrative remedies.[88]

[82] *Ibid*., Section 9.406-1(a).
[83] *Ibid*., Section 9.406-3(e).
[84] See www.epls.gov
[85] See https://www.fapiis.gov.
[86] 5 U.S. Code § 706.
[87] 5 U.S. Code § 706(2)(A).
[88] *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 167 (D.C. Cir. 1983).

The procedures required by FAR were developed in response to a series of court decisions finding deprivations of due process relating to suspension and debarment. Although the courts and FAR itself indicate that debarment is not intended to be punitive, and is designed to protect the government from the risk of dealing with non-responsible contractors,[89] the effects of debarment may have such far-reaching consequences for a contractor that they amount to a "corporate death penalty."[90] As such, the law is fairly settled that these procedures adequately represent the process that is due under the Constitution, and that it is unlikely that an excluded entity can make out a claim for violation of constitutional due process.[91] For example, in 1964, in *Gonzalez v Freeman*, the claimants challenged the temporary debarment by the Commodity Credit Corporation, arguing that the Corporation's action was imposed without procedural rules specifying the grounds for the suspension and that they were not given notice and a meaningful opportunity to contest the charges against them. Holding in the claimants' favour, the US Court of Appeals for the D.C. Circuit held that:

> "[d]is qualification from bidding or contracting for five years directs the power and prestige of government at a particular person and, as we have shown, may have a serious economic impact on that person. Such debarment cannot be left to administrative improvisation on a case-by-case basis. . . Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made."[92]

Over a decade later, the court in *Mathews v Eldridge* established a framework for analysing whether the government's administrative procedures comply with due process. The facts before the Supreme Court did not concern suspension or debarment practices, but procedures associated with the termination of Social Security benefits, which the court recognised as due process property interests. Nonetheless, the court articulated a general balancing test to be applied to all government actions adversely affecting due process rights, including life, liberty and property interests.[93] Importantly, the court made clear

[89] See *Roemer v. Hoffman*, 419 F. Supp. 130 (DDC 1976); *Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1995); *United States v. Bizzell*, 921 F.2d 263 (10th Cir. 1990); and *United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997), in each of which federal courts have held that suspension and debarment sanctions should not be imposed solely for punishment purposes; but see also *Fisher v. RTC*, 59 F.3d 1344 (D.C. Cir. 1995)), in which the court held that "[d]ebarment is a form of punishment which stigmatizes the target."

[90] See Adam K. Lasky and Oles Morrison: *The Rise of the Corporate Death Penalty: Understanding Suspensions and Debarments*, Navigant (2012).

[91] See Joseph D. West et al.: *Suspension and Debarment*, Briefing Papers, Second Series (2006).

[92] *Gonzales v. Freeman*, 334, F.2d 570 (D.C. Cir. 1964).

[93] *Mathews v Eldridge*, 424 U.S. 319 (1976).

that a due process enquiry must be conducted on the basis of the particular procedures in question as applied to the interests at stake by stating that "due process is flexible and calls for such procedural protections as the particular situation demands."[94] The court then identified three competing interests that must be balanced by:

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[95]

A few years later, in *Transco Security, Inc. of Ohio v. Freeman*,[96] the Court of Appeals for the Sixth Circuit had to consider the adequacy of a notice given to the debarred contractor. Specifically, Transco's due process claim was predicated on the fact that the General Services Administration denied it a hearing based on the Department of Justice's advice that a hearing would prejudice its ongoing criminal investigation and that Transco was provided with an inadequate notice, which deprived it of a "meaningful opportunity" to rebut the charges against it. The court first noted that "what process is due requires a balancing between the government's interest and the private interest." The court distinguished this case from *Horne Brothers, Inc. v Laird*, on which the appellant relied, where the plaintiff was not given *any* opportunity to challenge the charges against it. By contrast, under the then effective suspension regulations, promulgated following *Horne Brothers*, suspended contractors denied a hearing were provided the opportunity to present information or argument, in person, in writing, or thorough representation in opposition to the suspension. Thus, the court held that "under the current regulations, suspended contractors will not 'dangle in suspension for a period of one year or more' before being given an opportunity to rebut charges." Consequently, if it wishes to obtain a hearing, a contractor that is proposed for debarment or is suspended must demonstrate that there are significant factual disputes.

Obtaining a hearing does not necessarily give the contractor the same due process rights it would have in civil litigation. For example, in *Electro-Methods, Inc. v United States*, the court, commenting on a suspension, held that the "concept of due process cannot be extended so far, in the circumstances of this case, as to mandate that a

[94] *Ibid*., at 334.
[95] *Ibid*., at 335.
[96] *Transco Sec., Inc. of Ohio v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981).

'meaningful' hearing include permitting the contractor to subpoena and examine FBI agents involved in an on-going criminal investigation, as well as other government and industry officials, to prove its case."[97]

What type of hearing is required? The issue was addressed in *Lion Raisins, Inc. v United States,* in which the claimant argued that the hearing failed to comply with due process, relying on section 9.407-3(b)(2) of FAR (which, as described above, provides the respondent with the right to a hearing only if (1) material facts are in dispute, (2) the action was not based on an indictment, conviction or civil judgment, and (3) substantial interests of the government in pending or contemplated legal proceedings will not be prejudiced by a hearing).[98] The court noted that "FAR requires that administrative hearings comport with due process notions of 'fundamental fairness'", which require "notice and an opportunity for [a] hearing appropriate to the nature of the case" The court found that, in this case, the section 9.407-3(b)(2) was not applicable "because the plaintiff had not established the requisite issue of material fact."[99]

Although FAR served as the basis for the development of the WB's sanctions system, it is important to note that the purpose and context of the two systems are quite different: The debarment system under FAR is an informal extension of the federal contracting process and, as such, the main enquiry focuses on the performance risk posed by the contractor, while reputational risk plays a relatively minor role.[100] Therefore, the core enquiry under FAR is on the "present responsibility" and the performance risk posed by the contractor. Reputational risk plays a relatively small role and the system is expressly not intended to punish contractors' misdeeds or deter misconduct in other contractors.[101] By contrast, the WB sanctions system (and the sanctions systems of other MDBs, for that matter) appears to focus not on the performance risk that unqualified and corrupt contractors pose (given that WB does not actually administer contracts during performance), but rather on mitigating the risks that corruption will divert development

[97] *Electro-Methods, Inc. v United States*, 728 F.2d 1471 (Fed. Cir. 1984).
[98] *Lion Raisins v United States*, 51 Fed. Cl. 238 (2001).
[99] *Ibid*., 249-50.
[100] See Christopher R. Yukins: *Cross-Debarment: A Stakeholder Analysis*, The Geo. Wash. Int'l L. Rev., Volume 45 (2013), at 226.
[101] Christopher Yukins: *Cross-Debarment: A Stakeholder Analysis*, 45 Geo. Wash. Int'l L. Rev. 219 (2013), at 226.

resources and cause WB reputational harm.[102] As such, the WB's system defines sanctionable practices much more narrowly than FAR and is much more strictly structured, so that WB's main stakeholders can be assured that the system is objective and accountable.[103]

B. Evolution and description of the WB's sanctions system

(i) First sanctions regime

WB has had a formal sanctions regime since 1996. The establishment of the formal sanctions regime coincided with an increased focus on corruption as a development issue,[104] as suggested by James Wolfensohn in his "cancer of corruption" speech, in which he declared that, for developing countries to achieve growth and poverty reduction, "we need to deal with the cancer of corruption."[105] Around this time, other international organisations, such as the United Nations (UN) and the Organisation for Economic Cooperation and Development (OECD), commenced policy work on corruption, including the initial development of the UN and OECD conventions on corruption. In 1997, OECD adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "**Convention**"), subsequently ratified by 38 countries.[106] Unsurprisingly, given the strong influence of the United States, the Convention incorporates many concepts of the FCPA, which had been enacted already in 1977, pioneering the criminalisation of corrupt practices abroad.[107] The Convention sets forth binding undertakings by its member countries to enact domestic legislation against the bribing of foreign public officials, and its implementation is systematically monitored through the OECD's peer review process.[108] The Convention criminalises acts of offering or giving bribes, but not of soliciting or receiving bribes, and it covers only bribery aimed

[102] *Ibid*.
[103] *Ibid*.
[104] See Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms*, a World Bank Study (2012), at 9.
[105] James Wolfensohn, People and Development (speech delivered at the Annual Meeting of the World Bank and International Monetary Fund, Washington DC, 1 October 1996), available at: http://go.worldbank.org/PUC5BB8060.
[106] See Fighting Bribery and Corruption: Frequently asked Questions [hereinafter OECD FAQ], available at: https://bvc.cgu.gov.br/bitstream/123456789/2951/1/fighting_bribery_and_corruption.pdf.
[107] Christopher K. Carlberg, *A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards*, Boston College International & Comparative Law Review, Volume 26, Number 1 (2003), at 98-99.
[108] OECD FAQ (*How does the Convention work/Who ensures that it is effectively implemented?*)

at public officials, not bribery of private sector representatives or political party officials.[109]

It was in the same year (1997) that the WB's Board of Directors adopted the anti-corruption strategy, following which the WB's sanctions process was implemented in a January 1998 Operational Memorandum.[110] This process was managed entirely by the WB staff and overseen by the Internal Auditing Department. First, allegations of fraudulent or corrupt practices were reported to the Legal Officer. If the Legal Officer made a *prima facie* determination that the allegation was supported by substantial evidence, he/she would recommend to the WB's General Counsel that the matter be submitted for consideration to the Sanctions Committee.[111] The General Counsel would then advise the relevant Managing Director whether further investigation should be conducted by the WB staff, by specialised outside investigators or auditors or by law enforcement authorities of the government affected by the matter. With respect to the investigation conducted by the WB staff, the Operational Memorandum provided that the investigation 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." This approach was later criticised as "illusory", given that the WB would have no authority to compel the accuser to submit to any such questioning. Consequently, this approach was replaced by the approach "common in administrative proceedings" where "neither [party] can require a person's attendance and testimony."[112] The results of the investigation would then be submitted to the Sanctions Committee.[113]

---

[109] *Ibid*.
[110] See Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms*, a World Bank Study (2012), at 10, and Dick Thornburgh, Ronald Gainer and Cuyler Walker: *Report Concerning the Debarment Processes of the World Bank* (14 August 2002), at 12, each citing *Fraud and Corruption under Bank-Financed Contracts: Procedures for Dealing with Allegations against Bidders, Suppliers, Contractors or Consultants*, Operational Memorandum dated 5 January 1998.
[111] Dick Thornburgh, Ronald Gainer and Cuyler Walker: *Report Concerning the Debarment Processes of the World Bank* (14 August 2002), at 14.
[112] *Ibid*., at 56.
[113] *Ibid.*, at 14.

The Sanctions Committee comprised five senor WB staff members – two Managing Directors, the General Counsel and two Vice Presidents. If the Sanctions Committee found that a reasonably sufficient evidence existed that the accused party had engaged in fraud or corruption, the Committee would consider appropriate sanctions, weighing the various aggravating and mitigating factors. It would then transmit its recommended sanction to the WB President, who would then decide whether to concur in, or to modify, the Committee's recommendations and proposed sanction.[114]

Public announcement of the sanction was posted on the WB's website, with the underlying purpose to demonstrate the seriousness of the WB's initiatives against fraud and corruption, and to deter future misconduct by other firms.[115]

Following the adoption of the Operation Memorandum, the WB's investigative capacity expanded greatly and the small Investigations Unit that had been established in early 1998 within the Internal Auditing Department eventually became the new Department of Institutional Integrity (the "**INT**"), which quickly grew to include a number of investigators focusing exclusively on fraud and corruption matters involving procurement.[116]

(ii) The Thornburgh report

The first major reform of the WB's sanctions regime occurred in 2004, following the review of the sanctions panel by the Thornburgh panel in 2002. The Thornburgh report made several noteworthy observations, which led to the overhaul of the then existing process and establishment of the regime that still operates today. Specifically, the report noted the inherent conflict of interest faced by internal staff members on the Committee, which had been raised "particularly strongly by counsel for respondents."[117] Arguably, WB managers cannot fairly judge matters concerning loans that their subordinates have evaluated and supervised, and that they themselves may have approved.[118] Consequently, such managers/members of the Sanctions Committee may be inclined to rule either (a) against sanctioning on the ground that a manager would be

[114] *Ibid.*, at 19.
[115] *Ibid.*
[116] *Ibid.*, at 16.
[117] *Ibid.*, at 23.
[118] *Ibid.*

embarrassed in acknowledging that a firm had successfully manipulated the WB in the course of negotiating or performing a contract within that manager's oversight; or (b) in favour of sanctioning on the ground that a manager would be angered by a firm that had violated its responsibilities under such contract.[119]

In view of these concerns that were recognised as "costly to the Bank in terms of the credibility of the debarment process,"[120] the Thornburgh report considered two options: (i) establishing a Sanctions Committee composed solely of external members and (ii) establishing a Sanctions Committee composed of majority external members, and opted for the latter, rationalising its choice by the fact that internal members bring detailed knowledge of the WB's methods of operation and procurement practices.

Further, it was at this time that a first-tier review by the Reviewing Officer (currently called the Suspension and Debarment Officer) was introduced, which was intended to allow for the relatively quick disposition of cases. The Reviewing Officer was tasked with reviewing the INT's proposed notice of debarment and, if he/she found that the evidence was sufficient to support a finding that the accused party had engaged in a fraudulent or corrupt practice, he/she would issue the notice to the respondent. If the respondent failed to request a review by the Sanctions Committee within the deadline prescribed in the notice, the Reviewing Officer would impose a sanction.[121] The report envisioned that this process would reduce the number of cases that go to the Sanctions Committee.

Similarly, the report proposed the introduction of a temporary suspension mechanism, whereby, at the time of the issuance of the notice of debarment, the respondent would be notified that its eligibility to be awarded new Bank-financed contracts would be temporarily suspended pending a final disposition of the matter. The respondent would then have the right to present a statement to the Reviewing Officer articulating the arguments for why the suspension should not remain in effect during the pendency of the case before the Sanctions Committee.[122]

[119] *Ibid.*
[120] *Ibid.*, at 25.
[121] *Ibid.*, at 37.
[122] *Ibid*., at 38-39.

The rationale for this mechanism was to protect the WB against awarding contracts during the pendency of a matter before the Sanctions Committee to contractors whom the evidence showed had engaged in fraud and corruption. Moreover, such procedure would also remove the incentive for the respondent to contest the case at the Sanctions Committee level solely for the purpose of delaying a debarment decision.[123] Unlike under FAR, however, the party's name and the fact of the suspension are not published.

(iii) Expansion of sanctions regime beyond procurement and launch of the voluntary disclosure programme

In 2006, further reforms to the WB's sanctions regime ensued, which resulted in the expansion of the sanctions regime beyond procurement to cover more generally sanctionable practices that may occur in connection with the use of WB loan proceeds.[124]

Notably, until that time, the WB's sanctions regime applied only in the context of the procurement of goods, works and services, but not in the context of WB-financed projects outside the procurement process. The WB's fiduciary duty under its Articles of Agreement to ensure the proper use of its proceeds certainly extends to all WB-financed projects and, consequently, there is no reason for the difference in treatment between those projects with the procurement process and those without. The expansion of the sanctions regime was therefore intended to ensure consistency of treatment of sanctionable offences in relation to all WB-financed operations.[125]

In addition, in 2006, WB formally launched its voluntary disclosure programme (VDP).[126] Under this programme, an entity or an individual not being investigated by the INT may report to the WB past sanctionable behaviour. Consequently, the party will have to (a) cease corrupt practices and abstain from future misconduct; (b) implement a "best practices" internal compliance programme monitored by a WB-approved third party for three years and (c) disclose to the WB the results of an internal investigation into any misconduct in connection with a WB-financed contract, that the party committed within the preceding five years. In exchange for its full cooperation, the VDP participants enjoy

[123] *Ibid*., at 39.
[124] Sanctions Reform: *Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices*, Information Note for Borrowers (2006).
[125] *Ibid*.
[126] See Press Release: *World Bank Launches Voluntary Disclosure Program*, available at: http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf (2006).

immunity from sanction on disclosed misconduct, anonymity and the ability to continue to bid on the WB-financed projects.[127] If, however, a participant continues to engage in misconduct after entering the VDP or otherwise materially violates the programme's terms and conditions, it will be debarred by the WB for a ten-year period.[128]

VDP has been praised by experts as an exemplary tool for combatting corruption.[129] On the other hand, it has been criticised for failure to impose any restitution of funds that may have been obtained through corrupt practices[130] and for favouring wealthier firms and individuals.[131] In addition, it has been argued that the compulsory independent monitor requirement subjects participants to enormous costs and burdens, while the provision that any future violation will result in a mandatory ten-year debarment poses an "unacceptable level of risk to a contractor, despite any assurances that the provision will not be strictly applied."[132]

(iv) Early harmonisation efforts with other MDBs

At about the same time, WB started working with other MDBs on the harmonisation of approaches to sanctionable practices in projects, which led to the formation of the International Financial Institutions Anti-corruption Task Force (the "**Task Force**") in 2006. The Task Force was formed by the five MDBs, together with the International Monetary Fund and the European Investment Bank in order to consider a catalogue of measures aimed at harmonising the efforts of the participating institutions against fraud and corruption. The Task Force recommendations were published in September 2006 in a document titled *Uniform Framework for Preventing and Combating Fraud and Corruption* (the "**Uniform Framework**"), which was subsequently endorsed by the participating institutions[133] and hence was a crucial first step in the MDBs' efforts to coordinate their efforts against fraud and corruption. The Uniform Framework contained a set of harmonised definitions for sanctionable practices to be used by the

[127] See World Bank: *VDP Guidelines for Participants*, available at: http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.
[128] *Ibid*., ¶3.
[129] See World Bank: *What they are saying about the VDP*, available at: http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.
[130] See Sarah B. Rogers: *The World Bank Voluntary Disclosure Program (VDP): A Distributive Justice Critique*, 46 Colum. J. Transnat'l L. 709 (2007-2008), at 724.
[131] *Ibid*., at 720.
[132] *See* Freshfields Bruckhaus Deringer US LLP: *Submission of Freshfields Bruckhaus Deringer LLP in Connection with Review of the World Bank Group Sanctions System*, 31 October 2013.
[133] Uniform Framework for Preventing and Combating Fraud and Corruption (2006).

participating institutions in all their operations. It also included a commitment to adopt harmonised investigative procedures, as well as an undertaking to explore whether debarment decisions of any one of the participating institutions could be recognised by the other institutions.

The Uniform Framework recognises four sanctionable practices – corrupt practice, fraudulent practice, coercive practice and collusive practice – and defines them as follows:

(1) A **corrupt practice** is defined as the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party.[134] Notably the word "improperly" was inserted in the definition to ensure that it would not inadvertently capture legitimate conduct. Otherwise, the definition could be interpreted to cover legitimate conduct (e.g., the payment of a salary to "influence" an employee to perform his or her job).

An example of corrupt practice would involve a situation where a company is awarded an MDB-financed contract from government in exchange for a bribe or kickbacks. Kickbacks generally occur when a company that is awarded a contract "kicks back" money to the ministry official(s) who steered the award of the contract to the company.[135] For example, the WB's Sanctions Board Decision No. 50 concerns a case in which the respondent was debarred because it was found to have engaged in corrupt practices by offering (and agreeing) to pay the officials of the implementing agencies for the Thailand Highways Management Project 17% of the total contract price to influence the technical score of one of the bidders.[136] Similarly, the WB's Sanctions Board Decision No. 60 concerns a case in which the respondent was debarred because it was found to have engaged in corrupt practices by offering to pay 5% of the value of each awarded contract to a WB consultant involved in the procurement process in relation to the Kyrgyz Republic Health and Social Protection Project.[137]

[134] *Ibid*., § 1.
[135] See The World Bank's *Anti-corruption Guidelines and Sanctions Reform*, available at: http://siteresources.worldbank.org/PROJECTS/Resources/40940-1173795340221/RevisedPMNDFinaluserGuideline031607.pdf, at 6.
[136] WB Sanctions Board Decision No. 50 (30 May 2012).
[137] WB Sanctions Board Decision No. 60 (9 September 2013).

Notably, whereas the FCPA prohibits bribery of foreign public officials,[138] in the MDBs context, the term "corrupt practice" applies to bribes given to or received by another party, giving it a broader context. The definition of "corrupt practice" also makes no exception for facilitation payments, which are a key exception under the FCPA.[139]

(2) A **fraudulent practice** is defined as any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.[140] To act recklessly requires that the actor is indifferent as to whether the information or representation is true or false. Mere inaccuracy in information or representation, committed through simple negligence, is not tantamount to a fraudulent practice.[141]

An example of fraudulent practice might involve a scenario where, during the implementation of a project, the poor performance of a key consulting company raises suspicion that the capacities and qualifications of the company might have been misrepresented. An investigation reveals that the experience and credentials of the principal, as well as the qualifications and certifications of the consulting firm were misrepresented in order to meet the selection criteria of the tender.[142] For example, the WB's Sanctions Board Decision No. 48 concerns a case in which a bidder was debarred because it submitted fraudulent documentation evidencing its prior experience in relation with the Sudan Emergency Transport and Infrastructure Project. Specifically, the respondent submitted three letters purportedly issued by the Nigerian government to confirm the respondent's substantial completion of the Nigerian road project. After additional due diligence, the Bid Evaluation Committee concluded that several of the letters contained false and/or misleading information.[143] Similarly, the WB's Sanctions Board Decision No. 51 concerns a case arising in the context of the West Bank and Gaza Local Government Capacity Building Project, in which bidders' proposals had to include the names of the professional staff who would work under the contract. The bidder, which was subsequently debarred, included a CV of a consultant who had never agreed to be part

[138] 15 U.S.C. §78dd-1(a).
[139] 15 U.S.C. §78dd-1(b).
[140] Uniform Framework for Preventing and Combating Fraud and Corruption, § 1.
[141] See EBRD's Enforcement Policy and Procedures, footnote 3.
[142] The World Bank's *Anti-corruption Guidelines and Sanctions Reform*, at 7.
[143] WB Sanctions Board Decision No. 48 (30 May 2012).

of the proposal.[144] Fraudulent practice has been by far the most common sanctionable practice under the MDBs' sanctions regimes thus far.

(3) A **coercive practice** is defined as impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.[145] An example would be a project where procurement for two MDB-financed roads is found to be tainted by the use of intimidation of competing bidders. An investigation reveals that a company that was pre-determined to win contracts in a collusive scheme used a combination of threats to the future business interests of competitor companies or threats to the physical well-being of competitors' staff, in addition to payments to "losing" bidders, to ensure that other bidders submitted inflated bids.[146] For example, in 2010, ADB debarred a consultant working with village groups under an ADB-financed project, found to have misappropriated project funds by falsely representing to the groups that a share of the funds should be channelled through him (fraud) and threatening that the funds would be withheld if this was not done (coercion).[147]

(4) A **collusive practice** is defined as an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party.[148] An example would involve a situation where a borrowing government arrests an official of an agency that is responsible for implementing an MDB-financed project on charges of financial impropriety. On the basis of that arrest and subsequent information from a contractor, an investigation of the relevant contracts is carried out, and reveals that the agency official had arranged a collusion "ring" to steer a large number of contract awards to his own company and to the companies of people known to him/her. To implement the collusion, the agency official influenced local officials who had a role in awarding the contracts.[149] For example, in 2010, the WB's Sanctions Board debarred a party found to have engaged in collusion constituting a fraudulent practice in connection with a WB-financed water sector project. Specifically, the respondent was found to have coordinated bid prices with the other two firms bidding for the same small works tender to

[144] WB Sanctions Board Decision No. 51 (30 May 2012).
[145] Uniform Framework for Preventing and Combating Fraud and Corruption, § 1.
[146] The World Bank's *Anti-corruption Guidelines and Sanctions Reform*, at 7.
[147] ADB Case No. 09-060-1004 (27 April 2010).
[148] Uniform Framework for Preventing and Combating Fraud and Corruption, § 1.
[149] The World Bank's *Anti-corruption Guidelines and Sanctions Reform*, at 8.

ensure the respondent would win the contract.[150] Similarly, in 2011, the WB's Sanctions Board debarred a party found to have engaged in collusive practices in connection with a WB-financed transport sector project. Specifically, the respondent and another firm had utilised the respondent's subsidiary to prepare coordinated bids for a contract under the project.[151]

In addition to the above four practices, each of the MDBs has subsequently (although not concurrently with each other) incorporated "obstructive practice" in its Sanctions Procedures. Interestingly, the definition of "obstructive practice" slightly varies across all five MDBs. At AfDB, IADB and WB, it is defined, in general terms, as "(i) deliberately 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 contractual rights of audit or inspection or access to information." An example of such practice would involve a situation where, based on an allegation of corruption, investigators contacted a company that was awarded a contract on an MDB-financed project to audit the financial records. While the company is required under its contract to allow access to these records, it refused to do so. This refusal of access is itself an offence that could make the company ineligible to bid on future contracts of the relevant MDB.[152]

For example, in 2017, WB debarred a party for obstruction in relation to a health sector development program in Bangladesh. Following the procurement of ultrasound machines under this project, INT requested to audit the accounts and records of the respondent, a company that was among the losing bidders. Despite initially agreeing to cooperate with INT, the respondent ultimately refused to permit the audit. To justify this refusal, the respondent claimed, *inter alia*, that INT did not allege misconduct separate from obstruction, and that WB had no audit rights over losing bidders. In its decision, the

[150] WB's Sanction Board Decision No. 40 (2010), as described in the WB's Sanctions Board Law Digest (December 2011).
[151] WB's Sanction Board Decision No. 45 (2011), as described in the WB's Sanctions Board Law Digest (December 2011).
[152] *Ibid*., at 9.

Sanctions Board observed that, in order to detect, deter, and prevent fraud and corruption effectively, WB must be able to exercise its audit rights without interference – especially considering that INT has no powers to compel the production of evidence or witness testimony. The Sanctions Board further observed that, per the bidding documents, the respondent not only undertook an obligation to comply with audit requests by WB, but also expressly agreed that failing to do so could, in and of itself, lead to sanctions for obstruction. Emphasising that this obligation is not limited to the winning bidder, the Sanctions Board found the respondent liable for obstruction.[153]

At ADB and EBRD, the definition of "obstructive practice" also captures "failing to comply with requests to provide information, documents or records in connection with [an ADB/EBRD] investigation."[154] In addition, at EBRD, which was the last MDB to incorporate "obstructive practice" in its Sanctions Procedures in November 2015, the definition does not require for the tempering of evidence to be deliberate.[155]

Some MDBs have also incorporated other sanctionable practices. ADB, for example, may also sanction for conflict of interest, retaliation against whistleblowers or witnesses, violations of ADB sanctions and failure to adhere to the highest ethical standards.[156] EBRD may also sanction for theft and misuse of EBRD's resources and assets.[157]

Notably, all of the sanctionable practices are broadly defined and provide the MDBs with fairly wide scope to sanction. They deliberately omit the *mens rea* requirement in order to shift the focus from the subjective state of mind of the relevant party to the more easily provable objective facts. In addition to harmonising the definitions of sanctionable practices, the Framework also established agreed minimum standards by which each of the signatories conducts investigations of the sanctionable practices, while continuing to maintain its own sanctions system.

---

[153] WB Sanctions Board Decision No. 104 (December 2017).
[154] ADB Integrity Principles and Guidelines (2015), available at: http://www.adb.org/sites/default/files/institutional-document/32131/integrity-principles-guidelines.pdf, at 6.
[155] EBRD Enforcement Policy and Procedures (2017), available at: https://www.ebrd.com/news/publications/policies/enforcement-policy-and-procedures.html, §II(46)(f).
[156] ADB Integrity Principles and Guidelines (2015), at 7.
[157] EBRD Enforcement Policy and Procedures (2017), §II(46)(e).

(v) Description of current WB Sanctions Procedures

(a) Two-step decision-making process

WB sanctions cases begin with an INT investigation into possible misconduct under a WB-financed activity. As INT does not have law enforcement powers, it relies on the audit and inspection rights provided in WB-financed contracts and in tender documents for WB-financed activities.[158]

The WB's jurisdiction is established through the application of any of the Procurement, Consultant or Anti-Corruption Guidelines that include provisions establishing the WB's right to sanction to the project where the sanctionable practice allegedly took place.[159] This application typically occurs through the incorporation by reference of the relevant guidelines into the loan or other legal agreement governing the project.[160] Further, just like all other MDBs, WB does not need the agreement of third parties to sanction because the right to sanction is one that carries with it no corresponding obligation on the part of the sanctioned party. Even in cases where conditions are placed on non-debarment or release from debarment, these are not contractual obligations, but a unilateral decision by WB that it will either debar a party, or not release a party from debarment if these conditions are not met. Notably, however, the inclusion of appropriate provisions regarding the WB's sanctions and fraud and corruption generally, in bidding documents and contracts, while not necessary to establish the authority to sanction, serves two important purposes relevant to the sanctions regime: (i) first, as a matter of fundamental fairness, it puts bidders and contractors on notice that they are subject to the sanctions regime and (ii) second, these provisions would strengthen the WB's defences against potential claims of tortuous interference with contract or defamation by sanctioned parties.

---

[158] World Bank: *World Bank Group' Settlements: How Negotiated Resolution Agreements Fit within the World Bank Group's Sanctions System*, at 2.

[159] See *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants* (2006), available at: http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB_Anti_Corruption_Guidelines_10_2006.pdf and *Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants* (last updated on 1 July 2014), available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html.

[160] See *Legal Vice Presidency of the World Bank: Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases*, No. 2010/1 (2010), available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1377105390925/AdvisoryOpinion.pdf, at 8.

The WB's sanctions system follows a two-step process: In step one, if an INT investigation concludes that a party has engaged in a sanctionable practice, INT presents the case to a Suspension and Debarment Officer (the "**SDO**"), who conducts a first, internal review of the written record presented by INT to determine whether it appears sufficient to support a finding of sanctionable misconduct. In addition, if INT finds evidence indicating that a sanctionable practice has occurred, but continues to investigate related matters, INT may seek an Early Temporary Suspension of a party's eligibility to receive WB-financed contracts pending the completion of the remaining investigative work.[161]

Where the Officer determines that INT has presented evidence sufficient to conclude that a party (at this stage called a "**respondent**") engaged in sanctionable practice, the Officer will issue to the respondent a Notice of Sanctions Proceedings that contains INT's allegations and evidence and the Officer's recommended sanction. In addition, the Officer will also temporarily suspend the respondent's eligibility to receive WB-financed contracts.[162]

The respondent may then file: (i) an Explanation, explaining why the case should be withdrawn or its temporary suspension lifted[163]; and/or (ii) a Response, contesting the case.[164] In theory, this model can lead to a conflict of jurisdictions, in that the respondent may submit its Explanation and Response simultaneously to the Officer and the Sanctions Board.

If the respondent does not contest the allegations, the Officer will automatically impose the recommended sanction. In addition, since September 2011, the Officer's

[161] World Bank Sanctions Proceedings and Settlements in Bank Financed Projects (2016) (hereinafter: "World Bank Sanctions Procedures"), available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1377105390925/Procedure_Bank_Procedure_Sanctions_Proceedings_and_Settlements_in_Bank_Financed_Projects(6.28.2016).pdf, §2.01(a); see John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[162] *Ibid*., §4.01(a).
[163] *Ibid*., §4.02(b).
[164] *Ibid*., §5.01(a).

determinations have been publicly disclosed on the WB's website.[165] If, however, the respondent contests the allegations, the matter proceeds to the second step and moves before the WB's Sanctions Board. The Sanctions Board is a seven-member body comprised entirely of non-staff members. The Sanctions Board provides a full and independent review based on an adversarial process with exchanges of written submissions of arguments and evidence. The Sanctions Board may also convene a hearing, either upon a party's request or at the Sanctions Board Chair's discretion, at which Sanctions Board members hear the parties' oral presentations and may question the parties and any witnesses called by the Sanctions Board.[166]

This stage of WB's Sanctions Procedures resembles the FAR's Notice of Proposed Debarment phase in that, under both systems, the Notices serve the same purpose – to notify the accused party of a potential debarment. Moreover, both systems provide for additional proceedings after the accused party has submitted a response contesting the allegations.[167] Notably, however, under FAR, oral hearings are available only when the respondent's response to the Notice raises a "genuine dispute over the material facts."[168] Conversely, under the WB's Sanctions Procedures, a respondent may obtain a hearing before the Sanctions Board upon request, regardless of whether a dispute regarding material facts exists.[169]

Sitting in a plenary or panel session, the Sanctions Board considers cases *de novo*, which means that it does not give any deference to the SDO's determinations. In reviewing contested cases, the Sanctions Board considers a more expansive record than the SDO, including at least one additional round of pleadings containing additional arguments and/or new evidence.[170] The Sanctions Board also conducts oral hearings, as requested by any of the parties or convened at the discretion of the Sanctions Board Chair. In 2018, oral hearings were held in 60% of the cases before the Sanctions Board.[171] The

[165] World Bank: *World Bank Group' Settlements: How Negotiated Resolution Agreements Fit within the World Bank Group's Sanctions System*, at 2.
[166] World Bank Sanctions Procedures, §6.
[167] Pascale Helene Dubois: *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, The University of Chicago Legal Forum, Volume 2012, at 226.
[168] FAR, Section 406.3(b)(2).
[169] World Bank Sanctions Procedures, §6.01.
[170] *World Bank Group Sanctions System Annual Report FY18*, at 48.
[171] *Ibid*., at 49.

Sanctions Board may also call witnesses, who may be questioned only by Sanctions Board members.

The Sanctions Board then issues a fully reasoned decision as to whether it is more likely than not that the respondent engaged in a sanctionable practice. Where the Sanctions Board finds that a respondent engaged in a sanctionable practice, the Sanctions Procedures require that a sanction be imposed. Decisions of the Sanctions Board are final and non-appealable.[172]

For cases initiated from 2011 onward, the Sanctions Board has published full texts of its decisions in accordance with the Sanctions Procedures.[173] In addition, the Sanctions Board has published a Law Digest that summarises the legal principles applied in decisions that predate the start of publication.[174] Publication of Sanctions Board decisions, and particularly their rationales, has created a body of jurisprudence that will hopefully supplement the sparse substantive legal framework for the MDBs' sanctions regimes.[175]

(b) Range of sanctions

WB's Sanctions Procedures provide for five different types of sanctions that may be imposed:

(1) **Debarment with conditional release**: The "baseline" or default sanction[176] is to impose a minimum period of debarment (i.e., ineligibility to be awarded a WB-financed contract or otherwise participate in WB-financed activities) of three years, after which the sanctioned party may be released from debarment if it has complied with certain prescribed conditions.[177] If they fail to do so, the sanction converts into an indefinite debarment. The conditions typically include the sanctioned party putting in place, and implementing for an adequate period, an integrity compliance program

[172] John Coogan et al.: *Combatting Fraud and Corruption in International Development*, Journal of Financial Crime, Volume 22, Issue 2 (2015).
[173] See WB Sanctions Board Decisions, available at: http://go.worldbank.org/58RC7DVWW0.
[174] See WB Sanctions Board Law Digest (2011), available at: http://go.worldbank.org/S9PFFMD6X0.
[175] See Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms*, a World Bank Study (2012), at 9.
[176] See *The World Bank Group's Sanctions Regime: Information Note*, available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf, at 6, footnote 11.
[177] World Bank Sanctions Procedures, § 9.01(d) and *The World Bank Group's Sanctions Regime: Information Note*, at 6.

satisfactory to the WB. Sanctioned parties must apply for release and must provide evidence that they have met the conditions for release.[178]

(2) **Debarment for a fixed term**: In cases where no appreciable purpose would be served by imposing conditions for release, sanctioned parties may be debarred for a specified period of time, after which they are automatically released from debarment. This may occur, for example, in cases where a sanctioned firm already has in place a robust corporate compliance program, the sanctionable practice involved the isolated acts of an employee or employees who have already been terminated, and the proposed debarment is for a relative short period of time (e.g., one year or less). At the opposite extreme, where there is no realistic prospect that the respondent can be rehabilitated, it may be sanctioned permanently.[179]

(3) **Conditional non-debarment**: Under this sanction, the sanctioned party is not debarred provided that the sanctioned party complies with certain defined conditions within a set time frame. If the conditions of conditional non-debarment are not met, the sanctioned party is debarred for a defined period of time. Conditional non-debarment may be applied, for example, in cases where the respondent already has taken comprehensive voluntary corrective measures and the circumstances otherwise indicate that it need not be debarred.[180]

(4) **Letter of reprimand**: In some cases, debarment or even conditional non-debarment may be disproportionate to the offense. In such cases, and in other appropriate cases, a letter of reprimand is issued to the sanctioned party. A letter of reprimand may be issued, for example, in cases where an affiliate of the respondent has been found to have some shared responsibility for the misconduct because of an isolated lapse in supervision, but the affiliate was not in any way complicit in the misconduct.[181]

---

[178] *The World Bank Group's Sanctions Regime: Information Note*, at 6.
[179] World Bank Sanctions Procedures, §9.01(c) and *The World Bank Group's Sanctions Regime: Information Note*, at 6-7.
[180] World Bank Sanctions Procedures, §9.01(b) and *The World Bank Group's Sanctions Regime: Information Note*, at 7.
[181] World Bank Sanctions Procedures, §9.01(a) and *The World Bank Group's Sanctions Regime: Information Note*, at 7.

(5) **Restitution**: Under this sanction, the respondent is required to make restitution to the borrower of the WB's funds, to the WB itself or another party sufficient to, at a minimum, disgorge illicit profits, remedy harm done to the borrower or others, or to the public good, or to undertake other remedial measures.[182] The WB's Sanctioning Guidelines state that this sanction is to be used "in exceptional circumstances, including those involving fraud in contract execution where there is a quantifiable amount to be restored to the client country or project."[183] Moreover, given that the WB, just like all other MDBs, lacks enforcement powers of a court, such sanction is typically imposed as one of the conditions under the conditional non-debarment or debarment with conditional release.

Comparing the WB's Sanctions Procedures with FAR, it is noteworthy that FAR only provides for a fixed-term debarment, whereas the WB's Sanctions Procedures provide for a range of five types of sanctions.

Finally, the WB's Sanctions Procedures include a non-exhaustive list of aggravating and mitigating factors to be considered when determining appropriate sanction.[184] In addition, the WB's Sanctioning Guidelines include more detailed treatment of these factors, with indicative ranges for increases (in the case of aggravating factors) and decreases (in the case of mitigating factors) of the debarment period.[185] These have been subsequently encapsulated in the General Principles and Guidelines for Sanctions, to which all other MDBs have subscribed[186] and are analysed in greater detail in Chapter 3.

Notably, FAR's mitigating factors are broadly similar to those enumerated in the WB's Sanctions Procedures.[187] However, while the WB uses a specific list of potentially aggravating factors, FAR does not name any aggravating factors. The following table illustrates key differences between FAR and the WB's Sanctions Procedures:[188]

---

[182] World Bank Sanctions Procedures, §9.01(e).
[183] World Bank Sanctioning Guidelines, available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf, ¶ 2(f).
[184] World Bank Sanctions Procedures, § 9.02.
[185] See WB Sanctioning Guidelines, § IV.
[186] General Principles and Guidelines for Sanctions, available at: http://siteresources.worldbank.org/INTDOII/Resources/HarmonizedSanctioningGuidelines.pdf, ¶¶ 5 and 6.
[187] See FAR, Sections 406-1(a)(1)-(10).
[188] Christopher R. Yukins: *Rethinking the World Bank's Sanctions System, The Government Contractor*, Volume 55, No. 42 (2013), at 2.

	FAR	WB's Sanctions Procedures
Causes of debarment	Broadly defined (for discretionary, i.e., non-statutory debarments)	Corrupt, fraudulent, coercive, collusive and obstructive practices
Referral and sources of evidence	Any source	INT investigation
Temporary suspension	Allowed in case of suspicion, upon adequate evidence	Allowed if sufficient evidence
Standards of debarment	Preponderance of evidence; then contractor must be shown responsible ("present responsibility")	Preponderance of evidence; Sanctions Board is the ultimate decision-maker
Hearing allowed?	Yes, only in case of a genuine dispute over material facts	Yes, before the Sanctions Board
Range of sanctions	From debarment to administrative agreement	From debarment to reprimand
Cross-debarment	All federal agencies	Four other MDBs
Judicial review	Yes	No

(c) Settlements

WB's Sanctions Procedures allow for the negotiated resolution of cases at any stage of the sanctions process up to the issuance of a decision by the Sanctions Board. All firms or individuals under investigation are given the option of resolving a matter through a settlement in lieu of a sanctions process. The INT may consider a variety of factors when determining whether a settlement is appropriate, including the potential resource savings for WB and the corrective measures undertaken by the party.[189]

The admission of culpability is not a requirement for settlement and settlement may be appropriate in certain cases for a respondent who, although unwilling to admit culpability, is willing to resolve the matter. For example, a respondent may be keen to resolve the matter quickly, thus reducing the expenditure of resources on sanctions proceedings, or having certainty as to the outcome.[190] Settlements are subject to review by the WB General Counsel and the Suspension and Debarment Officer. Further, sanctions imposed through settlements are implemented identically to any sanction

[189] See *World Bank Group Sanctions System Annual Report FY18*, at 22

[190] Frank Fariello and Anne Marie Leroy: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012), at 21-22.

imposed through the traditional sanctions process, including the application of cross-debarment[191] (described in more detail in section G(ii) below).

In 2009, in what remains the largest WB case in terms of monetary settlement, Siemens reached a settlement with WB over bribery allegations, agreeing to make USD 100 million available for anti-corruption projects and to forego bidding on WB projects for two years.[192] Except for its Russian subsidiary, Siemens was not debarred or otherwise sanctioned. The obvious questions that this settlement raises are: First, on what basis was the amount of USD 100 million determined and, much more importantly, does the settlement suggest that those with "deep pockets" can buy their way out of sanctions? Interestingly, the Review of the World Bank Group Sanctions Regime 2011 – 2014 expressed concern over the lack of transparency surrounding settlements.[193]

Other examples of settlements that followed after the Siemens settlement include:

- A settlement with Iberdrola Ingeniería y Construcción, S.A.U. ("Iberinco"), following acknowledgment of misconduct by Iberinco involving two power projects in Albania. Under the terms of the settlement agreement, Iberinco was debarred for a period of twelve months to be followed by a six-month conditional non-debarment period. In addition, the company had to make a restitution payment of USD 350,000 to the Albanian government.[194] Here, again, the sanction appears to be conspicuously under the one-year threshold which would have triggered cross-debarment, described in more detail in section G(ii) below, raising questions as to whether a restitution payment has contributed to the imposition of more lenient terms.

- A settlement with Sinclair Knight Merz Pty (SKM), following the company's self-reporting to the INT of corrupt misconduct relating to Bank-financed projects in

[191] *Ibid*., at 4.
[192] See Siemens Q&A, available at: http://siteresources.worldbank.org/INTDOII/Resources/Siemens_Q&A_12_22_2009.pdf.
[193] Review of the World Bank Group Sanctions Regime 2011 – 2014, available at: https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctionsreview_initiatingdiscussionbrief.pdf, ¶¶ 30 and 32.
[194] See Press Release: *World Bank Announces Settlement with Iberdrola Ingeniería y Construcción, S.A.U. ("Iberinco") and Iberdrola S.A.* (June 2015), available at: http://www.worldbank.org/en/news/press-release/2015/06/01/world-bank-settlement-iberdrola-ingenieria-construccion-sau.

the East Asia and Pacific region. The settlement resulted in a conditional non-debarment, with the WB press release noting that "[a] combination of self-reporting, corrective action against corruption, and engaging with the World Bank's Integrity Vice Presidency with full transparency placed SKM in a strong and credible position with regard to the resolution of this matter. As a result of the exceptional cooperation received from the company, which has enabled INT to take steps to safeguard World Bank funds and identify other potential targets for investigation, a conditional non-debarment for two and a half years is being imposed on SKM, under strict conditions."[195]

- A settlement with Alstom, resulting from the company's improper payment to an entity controlled by a former senior government official for consultancy services in relation to the WB-financed Zambia Power Rehabilitation Project. The settlement resulted in a debarment of Alstom Hydro France and Alstom Network Schweiz AG (Switzerland), as well as their affiliates, for a period of three years, which period may be reduced to 21 months if the companies comply with the conditions in the agreement. In addition, Alstom had to make a restitution payment of $9.5 million.[196]

The number of settlements has seen a steady increase since 2014, with only six settlement agreements submitted to the SDO by the INT in 2014, and 23 settlement agreements submitted in 2018.[197]

Quite problematically from the due process perspective, it is unclear how multi-million dollar settlements have been calculated by participating institutions and the respondent and whether the amount is intended to be restorative and/or related to reimbursement of investigation and proceedings costs, particularly as settlement

[195] See Press Release: *World Bank Group Announces Settlement with Sinclair Knight Merz Management Pty Ltd, Sinclair Knight Merz Holdings Ltd and Sinclair Knight Merz Pty* (July 2013), available at: http://www.worldbank.org/en/news/press-release/2013/07/24/world-bank-group-announces-settlement-sinclair-knight-merz.
[196] See Press Release: *Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates* (February 2012), available at: http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:23123315~menuPK:51062075~pagePK:34370~piPK:34424~theSitePK:4607,00.html.
[197] *World Bank Group Sanctions System Annual Report FY18*, at 55.

agreements terms are not widely disclosed and are subject to less public scrutiny.[198] Of particular concern is whether, in view of the cross-debarment regime, a debarment against an entity by one MDB may allow another MDB with an open investigation into the same entity to gain leverage from the debarment to extract maximum payment amounts if there is a settlement, given that a settlement could save the entity from cross-debarment by that other MDB.[199]

With settlements becoming more common on MDBs' sanctions landscape, further measures to increase transparency and checks and balances around settlement agreements are warranted, as discussed in greater detail in Chapter 3.

C. Inter-American Development Bank's sanctions regime

(i) Early developments and the Thornburgh report

The Inter-American Development Bank ("**IADB**") was established in 1959 with the aim to contribute to the acceleration of the process of economic and social development of its member countries in Latin America and the Caribbean.[200] Just like WB, IADB also started paying more attention to matters involving fraud and corruption in the 1990s.[201] Thus, in 1996, IADB's Board of Executive Directors approved the institution's Policy on Modernization of the State and Strengthening of Civil Society, designed to consolidate democratic systems and strengthen governance processes in its borrowing member countries.[202] A few years later, in 2001, IADB's Board of Executive Directors adopted the strategy document titled "Strengthening the Systematic Framework Against Corruption", which sets forth guidelines and policies for the IADB's actions to prevent corruption in three areas: ensuring integrity among IADB's staff, ensuring activities financed by IADB are free of corruption and fraud, and supporting IADB's borrowing member countries to strengthen good governance and

[198] Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016), at 22.
[199] *Ibid*., at 24.
[200] Agreement Establishing the Inter-American Development Bank, available at: http://IADBdocs.iadb.org/wsdocs/getdocument.aspx?docnum=781584, Article I.
[201] Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank, available at: http://IADBdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1824265 (2008), at 3.
[202] *Ibid*.

combat corruption.[203] In the same year, IADB's President announced the establishment of an independent Oversight Committee on Fraud and Corruption ("**OCFC**"), composed of senior staff members and tasked with coordinating responses to all allegations of fraud and corruption in connection with IADB's activities and operations, overseeing any resulting investigations and assuring proper dispositions.[204] The OCFC was receiving allegations of fraud and corruption and referring them for investigation to the Office of the Auditor General, the Procurement Committee, the Ethics Committee or the Legal Department, and then adjudicating the matter, including recommendation of any sanctions, which would then be sent to IADB's President for his final decision.[205]

Evidently, at this early stage of IADB's sanctions proceedings, both investigation and adjudication were centred in a single body, comprised entirely of the institution's staff members. Very soon, however, the organisation adopted more sophisticated investigative procedures, together with the rules for the protection of whistleblowers and witnesses, an established the Office of Institutional Integrity ("**OII**"), an office within the Office of the President, tasked with investigating matters related to integrity,[206] and an analogue to the WB's INT. In addition, the Sanctions Committee, comprised senior staff members, was created and took over much of OCFC's adjudicatory and sanctioning functions.[207]

The evolutionary path of IADB's sanctions procedures is very similar to that of the WB, given that – just like at WB – the major reform of the IADB's sanctions regime occurred following the review of the sanctions regime by a working group consisting of four experts, including Dick Thornburgh.[208] The report prepared by the working group in 2008 made several recommendations, reminiscent of the ones articulated in the above-described Thornburgh Report, prepared for the WB in 2002.[209]

In 2011, important changes ensued: (i) the OII became an independent office reporting directly to the President of the Bank; (ii) the role of the Sanctions Officer, the

[203] See *Strengthening the Systematic Framework Against Corruption for the Inter-American Development Bank*, available at: http://IADBdocs.iadb.org/wsdocs/getdocument.aspx?docnum=815064 (2001).
[204] Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank, at 8.
[205] *Ibid*., at 8-9.
[206] *Ibid*., at 9.
[207] *Ibid*., at 15, 66 and 67.
[208] See generally, Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank.
[209] *Ibid*.

first-tier decision-maker, was created and (iii) the Sanctions Committee was reformed into a majority-external second-tier decision-making body.[210]

(ii) Description of IADB's current sanctions procedures

(a) Two-step decision-making process

Just like at WB, IADB's sanctions cases begin with an OII investigation into possible misconduct under an IADB-financed activity. The IADB's sanctions system follows a two-step process: In step one, if an OII investigation concludes that a party has engaged in a sanctionable practice, OII presents the case to the Sanctions Officer.[211] The Sanctions Officer is the first instance of IADB's sanctions system's adjudication phase. In addition, OII may recommend that the Sanctions Officer impose a temporary suspension.[212] In order to impose a temporary suspension, the Sanctions Officer must find, in consultation with the Chairperson of the Sanctions Committee (the second-tier decision-maker) that the award of contracts to the concerned party or its participation in additional IADB-financed projects could result in significant harm to IADB and that OII has offered substantial evidence that supports an allegation of a sanctionable practice.[213] The concerned party has an opportunity to request that the temporary suspension be reconsidered.[214]

The Sanctions Officer reviews OII's investigative findings and decides if it is more likely than not that the respondent committed a sanctionable practice. If that is the case, the Sanctions Officer issues a Notice of Administrative Action with a recommended sanction.[215] This Notice is sent to the respondent, who can respond to the Notice, following which the Sanctions Officer determines whether a preponderance of the evidence supports a finding that the respondent engaged in a sanctionable practice and issues a determination to that effect.[216] If the respondent does not respond to the Notice,

---

[210] See description of IADB's sanctions system on IADB's website, at: http://www.iadb.org/en/about-us/IADB-sanctions-system,8619.html.
[211] IADB's Sanctions Procedures, available at: http://IADBdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39676437, §4.1.
[212] *Ibid*., §13.2.
[213] *Ibid*., §13.3.
[214] *Ibid*., §13.5.
[215] *Ibid*., §4.5.
[216] *Ibid*., §4.9.

the respondent is deemed to have admitted the allegations in the Notice and to have waived the opportunity for appeal.[217] Unless the respondent has so waived the opportunity to appeal, the respondent may appeal the Sanctions Officer's determination, in which case the matter proceeds to the second step and moves before the IADB's Sanctions Committee.[218]

The Sanctions Committee is a seven-member body comprised four non-IADB employees and three IADB employees.[219] The Sanctions Committee provides a full and independent review based on an adversarial process with exchanges of written submissions of arguments and evidence. The Sanctions Committee may also convene a hearing, only upon its own discretion, and not upon a party's request.[220]

Sitting in a plenary or panel session, the Sanctions Committee considers *de novo* the allegations and evidence presented by the respondent in its appeal, the OII's reply (if any), the parties' presentations at any hearing, and any other materials in the record before taking a decision.[221] The Sanctions Committee then issues a decision as to whether it is more likely than not that the respondent engaged in a sanctionable practice.[222] Where the Sanctions Committee finds that a respondent is liable for a sanctionable practice, the Sanctions Procedures require that a sanction be imposed.[223] Decisions of the Sanctions Board are final and non-appealable.[224]

Any sanction imposed by the Sanctions Officer or the Sanctions Committee is published on IADB's website,[225] together with the name and nationality of the sanctioned party, country where the relevant project was located, the length of, and grounds for, the

[217] *Ibid*., §4.8.
[218] *Ibid*., §6.1.
[219] *Ibid*., Annex A (Sanctions Committee Charter), Article III, §§1 and 2.
[220] *Ibid*., §11.3.
[221] *Ibid*., §§11.1, 11.2 and 12.1; see also Annex A (Sanctions Committee Charter), Article VI.
[222] *Ibid*., §7.1.
[223] *Ibid*., §7.3.
[224] *Ibid*.; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[225] *Ibid*., §8.6.

sanction.[226] However, unlike WB, IADB does not publish texts of fully reasoned Sanctions Committee decisions.

(b) Range of possible sanctions

IADB's Sanctions Procedures provide for six different types of sanctions that may be imposed: (1) reprimand, (2) debarment, (3) conditional non-debarment, (4) debarment with conditional release, (5) other sanctions and (6) sanctions of other institutions (which take into account the Cross-Debarment Agreement). The first four are identical to the ones described in section B(v)(b) above relating to the sanctions prescribed by the WB's Sanctions Procedures. While IADB does not have (or make publicly available) its own sanctioning guidelines, all MDBs, including IADB, are signatories to the General Principles and Guidelines for Sanctions, which stipulate that "[t]he base sanction is three year debarment (with or without conditional release), which may be decreased or increased taking into account any mitigating and/or aggravating circumstances."[227]

In addition, IADB's Sanctions Procedures stipulate that "[o]ther sanctions may be imposed as deemed appropriate by the Sanctions Officer, or the Committee, as applicable, including, but not limited to, the restitution of funds, and the imposition of fines representing reimbursement of the costs associated with investigations and proceedings contemplated herein."[228] The restitution of funds and the imposition of funds are analogous to the sanction of restitution under the WB's Sanctions Procedures. The "other sanctions" construct, on the other hand, raises concerns over this sanction's potential violation of the basic *nulla poena sine lege* principle, which requires punishable conduct and penalties to be sufficiently precise, so that parties know what the expect if they are found guilty of a particular offence. Finally, the IADB Sanctions Procedures specifically mention that IADB may impose a sanction in recognition of the sanctions of other institutions, referring primarily (although not expressly) to the cross-debarment regime described in section G(ii) below.

[226] See IADB's list of sanctioned parties at: http://www.iadb.org/en/topics/transparency/integrity-at-the-IADB-group/sanctioned-firms-and-individuals,1293.html; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[227] General Principles and Guidelines for Sanctions, available at: http://siteresources.worldbank.org/INTDOII/Resources/HarmonizedSanctioningGuidelines.pdf, ¶4.
[228] IADB Sanctions Procedures, §8.2.5.

Unlike WB, whose base sanction is debarment with conditional release, so far IADB has imposed almost exclusively simple debarments. In 2014, IADB imposed debarment with conditional release for the first time.[229] Arguably, unlike simple debarment, debarment with conditional release places greater emphasis on rehabilitation, encouraging sanctioned companies to adopt effective policies and measures that make it less likely that they will engage in misconduct in the future. On the other hand, however, working with a firm on its meeting of the prescribed conditions and ultimately determining whether these conditions have been met is a resource-intensive process whose benefits have not been demonstrated. Namely, as discussed in greater detail in Chapter 3, the 2013 Review of the World Bank Sanctions System raised concerns over "very limited engagement by Respondents, in particular SMEs, . . . raising the prospect that, contrary to intentions, debarment with conditional release will become, de facto, a road to indefinite debarment."[230]

(c) Settlements

IADB's Sanctions Procedures did not allow for settlements until 2015, when the organisation adopted revised Sanctions Procedures, which only briefly mention the possibility of settlements by stating that "[a]t any time prior to or during an investigation, but not after the receipt of a Statement of Charges by the Sanctions Officer, the Bank . . . may enter into negotiated resolution agreements related to Prohibited Practices."[231] The timeframe within which settlements are allowed is much more narrow than under the WB Sanctions Procedures, where settlements are permitted at any stage of the sanctions process until the issuance of the Sanctions Board decision. In addition, unlike WB's settlements, which are available to all respondents, the IADB's procedures suggest that settlements are available only to those parties that provide evidence that assists in IADB's investigations of sanctionable practices.

[229] Office of Institutional Integrity and Sanctions System Report of Activities 2014, available at: http://IADBdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39505879, at 30.
[230] Review of the World Bank Group Sanctions Regime 2011-2014, available at: https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctionsreview_initiatingdiscussionbrief.pdf, ¶34.
[231] IADB Sanctions Procedures, §15.4.

D. European Bank for Reconstruction and Development's sanctions regime

(i) Early developments

The European Bank for Reconstruction and Development ("**EBRD**") was established in 1991 with the aim to help create a new post-Cold War era in central and eastern Europe, furthering progress towards market-oriented economies and the promotion of private and entrepreneurial initiatives.[232] Initially focused on the countries of the former Eastern Bloc, it has since expanded to support development in central Asian and southern and eastern Mediterranean countries. The main difference between EBRD and other MDBs is that EBRD is particularly focused on the development of the private sector within its countries of operations.

EBRD adopted its sanctions procedures (called the Enforcement Policy and Procedures) in 2009. Until that year, EBRD's formal sanctions mechanism, which included debarment as a possible sanction, was limited to public sector procurement pursuant to its Procurement Policies and Rules.[233]

Just like WB did in 2006, in 2009, EBRD decided that the organisation should have a single sanctions mechanism for cases that are covered by the Procurement Policies and Rules (public procurement) and all other cases that fall outside it. Consequently, EBRD adopted a single sanctions mechanism to address sanctionable practices by a party not only in relation to procurement opportunities in EBRD-financed contracts, but also with respect to EBRD's financing(s), technical assistance contracts and corporate purchases. Notably, because of EBRD's focus on fostering private sector development, EBRD has a much lower level of public sector procurement as its percentage of its overall business and, as a consequence, has had a significantly lower number of cases related to sanctionable practices.[234]

---

[232] See Agreement Establishing the European Bank for Reconstruction and Development, available at: http://www.ebrd.com/news/publications/institutional-documents/basic-documents-of-the-ebrd.html%20, Article 1.
[233] EBRD's Procurement Policies and Rules, §2.9.
[234] See the list of ineligible entities on EBRD's website, available at: http://www.ebrd.com/ineligible-entities.html, and compare the number of EBRD-initiated sanctions with the number of sanctions resulting from the mutual enforcement of debarment decisions.

Until November 2015, EBRD's Enforcement Policy and Procedures resembled early sanctions procedures of other MDBs, with the decision-making centred in the Enforcement Committee comprising five senior staff members.[235] This type of sanctions system did not provide the respondent with an opportunity to appeal the first-tier decision-maker's decision and, even more significantly, lacked independence because the Enforcement Committee was comprised entirely of internal staff members. Because of these shortcomings, in 2015 EBRD reformed its sanctions system in order to provide greater due process protections to respondents and align its processes with those of other MDBs.

(ii) Description of EBRD's current sanctions procedures

(a) Two-step decision-making process

EBRD's sanctions process begins with the investigation by the Office of the Chief Compliance Officer ("**OCCO**") into whether there is sufficient evidence that (i) preponderance of the evidence supports a finding that the suspected Prohibited Practice was committed or (ii) a Third Party Finding may warrant a sanction.[236] The imposition of a sanction on the basis of a Third Party Finding is unique to EBRD, as none of the other MDBs impose a sanction on that basis. "**Third Party Finding**" is defined as a final judgment of a judicial process in EBRD's member country or a finding by the enforcement (or similar) mechanism of another international organisation that is not an MDB that a party has engaged in a sanctionable practice or equivalent act of that member country or international organisation.[237] The Third Party Finding mechanism allows the organisation to impose a sanction on the basis of a final judgment, without the need to conduct internal investigation and use internal resources. Notably, a sanction imposed on the basis of a Third Party Finding is not subject to cross-debarment by other MDBs.[238]

When OCCO's investigation concludes that there is sufficient evidence that either (i) preponderance of the evidence supports a finding that the suspected sanctionable practice was committed or (ii) a Third Party Finding may warrant a sanction, the Chief Compliance Officer (the "**CCO**") prepares a Notice that details, among other things, the

[235] *Ibid*., §4.1(i).
[236] EBRD's Enforcement Policy and Procedures (2017), available at: https://www.ebrd.com/news/publications/policies/enforcement-policy-and-procedures.html, §§3.2 and 3.3.
[237] *Ibid*., §II(59).
[238] Agreement for Mutual Enforcement of Debarment Decisions, §4(f).

CCO's evidence and findings (or a copy of the Third Party Finding), the sanction(s) proposed by the CCO and any exculpatory or mitigating evidence.[239] A finding that "a Third Party Finding" may warrant a sanction is much more vague than the preponderance of the evidence standard. This is probably deliberately so in order to give EBRD maximum discretion in deciding whether it wants to do business with a party found to have engaged in a sanctionable practice. Yet, the respondent is restricted to the presentation of mitigating circumstances and/or other facts relevant to the proposed sanction and arguments as to the relevance of the Third Party Finding to EBRD,[240] which is a difficult task, given that EBRD itself is best positioned to assess the relevance of the Third Party Finding to it.

EBRD's enforcement proceedings follow a two-stage decision-making process. In the first stage, the CCO submits the above-described Notice to the Enforcement Commissioner, who determines whether, in the Enforcement Commissioner's view, the CCO has presented evidence sufficient to support a finding that (i) more likely than not the party committed the alleged Prohibited Practice(s) or (ii) a Third Party Finding may warrant a sanction. If the Enforcement Commissioner finds sufficient evidence, he/she will issue the Notice to the party (at this stage referred to as the respondent).[241] If the respondent does not contest the allegations within the deadline prescribed in the Notice (which is never less than 30 days), the Enforcement Commissioner will issue a decision against the respondent imposing one or more sanctions.[242]

If the respondent contests the case within the prescribed deadline, the CCO may then submit a reply presenting the arguments and evidence addressing the arguments and evidence presented in the respondent's response.[243] Based on these submissions and any additional submissions authorised by the Enforcement Commissioner or expressly requested by the Enforcement Commissioner, the Enforcement Commissioner will issue a decision. EBRD is the only MDB whose sanctions procedures allow the investigators to appeal the first tier decision-maker's decisions. If, within the prescribed deadline, neither the respondent nor the CCO presents an appeal, the Enforcement Commissioner will

[239] EBRD's Enforcement Policy and Procedures (2017), §§ 4.4 and 4.5.
[240] *Ibid.*, §5.1(iii).
[241] *Ibid.*, §§ 4.1(i) and 4.2(i).
[242] *Ibid.*, §4.8(i).
[243] *Ibid.*, §5.2.

impose the sanction set forth in his/her decision, which will be publicly disclosed on EBRD's website (if it involves a debarment).[244]

If, however, either the respondent or the CCO submits an appeal, the matter proceeds to the second stage and moves to the Enforcement Committee. The Enforcement Committee is a five-member body comprised three non-EBRD employees and two EBRD employees.[245] The respondent may contest the Enforcement Commissioner's decision on written pleadings and may also request to make oral representations to the Enforcement Committee. In addition, the Enforcement Committee may also request oral representations of both parties on its own volition.[246]

In response to the appellant's notice of appeal, the appellee may submit an appeal response, following which the appellant may submit an appeal reply, in each case within the prescribed deadlines.[247] The Enforcement Committee will then issue a decision, which is non-appealable.[248] For cases initiated from November 2015, the Enforcement Committee will publish full texts of its decisions.[249]

(b) Range of possible sanctions

EBRD's Enforcement Policy and Procedures provide for seven different types of sanctions that may be imposed: (1) rejection of a proposal for award of contract to a respondent in respect of a procurement of goods, works or services; (2) cancellation of a portion of EBRD's finance allocated to a respondent, but not yet disbursed in respect of a contract for the procurement of goods, works or services; (3) reprimand; (4) debarment; (5) conditional non-debarment; (6) debarment with conditional release and (7) restitution.[250]

The first one of these is always available to EBRD, even without the sanctions regime, as the organisation can always reject the respondent's proposal a procurement of goods, works or services. The second one is presumably dependent on EBRD's ability to

[244] *Ibid.*, §5.8(ii).
[245] *Ibid.*, §6.2.
[246] *Ibid.*, §§7.7(i) and (iii).
[247] *Ibid.*, §§7.2 and 8.3.
[248] *Ibid.*, §7.8(vi).
[249] *Ibid.*, §11.3(iv).
[250] *Ibid.*, §10.2.

cancel the portion of its finance under the provisions of the relevant contract. Finally, the last five sanctions are the same as the ones described in section B(v)(b) above in the context of the WB's Sanctions Procedures.

(c) Settlements

EBRD's Enforcement Policy and Procedures allow for the settlement of cases at any stage of the sanctions process prior to the issuance of the Enforcement Commissioner's decision. Before commencing settlement negotiations, OCCO must be satisfied that the particular case warrants a negotiated resolution in lieu of pursuing a traditional sanctions proceeding.

Additional measures are taken to ensure that all parties, both large and small, represented or unrepresented, who enter into a settlement agreement do so voluntarily and of their own free will. To this end, a settlement agreement contains an acknowledgement by all parties that are subject to it, including the CCO, that the accused party entered into it freely and fully informed of its terms.[251]

Once the accused party signs a settlement agreement, it must be submitted to the Enforcement Commissioner for his/her review. The Enforcement Commissioner, in consultation with EBRD's General Counsel, will review the terms of the settlement agreement to ensure that they do not violate any of EBRD's policies. Only after the Enforcement Commissioner has completed his/her review does the settlement agreement become binding and is the sanction imposed.[252] Sanctions imposed through settlements are implemented identically to any sanction imposed by the Enforcement Commissioner through the regular enforcement proceedings, including the disclosure requirements on EBRD's website.[253]

E. African Development Bank's sanctions regime

(i) Early developments

The African Development Bank ("**AfDB**") was founded in 1964 with the mission to fight poverty and improve living conditions on the African continent through promoting

[251] *Ibid*., §13.1(ii).
[252] *Ibid*., §§13.4(ii) and (iii).
[253] *Ibid*., §13.5(i).

the investment of public and private capital in projects and programs that are likely to contribute to the economic and social development of the region.[254] AfDB adopted its sanctions procedures in 2012. Until that year, AfDB's processes governing sanctions were based on the following instruments: (i) the Uniform Framework, (ii) the organisation's zero-tolerance policy against corruption and (iii) the organisation's Rules and Procedures for Procurement of Goods and Works and the Rules and Procedures for the Use of Consultants.[255]

In 2012, prompted by its signing of the Cross-Debarment Agreement in 2010, the organisation undertook a review of its sanctions process, which concluded that "[t]he Bank's current sanctions process does not conform to the required standards that must be in place for the [Cross-Debarment] Agreement to be effective with respect to a Participating Institution", particularly the standard that requires the Investigative Office to "perform its duties independently from those responsible for or involved in operational activities and from staff members liable to be subject of investigations."[256] This was because, at the time, AfDB's Integrity and Anti-Corruption Division ("**IACD**") played multiple roles: it both conducted investigations and made recommendations to AfDB's President and, upon approval, implemented the sanctions.[257] Thus, it exercised both investigative and adjudication functions. The review of AfDB's sanctions process concluded that, as a result of IACD's multiple functions, "the transparency of the current process could be brought under scrutiny by both the sanctioned entities and the other IFIs..."[258] Because of these shortcomings, in 2014 AfDB reformed its sanctions system in order to provide greater due process protections and align its processes with those of other MDBs.

[254] Agreement Establishing the African Development Bank, Articles 1 and 2.
[255] Proposal for the Implementation of a Sanctions Process within the African Development Bank (2012), available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Proposal%20for%20the%20Implementation%20of%20a%20Sanctions%20Process%20within%20the%20ADB%20-%20Rev%201.pdf, ¶4.2.
[256] See Uniform Framework for Preventing and Combating Fraud and Corruption (2006), at 5.
[257] Proposal for the Implementation of a Sanctions Process within the African Development Bank (2012), ¶4.3.
[258] *Ibid*.

(ii) Description of AfDB's current sanctions procedures

(a) Two-step decision-making process

AfDB's sanctions process begins with the investigation by IACD into whether there is sufficient evidence to support a finding of one or more sanctionable practices.[259] If, either before IACD concludes its investigation or after the end of its investigation, IACD believes that continuous eligibility of the subject of investigations would cause imminent financial or reputational harm to AfDB, IACD may seek a suspension of such party's eligibility to participate in AfDB-financed programmes or projects and to be awarded new contracts and other support from AfDB.[260] If, based on IACD's request, the first-tier decision-maker (the Sanctions Commissioner) issues a Notice of Temporary Suspension, the party may then file an objection to such Notice, explaining why the suspension should be lifted.[261]

AfDB's sanctions proceedings follow a two-stage decision-making process. In the first stage, when IACD's investigation concludes that the evidence supports such finding, IACD presents Findings of Sanctionable Practices, together with any exculpatory or mitigating evidence to the Sanctions Commissioner.[262] The Sanctions Commissioner then determines whether the Findings of Sanctionable Practice(s) support a *prima facie* finding that the respondent has engaged in a sanctionable practice.[263] If so, the Sanctions Commissioner will issue a Notice of Sanctions Proceedings to the respondent.[264]

If the respondent does not contest the allegations within the prescribed deadline, the Sanctions Commissioner will impose a sanction.[265] If, however, the respondent contests the allegations, the Sanctions Commissioner will determine whether a

[259] Sanctions Procedures of the African Development Bank (2014), available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/The%20Sanctions%20Procedures%20of%20the%20AfDB.pdf, §5.1.
[260] *Ibid*., §6.1.
[261] *Ibid*., §§6.2 and 6.4.
[262] *Ibid*., §§5.1 and 5.3.
[263] *Ibid*., §5.4.
[264] *Ibid*.
[265] *Ibid*., §5.13.

preponderance of the evidence supports a finding that the respondent has engaged in a sanctionable practice.[266]

The respondent may appeal the Sanctions Commissioner's decision within 25 days of its receipt. In such case, the matter proceeds to the second stage and moves to the Appeals Board. The Appeals Board is a three-member body comprised two non-AfDB employees and one AfDB employee.[267] The respondent may contest the Sanctions Commissioner's decision on written pleadings and may also request to make oral representations to the Appeals Board. In addition, IACD and the Appeals Board itself may request an oral hearing.[268] If the hearing has been requested by the respondent or IACD, the Appeals Board will hold it if it deems appropriate to do so and provided that the request for a hearing is supported by whatever the Appeals Board deems reasonable cause for such hearing.[269]

In response to the respondent's notice of appeal, IACD may submit a reply, following which the respondent may submit a rebuttal.[270] The Appeals Board will then consider whether a preponderance of the evidence supports a finding that the respondent engaged in a sanctionable practice.[271] The Appeals Board's decision will be delivered to IACD, the respondent and the Sanctions Commissioner, but will not be published on AfDB's website. What is published are the imposed sanction(s), the identity of the sanctioned party, the sanctionable practice the party is found to have committed and a summary of the decision.[272] The Appeals Board's decisions are non-appealable.

(b) Range of possible sanctions

AfDB's Sanctions Procedures provide for six different types of sanctions that may be imposed: (1) letter of reprimand, (2) conditional non-debarment, (3) debarment for a fixed or indefinite term, (4) debarment with conditional release, (5) restitution and/or remedy and (6) other sanctions.

[266] *Ibid*., §§5.6. and 5.7.
[267] *Ibid*., §3.3.
[268] *Ibid*., §8.8.
[269] *Ibid*.
[270] *Ibid*., §§8.4 and 8.5.
[271] *Ibid*., §10.1.
[272] *Ibid*., §14.1.

The first five sanctions are identical to the ones described in section B(v)(b) above relating to the sanctions prescribed by the WB's Sanctions Procedures.[273] Just as in IADB's case, the open-endedness of the "other sanctions", however, raises concerns over this sanction's potential violation of the *nulla poena sine lege* principle.

(c) Settlements

Just like WB's Sanctions Procedures, AfDB's Sanctions Procedures allow for the negotiated resolution of cases at any stage of the sanctions process up to the issuance of a decision by the Appeals Board.[274] Settlements are subject to review by the AfDB General Counsel and the Sanctions Commissioner.[275] Further, sanctions imposed through settlements are implemented identically to any sanction imposed through the traditional sanctions process, including the application of cross-debarment.[276]

The way in which AfDB has been using settlements raises concerns. Namely, in October 2015, AfDB reached a settlement with SNC-Lavalin International Inc. with respect to SNC's uncontested illicit payments ordered by former SNC's employees to public officials in order to secure contracts in relation to AfDB-financed projects in Uganda and Mozambique. Under the terms of the settlement agreement, AfDB imposed a conditional non-debarment on SNC for a period of two years and ten months, while SNC is required to make a settlement payment of CAD 1.5 million to flow into support of activities and programmes combating corruption on the African continent.[277] Similarly, in December 2015, AfDB reached a settlement with Hitachi, Ltd. with respect to Hitachi's engagement in sanctionable practices in order to be awarded the boiler works contract in the Republic of South Africa. Under the terms of the settlement agreement, AfDB imposed a debarment of twelve months with conditional release, while "Hitachi has voluntarily agreed . . . to make a substantial financial contribution to the AfDB, which will be used to fund worthy anti-corruption causes on the African continent."[278]

---

[273] *Ibid*., §10.2.
[274] *Ibid*., §15.2.
[275] *Ibid*., §15.3.
[276] *Ibid*., §15.5.
[277] See Press Release: *Integrity in Development Projects: AfDB and SNC-Lavalin settle corruption allegations* (October 2015), available at: http://www.afdb.org/en/news-and-events/article/integrity-in-development-projects-afdb-and-snc-lavalin-settle-corruption-allegations-14760/.
[278] See Press Release: *Integrity in Development: AfDB and Hitachi, Ltd. conclude settlement agreement* (December 2015), available at: http://www.afdb.org/en/news-and-events/article/integrity-in-development-afdb-and-hitachi-ltd-conclude-settlement-agreement-15118/.

In both instances, the sanctions appear quite lenient, do not trigger cross-debarment and thus raise concerns over the perceived ability of those with financial resources to forego a sanction commensurate with sanctionable practices committed. Moreover, the funds that respondents in both cases have been asked to pay are not being made as a restitution to remedy harm done by the respondent, but directly to AfDB.

F. Asian Development Bank's sanctions regime

(i) Early developments

The Asian Development Bank ("**ADB**") was established in 1966 with the aim to foster economic growth and cooperation in the region of Asia and the Far East and to contribute to the acceleration of the process of economic development of the developing member countries in the region.[279] ADB revised its sanctions regime in 2009, when it established an independent anticorruption office, the Office of Anticorruption and Integrity ("**OAI**"), which acts as an investigative body in cases involving sanctionable practices.[280] Prior to that, ADB's Integrity Division was part of the Office of the Auditor General.

Previously, after a respondent was given an opportunity to contest OAI's allegations, the OAI's investigative findings and the respondent's response, if any, were sent to ADB's Integrity Oversight Committee ("**IOC**"), an independent body comprising of three ADB's staff members. In 2011, ADB took a further step forward towards increasing the independence of its sanctions system and revised the membership of its IOC to include one external member.

(ii) Description of ADB's current sanctions process

(a) Two-step decision-making process

ADB's Sanctions Procedures (called Integrity Principles and Guidelines) differ markedly from those of the other MDBs, but nevertheless accommodate a two-tier decision-making process. More specifically, at ADB, OAI is the initial point of contact

[279] Agreement Establishing the Asian Development Bank, available at: http://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf, Article 1.
[280] See Office of Anticorruption and Integrity Annual Report 2009, available at: http://www.adb.org/documents/office-anticorruption-and-integrity-2009-annual-report.

for allegations of integrity violations involving ADB-related activities.[281] When OAI receives a complaint, its complaints assessment team considers whether the complaint is within OAI's mandate, credible, verifiable and material. At the conclusion of the screening, the team will recommend closure of the complaint (when the complaint does not meet all the criteria) or further investigation (if all the screening criteria are met) to the Director of OAI or his/her designee.[282]

At any time during the course of the investigation where OAI finds that there is sufficient evidence to support a finding of an integrity violation against a party, and that it is highly unlikely that the investigation will be concluded within a maximum of one year, OAI may present to the IOC a request for a temporary suspension.[283] OAI can also present to the IOC a request for a temporary suspension where a party has been temporarily suspended by another MDB, and if OAI determines that the party's continued eligibility may constitute a reputational risk or a risk of further integrity violations until such time that the party is debarred.[284] Unlike sanctions procedures of other MDBs, sanctions procedures of ADB do not allow a respondent to contest the imposition of a temporary suspension.[285]

After investigation, and if OAI finds that a party has committed an integrity violation, OAI will provide that party an opportunity to respond. OAI will send its findings to the party, which may or may not contain a proposed sanction. The party is given a reasonable period, which is generally not less than 30 days, within which to submit its response together with any evidence.[286] If requested, OAI will also entertain oral representations.[287] OAI will re-evaluate the case upon receipt of any response, and may conduct further enquiries and/or request additional information from the party.[288] Where a party accepts OAI's findings and proposed sanction, such party will execute a confirmation of agreement to the proposed sanction. The sanction against the party will be

[281] ADB's Integrity Principles and Guidelines (2015), available at: http://www.adb.org/sites/default/files/institutional-document/32131/integrity-principles-guidelines.pdf, §1.
[282] *Ibid*., §§ 29, 30 and 30.A; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development*, *Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[283] *Ibid*., §72.
[284] *Ibid*., §73.
[285] *Ibid*., §76, stating that temporary suspensions are not subject to appeal.
[286] *Ibid*., §§ 58 and 63.
[287] *Ibid.*, §60.
[288] *Ibid.*, §61.

effective from the date OAI received the signed confirmation.[289] This process is markedly different from that of other MDBs, where both the evaluation of the case upon receipt of any response from a respondent and a decision on the type of sanction to be imposed are within the purview of the first-tier decision-maker, rather than the investigators.

Where, however, a party disputes OAI's investigative findings or when there is no response to the findings, OAI will provide the IOC with a report of its investigation, together with the party's response to the findings, if any. As noted above, the IOC consists of three voting members, one of whom is selected from a list of external members. Unlike the other MDBs' Sanctions Boards, IOC is majority internal. The IOC determines, on a more probable than not basis, whether the party violated ADB's Anticorruption Policy and sanction should be imposed.[290]

Finally, a sanctioned party can appeal to the Sanction Appeals Committee ("**SAC**") within 90 days from the date a sanction is imposed. The SAC will consider appeals that include new information that is relevant to the IOC's decision and could not have been reasonably known to the appellant at the time OAI concluded its investigation.[291] The SAC consists of two or three ADB's Vice Presidents, appointed by the Executive Directors.

ADB publishes only the names of entities and individuals that have been debarred more than once.[292] Under this approach, first-time violators may be seen as having an opportunity to improve their ethical standards and controls without the added pressure of public sanctions or cross-debarment. The list of parties that ADB debars for the first time, although not published, is made available to parties with a demonstrated need to know.[293] These parties are not subject to cross-debarment by other MDBs, given that, under the Cross-Debarment Agreement, cross-debarment applies only if the decision is made public

[289] *Ibid.*, §64; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[290] *Ibid.*, §§ 62, 65 and 69; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[291] *Ibid*., §98; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).
[292] *See* ADB's Sanctions List, available at: http://lnadbg4.adb.org/oga0009p.nsf.
[293] ADB's Integrity Principles and Guidelines, §110; see also John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015).

by the sanctioning institution.[294] ADB also publishes synopses of the debarment decision on its website, although the information is not linked to the names of the debarred entities and individuals.

Unlike sanctions procedures of other MDBs, sanctions procedures of ADB do not allow for the settlement of cases.

(b) Range of possible sanctions

ADB's Integrity Principles and Guidelines provide for six different types of sanctions that may be imposed: (i) debarment, (ii) debarment with conditional reinstatement, (iii) conditional non-debarment, (iv) reprimand, (v) restitution and/or remedy and (vi) caution.[295]

The first five sanctions are identical to the ones described in section B(v)(b) above relating to the sanctions prescribed by the WB's Sanctions Procedures. Caution is given where a party has committed a lapse not amounting to an integrity violation (e.g., ordinary negligence).[296]

G. Comparison of MDBs' sanctions regimes and the cross-debarment regime

(i) Comparison of MDBs' sanctions regimes

The following table provides a comparison of key elements of the sanctions procedures of each of the five MDBs:

	WB	IADB	EBRD	AfDB	ADB
Types of sanctionable practices	(i) Corruption (ii) Fraud (iii) Collusion (iv) Coercion (v) Obstructive practice	(i) Corruption (ii) Fraud (iii) Collusion (iv) Coercion (v) Obstructive practice	(i) Corruption (ii) Fraud (iii) Collusion (iv) Coercion (v) Obstructive practice (vi) Theft (vii) Misuse of EBRD's resources or assets	(i) Corruption (ii) Fraud (iii) Collusion (iv) Coercion (v) Obstructive practice	(i) Corruption (ii) Fraud (iii) Collusion (iv) Coercion (v) Obstructive practice (vi) Abuse, which is theft, waste or improper use of assets related to ADB-related activity (vii) Conflict of interest

[294] Agreem AfDB ADB EBRD IADB WB
[295] ADB's Integrity Principles and Guidelines, §§ 79 and 86.
[296] *Ibid*., §86(iii).

					(viii) Violations of ADB sanctions (ix) Retaliation against whistleblowers or witnesses (x) Other violations of ADB's Anticorruption Policy
Sanctions on the basis of court judgments	No	No	Yes	No	No
Range of possible sanctions	(i) Debarment with conditional release (ii) Debarment for a fixed or indefinite term (iii) Conditional non-debarment (iv) Reprimand (v) Restitution	(i) Debarment with conditional release (ii) Debarment for a fixed or indefinite term (iii) Conditional non-debarment (iv) Reprimand (v)Other sanctions (vi)Sanctions of other institutions	(i) Debarment with conditional release (ii) Debarment for a fixed or indefinite term (iii) Conditional non-debarment (iv) Reprimand (v) Restitution (vi) Rejection of a proposal for award of contract (vii)Cancellation of a portion of EBRD's finance allocated to a respondent, but not yet disbursed	(i) Debarment with conditional release (ii) Debarment for a fixed or indefinite term (iii) Conditional non-debarment (iv) Reprimand (v) Restitution (vi)Other sanctions	(i) Debarment with conditional release (ii) Debarment for a fixed or indefinite term (iii) Conditional non-debarment (iv) Reprimand (v) Restitution (vi) Caution
Settlements	Yes, at any stage of the sanctions process up to the issuance of the Sanctions Board decision.	Yes, at any time prior to or during an investigation, but not after the receipt of a Statement of Charges by the Sanctions Officer.	Yes, at any stage of the sanctions process prior to the issuance of the Enforcement Commissioner's decision.	Yes, at any stage of the sanctions process up to the issuance of the Appeals Board decision.	No, although the respondent may accept the OAI's findings and proposed sanction.
Composition of appellate bodies	7 external members.	7 members – 4 external and 3 internal.	5 members – 3 external and 2 internal.	3 members – 2 external and 1 internal.	2 or 3 Vice Presidents of ADB.
Investigators allowed to appeal	No	No	Yes	No	No
Oral hearings	Yes, at the appellate level: at either party's request or at the Sanctions	Yes, at the appellate level: only at the Sanctions Committee discretion.	Yes, at the appellate level: at the respondent's request or at the Enforcement	Yes, at the appellate level: at either party's request or at the Appeals Board	Yes, at the investigations stage: at the respondent's request.

	Board discretion.		Committee discretion.	discretion.	
Live witness testimony during sanctions proceedings	Only from witnesses called by the Sanctions Board.	Not expressly stated in the Sanctions Procedures.	No	Not expressly stated in the Sanctions Procedures.	Not expressly stated in the Sanctions Procedures.
Publication of debarred parties' names	Yes	Yes	Yes	Yes	Only of those debarred more than once.
Publication of texts of the first-tier decision-maker's decisions	Yes	Summary only	No	Summary only	No
Publication of texts of the appellate body's decisions	Yes	Summary only	Yes	Summary only	No
Referral to national authorities	WB may make disclosure to any governmental authorities as deemed necessary.	The Chairperson of the Sanctions Committee, the Sanctions Officer or the Executive Secretary of the Committee may recommend to the President at any time, if they believe that the laws of any country may have been violated by a respondent, that the matter be referred to appropriate governmental authorities.	If the CCO makes a *prima facie* determination that criminal or regulatory laws of any country may have been violated by any party, the CCO may at any time, recommend to the President of EBRD that the matter be referred to appropriate governmental authorities.	AfDB may make disclosure to any governmental authorities as deemed necessary.	The OAI may consider whether it is appropriate to refer information relating to the complaint to the appropriate national authorities, and the OAI will seek the necessary internal authorisation to do so in cases where it finds a referral is warranted.

Below are a few examples illustrating how these differences could lead to different outcomes:

If an MDB's client used the MDB's funds for a purpose different from the one for which the MDB's funds were intended (for example, if it spent money on unnecessary infrastructure, or improperly diverted travel expenses for personal purposes), or if it simply misappropriated the MDB's funds, such conduct would probably result in a contractual breach. However, unless such conduct also fell under the definition of "fraudulent practice" (which would require an act or omission, including

misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation), it would lead to an investigation under EBRD's and ADB's Sanctions Procedures, while it would not lead to an investigation under the Sanctions Procedures of WB, AfDB or IADB, given that these organisations have not included theft or misuse of resources or assets as one of their sanctionable practices.

Further, a company found guilty of fraud or corruption in a national court would be eligible to participate in tenders for MDBs' contracts, except in the case of EBRD, which is the only MDB that may enforce final judgments of a judicial process in EBRD's member countries, if such judgment "has relevance and seriousness to the Bank."[297]

Moreover, a respondent could try to negotiate a settlement at any stage of the sanctions proceedings with AfDB and WB. EBRD's and IADB's regimes are a bit more restrictive, and allow respondents to negotiate a settlement only before the first-tier decision-maker has issued a decision (in the case of EBRD) or received a Statement of Charges from investigators (in the case of IADB). By contrast, if a respondent found itself accused of a sanctionable practice under ADB's Sanctions Procedures, settlement would not be an option, although the respondent could simply accept the investigators' findings and proposed sanction by signing a confirmation to that effect.

Furthermore, while EBD, ADB, AfDB and WB would each grant the respondent's request for an oral hearing, such option is not available under IADB's sanctions proceedings, which permit oral hearing only at the discretion of the Sanctions Committee. The respondent would have even less certainty if it wanted to request live witness testimony, given that ADB's, AfDB's and IADB's sanctions procedures are silent on whether this is permitted, while EBRD's procedures expressly do not allow live witness testimony, and WB's procedures allow only the Sanctions Board to call witnesses.

Finally, if a respondent were debarred, its name would be published on the relevant MDB's website, except in the case of ADB, which publishes the names of debarred parties only if they have been debarred more than once. Further, if the debarment were issued on

[297] EBRD's Enforcement Policy and Procedures, § 11.59 (*Third Party Finding*).

the basis of a first-tier decision maker's decision, only WB would publish the text of such decision. If the debarment were issued on the basis of an appellate body's decision, only EBRD and WB would publish the text of such decision, while ADB, AfDB and IADB would not.

The above-illustrated inconsistencies are problematic not only from the due process standpoint, but also on practical grounds. With different global and regional sanctions regimes proliferating, in practice it is very difficult for companies to monitor various regimes they are subject to, let alone study procedural idiosyncrasies of each regime when mounting a defence. Greater harmonisation on basic due process matters in MDBs' sanctions procedures would therefore be beneficial not only from the human rights perspective, but also from the practical perspective of ensuring that compliance with these regimes is practically feasible.

(ii) Cross-debarment regime

On 9 April 2010, the heads of the five MDBs signed an agreement providing for mutual and reciprocal enforcement of debarment decisions made by any one of them against entities that engage in sanctionable practices (i.e., corrupt, fraudulent, collusive and coercive practices) in connection with MDB-financed projects.[298] Under the Agreement for Mutual Enforcement of Debarment Decisions (the "**Cross-Debarment Agreement**"), sanctions covering the sanctionable practices that are imposed and made publicly available by any participating MDB may be enforced by other participating MDBs.

The Cross-Debarment Agreement establishes the following six principles shared by the contracting MDBs for addressing sanctionable practices:

(1) adoption of harmonised definitions of sanctionable practices for (i) fraudulent practice, (ii) corrupt practice, (iii) coercive practice and (iv) collusive practice;[299]

[298] AGREEMENT FOR MUTUAL ENFORCEMENT OF DEBARMENT DECISIONS, 9 April 2010, available at: http://www.ebrd.com/downloads/integrity/Debar.pdf.
[299] *Ibid*., § 2(a).

(2) adherence to standardised investigatory procedures that ensure fair, impartial and thorough investigations;[300]

(3) establishment of internal authorities with independent investigative and distinct decision-making authority;[301]

(4) publishing of written procedures that require (a) notice to entities and/or individuals against whom the allegations are made and (b) an opportunity for those entities and/or individuals to respond to the allegations;[302]

(5) use of the "more probable than not" standard, or its equivalent, to assess allegations of sanctionable conduct;[303] and

(6) providing for a range of sanctions that are proportional and incorporate mitigating and aggravating factors.[304]

An MDB may decide not to enforce a debarment decision of another MDB where such enforcement would be inconsistent with its own legal or other institutional considerations.[305] If an MDB decides not to enforce another MDB's debarment decision, it must "promptly notify" all other MDBs of such decision.[306] Finally, the Cross-Debarment Agreement does not preclude an MDB from instituting independent debarment proceedings, which could result in "concurrent, consecutive or subsequent periods of debarment" for entities and individuals engaging in sanctionable practices.[307]

It has been suggested that the Cross-Debarment Agreement constitutes "an unprecedented step in the fight against corruption in the context of public procurement and of cooperation for development", given that it allowed the MDBs to apply consistent standards to parties that would have otherwise posed a reputational risk to the same MDBs by being able to be awarded contracts funded by an MDB while being debarred by

[300] *Ibid*., § 2(b).
[301] *Ibid*., § 2(c)(i).
[302] *Ibid*., § 2(c)(ii).
[303] *Ibid*., § 2(c)(iii).
[304] *Ibid*., § 2(c)(iv).
[305] *Ibid*., § 7.
[306] *Ibid.*
[307] *Ibid*., § 6.

another.[308] In addition, the Cross-Debarment Agreement increased the deterrence effect already created by the risk of being publicly debarred by one of the main MDBs through the extension of the debarment to all other MDBs.[309]

H. Conclusion

While MDBs seek to support countries in their development efforts, corruption in recipient societies can undermine this support. Consequently, MDBs attach to their financing a range of integrity measures aimed at ensuring the proper use of their proceeds, which range from professional procurement rules, external audits and sanctions rules that exclude from their projects those who have engaged in a set of actions found damaging to development initiatives, including fraud, corruption, collusion and coercion. This Chapter has examined the origins and characteristics of MDBs' sanctions regimes, as one of the tools for curbing corruption and mitigating its negative effects on MDBs' development efforts.

My analysis has demonstrated that, while many similarities exist between the five systems (for example, notice requirements, two-step decision-making processes, and consideration of mitigating and aggravating circumstances), the systems are also quite distinct from each other, particularly regarding the composition of appellate bodies, the range of possible sanctions, the use of hearings and witnesses in the discovery process, the publication of decisions, and the use of negotiated settlements. This is problematic not only from the due process standpoint, but also on practical grounds of having to comply with five different regimes.

Because of the far-reaching consequences of the MDBs' sanctions proceedings, particularly in view of the Cross-Debarment Agreement, these proceedings are likely to evolve towards increasingly quasi-judicial models with the development of adjudicatory processes that are more elaborate than those that typify national administrative processes like FAR. At the same time, however, sanctions processes remain essentially administrative in nature, given that MDBs do not have any law enforcement powers. Therefore, in developing their sanctions proceedings, MDBs will need to determine the

[308] Lorenzo Nesti: *The 2010 "Agreement on Mutual Enforcement of Debarment Decisions" and Its Impact for the Fight Against Fraud and Corruption in Public Procurement*, Journal of Public Procurement, Volume 14, Issue 1, 62-95 (2014), at 68.
[309] *Ibid*.

most appropriate benchmark(s) for establishing due process rights most appropriate for their sanctions systems, in view of the MDBs' efforts to balance standards of efficiency and effectiveness, on the one hand, with the rule of law and due process considerations, on the other. Finding the appropriate benchmark regime for MDBs' sanctions procedures is far from easy, however. The obvious starting point are judicial review regimes, particularly the US and UK ones, given that MDBs' sanctions regimes are based on the common law principles and that three out of the five MDBs are based in these two jurisdictions. The next Chapter therefore starts off with the analysis of due process rights under the US and UK judicial review regimes, particularly in relation those issues where MDBs' sanctions procedures differ, such as the right to a hearing and to live witness testimony, and the right to be given reasons for the decision. Judicial review standards are not directly applicable to MDBs, however, because of MDBs' jurisdictional immunity, which is also analysed in the next Chapter 2. In search of the most appropriate legal principles applicable to MDBs' sanctions regimes, the next Chapter proceeds to examine possible benchmark regimes: from customary law and legal principles, and Global Administrative Law, which it finds to be too high-level and therefore not particularly useful for determining appropriate due process standards, to Article 6(1) of the ECHR and MDBs' administrative tribunal jurisprudence.

CHAPTER 2: JUDICIAL REVIEW STANDARDS; IMMUNITY OF MDBs AND BENCHMARKS FOR MDBs' SANCTIONS REGIMES

Introduction

Arguably, MDBs fulfil a public function and the decisions of their sanctions bodies should therefore – just as those of national administrative agencies – be subject to judicial review. As described in the first section of this Chapter, judicial review ensures that an essentially fair process is followed by an administrative agency and that an agency action is not arbitrary, capricious or an abuse of discretion. Nonetheless, because of MDBs' jurisdictional immunities, MDBs' sanctions decisions are not subject to judicial review, which raises concerns over the existence of mechanisms to prevent MDBs from making sanctions decisions that are arbitrary, capricious or an abuse of discretion. As demonstrated in the second section of this Chapter, domestic courts will not always uphold immunity of international organisations whose decisions fail to uphold appropriate due process standards. The key question that this Chapter addresses therefore is: What legal standards should underpin MDBs' sanctions regimes? The third section of this Chapter tries to answer this question by proposing four possible sources of best practice standards for MDBs' sanctions regimes.

1. Judicial review standards

A. Introduction

The phrase 'administrative law' is used to refer to the law governing the organisation and activities of administrative agencies. It defines the structural position of administrative agencies within the governmental system, specifies the decision-making procedures that they must follow and determines the availability and scope of review of their actions by an independent judiciary.[310] Administrative agencies were established to do the government's work in a simpler and more direct manner than the legislature could do by enacting a law, and than the courts could do by applying that law in various cases. Because they pursue their actions less formally, administrative agencies do not follow the civil procedure that is set up for courts. Instead, the law of administrative procedure has

[310] Richard Stewart: *US Administrative Law: A Model for Global Administrative Law?,* Law and Contemporary Problems (2005), at 73; see also Mark Elliott and Robert Thomas: Public Law, Oxford University Press (2011), at 454.

developed that agencies do not abuse their authority even though they use simplified procedures.[311]

Discussing the difference between the administrative and judicial process, US Justice Franfkurter said:

> "… unlike courts which are concerned primarily with the enforcement of private rights . . . administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts."[312]

This attitude reflects the view that the administrative branch of the government must be granted a large measure of autonomy in procedural matters. However, the limits of this power have not been clearly drawn.[313] In that context, judicial review of agency action provides an important set of controls on administrative behaviour by offering relief for a party that has been harmed by a particular agency decision. As described in more detail below, judicial review has evolved over a period of years into a complex system of statutory, constitutional and judicial doctrines that define the proper boundaries of this system of oversight. The sections that follow briefly describe the bases for judicial review of administrative decisions in the UK and the US, with the focus on due process violations. Both jurisdictions were selected because MDBs' sanctions regimes emanated from FAR and are thus firmly grounded in the common law tradition. Given these origins of MDBs' sanctions regimes, the examination of judicial review standards in the Anglo-American jurisdictions is relevant and more suitable than a civil law system for determining appropriate due process standards for MDBs' sanctions regimes.

---

[311] *Ibid*.
[312] *FCC v National Broadcasting Co.*, 319 U.S. 239, 248 (1943), cited in St. John's Law Review: *Due Process and the Right to Counsel in Administrative Proceedings*, St. John's Law Review, Volume 32, Iss.1, Article 8, at 67-8.
[313] St. John's Law Review: *Due Process and the Right to Counsel in Administrative Proceedings*, St. John's Law Review, Volume 32, Issue 1, Article 8, at 68.

B. Judicial review standards in the UK and the US

Judicial review is the procedure by which an individual can seek to challenge the policy, decision, action or failure to act of a public body. Judicial review is available as a means of challenging the legality of decisions of government authorities, and is regarded as a procedure of last resort which should be used only where the aggrieved party has no alternative remedy such as a right to appeal. Moreover, where an appeal is available, it is usually preferable for an aggrieved party to pursue that option, because an appeal may well involve a reconsideration of the merits of the case, not merely its legality.[314] Traditionally, the main focus of judicial review has been on the way in which the decision was rendered, rather than on the decision itself.[315]

(i) Judicial review in the UK

(a) Bases for judicial review

Judicial review in the UK is governed by section 54.1 of the Civil Procedure Rules, which says:

> "(2) In this Part –
>
> (a) a 'claim for judicial review' means a claim to review the lawfulness of
>
> (i) an enactment; or
> (ii) a decision, action or failure to act in relation to the exercise of a public function."

Courts have been concerned to emphasise that, in judicial review proceedings, they are exercising supervisory, not an appellate, jurisdiction. Thus, for example, in *Chief Constable of the North Wales Police v Evans*,[316] Lord Hailsham described the difference between judicial review and appeal as follows: "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in they eyes of the court." Judicial review is therefore a process by which a court reviews a decision made by a public body in order to decide whether or not that decision was lawful, while an appeal is usually brought to challenge the outcome of a particular case.

---

[314] Peter Leyland and Gordon Anthony: Administrative Law, 7th Edition, Oxford University Press (2013), at 184.
[315] Mark Elliott and Robert Thomas: Public Law, Oxford University Press (2011), at 452.
[316] [1982] 1 WLR 1155.

Not all decision-making bodies will be subject to judicial review. Many applications for judicial review concern such bodies as local authorities carrying out statutory duties, which are quite clearly subject to public law remedies. The fact that a body derives its authority from statute will generally be conclusive, although not always.[317] Difficulties, however, arise in the case of bodies that are created in some other way, such as self-regulatory bodies set up by persons with a common interest, or where a public authority contracts set out its services. In the landmark case, *R v City Panel on Takeovers and Mergers ex parte Datafin plc*,[318] the Court of Appeal found that, to be subject to judicial review, a body needs to have a "public element" or be under some "public duty".

In *Regina (Beer (Trading as Hammer Trout Farm)) v Hampshire Farmer's Markets Ltd,*[319] the Court of Appeal listed four crucial factors that warranted judicial review in the case which concerned a private company to which the local council had transferred certain powers: (1) first, the company was set up by the council using its statutory powers; (2) second, the markets took place on public land to which the public had access; (3) third, the company was set up by the Council with the specific aim of running the market and thus "stepped into the Council's shoes"; and (4) fourth, the Council substantially assisted the company in carrying out its activities. These were sufficient to render the running of the markets a public function despite the fact that in doing so the company was not carrying out any statutory function for the Council.

Applying these tenets to MDBs, it could be argued that MDBs have a "public element", given that they are created by a group of countries, in order to provide financing and advisory services for the purpose of development. They are publicly funded and, arguably, if they did not exist, the individual governments would be likely to step in to fulfil MDBs' function through their own development organisations. Thus, it could be argued that judicial review standards should be applicable to MDBs' administrative decisions, including sanctions decisions.

[317] For example, *R (on the application of West) v Lloyds of London* [2004] EWCA (Civ) 506, Dr West applied for judicial review of four decisions of the Business Conduct Committee of Lloyd's of London.
[318] [1987] 2 WLR 699.
[319] [2004] 1 WLR 223.

(b) Reasons for judicial review

The most common reasons for judicial review in the UK are: i) illegality/*ultra vires* doctrine, ii) improper purpose, iii) irrationality or unreasonableness, iv) procedural impropriety, v) bias, vi) flawed consultation process, vii) violation of a party's legitimate expectations and viii) section 6(1) of the European Convention on Human Rights (ECHR).[320] Below, the chapter examines judicial review on the grounds of procedural impropriety, which is most relevant to the analysis of appropriate due process standards under MDBs' sanctions regimes. Section 6(1) of the ECHR is analysed in greater detail in section 3 of this Chapter.

For much of the first half of the 1900s, courts drew a distinction between administrative decisions and 'judicial' type decisions, allowing the right to a hearing, or consultation, only in the latter type of case.[321] This distinction was largely swept away by *Ridge v Baldwin* [1964] AC 40, often described as "the turning point of judicial policy", which extended the doctrine of procedural fairness in judicial hearings into the realm of administrative decision making. Namely, *Ridge* made it clear that it was not so much the type of decision being made, or the status of the person making it, that was important, so much as whether fairness demanded consultation. In determining this issue, the primary matter to look at is the *impact* of the decision on the person affected and, in particular, what rights or interests of the person are affected by the decision.[322]

If the decision affects a person's legal rights, then the decision-maker will generally be required to follow a high standard of fairness – as in civil or criminal trials.[323] More difficult are those cases where the decision will affect an interest, for example a person's business, but will not infringe his or her rights. A classic example cited by Fenwick and Phillipson is a case where the decision in question was to revoke a licence allowing a person to run their business. In general, the individual interest will have to be balanced against the cost and inconvenience to the decision-maker of holding hearings and following lengthy procedures. But sometimes in cases of this sort, a person affected by a

[320] Peter Leyland and Gordon Anthony: Administrative Law, 7th Edition, Oxford University Press (2013), at 269 and Mark Elliott and Robert Thomas: Public Law, Oxford University Press (2011), at 463.
[321] Helen Fenwick and Gavin Phillipson: Text, Cases and Materials on Public Law and Human Rights, 3rd edition, Routledge (2011), at 797.
[322] *Ibid*.
[323] *Ibid.*

decision may also be able to claim a right to a hearing or a consultation simply by virtue of the importance of the decision for his or her livelihood, reputation or some other vital interest.[324] Thus, in *R v Barnsley Metropolitan Borough Council ex parte Hook*,[325] which concerned a market trader, Hook, being banned for life following an incident, the court held that the hearing concerning his case had to be run in accordance with principles of procedural fairness.

As Fenwick and Phillipson suggest, a crucial aspect of the *Hook* decision was the fact that it deprived Mr Hook of his livelihood. By contrast, where someone complains of a decision not to grant him a licence in the first place, he is far less likely to be able to attack the procedure surrounding such a decision successfully. This is because he/she is seen as not having been deprived of any benefit he previously had, but merely as not having had a benefit granted to him.[326] If we compare this to MDBs' sanctions processes, we can conclude that MDBs' sanctions deprive respondents of the right they had beforehand – i.e., the right to act as borrowers, contractors, sub-contractors, supplier, sub-suppliers, consultants and sub-consultants in MDB-financed projects. Thus, one could possibly argue that an MDB sanction deprives such respondents of their livelihood, given the impact that such debarment has on their business not only with the five MDBs, but also with other entities which may be deterred by the respondents' public listing on MDBs' sanctions lists.

(c) Required procedures

The question that arises in the context of the judicial review cases is the extent of due process required in administrative proceedings. To that end, Fenwick and Phillipson argue that, in ascending order of seriousness, the different procedural safeguards that courts may find required are: (i) the notice of the charge against the person, (ii) the right to a hearing, (iii) the right to call witnesses and cross-examine the other party's witnesses and (iv) the right to legal representation. Each of these is described in more detail in continuation, together with the need to provide a reasoned decision which has emerged from case law.

[324] *Ibid.*
[325] [1976] 1 WLR 1052.
[326] Helen Fenwick and Gavin Phillipson: Text, Cases and Materials on Public Law and Human Rights, 3rd edition, Routledge (2011), at 799.

I. Notice

Notice of the case against a person is the lowest level of procedural protection: if a person has no notice of the case against him, he cannot make any effective representation on his own behalf. Because this right is so basic, it is only likely to be denied either for very pressing reasons of public policy (for example, national security) or where the applicant is a mere applicant for a benefit, where no wrongdoing is alleged against the applicant.[327]

II. Oral hearing

Oral hearing is a much more burdensome procedure, and in many cases, unlikely to be necessary. Conversely, as with the right to notice, the situations in which a person is likely not to be granted a right to make written representations is in the bare application cases.[328] In terms of deciding whether an oral hearing should be permitted, one school of thought that courts have used is to look at the *purpose* that any such hearing would serve. In other words, if the court thinks that allowing a party to make oral representations or call witnesses would make no difference to the party, then he has suffered no real unfairness.[329]

R (on the application of Smith) v Parole Board[330] offers some guidance on when oral hearing may be required. The case concerned two prisoners, released from prison on licence, who sought to resist subsequent revocation of their licences, because of the alleged breach of the licence by the claimants. They brought judicial review proceedings, arguing that the refusal of the Parole Board to hold oral hearings before deciding to revoke their licences was a breach of their due process rights. The relevant statutory rules permitted, but did not require oral hearings in these circumstances. In his concurring opinion, Lord Slynn helpfully observed that even though:

> "there is no absolute rule that there must be an oral hearing automatically in every case, [w]here . . . there are issues of fact, or where explanations are put forward to justify actions said to be a breach of licence conditions, or where the officer's assessment needs further probing, fairness may well require that there should be an oral hearing. If there is doubt as to whether the matter can fairly be dealt with on paper, then in my view the board should be predisposed in favour of an oral hearing. On any view the applicant should be

[327] *Ibid*., at 803.
[328] *Ibid*., at 804.
[329] *Ibid*., at 805.
[330] [2005] 1 WLR 350.

> told that an oral hearing may be possible though it is not automatic; if having been told this the applicant clearly says he does not want an oral hearing then there need not be such a hearing unless the board itself feels exceptionally that fairness requires one."

III. Right to call and cross-examine witnesses

It has been argued that it would make little point to conduct an oral hearing but refuse to allow for the presence of witnesses or their cross-examination.[331] Arguably, then, the essential test here is the same as that for an oral hearing: is the calling of witnesses, and allowing their cross-examination necessary to ensure a fair hearing of the applicant's case? Thus, in a case which involves merely an interpretation of rules, or the law, or an examination of one person's isolated conduct, a public authority will not generally be required to call witnesses. Similarly, if it thought such request were in bad faith (e.g., in order to obstruct or subvert proceedings by calling large numbers of witnesses), it would also not be required to call witnesses.[332]

The right to cross-examine witnesses was analysed in *Bushell v Secretary of State for the Environment*.[333] In this case the court considered planning procedures adopted on the construction of two new stretches of motorway, and in particular whether the Secretary of State had acted unlawfully in refusing to allow objectors to the scheme to cross-examine the Department's witnesses. The court held that it did not. Lord Diplock stated:

> "Proceedings at a local inquiry at which many parties wish to make representations without incurring the expense of legal representation and cannot attend the inquiry throughout its length ought to be as informal as is consistent with achieving those objectives. To 'over-judicialise' the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair. It would, in my view, be quite fallacious to suppose that at an inquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to cross-examination on behalf of parties who disagree with what they have said."

Still, the decision leaves open the question of why calling of witnesses was allowed, but their cross-examination was not.

IV. Right to legal representation

The approach here has been very much to deny any clear right to legal representation except in courts and in certain tribunals (in statutory tribunals, the position

---

[331] Helen Fenwick and Gavin Phillipson: Text, Cases and Materials on Public Law and Human Rights, 3rd edition, Routledge (2011), at 809.
[332] *Ibid*.
[333] [1981] AC 75.

is that legal representation should normally be permitted, in the absence of statutory provision to the contrary).[334] In a prisoners' rights case, *R v Secretary of State for the Home Dept ex parte Tarrant*[335], the court held that, in considering whether to allow legal representation, every parole board should consider the following factors: "the seriousness of the charge; whether points of law are likely to arise; the capacity of the prisoner to present his own case; any procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness between prisoners and between prisoners and prison officers."

V. Failure to give reasons for the final decision

In *R v Ministry of Defence ex parte Murray*,[336] the court provided a useful summary of the principles governing the right to be given reasons for the final decision:

(a) The law does not at present recognise a general duty to give reasons.[337]

(b) In the absence of a requirement to give reasons, the person seeking to argue that reasons should have been given must show that the procedure adopted of not giving reasons is unfair.[338]

(c) There is a perceptible trend towards an insistence on greater openness . . . or in transparency in the making of administrative decisions.[339]

(d) In deciding whether fairness requires a tribunal to give reasons, regard will be had not only to the first instance hearing but also to the availability and the nature of any appellate remedy or remedy by way of judicial review:

(i) The absence of any right to appeal may be a factor in deciding that reasons should be given.[340]

(ii) If it is important that there should be an effective means of detecting the kind of error [by way of judicial review] which would entitle the court to intervene, then the reasoning may have to be disclosed.[341]

(e) If the giving of a decision without reasons is insufficient to achieve justice, then reasons should be required; the reasons need be no more than a concise statement of the way in which the decision-maker arrived at its decision.[342]

---

[334] Helen Fenwick and Gavin Phillipson: Text, Cases and Materials on Public Law and Human Rights, 3rd edition, Routledge (2011), at 814.
[335] [1984] 2 WLR 613.
[336] [1998] COD 134.
[337] *R v Secretary of State for the Home Department ex parte Doody and Others* [1994] 1 AC 531.
[338] *Ibid*.
[339] *Ibid*.
[340] *Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310.
[341] *Ibid*.

(f) In favour of giving reasons are the following factors: the giving of reasons may, among other things, concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process.[343]

(g) In favour of not requiring reasons are the following factors: it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for articulation of sometimes inexpressible value judgments; and offer "an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge."[344]

(h) Although fairness may favour a requirement for giving reasons, there may be considerations of public interest which would outweigh the advantages of requiring reasons.[345]

(i) The giving of reasons will not be required if the procedures of the particular decision-maker would be frustrated by a requirement to give reasons.[346]

(ii) Judicial review in the US

(a) Bases for judicial review

The so-called Due Process Clause of the Fifth Amendment of the US Constitution guarantees no deprivation of life, liberty or property without due process of law. With the passage of the US Administrative Procedure Act (the "**APA**"), these procedural due process standards have been routinely applied to federal administrative agencies.[347] The APA applies to all administrative agencies and provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[348] The APA provides several types of judicial review that apply unless otherwise specified by statute. With respect to the standards of judicial review of agency action that a court will use to evaluate whether an agency's action is valid, the APA states that "the reviewing

---

[342] *Ibid*.
[343] *R v Higher Education Funding Council ex p Institute of Dental Surgery* [1994] 1 WLR 242.
[344] *Ibid*.
[345] *Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310.
[346] *Ibid*.
[347] Ruqaiijah Yearby: *A Right to No Meaningful Review under the Due Process Clause: The Aftermath of Judicial Deference to the Federal Administrative Agencies*, 16 Health Matrix 723 (2006), at 726.
[348] See 5 U.S.C. §§ 702 and 704.

court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

A party that has been adversely affected by an agency action or decision and that wants to avail itself of judicial review must demonstrate that: (a) the court has jurisdiction to hear the case, (b) the party has standing to challenge the administrative decision or action, (c) the case is ripe and not moot, (d) the agency's action is reviewable, (e) the party has exhausted all administrative remedies available within the agency, and (f) primary jurisdiction problems are not involved.[349]

Turning back to the Due Process Clause, in the administrative law context, the two important protected interests are property and liberty.

"**Property**" in the due process sense has both a traditional and non-traditional usage. In the traditional sense, property encompasses well-defined categories of wealth, such as money, tangible personal property, real estate, etc. Thus, for example, if an agency is bringing an enforcement proceeding seeking monetary penalty, the private party undoubtedly has a property interest at stake which implies due process protections.[350]

[349] *Ibid*., at 145.
[350] New York State Department of Civil Service: *Manual for Administrative Law Judges and Hearing Officers* (2002), available at: http://www.nysalja.org/wp-content/uploads/2011/03/manual4aljs.pdf, at 56.

The non-traditional sense of the word "property", however, requires closer examination. For example, government employees, holders of government licenses, applicants for and current recipients of social welfare benefits all suffer from a loss of their relationship with the government, and the question is whether the loss of such relationship constitutes a deprivation of a property interest for due process purposes.[351]

In 1972, the US Supreme Court ruled in two cases – *Board of Regents v Roth*[352] and *Perry v. Sindermann*[353], both of which required the Court to consider the due process requirements when employees were facing the non-renewal of their employment contracts. In *Roth*, the claimant (Roth) was a non-tenured professor, hired to teach for one year at a public university in Wisconsin. During that year he made comments against the university officials. He was not rehired for the following year, and no reason was given. Roth sued, claiming that the failure to provide him with a hearing before deciding to terminate his employment constituted a due process violation. The Supreme Court, however, ruled that Roth's employment did not fall under the nature of "liberty" or "property", because Roth, by his employment contract, did not have any legitimate entitlement to the employment.[354]

Perry v. Sindermann also involved a claim brought by a university professor who had taught at a state university, under a series of one-year contracts. When his contract ran out, the university did not renew it. Although the university issued a press release setting forth allegations of Perry's insubordination, it refused to provide him with a further statement of reasons for his non-renewal or a hearing to challenge it. In this case, however, the Supreme Court held that the professor might have a property interest. Unlike Roth, Perry had produced university handbooks and other official publications that arguably created an entitlement to continued employment during satisfactory performance. The Court was therefore able to distinguish the claimant's due process claim in *Perry* from *Roth*: As in *Roth*, the Court in *Perry* held that a simple refusal to rehire a non-tenured teacher did not amount to a deprivation of property. However, the Court stressed that the absence of a contractual right of renewal was not controlling. The employee in *Perry* had "alleged that the college had a *de facto* tenure program."[355] The existence of such a

[351] *Ibid.*
[352] 408 U.S. 564 (1972).
[353] 408 U.S. 593 (1972)
[354] See *Board of Regents v Roth.*
[355] *Perry v Sindermann*, at 600.

programme, and the claimant's participation in it, constituted a sufficient interest in property to entitle him to a hearing before dismissal.

Roth and *Perry* thus show that the question of whether a private party has a property interest can turn on very narrow factual distinctions and, consequently, administrative law judges and other agency employees have been advised to assume that due process principles do, in fact, apply to the proceeding before them.[356]

"**Liberty**" interests, like property interests, can be divided into fundamental and non-fundamental interests. Fundamental liberty interests are those that are sufficiently well-recognised that they are protected regardless of how they are defined by state law. These types of interests include free speech, voting, privacy and other interests that are protected expressly or implicitly by the US Constitution and thus trigger a hearing requirement.[357]

Non-fundamental liberty interests closely resemble property interests. In order for a person to successfully assert that he has a non-fundamental liberty interest, he must be able to point to some statute, regulation, contract or other source of law that creates such entitlement. Non-fundamental liberty interests differ from property interests only in that liberty interests lack a clear monetary value, while property interests have a clear monetary value.[358]

One context in which liberty interests are raised in administrative matters, which is quite relevant in the context of sanctions regimes of MDBs, is a reputational injury. The US Supreme Court has held that a person does not have a liberty interest in his reputation as such. However, an injury to reputation, coupled with some other significant negative consequences is indeed a loss of liberty that triggers due process.[359]

[356] New York State Department of Civil Service: *Manual for Administrative Law Judges and Hearing Officers* (2002), at 58.
[357] *Ibid*., at 59.
[358] *Ibid*., at 60.
[359] *Ibid*., at 61.

For example, in *Miller v DeBuono*,[360] a nurse's aide was accused of hitting one of her patients. Under state law, her name was to be placed on a registry maintained by a state agency for the purpose of identifying abusers. The New York Court of Appeals held that the aide had a liberty interest at stake. Placement of her name in the registry called into question her reputation *plus* it had the effect of severely limiting her employment opportunities, as the registry was publicly available.[361] Because she had a liberty interest at stake, her due process rights were triggered, and the court ruled that she should have received extensive procedural protections before being placed on the registry.[362]

This can be compared to the consequences of debarment of parties found to have engaged in sanctionable practices in relation to MDB-financed contracts, given that such debarments are made public on MDBs' websites, which has a significant impact on the affected parties' reputation.

(b) Required procedures

Assuming there is an administrative action in which a party has a property or liberty interest at stake, the party's right to "due process of law" is triggered. Of course, this is not a mechanical test, and notions of the appropriate amount of procedures required have evolved over time.[363]

One of the most famous administrative due process cases in the United States Supreme Court's opinion is *Goldberg v Kelly*.[364] In that case, John Kelly and others sued when State and local officials terminated their welfare benefits without having given them prior notice and an opportunity to be heard. The Supreme Court ruled that the then-existing procedures for determining eligibility under the Aid to Families with Dependent Children Programme were inadequate, because those procedures gave the recipient an insufficient opportunity to contest the reasons for being removed from the eligible list. In ruling that the then-existing procedures were inadequate, the Court ruled that, at a minimum, due process requires:

[360] 90 N.Y.2d 783 (1997)
[361] New York State Department of Civil Service: *Manual for Administrative Law Judges and Hearing Officers* (2002), at 61.
[362] *Ibid*., at 61-62.
[363] *Ibid*., at 62.
[364] 397 U.S. 254 (1970).

- adequate, pre-deprivation notice of the basis for the welfare department's proposed action, followed by
- an opportunity to contest the action in an administrative hearing bearing most of the elements of a judicial proceeding, including:

    - an impartial adjudicator,
    - a proceeding on the record, and
    - the right to:

        - appear in person,
        - confront and cross-examine adverse witnesses,
        - adduce evidence through testimony and documents,
        - present written and oral arguments, and
        - be represented by counsel.[365]

The Court justified this holding, to a great extent, on its finding that the stakes for a welfare recipient facing loss of her means of survival, were "simply too high," and the risk of erroneous deprivation too great to permit any less protective process.

As noted in Chapter 1, more recently, in *Matthews v Eldridge*[366], the Supreme Court has articulated a more flexible test, which requires that due process rights be balanced against three factors: (1) first, the value of the property or liberty interest, (2) second, the risk of an erroneous deprivation of such interest through the procedure used, and the probably value, if any, of additional or substitute procedural safeguards and (3) finally, the cost to the government in providing more procedure. Thus, arguably, for smaller matters, very informal hearings can suffice. For administrative matters in which much of the evidence is documentary or technical, written submissions can substitute for what otherwise might be lengthy oral hearings. As long as the procedures give all parties concerned a reasonable opportunity to present their case, and the decision is made in a

[365] See Laura J. Cooper: *Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised Is a Question of Law?*, 64 Minnesota Law Review 1107 (1980) and Jason Parkin: *Adaptable Due Process*, 160 University of Pennsylvania Law Review 1309 (2012).
[366] 424 U.S. 319 (1976).

reasoned, fair and impartial manner based upon what the decision-maker learns at the hearing, due process is generally satisfied.[367]

C. Conclusion

The examination of judicial review standards in the Anglo-American jurisdictions is relevant for determining appropriate due process standards for MDBs' sanctions regimes, which are modelled on the US FAR. While the UK and the US offer several grounds for judicial review of administrative decisions, the most relevant for purposes of determining appropriate due process standards of MDBs' sanctions regimes are procedural improprieties. In that context, several principles of fundamental due process rights emerge from the UK and the US judicial review case law, which could prove useful for MDBs:

First, notice of the charges against the respondent (which all MDBs' sanctions procedures provide for) and a decision by an impartial adjudicator are fundamental due process rights. Oral hearing is not an absolute right and should be required only if there is doubt as to whether the matter can be fairly dealt with on the basis of written submissions only. Similarly, the right to call and cross-examine witnesses should be allowed only if it is necessary to ensure a fair hearing of the respondent's case. Further, the right to legal representation depends on the seriousness of the charges, the likelihood of legal points arising, the capacity of the respondent to present its own case, any procedural difficulties, the need for reasonable speed in making the adjudication, and the need for fairness. Finally, the right to be given the reasons for the final decision depends on several factors, including whether the giving of reasons is required to achieve justice, but bearing in mind, on the other hand, considerations of public interest which would outweigh the advantages of requiring reasons. Such reasons need be no more than a concise statement of the way in which the decision-maker reached the decision.

Nevertheless, despite the fact that it can be argued that MDBs fulfil a public function and that their sanctions decisions are thus subject judicial review, as examined in the next section, because of MDBs' special status, courts have usually recused themselves from exercising jurisdiction over MDBs' administrative decisions, thus sheltering MDBs from the rigours of judicial review. However, with the number and activities of

[367] New York State Department of Civil Service: *Manual for Administrative Law Judges and Hearing Officers* (2002), at 65.

international organisations having multiplied in the recent decades, questions of accountability are taken more seriously than they were a few decades ago. Increasingly, domestic courts have been abandoning the traditional view of the immunity of international organisations whose decisions fail to consider due process rights, with an emerging consensus that international organisations must observe general principles of customary norms of international law, including certain due process norms. The chapter proceeds therefore to consider the issue of accountability of international institutions.

2. Accountability of international organisations

A. Introduction

Even though it could be argued that international organisations, including MDBs, perform a public function, decisions of international organisations do not benefit from judicial review in the same way that decisions of public bodies do. Because of jurisdictional immunities of international organisations, the key question is how international organisations are held accountable and by whom. The answer to this question requires the analysis of the immunities of international organisations. This Chapter describes the basis of immunities of international organisations and how courts of different jurisdictions around the world have interpreted them. Specifically, the Chapter looks at the treatment of immunities in the US, the UK, Italy, France and Belgium. These five countries were chosen because they all host a significant number of international organisations and their courts have addressed the challenges to international organisations' immunities. The Chapter further describes the treatment of immunities before the European Court of Human Rights (the "**ECtHR**") in view of several landmark cases, where international organisations' immunity was challenged on human rights grounds.

B. Basis of international organisations' immunities

The immunities of international organisations have their own distinctive basis, derived primarily from treaty law. The distinctive personality of international organisations is quite different from that of states. A state represents political communities, the effective government of a population in a fixed area territory, enjoying sovereignty and equality with other states. International organisations, by contrast, are essentially legal constructs. They do not have the material attributes of states, and their actions always take place on the territory of a state, yet they are characterised, *inter alia*, by their independence from executive, administrative legislative and judicial interferences of their members.[368]

Arguments justifying the immunity of international organisations generally fall into three categories:

[368] Chanaka Wickremasinghe: *The jurisdictional immunities of international organisations and their officials*, PhD thesis, London School of Economics and Political Science (2003).

The first and the most often cited argument is that the use of legal process by a state authority might be used for an illegitimate purpose, in order to exert political pressure on international organisations to act in certain ways or to desist from so acting.[369] For example, if WB does not grant a loan to country C, or does not make timely disbursement of funds pursuant to such a loan, then the next time a WB official travels to country C he/she may find him/herself subject to arrest or other arbitrary detention. Thus, without the protection of immunities, individual member countries could impose a myriad national legal obligations on an organisation, impairing its ability to conduct business efficiently, chilling open and frank discussions between staff, management and member countries, and undermining the global, multilateral nature of the organisation.[370]

Second, it has been suggested that for private contractual arrangements, including employment contracts, it would place an intolerable administrative burden upon international organisations were they obliged to subject themselves to the legal systems of every country in which they operate.[371]

Finally, international law is supposed to create a legal order higher than that of any national state. Therefore, the position of international organisations would be subverted if they were rendered subject to the jurisdiction of national courts, just as it would place impossible fetters on the Federal Government's position in the US if its actions were subject to the challenge in individual states' courts.[372]

Notably, the traditional grounds for state immunity are not valid for granting immunity to international organisations. The (now historic) view that immunity against lawsuits is an inherent element of the sovereign quality of the state, was never a consideration with respect to international organisations because they do not possess sovereignty, but are created by states through international agreements defining their legal

[369] August Reinsch: *Immunity of International Organisations and Alternative Remedies against the United Nations*, Seminar on State Immunity, Vienna University (2006), at 3.
[370] *Mendaro v World Bank*, 717 F.2d 610 (D.C. Cir, 1983) at 7-8.
[371] Matthew Parish: *An Essay on the Accountability of International Organizations*, International Organizations Law Review 7 (2010), at 310; see also W. M. Berenson: *Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS*, in H. Cisse, D. D. Bradlow and B. Kingsbury, The World Bank Legal Review, Volume 3 (2012), at 133.
[372] Matthew Parish: *An Essay on the Accountability of International Organizations*, International Organizations Law Review 7 (2010), at 310, at 320.

status and capacities.[373] A state has a territory and a population that are subject to its legislative and executive authority and over which it exercises judicial jurisdiction – thereby providing a claimant with the opportunity to sue before domestic courts. By contrast, an international organisation has neither citizens, a comprehensive body of law applicable to its activities, nor a territory. Therefore, a complaint against an international organisation before a domestic court will always be directed against a foreign legal person, and an alternative forum analogous to the possibility of suing a foreign state before its own courts is not available.[374] Thus, arguably, the immunity from judicial process before national courts reflects the determination of international organisations' member states that a rational use of their resources requires that the international organisation not be subject to vexatious litigation which would impair the ability of that organisation to carry out its functions or fulfil its purpose; or alternatively in inconvenient fora, where the organisation does not have an office, staff, papers or settled operational ways of working with local authorities. On the other hand, it might be argued that any person or organisation involved in cross-border activities is faced with similar problems, but few are offered the solution of immunity.[375]

Rules of the immunity of international organisations, including MDBs, are set out in their foundation documents, which contain a number of common characteristics:

(1) Often, the foundation document of the organisation refers to the fact that these privileges and immunities are necessary for the fulfilment of the functions or the purpose of the organisation – in other words, the 'functional necessity.'[376] This standard is flexible enough to allow courts to balance the operational needs of international organisations against other important legal principles and public expectations, such as fairness to private litigants and accountability under the rule of law. But in practice, many international organisations – including those whose foundational charters clearly contemplate that they will be sued in national courts – have insisted that only absolute or near-absolute immunity is sufficient to ensure

[373] August Reinsch: *Immunity of International Organisations and Alternative Remedies against the United Nations*, Seminar on State Immunity, Vienna University (2006), at 4.
[374] *Ibid.*
[375] Chanaka Wickremasinghe: *The jurisdictional immunities of international organisations and their officials*, PhD thesis, London School of Economics and Political Science.
[376] See, e.g., Article 44 of the Agreement Establishing the European Bank for Reconstruction and Development, and Article VII, Section 1 of the IBRD Articles of Agreement.

that judicial scrutiny does not impede them from achieving their institutional objectives.[377] On the other hand, however, functional necessity does not provide a specific yardstick by which it can be decided in each concrete case whether or not an organisation is entitled to immunity.[378]

(2) Generally, the immunity of the organisation is absolute and unconditional.[379]

(3) With respect to the denial of justice risk, waiver of immunity is possible. Thus, by way of example, the Agreement Establishing the European Bank for Reconstruction and Development says:

> "The Board of Directors may waive to such extent and upon such conditions as it may determine any of the immunities, privileges and exemptions . . . in cases where such action would, in its opinion, be appropriate in the best interests of the Bank. The President shall have the right and the duty to waive any immunity, privilege or exemption in respect of any officer, employee or expert of the Bank. . . ."[380]

Courts have generally recognised that the privileges and immunities afforded to international organisations are rooted in their independence, i.e., the need to protect international organisations from any member's unilateral control over their activities within the member's territory or purview, thus allowing organisations to fulfil their mission of public interest.[381]

The principle of immunity of international organisations has become increasingly criticised, however. If national courts cannot exercise jurisdiction over international organisations, who can? As case law has progressively accepted that the sovereignty of a state is not jeopardised when the state is brought before domestic courts for a dispute arising from a *jure gestionis* act, it has also been argued that the independence of an

[377] Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. (2008), at 474-75.
[378] Niels Blokker and Nico Schrijver: *Afterwords, International Organizations Law Review* 10 (2013), at 605.
[379] See, e.g., Article VII of the IBRD Articles of Agreement.
[380] Article 55 of the Agreement Establishing the European Bank for Reconstruction and Development.
[381] See, e.g., *Mendaro v. World Bank*, 717 F.2d 610 (1983); International Organizations Immunities Act, 22 U.S.C. §§288-288i (1976 & Supp. V 1981); and *Eurotrends v. Banque Asiatique de Développement*, Tribunal De Grande Instance de Paris (April 2015), File No. 13/07942.

international organisation would not be endangered if it too had to submit to the jurisdiction of local courts in respect of comparable disputes.[382]

Further, it has been suggested that one of the most important shortcomings in the public accountability of international organisations is the lack of opportunities for aggrieved individuals to obtain legal redress. Arguably, broad assertions of immunity also contravene two widely accepted principles of international law: the notion that individuals are entitled to minimum standards of procedural fairness in resolving claims against public entities, and that sovereigns should not use expansive grants of immunity as a way to avoid the rule of law or sidestep popular moral judgment.[383]

C. Case Law

In applying a stricter functional immunity standard, national courts have sometimes denied immunity to international organisations where they considered a specific activity to fall outside the scope of functional necessity.[384] For example, Italian courts have held that customary international law does not grant absolute immunity to international organisations and that international organisations established in Italy do not have immunity for transactions of a commercial nature, but only for acts related to their institutional purposes.[385]

Generally, however, national courts tend to accept a rather broad scope of functional necessity covering, in particular, employment disputes,[386] given that the protection of the independent functioning of the organisation should be balanced against the equally compelling demand of protecting the interests of potential litigants in having the opportunity to pursue their claims against an international organisation before an

[382] Emmanuel Gaillard and Isabelle Pingel-Lenuzza: *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass*, International & Comparative Law Quarterly, Volume 51, Part 1 (2002), at 5.
[383] Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. (2008), at 473-74.
[384] *Ibid*., citing *Camera confederale del lavoro and Sindicato scuola C.G.I.L. v Instituto di Bari del Centro internazionale di alti studi agronomici mediterranei;* see also *Amaratunga v Northwest Atlantic Fisheries Organisation* 2013 3 SCC 66.
[385] See, e.g., *Giovanni Porru v FAO*, the Rome Court of 1st Instance (1969); see also August Reinsch: *Immunity of International Organisations and Alternative Remedies against the United Nations*, Seminar on State Immunity, Vienna University (2006).
[386] August Reinsch and Ulf Andreas Weber: *In the Shadow of Waite and Kennedy*, International Organizations Law Review 1 (2004), at 64.

independent judicial or quasi-judicial body.[387] What follows is an overview of the ways in which different courts in the aforementioned selected jurisdictions have interpreted the jurisdictional immunities of international organisations.

(i) US courts

Under US law, international organisations possess privileges and immunities set forth in ratified treaties, as well as the privileges and immunities set forth in the International Organizations Immunities Act ("**IOIA**"), which was adopted in 1945. IOIA provides that "[i]nternational organizations, their property, and their assets, wherever located and by whomsoever held, shall enjoy ***the same immunity*** from suit and every form of judicial process as enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceeding or by the terms of any contract." (emphasis added)[388] "International organisation" is, in turn defined as "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided."[389] Therefore, the immunity conferred by IOIA is subject to two sources of limitation: First, the organisation itself may expressly waive its immunity. Second, the President may specifically limit the organisation's immunities when he selects the organisation as one entitled to enjoy IOIA's privileges and immunities.

The question of whether international organisations and their employees enjoy absolute or limited immunity under US law has long been the subject of a split among US federal courts. In terms of case law, the DC Circuit has played a central role in the interpretation of IOIA. Due to its location, the DC Circuit has jurisdiction over all suits filed against international organisations headquartered in DC. As a result, it has heard almost all of the cases involving IOIA immunity claims.[390] Broadly speaking, the DC

[387] *Ibid*., at 65.
[388] International Organizations Immunities Act, Title I, §2(b).
[389] *Ibid*., Title I, §1.
[390] George B. Adams III: *Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations*, 81 Fordham L. Rev. 241 (2012), at 262.

Circuit follows a two-step analysis when determining whether an international organisation is entitled to judicial immunity under IOIA:

(1) First, it establishes the baseline standard of immunity authorised by IOIA, which requires the court to determine whether IOIA permanently adopts "the same" foreign sovereign immunity rules that the Foreign Sovereign Immunities Act ("**FSIA**") conferred to foreign states in 1945, when IOIA was enacted, or whether it incorporates subsequent changes, which limited foreign sovereign immunity in the context of commercial activities,[391] so that the two immunities remain "the same" over time. As described in more detail below, the court has traditionally opted for the former interpretation.

(2) Second, the court must determine whether an international organisation has waived any immunity to which it may be entitled under IOIA. This includes specific waivers that may be made in the context of a given case or contract, and more general waivers that may be found in an organisation's foundation documents.[392]

One of the first cases heard by the DC Circuit on the immunity of international organisations from a lawsuit brought by former employees was *Broadbent v Organization of American States*.[393] The former employees of the Organization of American States (the "**OAS"**) sued the employer for damages alleging that their terminations were a breach of contract. OAS moved to dismiss the suit on the immunity grounds. The employees argued that IOIA conferred on international organisations the same immunity enjoyed by foreign governments under FSIA; FSIA, in turn, indicates that foreign governments enjoy only restrictive immunity; therefore, the employees reasoned that international organisations enjoyed only restrictive immunity as well.

The court found that it did not need to decide whether FSIA had the effect on limiting the scope of immunities under IOIA because, even under the restrictive view, the

[391] See 28 U.S.C. § 1605(a)(2).
[392] Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. (2008), at 492-3.
[393] *Broadbent v Organization of American States*, 628 F.2d 28 (DC Cir 1980).

employment of civil servants does not represent a commercial activity.[394] It then concluded that the OAS was insulated from the employees' lawsuits by finding that:

> "An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively."[395]

Three years later, the DC Circuit was faced with a similar situation in *Mendaro v World Bank*,[396] which also concerned a former employee bringing a lawsuit against WB, which claimed immunity. In its decision, the DC Circuit avoided the FSIA altogether. Instead, it analysed the WB's immunity under IOIA and stated that "the members of the World Bank effectively curtailed much of the Bank's immunity from judicial process in Article VII, section 3 [of the Articles of Association of the International Bank for Reconstruction and Development] by stipulating the conditions under which actions may be brought against the Bank. Thus, even though the extensive immunity conferred by section 2(b) [of IOIA] would normally insulate the Bank from jurisdiction over this type of action brought by employees, this court must accept jurisdiction over Mendaro's claim unless the Articles of Agreement preserve the World Bank's immunity to suits by employees."[397] The court, however, did not find any evidence that WB intended to waive its immunity, finding that the waiver of immunity to suits arising out of the WB's internal operations, such as in relations with its own employees, "would lay the Bank open to disruptive interference with its employment policies in each of the thirty-six countries in which it has resident missions, and the more than 140 nations in which it could be involved in its lending and financing activities."[398]

Nearly 15 years since *Mendaro*, in *Atkinson v Inter-American Development Bank*,[399] the DC Circuit reached a conclusive determination of the relationship between IOIA and FSIA. In this case, the claimant sought to garnish the wages of her former

[394] *Ibid*., at 33.
[395] *Ibid*., at 34-35.
[396] *Mendaro v World Bank*, 717 F.2d 610 (D.C. Cir. 1983)
[397] *Ibid.*, at 614.
[398] *Ibid.*, at 618.
[399] *Atkinson v Inter-American Development Bank*, 156 F.3d 1335 (1998).

husband, the IADB staff member who had fallen behind on alimony and child-support payments. In particular, the claimant argued that:

(a) IOIA conferred on international organisations only "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments";

(b) FSIA subsequently eliminated the immunity of foreign governments for claims based on their commercial activities; [400] and

(c) the IADB therefore had no entitlement to immunity for commercial activities, such as the payment of wages.[401]

According to the court's analysis, the issue turned on whether "the 1945 Congress mean[t] to refer to the law governing the immunity of foreign governments as it existed in 1945, or to incorporate as well . . . subsequent . . . changes to that body of law."[402] The court found that "despite the lack of a clear instruction as to whether Congress meant to incorporate in IOIA subsequent changes to the law of immunity of foreign sovereigns, Congress' intent was to adopt that body of law only as it existed in 1945 when immunity of foreign sovereigns was absolute. . . [Notably, however,] absolute immunity under IOIA is merely a baseline that is subject to modification by executive order."[403] The Court found that "[s]ince the purpose of the immunities accorded to international organizations is to enable the organizations to fulfil their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goals."[404]

Thus, according to the DC Circuit, the judiciary is the one vested with the authority to conduct the cost-benefit analysis to determine when a constructive waiver of immunity is appropriate. More specifically, the court hypothesised that the cost-benefit test would apply when international organisations engaged in commercial transactions, because otherwise private parties would be reluctant to trade without legal remedy.

[400] See 28 U.S.C. § 1665(a)(1) – (3).
[401] *Atkinson v Inter-American Development Bank*, 156 F.3d 1335 (1998), at 1339-40.
[402] *Ibid*., at 1340.
[403] *Ibid*.
[404] *Ibid*., at 1338.

Therefore, international organisations must have intended to include a commercial waiver in their foundation documents.[405]

This test has been criticised on the grounds that IOIA only allows express waiver of immunity.[406] When the judiciary engages in a balancing test to determine whether an organisation intended to waive its immunity in a particular situation, such waiver runs counter to the international organisations' *raison d'etre* and, arguably, may severely impair the ability of international organisations to carry out their mandate.[407]

In addition, it could also be argued that the "to enable the [MDB] to fulfil the functions with which it is entrusted" construct is merely a descriptive, purposive clause, which states the reason for according the relevant international organisation the immunities set out in its foundation documents and is not intended to require international organisations to justify the application of the asserted immunity – an argument recently upheld by the Supreme Court of Canada in its ruling on the WB immunity.[408] At the other end of spectrum, it has been suggested that the functional necessity doctrine has been interpreted much too broadly and should, instead, provide a framework to balance the operational requirements of international organisations against other important social values, such as fairness to private litigants, equal access to justice, and accountability under the rule of law.[409]

Finally, the *Atkinson* decision has been criticised because of the court's determination that, although IOIA says that international organisations enjoy the same immunity from judicial process as is enjoyed by foreign governments, the reference to the "same immunity" was to be interpreted as the immunity conferred to foreign states under the FSIA in force when IOIA was enacted in 1945 (which was a "virtually absolute immunity").[410] Instead, critics argue, the court should have recognised that a natural

[405] George B. Adams III: *Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations*, 81 Fordham L. Rev. 241 (2012), at 275.
[406] *Ibid*.
[407] *Ibid*.
[408] See *World Bank Group v Wallace*, 2016 SCC 15, ¶58.
[409] Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. (2008), at 521.
[410] *Atkinson v Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir 1998), at 1340.

reading of the "same immunity" language in IOIA dictates that the immunity of international organisations should evolve in parallel with that of foreign governments.[411]

In 2009, the court reaffirmed *Mendaro* and *Atkinson* in *Osseiran v International Finance Corporation*,[412] in which the claimant investor sued the IFC when its investment deal soured on the grounds of promissory estoppel and breach of confidentiality in a commercial transaction. The IFC claimed immunity under IOIA. Building on *Mendaro* and *Atkinson*, in which the court determined that it was for the federal judiciary to decide whether an international organisation's invocation of immunity for certain actions would interfere with its mission, and found that in those particular cases, the relevant international organisation had not waived immunity because the waiver of immunity would not yield the organisation any conceivable benefit, the court in *Osseiran* reasoned that immunity from lawsuits based on commercial transactions would actually harm an organisation's ability to fulfil its fundamental goals by hindering its capacity to operate in the marketplace.[413] In this case, the court found that the IFC did not identify any countervailing costs to suggest that immunity should not be waived. Therefore, the court found that the IFC had waived its immunity under IOIA for commercial transactions.[414]

However, in its most recent decision on the immunities of international organisations – *Budha Ismail Jam, et al. v International Finance Corporation*,[415] the US Supreme Court overturned the DC Circuit's decision (which had relied on *Atkinson*) and held that international organisations do *not* have absolute immunity that foreign governments enjoyed when IOIA, but rather limited immunity that foreign governments enjoy today. In reaching its conclusion, the Supreme Court noted that IOIA defines immunities by reference to comparable privileges and immunities enjoyed by foreign governments. Thus, the IOIA should be understood to link the law of international organisation immunity to the law of foreign state immunity, as defined by FSIA. As a consequence, international organisations are now exposed to potential liability if their

[411] Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, Suffolk Transnat'l L. Rev. (2008), at 497.
[412] *Osseiran v International Finance Corporation*, 552 F.3d 835 (D.C. Cir. 2009).
[413] *Ibid*., at 840.
[414] *Ibid*., at 840-1. See also, *BRO Tech Corp. v European Bank for Reconstruction and Development*, 200 WL 1751094 (E.D. Pa) (2000), in which the Eastern District of Pennsylvania found that EBRD had waived its immunity in a commercial transaction.
[415] *Budha Ismail Jam, et al. v International Finance Corporation*, No. 17–1011, 586 US (2019).

actions fall within one of the exceptions to the FSIA, including the exception for "commercial activities."

Outside the DC Circuit, the Third Circuit rejected the *Atkinson* interpretation in *OSS Nokalva, Inc. v European Space Agency*.[416] In this case, the claimant software provider from New Jersey sued the European Space Agency (the "**ESA**") for claims including breach of contract, conversion, negligence, and tortious interference. The ESA argued that it enjoyed absolute immunity under IOIA. Although the District Court agreed, it found that the ESA had waived immunity, due in part to the fact that the ESA had executed licence agreements, under which the ESA had expressly submitted to court jurisdiction.[417]

On appeal, the Third Circuit held that IOIA does not confer absolute immunity on international organisations and that it only provides international organisations with "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments",[418] where "the same" was interpreted to include the restrictions to sovereign immunity adopted under the FSIA subsequent to IOIA enactment.

As a result, the Third Circuit deemed IOIA to incorporate the standards set forth in the FSIA, including the exception to immunity for commercial activities having close connections to the territory of the United States.[419] In conclusion, the Third Circuit stated that the recognition of absolute immunity enjoyed by international organisations would produce "anomalous result." Because foreign governments enjoyed no immunity from claims based on their commercial activities, the Court found no reason "why a group of states acting through an international organization is entitled to broader immunity than its member states when acting alone."[420]

Finally, it is important to note that, unlike its European counterparts, the US judiciary does not have to reconcile the obligations set forth in the relevant immunity and those included in or developed on the basis of the European Convention on Human Rights.

---

[416] *OSS Nokalva, Inc. v European Space Agency*, 617 F.3d 756 (3d Cir. 2010).
[417] *Ibid*., at 759.
[418] *Ibid*., at 762.
[419] *Ibid*., at 763-4.
[420] *Ibid*., at 764.

Therefore, US courts have not developed case law similar to *Waite and Kennedy v Germany*, described in more detail in section (vi) below, which conditions the granting of immunity on the availability of "alternative remedies" to claimants.

(ii) UK courts

The UK view appears to be that the basis of the privileges and immunities of international organisations is premised on the principle of functional necessity, as set out in the policy document from 1969.[421] The standard way in which international organisations and their officials enjoy privileges and immunities in the UK is when the UK government adopts an "Order of Council" pursuant to sections 1(2)(b)-(d) of the International Organisations Act, which state that an international organisation, its officials, employees and experts shall have the privileges and immunities set out in Parts I, II and III of Schedule 1 of the International Organisations Act.

UK courts have generally shown considerable consciousness of the fact that, for the most part of their activities, international organisations operate at the level of international law, and have been careful to observe the proper role of national courts when faced with cases concerning international organisations.[422] In two cases relating in broad terms to labour disputes with EBRD (specifically, race and sex discrimination), the Employment Appeal Tribunal found that the respective disputes concerned the official employment-related functions of EBRD which were immune from the jurisdiction by virtue of the Headquarters Agreement that had been given effect in the relevant Order of Council under the International Organisations Act of 1968.[423] Specifically, in *Mukoro v European Bank for Reconstruction and Development*, the claimant argued that his application for employment at EBRD was unlawfully rejected on the grounds of race. More particularly, he put forward two arguments in an attempt to defeat EBRD's claim of immunity: first, he argued that an act of racial discrimination could not be construed as an "official activity" of EBRD, as this was inconsistent with EBRD's commitment to the respect for human rights as expressed in its founding document. Second, he argued that

[421] General Policy of her Majesty's Government on Privileges and Immunities of International Organizations states (1969).
[422] Chanaka Wickremasinghe: *The Immunity of International Organizations in the United Kingdom*, International Organizations Law Review 10 (2013), at 445.
[423] *Mukoro v European Bank for Reconstruction and Development* [1994] UKEAT 813_92_2303 and

the 1991 Order of Council, which granted privileges and immunities to EBRD was *ultra vires* insofar as it granted EBRD broader immunities than those required under its constituent treaty, which provided only for the immunity of EBRD's employees and officers and not for the immunity of EBRD itself.[424]

The Employment Appeal Tribunal rejected both arguments, finding that, with respect to the claimant's first argument, under the terms of the 1991 Order, "official activity" included "administrative activity", and the selection of staff fell within such administrative activity for which the Order provided immunity from suit. The claimant's second argument was rejected based on the court's interpretation of the UK-EBRD Headquarters Agreement that provided for the immunity of both EBRD and its staff.[425]

Entico Ltd. v UNESCO[426] is another mention-worthy case. It concerned a dispute between an English publishing company which contracted with UNESCO to produce a calendar. Entico alleged wrongful repudiation of contract by UNESCO, whereas UNESCO argued that no contract had been formed to begin with. The claimant argued that UNESCO's immunity was qualified by the requirement to provide an alternative remedy under section 31 of UNESCO's Specialised Agencies Convention. The court, however, interpreted section 31 quite narrowly and stated:

> "Section 31 itself offers no criteria pursuant to which the appropriateness of a mode of settlement is to be judged. . . It would be wholly inimical to the international scheme envisaged if individual States party arrogated to themselves the power to determine whether the provision made by each specialised agency for the settlement of disputes is adequate, whether considered generally or by reference to the facts of a particular case."

It is perhaps the specific facts of the case that offer a reason why the court was quick to reject any challenge to UNESCO's immunity: Entico had the option, under its purported contract with UNESCO, to take the dispute to arbitration under UNCITRAL rules, which is seen as an option providing access to justice.[427]

(iii) Italian courts

[424] See Dan Sarooshi and Antonios Tzanakopoulos: *United Kingdom*, in August Reinisch: The Privileges and Immunities of International Organizations in Domestic Courts, Oxford University Press (2013).
[425] *Ibid*.
[426] *Entico Corp Ltd v United Nations Educational Scientific & Cultural Organisation (UNESCO)* [2008] APP.L.R. 03/18.
[427] See Dan Sarooshi and Antonios Tzanakopoulos: *United Kingdom*, in August Reinisch: The Privileges and Immunities of International Organizations in Domestic Courts, Oxford University Press (2013).

Unlike their UK counterparts, Italian courts have gradually restricted international organisation immunity by interpreting the functional necessity principle in an increasingly rigorous manner. Functional immunity is confined to activities having a "public" or "sovereign" nature.[428] However, like US courts, Italian courts have become increasingly more demanding in this regard and have retained the power to decide which activities are the essential purposes and "public" activities of the international organisation. Therefore, they retained the power to deny immunity where, in their opinion, the activity was not connected to a purpose which was regarded as being essential for the international organisation.[429]

It has been suggested that Italian courts have been forerunners in recognising that international organisation immunity should be subordinated to the availability of effective alternative remedies.[430] Namely, in the Italian legal order, international organisation immunity is provided under treaty law and treaties are subordinated to the Italian Constitution, which says that "[e]veryone can take judicial action for the protection of individual rights and legitimate interests."[431]

The constant concern of Italian courts has been the balancing of two competing interests: the fundamental right to judicial protection, on the one hand, and the immunity of international organisations, on the other hand.[432] This has been evident primarily in the context of disputes with international organisations' employees. Therefore, where alternative internal remedies are available, courts will typically find no breach of the right of access to court provided under the Italian Constitution.[433] By contrast, where no

[428] Beatrice I. Bonafe: *Italian Courts and the Immunity of International Organizations*, International Organizations Law Review 10 (2013).
[429] *Ibid*. See, e.g., *Chirico v ICAMAS, Corte di Cassazione*, Judgment No. 4968/1989 (1991), where the subject matter of the employee's claims was confined to pecuniary aspects.
[430] Beatrice I. Bonafe: *Italian Courts and the Immunity of International Organizations*, International Organizations Law Review 10 (2013), at 529, citing *Luggeri v ICEM*, Tribunale di Santa Maria Capua Vetere (1968).
[431] Article 24 of the Italian Constitution. See also *Pistelli v European University Institute*, Judgment No. 20995/2005 (2006).
[432] Beatrice I. Bonafe: *Italian Courts and the Immunity of International Organizations*, International Organizations Law Review 10 (2013), at 531. See also *Chirico v ICAMAS*, Corte di Cassazione, Judgment No. 4968/1989 (1991).
[433] *Ibid*.

internal remedies were available to an international organisation's employees, immunity has been denied and Italian jurisdiction upheld.[434]

Notably, Italian courts no longer appear to be satisfied with the formal existence of alternative remedies: recent decisions suggest that Italian courts will not shy away from ensuring that, before they grant immunity to an international organisation, the judicial protection of employees is entrusted to a body that is independent and impartial. Italian courts will therefore look into the composition of the adjudicating body established inside the international organisation to ensure that it is truly independent and impartial. For example, in *Drago A. v International Plant Genetic Resources Institute (IPGRI)*, the Supreme Court did not uphold the immunity from jurisdiction of IPGRI as a consequence of its failure to provide an independent and impartial judicial remedy alternative to court proceedings in the host state for the resolution of employment disputes. Mr Drago was a former IPGRI employee with a temporary employment contract. After the termination of the working relationship, he launched a court action invoking unfair dismissal and asked to be reinstated in service. The court found that the IPGRI Appeals Committee was a mere internal remedy, unsuited to provide appropriate judicial protection to an employee contesting his dismissal.[435] It further held that the jurisdictional immunity conferred upon IPGRI in its headquarters agreement with Italy was incompatible with the fundamental right to commence proceedings to protect one's rights contained in Article 24 of the Italian Constitution, because the organisation had not fulfilled its obligation pursuant to the headquarters agreement to provide an independent and impartial judicial remedy for the resolution of employment-related dispute.[436] Specifically, the Court held that IPGRI's "internal rules (known as the Personnel Policy Manual) state that disciplinary measures are to be re-examined by a body known as the Appeals Committee, which may also consider appeals of a non-disciplinary nature. This merely constitutes an internal remedy, which does not provide jurisdictional protection in the aforesaid sense."[437]

[434] See, e.g., *Scuola europea di Varese v Philippe*, Corte di Cassazione, Judgment No. 376/1990 (1991).
[435] *Drago v IPGRI*, Corte di Cassazione, Judgment No. 3718/2007 (2007).
[436] *Ibid*., as cited in August Reinisch: *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, Chinese Journal of International Law (2008), Volume 7, No. 2, at 298.
[437] *Drago v IPGRI*, Corte di Cassazione, Judgment No. 3718/2007 (2007), ¶ 6.6.

This preclusion of any form of judicial protection of the organisation's employees led the Court to conclude that IPGRI could not rely on its immunity and that the dispute fell within the jurisdiction of Italian courts.[438]

(iv) French courts

As in Italy, French courts have sometimes followed a restrictive approach towards the immunity of international organisations, particularly in relation to labour disputes. Unlike in the US and the UK, no specific domestic legislation has been enacted in France concerning international organisations. Consequently, sources of rules applicable to international organisations are typically found in international treaties introduced in the French legal order; specifically: the constituent treaties of international organisations; multilateral conventions and protocols on privileges and immunities, such as the Convention on the Privileges and Immunities of the UN; and bilateral agreements, such as headquarters agreements.[439] French courts rely exclusively on these sources when applying jurisdictional immunities.[440]

In recent years, French courts have been visibly influenced by the case law of the ECtHR and the necessity to preserve the right of any claimant to free access to a judge. Thus, for example, in *UNESCO v Boulois*, a French appellate court rejected UNESCO's claim of immunity by directly invoking ECHR. The court held that granting immunity "would inevitably lead to preventing [the claimant] from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Article 6(1) of the [ECHR] and fundamental liberties."[441]

More recently, in *Banque africaine de développement v M.A. Degboe,* Cour de Cassation decided that AfDB could not benefit from immunity because there was no internal tribunal that could decide a dispute between the Bank and a former employee.[442] In its decision, the court did not refer to the ECHR; rather, the decision was grounded on

[438] *Ibid*., ¶ 6.8.
[439] Genevieve Bastid Burdeau: *France*, in August Reinisch: The Privileges and Immunities of International Organizations in Domestic Courts, Oxford University Press (2013), at 104-5.
[440] *Ibid*., at 114.
[441] *UNESCO v Boulois*, Cour d'Appel Paris, 19 June 1998, at 294.
[442] *Banque africaine de développement v M.A. Degboe, Cour de Cassation*, 25 January 2005, Bull. civ. V, No. 04-41.012 (Fr.).

the notion of "international public order" which forbids the denial of justice.[443] This approach suggests that the idea of a "forfeiture" of immunity in cases in which no alternative remedy is provided is not limited to those situations where the right of access to justice is derived from the ECHR. Rather, it indicates that this concept may be "transferable" to other jurisdictions, where it may be based on due process or the prohibition of denial of justice understood as elements of an "international public order" or equally customary international law.[444]

The Court of Cassation confirmed its position in other decisions, and went further in its oversight, which is not limited to ensuring that there exists a tribunal within an organisation, but also extends to the characteristics of this tribunal and to the rights offered to claimants. Thus, in *Illemassene v OECD*,[445] the French Court of Cassation stressed the fact that the organisation was not bound by the ECHR, but carefully verified that staff members enjoyed the rights provided by the ECHR concerning access to justice. Specifically, the court examined the set-up of OECD's administrative tribunal and found that it did not violate the French concept of *ordre publique* and that, therefore, OECD was entitled to benefit from immunity to jurisdiction. In particular, the Court noted that the administrative tribunal judges were three highly qualified jurists from outside the OECD and were to exercise their functions with impartiality and complete independence. Further, the administrative tribunal sessions were open to public, unless otherwise requested by the parties in the proceedings; the dates of sessions were published on a list available to agents, delegations and the OECD's personnel association; and the judgments were issued in writing.[446]

Finally, French court was recently faced with a challenge to jurisdictional immunity of an international organisation (ADB) in the context of a debarment decision that ADB imposed on Eurotrends, a French company, under its sanctions procedures. More particularly, in July 2014, Eurotrends filed suit in the Paris Court of first instance, requesting the court to set aside ADB's debarment decision and to order ADB to pay

[443] *Ibid*.
[444] *See* August Reinisch: *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, Chinese Journal of International Law (2008), Volume 7, No. 2, at 298.
[445] *Illemassene v OECD*, Cour de Cassation, application number: 09-41030, 30 November 2010.
[446] *Ibid.*

Eurotrends €1.5 million in damages, plus interest and fees.[447] Eurotrends argued that ADB's debarment process deprived Eurotrends and its two directors (who joined the proceedings) of the right to access to a judge or to a fair legal process under the ECHR, as incorporated into international public policy or community law. Specifically, Eurotrends challenged ADB's debarment process and argued that ADB's sanctions procedures denied Eurotrends due process human rights. Further, Eurotrends also argued that ADB's sanctions regime was not sufficiently independent or impartial, partly because internal ADB personnel comprised its Sanctions Board, which according to Eurotrends, provided inadequate due process. ADB, on the other hand, requested the court to dismiss Eurotrends' claims on the basis of ADB's jurisdictional immunity as set out in Article 50 of the Agreement Establishing the Asian Development Bank.

In a judgment rendered in April 2015, the Paris Court of first instance held that Eurotrends' claims were not admissible, thereby dismissing Eurotrends' case. The court based its decision on the jurisdictional immunities clause of the Charter holding that "Article 50 [of the Charter] first establishes the absolute nature of ADB's jurisdictional immunity" from legal process and that the exceptions to such immunity are limited to acts in relation with the exercise of its power to borrow money, guarantee obligations, or to buy, sell or underwrite the sale of securities. The Court noted that ADB had not waived its immunity in the present case (Eurotrends had not argued that ADB had waived its immunities). The Court also ruled that while the "right to a judge" is recognised under international public law, this right is not absolute but rather subject to restrictions if the limitations are imposed for a legitimate purpose and are not disproportionate.

Most critically, the Court held that:

> "The jurisdictional immunity of the ADB . . . has a legitimate purpose. And the ineligibility of Eurotrends to take part in any calls for tender for three years [the length of debarment] is drawn from the very international public service missions that sixty-seven States, including France, have conferred on the ADB . . .
>
> . . . [The debarment process] was governed by the principles and rules and, correlatively, the procedures, corrective measures and sanctions that the ADB has adopted in relation to its duty of integrity, in order to carry out its international public service missions . . ."

The Court "for the sake of fair debate" also ruled that, in ADB's debarment process, Eurotrends received notice of the allegations against it, was able to present

[447] Tribunal de Grande Instance ordinary court of original jurisdiction, Paris, 8 April 2015, 13/07942.

arguments in its defense, and was heard by the appropriate bodies of ADB on its appeal against the debarment decision of ADB. The Court also noted that ADB's debarment process included an opportunity to appeal, albeit one that was denied Eurotrends on the basis that Eurotrends offered no new evidence required by ADB process to sustain an appeal. The Court also noted that the ADB debarment panels were comprised of ADB personnel, which did not appear to offend the Court's views on required due process. Without directly ruling on the matter, the Court seems to have indicated that ADB's debarment process comprised sufficient due process.

(v) Belgian courts

The most noteworthy Belgian case regarding the challenge of an international organisation's immunity before a national court is *Siedler v Western European Union*, in which Ms. Siedler challenged the termination of her employment, and in which the Court of Appeals refused to uphold the Western European Union's (WEU) immunity on the grounds that its internal tribunal failed to provide adequate due process rights to the respondent. In its analysis, the court first recognised the guarantees of a fair trial under Article 6(1) of the ECHR,[448] and noted that, in line with *Waite v Kennedy* (described in section (vi) below), the right to court was not absolute. The court proceeded to point out that in *Waite v Kennedy*, the ECtHR did not examine whether the available means offered by the ESA satisfied all the guarantees involved in the notion of a fair trial under Article 6(1) of the ECHR.[449] By contrast, the court decided to examine the proceedings before the WEU's Appeals Tribunal and found several elements in which they were deficient in meeting due process requirements under Article 6(1) of the ECHR.

Specifically, the Court held that the public character of the proceedings and of the decisions was not guaranteed because the hearings of the Board were held in private and the decisions were not published.[450] Moreover, it noted that the members of the tribunal were appointed by the Intergovernmental Committee for a two-year term. In the opinion of the Court, the short term of the WEU Appeals Board members' mandate and their mode of appointment did not provide sufficient guarantees for their independence (more particularly, the Court noted that the "irremovability" of judges was a necessary element

[448] *Siedler v Western European Union*, Appeal Judgment, JT 2004, 617, ILDC 53 (BE 2003), ¶ 43.
[449] *Ibid*., ¶¶ 46 and 54.
[450] *Ibid*., ¶ 60.

of their independence).[451] Finally, the Court found that no provisions existed to permit challenges concerning the impartiality of individual Tribunal members.[452] Thus, the Court concluded that the procedure provided by the WEU did not offer all the guarantees inherent in the notion of fair trial, with some of the most important conditions being flawed and, consequently, that the "limitation on access to the normal courts by virtue of the jurisdictional immunity of the WEU was incompatible with Article 6(1) of the ECHR."[453]

Several years later, the Supreme Court (Cour de Cassation) upheld the Court of Appeals' judgment.[454] Evidently, therefore, Belgian courts did not shy away from evaluating the quality of an international organisation's dispute resolution mechanism, and confirmed that the mere existence of such mechanism did not suffice for the organisation to invoke its immunity successfully before a domestic court. In the courts' view, such mechanism should also meet various qualitative due process criteria before an organisation could rely on it to justify invoking its immunity.

(vi) Human rights dimension and the ECHR

Although most human rights instruments do not expressly provide for a right of access to court, it is clear from the interpretations of the texts that the fair trial guarantees contained in such documents as the Universal Declaration of Human Rights[455], the International Covenant on Civil and Political Rights[456], the ECHR[457], and others,[458] include a right of access to court.

The human rights argument for providing access to court is equally persuasive in the context of the immunity of international organisations: the relevant human rights instruments clearly phrase the underlying fair trial rights as rights of individuals entitling them to have a fair third-party adjudication of their claims against anyone else, regardless of whether the opposing party might be another private party, a foreign state or an

[451] *Ibid*., ¶¶ 60 and 61.
[452] *Ibid*., ¶ 61.
[453] *Ibid*., ¶ 63.
[454] See *Western European Union v Siedler*, Cour de Cassation, N° S.04.0129.F (2009).
[455] Article 10 of the Universal Declaration of Human Rights.
[456] Article 14, ¶1 of the International Covenant on Civil and Political Rights.
[457] Article 6, ¶1 of the European Convention on Human Rights.
[458] See, e.g., *In re Rubio*, Judgment 1644 (1997) before the ILO Administrative Tribunal.

international organisation.[459] Nonetheless, the right of access to court is not unlimited and, provided that immunity is accompanied by appropriate safeguards – for example, the availability of appropriate alternative remedies for the claimant, immunity may be justified.

The reason international organisations have to provide appropriate alternative remedies for those parties whose interests have been or may have been affected by their acts, actions or omissions emanates from the imperative of the protection of human rights. The creation of comprehensive body of primary and secondary rules on human rights protection has taken place in parallel, although at a different pace, to the proliferation and expansion of international organisations. After all, "it would be quite ironic to negate the rights of individuals on the assumption that they might be incompatible with the functions of international organisations."[460] Thus, arguably, the functional needs of an international organisation should always be subordinated to basic international human rights standards, such as the right to adequate means of redress in the case of violations of one's rights.[461]

In two landmark cases, *Waite and Kennedy v Germany* and *Beer and Regan v Germany*[462], the ECtHR had to address the question of whether Germany had violated Article 6(1) of the ECHR by declaring complaints against the ESA brought by ESA's temporary workers, who pursued the approval of employment contracts, inadmissible on the grounds of the ESA's immunity. The ECtHR noted that:

> "[t]he right of access to the courts secured by Article 6 §1 of the [ECHR] is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. . . . [The Court] must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 §1 if it does not pursue a legitimate aim and if there is not a ***reasonable relationship of proportionality*** between the means employed and the aim sought to be achieved.[463] (emphasis added)

---

[459] August Reinsch and Ulf Andreas Weber: *In the Shadow of Waite and Kennedy*, International Organizations Law Review 1 (2004), at 67.
[460] Mahnoush Arsanjani: *Claims against International Organisations: Quis Custodiet Ipsos Custodes?*, Yale Journal of World Public Order 7 (1980-1), at 175.
[461] A. S. Muller: *International Organisations and their Host-states: Aspects of their Legal Relationship*, Kluwer Law International (1995), at 282.
[462] *Waite and Kennedy v Germany*, European Court of Human Rights (18 February 1999) and *Beer and Regan v Germany*, European Court of Human Rights (18 February 1999).
[463] *Waite v Kennedy*, ¶59.

The Court proceeded to note that "a material factor in determining whether granting the ESA immunity from German jurisdiction is permissible under the ECHR is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."[464] It then concluded that the requirement of the availability of these alternative means was fulfilled because the ESA had established an internal appeals board, which is "independent of the Agency."[465] The Court therefore found that the claimants were provided with "equivalent protection" to Article 6(1) of the ECHR, even in the absence of access to the German labour courts.

In denying the violation of Article 6(1) of the ECHR, the ECtHR did not address the concern expressed by the European Commission on Human Rights that the claimants were probably unable to resort to this internal remedial mechanism of the ESA, given that they did not fall within the ESA's definition of "staff members." The ECtHR therefore failed to clarify the general question of whether the EU Member States, by having signed the ESA founding statute, which is an act of an EU institution, might be liable for infringement of the ECHR.

The ECtHR's decision has been criticised on the grounds that there was hardly a risk that the functioning of a well-established organisation would be disrupted by the recognition of the right of staff members, who have not been given the status of agents, to refer any claims they might have to the jurisdiction of the state courts.[466] Arguably, a bolder approach would have recognised that it is necessary to limit the immunities that international organisations enjoy, in the same way that this was judged to be essential for states. It would then be necessary to determine the conditions in which such a restriction should be implemented.[467]

The obligation of international organisations to make available to claimants "reasonable alternative means to protect effectively their rights"[468] is not limited to providing a forum. It is also necessary that such alternative forum meets certain criteria as

[464] *Ibid*., ¶68.
[465] *Ibid*., ¶69.
[466] Emmanuel Gaillard and Isabelle Pingel-Lenuzza: *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass*, International & Comparative Law Quarterly, Volume 51, Part 1 (2002), at 7.
[467] *Ibid*.
[468] *Waite v Kennedy*, ¶68.

to its effectiveness. The question, however, remains as to what criteria permit the upholding of an international organisation's immunity and what type of alternative means of dispute resolution need to be in place in order to justify the maintaining of an expansive approach to the immunity of international organisations. In that context, it has been suggested that if judges do not strictly examine the actual existence of "reasonable alternative means" which provide "effectively" the right to an independent and impartial trial, adequate due process rights of the aggrieved are not protected.[469]

The issue was not clarified in a more recent ECtHR decision involving employment dispute with the UNDP – *Perez v Germany*,[470] in which a former staff member of the UNDP complained that there had been manifest deficiencies in the UNDP internal appeal proceedings surrounding her dismissal. Germany was to be held responsible for these deficient procedures as it had failed to ensure that there was a UN internal dispute settlement procedure protecting her fundamental rights in a manner equivalent to the ECHR standards. The claimant brought suit directly before the ECtHR, arguing that she had implicitly fulfilled the requirement of exhausting domestic remedies, because German courts would grant immunity to the UNDP and dismiss her case. The ECtHR disagreed, holding that German courts would have jurisdiction to review her claims.

Notably, the ECtHR held that the internal resolution mechanism that the UNDP had made available to the claimant was structurally deficient and would likely fail to meet the human rights protection required by the German Constitution and the ECHR. However, the Court left open the question of whether Germany was to be held responsible for the alleged deficiencies in Ms Perez's case, as it came to the conclusion that she had failed to exhaust the national remedies. In reaching that conclusion, the Court took note of the German Government's submission that a constitutional complaint would have been an effective remedy in respect of those complaints. It followed from several relevant decisions of the German Constitutional Court that – despite the immunity of international organisations from the jurisdiction of the German courts – the Constitutional Court had jurisdiction to examine whether the level of fundamental rights protection in employment

[469] See Anne-Marie Thevenot-Werner: *The Right of Staff Members to a Tribunal as a Limit to the Jurisdictional Immunity of International Organisations in Europe*, at 131, available at: http://www.coe.int/T/AdministrativeTribunal/Source/Article_AMTW_2014.pdf.
[470] *Perez v Germany*, App. No. 15521/08, European Court of Human Rights (2015).

disputes in international organisations complied with the Constitution. A complaint to the German Constitutional Court would therefore have been an effective remedy, which Ms Perez had failed to exhaust.

Another recent noteworthy ECtHR case is *Stichting Mothers of Srebrenica et al. v The Netherland,* [471] which upheld an international organisation's immunity despite complete lack of alternative remedies to claimants. The case concerned the conduct of a Dutch military force operating within the peacekeeping mission established in the former Yugoslavia by the UN Security Council. Surviving relatives sought to hold the UN accountable through Dutch courts for the abandonment of the peacekeeping force's duty to protect a group of Bosnian Muslims. The case before the ECtHR was a complaint by relatives of victims of the 1995 Srebrenica massacre, and by an NGO representing victims' relatives, of the Netherlands courts' decision to declare their case against the United Nations (UN) inadmissible on the ground that the UN enjoyed immunity from national courts' jurisdiction. In particular, the claimants alleged that their right of access to court had been violated by that decision.

The ECtHR, like the Dutch Supreme Court and all of Dutch lower courts, concluded that the UN's immunity prevailed over the claimants' right to access to justice even though there was no alternative remedy for the claimants. Referring extensively to *Waite and Kennedy*, the ECtHR interpreted this case to mean that the availability of an alternative remedy is not a *conditio sine qua non* for immunity.

In this particular case, the ECtHR concluded that "in the present case the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate."[472] The ECtHR was careful to distinguish the *Mothers of Srebrenica* case from earlier cases in which it decided upon the immunity of several international organisations. It held that at the root of the case was "a dispute between the applicants and the United Nations based on the use by the Security Council of its powers under Chapter

[471] *Stichting Mothers of Srebrenica et al. v The Netherlands*, Application No. 65542/12, European Court of Human Rights (2013).
[472] *Ibid.*, ¶ 169.

VII of the [UN Charter to act to preserve international peace and security]."[473] The ECtHR rationalised its decision as follows:

> "The Court finds that since operations established by United Nations Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field. . ."[474]

Accordingly, the Court considered the absence of an alternative remedy not to carry sufficient weight to outweigh the interest of the UN to retain immunity for the UN peacekeeping forces' failure to prevent the Srebrenica massacre. This ruling may be justified by the understanding that any review of such conduct would immediately implicate the operational decisions taken by the UN Security Council and would entail judicial scrutiny of the UN Security Council's use of its special powers under Chapter VII.[475] Arguably, the UN immunity was grounded in a political interest, as the claimants challenged the discharge of the UN's core functions of protecting international peace and security. On the other hand, it has been argued that the *Srebrenica* decision implies that an organisation exercising its functions and violating human rights – without this being the main objective of the action or inaction, but a side-effect – remains protected by its immunity from jurisdiction even if there is no recourse to international courts.[476] Still, as noted above, where an international organisation's conduct entails no element of public authority, and does not touch upon the core of the exercise of its functions, there is no reason to protect it from judicial scrutiny. It remains to be seen whether the ECtHR will use the same reasoning in cases concerning the immunity of other international organisations.

---

[473] *Ibid*., ¶ 152.
[474] *Ibid*., ¶ 154.
[475] See, e.g., *Georges v United Nations*, No. 15-455 (2d Cir. 2016), Brief of the European Law Scholars, at 26.
[476] See Anne-Marie Thevenot-Werner: *The Right of Staff Members to a Tribunal as a Limit to the Jurisdictional Immunity of International Organisations in Europe*, at 138, available at: http://www.coe.int/T/AdministrativeTribunal/Source/Article_AMTW_2014.pdf

D. Conclusion

As evidenced from the case law on immunities of international organisations, the regime of immunities continues to be the cornerstone of the law of international organisations, essential for their independent functioning and is generally accepted and upheld by courts. Nonetheless, there seems to be a clear development in the case law of domestic courts towards abandoning the traditional view of the immunity of international organisations whose decisions fail to consider the human rights-based notion of access to justice and due process. Case law suggests, however, that the court's decision on whether to uphold immunity will also depend on both the type of dispute and the type of international organisation concerned. Thus, for example, an employment case against IPGRI in the *Drago* case before the Italian Supreme Court is very different from the ECtHR case about the prevention of genocide in Srebrenica concerning the UN.

As described in the above analysis, national courts have struggled to define the scope of international organisations' immunities, with individual national courts having each found their own way to deal with the issue, and without common or coordinated approach having developed. To some extent, different approaches by national judges may be explained by differences in the applicable immunity provisions. While many international organisations enjoy immunity "from every form of legal process" (such as the UN and the IMF[477]), other organisations (such as all five MDBs) have a more restrictive immunity regime.[478]

Thus, in cases in which the relevant immunity rules of an international organisation provide for absolute immunity (such as those of the UN), there is indeed little room for national courts to exercise jurisdiction.[479] By contrast, if the organisation does not have absolute immunity (such as the MDBs), there is more room for national courts to exercise jurisdiction over certain cases that are not covered by immunities, with the national courts of different members possibly coming to different conclusions in cases that

[477] Article II, §2 of the Convention on the Privileges and Immunities of the United Nations and Article 9, Section 3 of the Articles of Agreement of the IMF.
[478] Article 46 of the Agreement Establishing the European Bank for Reconstruction and Development; Article 50 of the Agreement Establishing the African Development Bank; Article XI, Section 3 of the Agreement Establishing the Inter-American Development Bank, and Article VII, Section 3 of the Articles of Agreement of the International Bank for Reconstruction and Development.
[479] See Niels Blokker and Nico Schrijver: *Afterwords, International Organizations Law Review* 10 (2013).

are similar. In particular, Italian, French and Belgian courts have followed a restrictive approach towards immunity in comparison to their UK and US counterparts, especially in relation to employment disputes.[480]

The obvious criticism to the immunities regime is that parties suffering from the activities of international organisations cannot bring claims against them. Scholars have argued that international organisations must ensure that their actions are consistent with more than just their charters and internal governance procedures, and there is an emerging consensus that, as subjects of international law, international organisations must observe general principles of customary norms of international law, including certain human rights norms.[481] Namely, as with any other legal model, international organisations' sanctions regimes should be legitimate. Standard features legitimising legal systems include public accountability for the legislative process, public consultations, and media debates that shape national laws in democratic countries, and international organisations' systems do not operate under any of these types of controls.[482]

Moreover, the WB itself has acknowledged that economic development and human rights are intertwined.[483] It therefore seems clear that there is a human rights-driven need to close accountability gaps, irrespective of whether they result from immunity or other grounds leading to the lack of jurisdiction of national courts.[484] As to the determination of whether courts should be the ones to fill the accountability gap, the following considerations are relevant: (a) whether courts are suited to perform this task, (b) what law should be applied and (c) whether such exercise of jurisdiction will disproportionally hinder the independent functioning of international organisations.[485] The follow-on question is who should engage in this balancing exercise – international organisations themselves, national courts or international courts.

---

[480] *Ibid*.
[481] See August Reinisch: *The Changing International Legal Framework for Dealing with Non-State Actors*, in Paul Alston: Non-State Actors and Human Rights, Oxford University Press (2005), at 46; see also Eisuke Suzuki and Suresh Nanwani: *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 Mich. J. of Int. L. (2006), at 225.
[482] Yaraslau Kryvoi: *The Law Appliced by International Administrative Tribunals: From Autonomy to Hierarchy*, The Geo. Wash. Int'l L. Rev., Volume 47 (2015), at 276.
[483] See World Bank: *Development and Human Rights*: *The Role of the World Bank*, Washington: World Bank Group (1998), at 2.
[484] See August Reinisch: *To What Extent Can and Should National Courts 'Fill the Accountability Gap?'*, International Organizations Law Review 10 (2013), at 576-7.
[485] *Ibid*., at 578.

Possibly, the answer to close the accountability gap does not lie in questioning the existing regime of immunity rules of international organisations, but in reducing any "accountability gaps" by, among other things, providing alternative remedies for private law disputes.[486] If international organisations do not take this requirement seriously, courts may increasingly reject immunity claims by international organisations and, moreover, international organisations may lose the support of public opinion.[487]

Specifically, in the context of MDBs' sanctions regimes, coupled with the MDBs' immunity from judicial review, the question arises as to what measures exist to prevent MDBs from introducing such arbitrary decisions to, by way of example, debar not only the party found to have engaged in a sanctionable practice, but also all of its affiliates, including its parent companies, without even considering the extent of the parent companies' supervision. Or, to go as far as debarring a party for an indefinite period of time, without even taking into account any mitigating factors. Arguably, despite their immunity from jurisdiction, MDBs cannot inexplicably debar parties because this would be "anathema both to the [MDBs'] development missions and to [their] associated work to improve transparency and reasoned decision-making in governance worldwide."[488] In fact, the WB has committed to provide due process as part of the sanctions regime[489], but the question remains what that due process entails and what the appropriate benchmark for it would be.

In other words, given that the debarred parties are unlikely to get any redress against such onerous decisions in courts, what features should characterise MDBs' sanctions regimes in order to ensure that the aggrieved parties are provided with adequate protections against unreasonable and arbitrary decisions by the MDBs' sanctions decision-makers? The next section attempts to answer this question by trying to identify the

[486] Niels Blokker and Nico Schrijver: *Afterwords*, International Organizations Law Review 10 (2013), at 604.
[487] *Ibid*.
[488] *Ibid*.
[489] See The World Bank Group, The World Bank Group's Sanctions Regime: Information Note, at 3 available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf; see also The World Bank Group, Initiating Discussion Brief, Review of the World Bank Group Sanctions Regime 2011-14, Phase I Review: Stock-Taking at 3, available at: http://siteresources.worldbank.org/INTLAWJUSTICE/214574-1300377840517/23440420/SanctionsReview_InitiatingDiscussionBrief.pdf

appropriate benchmarks for MDBs' sanctions regimes. Chapter 3 then compares the principles of these benchmark systems with the MDBs' sanctions regimes and makes suggestions for their enhancement and improvement.

3. What legal principles should form the basis of MDBs' sanctions regimes?

A. Introduction

As noted in section 2 above, one of the most important shortcomings in the public accountability of international organisations is arguably the lack of opportunities for aggrieved parties to obtain legal redress. In addition to being inconsistent with contemporary notions of international organisations' accountability and legitimacy, the sweeping assertions of immunity by international organisations also contravene other well-settled and widely accepted international legal principles, including the principle that parties are entitled to minimum standards of procedural fairness in resolving claims against public entities.[490] In that context, scholars have recognised that "[t]he crux of the problem lies in the occasionally inadequate procedures – if not their complete absence – for victims of the acts of international organizations to seek justice."[491] In view of the increase of both the numbers and the activities of international organisations, the expectation of the international community is that international organisations should deliver justice not only in words but also in practice and, therefore, international organisations need to ensure that the alternative dispute resolution systems they provide are robust. The question, of course, is what such a robust dispute resolution system looks like and what benchmarks it should be measured against.

MDBs' sanctions processes are administrative adjudication processes, which incorporate aspects of at least three other legal disciplines: criminal, tort and contract law.[492] For example, the debates at WB echo those that legislators face when deciding whether strict liability, negligence or recklessness standards should govern tortious conduct.[493] This section examines what the appropriate benchmark for MDBs' sanctions regimes should be by looking at four possible sources of information: (i) customary law and general principles, (ii) Global Administrative Law, (iii) Article 6(1) of the ECHR, and (iv) MDBs' administrative tribunal jurisprudence, each of which is analysed in continuation. While there is a broad consensus that international organisations must adhere to general principles and customary norms of international law, including certain

[490] Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. (2008), at 473.
[491] *Ibid*., at 616.
[492] Pascale Helene Dubois and Aileen Elizabeth Nowlan: *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 Yale Journal of International Law 15 (2010), at 21.
[493] *Ibid*.

human rights norms that can be viewed as customary law or general principles of law,[494] as described in continuation, both customary law and general principles and GAL are too broad and high-level, while the ECHR and MDBs' administrative tribunal jurisprudence can indeed prove useful to fill the gaps in MDBs' sanctions procedures. In addition, international arbitration rules (such as the IBA Rules on the Taking of Evidence in International Arbitration, the SCC Rules and the LCIA Rules) may prove useful in filling very specific, procedural gaps in MDBs' sanctions procedures, given there is no basis for MDBs' sanctions decision-making bodies to choose, for example, one national law's approach towards the collection and assessment of evidence over another national law's approach. Therefore, any national law rules on such procedural matters would be inapplicable to the MDBs' sanctions procedures.

Arguably, another possible benchmark could be the practice of the European Anti-Fraud Office (commonly known as OLAF), which investigates fraud against the EU budget, corruption and serious misconduct within the European institutions, and develops anti-fraud policy for the European Commission.[495] However, unlike MDBs, OLAF is not a sanctioning body. Rather, it investigates and then refers cases to national authorities to take forward under their rules.[496] Also, unlike MDBs, OLAF does not maintain a debarment list separate from that of the European Union. While this may change with the establishment of the European Public Prosecutor's Office (EPPO), the EPPO is expected to take up its functions only in 2020.[497] Finally, the vast majority of the OLAF case law focuses on challenging OLAF's statutory and/or jurisdictional role to investigate, and doesn't go into the respondents' rights to due process in relation to a debarment decision, which is the focus of this thesis.[498] This is why OLAF's practices are not considered as appropriate benchmark for MDBs' sanctions regimes.

[494] See August Reinisch: *The Changing International Legal Framework for Dealing with Non-State Actors*, Non-State Actors and Human Rights Philip Alston ed. (2005), at 37; and Henry Schermers and Niels Blokker: International Institutional Law: Unity Within Diversity 3rd edition (1995), at 822.
[495] See OLAF: *What We Do*, available at: https://ec.europa.eu/anti-fraud/about-us/mission_en.
[496] OLAF: *Legal Background*, available at: https://ec.europa.eu/anti-fraud/about-us/legal-framework_en.
[497] See the European Public Prosecutor's Office website at: https://ec.europa.eu/anti-fraud/policy/european_public_prosecutor_en; and Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (12 October 2017).
[498] See the rulings of the Court of Justice of the European Union concerning OLAF, available at: https://ec.europa.eu/anti-fraud/about-us/legal-framework/court-rulings-relevant-to-olaf_en.

B. Customary law and general principles

"The most difficult thing about international law," Professor Watson of Columbus School of Law once wrote, "is finding it."[499] While there is no formal document in the legal frameworks of MDBs' sanctions regimes that expressly recognises general principles as a source of law for MDBs' sanctions regimes, it is common in international and administrative law to resort to customary law and general principles to resolve legal issues not clearly addressed within the applicable legal framework of the relevant international organisation (e.g., its sanctions procedures and related guidelines, as well as any precedent cases).[500] Specifically, the International Court of Justice ("**ICJ**") has observed that "international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are a party."[501] The determination of what constitutes customary law and general principles is far from simple, however.

First, customary law is not a written source, and the criteria for the identification of customary law are not clear: Article 38(1)(b) of the ICJ Statute says that international law disputes will be decided on the basis of "international custom, as evidence of a general practice accepted as law", and the ICJ has stated that "[n]ot only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it . . . The states concerned must feel that they are conforming to what amounts to a legal obligation."[502] Thus, for a new rule of customary international law to be created, two elements must be present: (i) state practice and (ii) *opinio juris*.

In particular, the element of state practice is subject to controversy. Scholars have debated what kind of activity constitutes state practice and disagree on the duration and

[499] GR Watson: *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreement* 308 (Oxford University Press, 2000), cited in Shabtai Rosenne: *The Perplexities of Modern International Law*, Martinus Nijhoff Publishers (2004), at 47.
[500] See, e.g., Statute of the International Court of Justice, Article 38, Section 1(c). See also Judgment of the International Labour Organisation Administrative Tribunal No. 2096.
[501] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 73 (1980), at 89-90.
[502] *North Sea Continental Shelf cases*, ICJ Reps (1969), at 3.

frequency of the activity that is necessary to satisfy the definition.[503] Further, it is practically impossible to determine the customs of the nearly 200 states in the international community, nor do we know how many states have to act in a certain way for it to become customary. Consequently, a determination of "customary law" will inevitably take into account only major powers and the most affected states.[504]

In 2018, the International Law Commission ("**ILC**") adopted a set of 16 "draft conclusions on customary international law,"[505] which concern the ways in which the existence and content of rules of customary international law are to be determined. According to the ILC, the requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of states that contributes to the formation of rules of customary international law.[506] While the ILC does not elaborate on the type of activity that constitutes state practice, it says that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."[507] The ILC further clarifies that such practice refers to the acts of international organisations that are functionally equivalent to the powers exercised by states, such as the practice of secretariats of international organisations when serving as treaty depositaries, in deploying military forces, or in taking positions on the scope of privileges and immunities for the organisation and its officials, while the acts of international organisations that are not functionally equivalent to the acts of states are unlikely to constitute relevant practice.[508] It is unlikely that MDBs' sanctions regimes would fall under the category of acts functionally equivalent to the powers exercised by states. Even if they did, the ILC's conclusion would make the determination of legal practices that should form the basis of MDBs' sanctions regimes circular, as it would suggest that MDBs' sanctions practices themselves form the basis of the formation of customary international law.

---

[503] See Anthony D'Amato: The Concept of Custom in International Law, Cornell University Press (1971), at 58; and Niels Petersen: *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, American University International Law Review, Volume 23, Issue 2, at 277.
[504] Niels Petersen: *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, American University International Law Review, Volume 23, Issue 2, at 277.
[505] International Law Commission: *Report on the work of the seventieth session*, UN Doc. A/73/10 (2018).
[506] *Ibid*., Conclusion 4(1).
[507] *Ibid*., Conclusion 4(2).
[508] *Ibid*., Commentary to Conclusion 4.

Admittedly, in the field of international human rights, certain obligations are widely accepted to form part of customary law, such as the prohibition of genocide, slavery, torture and other cruel, inhumane or degrading treatment of punishment, prolonged arbitrary detention, and systematic racial discrimination.[509] This is so although a number of states have not signed international treaties devoted to these obligations.[510] However, sanctions regimes of MDBs are not concerned with such broad principles, but rather with due process rights that should be accorded to those accused of sanctionable practices, where one has to consider what rules of customary law apply to these types of proceedings. When faced with this type of question in international law disputes, courts have often resorted to determining whether a customary rule exists in the *opinio juris* of states, which is a rather subjective element. For example, in *Nicaragua v U.S.A.*, the ICJ held that:

> "The *opinio juris* may be deduced from, inter alia, the attitude of the Parties and of States towards certain General Assembly resolutions . . . Consent to such resolutions is one of the forms of expression of an *opinio juris* with regard to the principle of non-use of force, regarded as a principle of customary international law, independently of the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter."[511]

In view of this difficulty of determining what constitutes "international custom" within the meaning of Article 38(1)(b), some authors have proposed that one ought to look for a different – and arguably less demanding – way to explain the legal force of universally recognised rights. This could be the third source mentioned in Article 381(1)(c) of the ICJ Statute, namely "the general principles of law recognised by civilised nations."[512] These general principles become effective through general acceptance or recognition by states.[513] While this approach would dispense with the requirement to ascertain what state practice is, it is not free of problems. As Petersen aptly put it:

> "If general principles can be established solely by their acceptance, the only significant distinction that they would have from customary rules would be the absence of a

[509] *Ibid*.
[510] Luigi Condorelli: Customary International Law: The Yesterday, Today, and Tomorrow of General International Law, Oxford University Press (2012), at 150.
[511] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v U.S.A.*), International Court of Justice (1986).
[512] See Bruno Simma and Philip Alston: *The Source of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int'l L. (1988), at 102.
[513] *Ibid*.

> requirement of state practice. Human rights would thus be privileged because fewer conditions would have to be met to establish unwritten human rights norms."[514]

Nonetheless, although due process rights are accepted by all common law systems and receive recognition in many others, this does not make these principles "universal", given that they do not have the same scope in every legal system. The European Court of Justice, for example, once surveyed national procedures in competition decisions, where due process rights are widely recognised: they were, however, shown to differ greatly even within the EU.[515] For example, while the generally accepted principles of due process rights focus on impartiality, the opportunity to be heard and a reasoned decision, English law protects the right to a hearing relatively strongly, but it does not recognise a general administrative duty to give reasons, although most administrative lawyers believe that it should. Similarly, in French administrative law, the main concern is legality and the focus on the "rights of the defence"; thus, in administrative proceedings, where penalties are not involved, due process rights may not be available.[516]

Finally, in the report commissioned by the UN on basic due process rights, Fassbender notes differences among jurisdictions related, *inter alia*, to the extent of the right of access to courts, the types of disputes subject to fair trial rights, the application of fair trial rights to administrative procedures, the independence and impartiality of a tribunal and legitimate restrictions of fair trial rights in the "public interest." [517] Nevertheless, Fassbender concludes that certain minimum standards exist:

> "Notwithstanding the … differences in the definition of due process rights, it can be concluded that today international law provides for a universal minimum standard of due process which includes, firstly, the right of every person to be heard before an individual governmental or administrative measure which would affect him or her adversely is taken, and secondly the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights . . . can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of . . . the ICJ Statute."[518]

---

[514] Niels Petersen: *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, American University International Law Review, Volume 23, Issue 2, at 285.
[515] Carol Harlow: *Global Administrative Law: The Quest for Principles and Values*, The European Journal of International Law Volume 17, No. 1 (2006), at 204.
[516] *Ibid*., at 204-5.
[517] Bardo Fassbender: *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs (2006).
[518] *Ibid*., ¶1.17.

Recognising the difficulties of defining customary law and general principles, in her Advisory Opinion, the then General Counsel of the WB suggested that "[n]ational law concepts are more likely to be reference points for the prospective amendments to the Bank's legal framework, and, in fact, many of the proposals in the [WB sanctions regime] are grounded in a survey of 'benchmark' national legal systems",[519] where "benchmark jurisdictions" would be the US, UK, France, Germany and possibly China.[520] Undoubtedly, not everyone will agree with the choice of these five benchmark jurisdictions.

One attempt to synthesise general principles of law has been in the form of the Global Administrative Law ("**GAL**") described below.

C. Global Administrative Law

Just as is the case with the general principles described in section B above, the legitimacy of GAL's principles as a source of law depends on whether they are "so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organisations."[521] This difficulty of convergence of legal norms is not endemic to GAL. Scholars have argued that one of the key obstacles to the convergence is that "everyone accepts unification provided this means the others failing into line with [his] national law." Moreover, the diversity of nations with their different economic, social and political structures and divergent ideas of justice, not to mention the diversity of methods used by lawyers of various countries in the elaboration and development of the law all contribute to the difficulties of achieving convergence of legal norms.[522] Arguably, however, a GAL-based approach would not dispense with the need to synthesise national laws, but it would allow MDBs to develop

[519] See *Legal Vice Presidency of the World Bank: Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases*, No. 2010/1 (2010), available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1377105390925/AdvisoryOpinion.pdf, at 6.
[520] *Ibid*., footnote 16.
[521] See Administrative Tribunal of the International Monetary Fund: *Statute of the Administrative Tribunal: Commentary of the Statute* 18 (2000).
[522] Uniform Commercial Law in the Twenty-First Century, Proceedings of the Congress of the United Nations Commission on International Trade Law (1992), at 251-53.

substantive norms, independent of whether they are in line with particular national systems.[523]

GAL has been described as "comprising of the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision and legality, and by providing effective review of the rules and decisions they make."[524] Global administrative bodies, in turn, include "formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance."[525]

The formal sources of GAL include the classical sources of public international law – treaties, custom and general principles.[526] However, it is highly unlikely that these sources will address all areas to be encountered in MDBs' sanctions proceedings. Moreover, it is equally unlikely that a definitive and detailed body of rules and principles governing global administrative law could be formulated, as disagreements are inevitable about whose practices to count and whose not to count for the emergence of a rule and as to how much consistent practice might be necessary to generate a strong pull for adhesion.[527] GAL has, however, developed some basic legal standards as its normative conception, which are as follows:

(1) **Procedural participation and transparency**: Decisional transparency and access to information promote accountability directly by exposing administrative decisions and relevant documents to public and peer scrutiny.[528] As a consequence of criticism of the decision-making secrecy of international

[523] Pascale Helene Dubois and Aileen Elizabeth Nowlan: *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 Yale Journal of International Law 15 (2010), at 16.
[524] Benedict Kingsbury, Nico Krisch and Richard B. Stewart: *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005), at 17.
[525] *Ibid*.
[526] *Ibid*., at 29.
[527] *Ibid*., at 31.
[528] Rajeshwar Tripathi: *Concept of Global Administrative Law, an Overview*, India Quarterly (2011), at 367.

organisations, international organisations have started providing wider public access to internal documents on internal decision-making and considerations on which decisions are based.[529] To that end, MDBs are publishing on their websites quite extensive information about their sanctions regimes[530] and some are also publishing full texts of reasoned decisions (EBRD and WB, in particular).

(2) **Reasoned decisions**: The requirement to provide reasons for administrative decisions, including responses to the major arguments made by the parties, has been transposed from domestic law into some global and regional institutions.[531] It is impossible to know how well-reasoned the decisions of MDBs' appeals bodies are if these decisions are not published and, thus far, only EBRD and WB are publishing full texts of the decisions of their appeals bodies, and WB is also publishing full texts of the first-tier decision-maker's decisions. As of the date of this writing, EBRD has not had any appeals body decisions published. Notably, it was only in November 2015 that EBRD introduced the requirement for all of its appeals body decisions to be published and, since then, the appeals body has not heard s single case.

(3) **Review**: An entitlement to have a decision of domestic administrative body affecting one's rights reviewed by a court or another independent tribunal is among the most widely accepted features of domestic administrative law and, as such, is to some extent reflected in GAL.[532] In fact, some international human rights conventions consider the right to have a detrimental decision reviewed by a court as a human right: for example, Article 14 of the International Covenant on Civil and Political Rights[533] and Articles 6 and 13 of

[529] *Ibid*.
[530] See, e.g., WB's website at: http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:21299248~menuPK:3726884~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html, which contains the Sanctions Board Statute, Suspension and Debarment Officer Terms of Reference, Sanctioning Guidelines, Sanctions Board Decisions, etc.
[531] Rajeshwar Tripathi: *Concept of Global Administrative Law, an Overview*, India Quarterly (2011), at 367.
[532] Benedict Kingsbury, Nico Krisch and Richard B. Stewart: *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005), at 39.
[533] Article 14, §5 of the International Covenant on Civil and Political Rights.

the ECHR.[534] However, as described in section 2, the regime of international organisations' immunities continues to be the cornerstone of the law of international organisations and is generally accepted and upheld by courts, although there is an emerging trend of domestic courts abandoning the traditional view of the immunity of international organisations whose decisions fail to consider the human rights-based notion of access to justice and due process. Arguably, if international organisations fail to provide effective accountability for seriously erroneous, arbitrary or abusive decisions, domestic courts might start to chip away at immunity.[535]

(4) **Substantive standards: proportionality, means-ends rationality and avoidance of unnecessary restrictive means**: [536] Proportionality is a cornerstone of the jurisprudence of some international human rights covenants: for example, under Article 8 of the ECHR, interference with certain individual rights is justifiable only if such interference is proportionate to the legitimate public objective pursued.[537] Similarly, measures should be allowed only if they meet certain requirements designed to ensure a rational fit between means and ends, and employ means that are not more restrictive than reasonably necessary to accomplish the objective.[538] This echoes the test that the US Supreme Court articulated in *Matthews v Eldrige*, described in Chapters 1 and 2, which requires that due process rights be balanced against several factors.

The question remains as to how the GAL norms will develop and evolve. In that context, two different approaches have been put forward, each of which faces important limitations:

(1) **The "bottom up" approach** would have GAL develop through the application of domestic administrative law tools to the decisions of global regulatory

[534] Articles 6 and 13 of the ECHR.
[535] See Frederick Rawski: *To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 Conn. J. Int'l L. 103 (2002).
[536] Benedict Kingsbury, Nico Krisch and Richard B. Stewart: *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005), at 40.
[537] Article 8, §1 of the ECHR.
[538] Benedict Kingsbury, Nico Krisch and Richard B. Stewart: *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005), at 41.

regimes.[539] The main constraint of this approach is that although domestic administrative law systems provide some valuable ideas, they are not generally applicable as direct models for understanding and problem solving in the quite different conditions presented by the global administrative space.[540] Most domestic systems of administrative law address the issue of executive branch officers or administrative agencies exercising authority delegated to them by a parliamentary statute. In exercising this authority, agencies are required to follow particular procedures involving the participation of affected parties or broader public.[541] This model does not fit easily with the structures of international law and global governance, which lacks a democratic anchor through a central plenary law-making authority or a delegation of powers from national democratic organs.[542] Therefore, while deriving some concepts from domestic administrative law, GAL must start from different structural premises in order to build genuinely global mechanisms of accountability.[543]

(2) **The "top down" approach** would create new *sui generis* administrative law mechanism directly at the level of global regulatory regime. Under this mechanism, individuals, groups and states would participate in global administrative procedures, the review of decisions would be performed by independent international bodies and this would include the review of domestic decisions forming part of distributed global administration.[544] The challenge with this approach, however, is that it would require legalisation and institutionalisation of administrative regimes that are currently informal, which is difficult to achieve without losing the benefits of informal modes of cooperation and powerful states will generally be suspicious of strongly legalised regimes because they reduce their discretionary influence.[545]

---

[539] Richard Stewart: *US Administrative Law: A Model for Global Administrative Law?*, Law and Contemporary Problems (2005), at 76.
[540] Rajeshwar Tripathi: *Concept of Global Administrative Law, an Overview*, India Quarterly (2011), at 366.
[541] Benedict Kingsbury, Nico Krisch and Richard B. Stewart: *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005), at 56.
[542] *Ibid*.
[543] *Ibid*.
[544] Rajeshwar Tripathi: *Concept of Global Administrative Law, an Overview*, India Quarterly (2011), at 367.
[545] *Ibid.*

In conclusion, GAL does not answer all of the challenges of appropriate due process rights under sanctions regimes, and national law will therefore likely remain a valuable source in MDBs' development of substantive legal norms. Still, in view of the differences in national laws and notions of justice from which MDBs would have to choose in developing their sanctions processes if they tried to base them on customary law, general principles or GAL, it has been suggested that the best way to cement due process values or present them as "universal" is in the guise of human rights.[546]

By contrast, the ECHR, the oldest and probably most influential regional treaty,[547] addresses the right to fair trial in Article 6 – it has generated extensive jurisprudence and has been cascaded in the national systems of administrative law. Thus, the standards articulated in the ECHR could be compared to MDBs' sanctions proceedings, given that rules on fair trial occupy functionally analogous positions under both the ECHR and MDBs' sanctions regimes, operating as procedural guarantees for the fair administration of justice. Although international organisations are not parties to the ECHR, because their member states or the forum state may be bound by the ECHR, it is reasonable to require that these organisations' dispute resolution mechanisms, including sanctions proceedings, offer rights protection that is at least equivalent (although not necessarily identical) to the protection offered by Article 6(1), described in continuation.

D. Article 6(1) of the ECHR

Article 6(1) of the ECHR says that:

> "[i]n the determination of his ***civil rights*** and obligations or of any criminal charge against him, everyone is entitled to a ***fair*** and public ***hearing*** within a reasonable time by an ***independent and impartial tribunal*** established by law. ***Judgment*** shall be pronounced ***publicly*** but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." (*emphasis added*)

As was noted in section 2, the constituent rights within Article 6 are not absolute and the aim is to ensure the fairness of the proceedings, while at the same time balancing it

[546] Carol Harlow: *Global Administrative Law: The Quest for Principles and Values*, The European Journal of International Law Volume 17, No. 1 (2006), at 206.
[547] Martins Paparinskis: International Minimum Standard and Fair and Equitable Treatment, Oxford University Press (2013), at 197.

with the need to adopt different procedures.[548] The following sections describe the way in which the ECtHR has interpreted the key principles of Article 6(1).

(i) Civil rights

In its analysis of what constitutes "civil rights", the ECtHR ascribed this concept broad meaning. Thus, the ability to carry on a business by entering into contractual relations with others in the future was held to be a "civil right".[549] By analogy, depriving a party of its business by denying it the right not only to get funding from, but also to become a contractor, supplier or consultant in relation to a project financed by, any of the MDBs is likely to constitute a "civil right" within the meaning of Article 6(1) of the ECHR.

(ii) Hearing

As a general principle, the ECtHR has held that parties to a dispute have a right to a public hearing unless one of the exceptional circumstances applies. This principle was articulated in *Miller v Sweden*, in which the ECtHR said that:

> "[t]he exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court. . . For example, the Court has recognised that disputes concerning benefits under social-security schemes are generally rather technical, often involving numerous figures, and their outcome usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social-security cases."[550]

Accordingly, unless there exist exceptional circumstances that justify dispensing with a hearing, the right to a public hearing under Article 6(1) implies a right to an oral

[548] See, e.g., *Waite and Kennedy v Germany*, European Court of Human Rights (18 February 1999) and *Beer and Regan v Germany*, European Court of Human Rights (18 February 1999).
[549] See, e.g., *Fredin v Sweden* (1991) 13 EHRR 784, ¶ 63; *Oerlemans v Netherlands* (1993) 15 EHRR 561, ¶¶ 46-49; and *Jacobsson v Sweden* (No. 2) (1990), ¶ 39.
[550] *Miller v Sweden* (2005), no. 55853/00, ¶ 29.

hearing at least before one instance.[551] Nonetheless, a hearing may not be required where there exist no issues of credibility or contested facts which require a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials;[552] a case raises merely legal issues of a limited nature[553] or presents no particular complexity;[554] or a case involves highly technical questions.[555]

On the other hand, however, an oral hearing will be considered necessary when the court needs to decide on issues of law and important factual questions,[556] the court needs to determine whether the facts were correctly established by the authorities,[557] circumstances require the court to get a personal impression of the applicants in order to give the applicants the right to explain their personal situation,[558] or the court would like to obtain clarification on certain points.[559]

(iii) Independent and impartial tribunal

The right to a fair hearing under Article 6(1) requires that a case be heard by an "independent and impartial tribunal." There is a close relationship between the guarantees of an "independent" and an "impartial" trial, and the Court therefore commonly considers the two requirements together.[560] The term "independent" refers to independence vis-à-vis the other powers (the executive and the Parliament)[561], as well as vis-à-vis the parties involved in the proceedings.[562] In determining whether a body can be considered "independent", the Court has considered, *inter alia*, the following criteria: (1) the manner of appointment of the members, (2) the duration of their term of office, (3) the existence of guarantees against outside pressures, and (4) whether the body presents an appearance of independence.[563]

---

[551] See, e.g., *Fischer v Austria* (1995), no. 16922/90, ¶ 44.
[552] See, e.g., *Döry v Sweden*, no. 28394/95 (2002), ¶ 37; and *Saccoccia v Austria*, 69917/01 (2008), ¶ 73.
[553] See, e.g., *Allan Jacobsson v Sweden (no. 2)*, (8/1997/792/993) (1998); and *Valová, Slezák and Slezák v. Slovakia*, no. 44925/98 (2004), ¶¶ 65-68.
[554] See, e.g., *Varela Assalino v. Portugal*, no. 643369/01 (2002).
[555] See, e.g., *Schuler-Zgraggen v Switzerland*, no. 14518/89 (1993), ¶ 58.
[556] See, e.g., *Fischer v Austria*, no. 16922/90 (1995), ¶ 44.
[557] See, e.g., *Malhous v Czech Republic*, no. 33071/96 (2001), ¶ 60.
[558] See, e.g., *Andersson v Sweden*, no. 17202/04 (2010), ¶ 57.
[559] See, e.g., *Lundevall v Sweden*, no. 38629/97 (2002), ¶ 39.
[560] See, e.g., *Kleyn and Others v the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99 (2003), ¶192; and *Langborger v Sweden*, no. 11179/84 (1989), ¶ 32.
[561] See, e.g., *Beaumartin v France*, no. 15287/89 (1994), ¶ 38.
[562] See, e.g., *Sramek v Austria*, no. 8790/79 (1984), ¶ 42.
[563] *Kleyn and Others v the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99 (2003), ¶ 190.

The fact that judges are appointed by one of the parties in the proceedings and are removable by it does not automatically amount to a violation of Article 6(1). Thus, in *Clarke v The United Kingdom*, the ECtHR held that "in order to establish whether a tribunal can be considered as 'independent', regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. What is at stake is the confidence which such tribunals must inspire in the public."[564]

The Court then proceeded to examine the manner of appointment of judges ruling on the case in question, noting that they were appointed after a competitive procedure, that they took the judicial oath which included an undertaking to administer justice impartially, that their salaries were fixed by statute, and that they could be removed only on grounds of misbehaviour or incapacity. The Court thus concluded that the manner of appointment of the judges was compatible with the requirements of Article 6(1). In addition, as to guarantees against outside pressures, the Court noted that there was no hierarchical or organisational connection between the judges and the Lord Chancellor (the defendant in the proceedings). Further, there was no suggestion that pressure was actually put on district or circuit judges to decide cases one way rather than another. Given the judicial oath that both judges had taken and the absence of any indication or risk of any outside pressures, the Court found no reason for concern in this respect.[565]

Similarly, the appointment of judges by the executive is allowed, provided that the appointees are free from influence or pressure when exercising their duties.[566] In determining whether a decision-making body can be considered "independent", the ECtHR has considered the following criteria:[567] the manner of appointment of the decision-making body's members, the duration of the judges' term of office, the existence of guarantees against outside pressures, and whether the tribunal presents an appearance of independence.

[564] *Clarke v The United Kingdom*, no. 23695/02 (2005), at 11.
[565] *Ibid.*
[566] See, e.g., *Flux v Moldova (no. 2)*, no. 31001/03, ¶ 27.
[567] See, e.g., *Langborger v Sweden*, no. 11179/84 (1989), ¶ 32.

As to the length of term, the ECtHR has not specified any particular term of office for the members of the decision-making body, but it has held that "whilst the irremovability of judges during their term of office must in general be considered as a corollary of their independence, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present."[568] This independence is, however, questionable when, as part of its mandate, the executive can remove lay judges without the law setting forth the criteria based on which such removal can be effected.[569]

As to the guarantees against outside pressure, individual judges must be free from undue influence – not only from outside the judiciary, but also from within. This internal judicial independence requires that judges be free from directives or pressures from fellow judges or those who have administrative responsibilities in a court such as, for example, the president of the court.[570] The absence of sufficient safeguards ensuring the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the ECtHR to conclude that there are justifiable doubts as to the independence and impartiality of a court.[571]

Finally, with respect to the "appearance of independence", what appears to be determinative is whether an "objective observer" would see cause for concern about the tribunals' independence in the circumstance of the case at hand.[572]

As for the impartiality of the tribunal, the ECtHR has repeatedly drawn a distinction between (i) a subjective test, whereby it sought to establish the personal conviction and behaviour of a given judge in a given case, i.e., whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, aimed at ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.[573]

---

[568] *Sacilor-Loramines v France*, no. 65411/01 (2006), ¶ 67.
[569] See *Luka v Romania*, no. 34197/02 (2009), ¶ 44.
[570] *Parlov-Tkalčić v. Croatia*, no. 24810/06 (2009), ¶ 86.
[571] *Agrokompleks v Ukraine*, no. 23465/03 (2012), ¶ 137; and *Parlov-Tkalčić v. Croatia*, no. 24810/06 (2009), ¶ 86.
[572] See *Clarke v The United Kingdom*, no. 23695/02 (2005), at 12.
[573] See *Langborger v Sweden*, no. 11179/84 (1989), ¶ 32 and *Micallef v Malta*, no. 17056/06 (2009), ¶ 93.

With respect to the subjective test, the ECtHR has consistently held that "the personal impartiality of a judge must be presumed until there is proof to the contrary."[574] As to the type of evidence required, the ECtHR has, for example, found evidence of the judge using expressions "which implied that he had already formed an unfavourable view of the applicant's case" before the commencement of the proceedings, as "incompatible with the impartiality required of any court, as laid down in Article 6 § 1 of the Convention."[575]

With respect to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may cast doubt as to his impartiality.[576] The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings, which objectively justify doubts as to the impartiality of the tribunal and thus fail to meet the Convention standard under the objective test.[577] For example, in a case where the judge represented the applicant's opponents at an earlier stage in the proceedings and that, later on, his daughter continued to do so, the ECtHR found that such "dual role" of the judge in a single set of proceedings "raised legitimate doubts as to [the judge's] impartiality."[578] Similarly, in a case where the applicant was faced with a panel of three judges, one of whom was the uncle of the opposing party's advocate and the brother of the advocate acting for the opposing party during the first-instance proceedings, the ECtHR held that "the close family ties between the opposing party's advocate and the Chief Justice sufficed to objectively justify fears that the presiding judge lacked impartiality."[579] Further, in a case where one of the judges involved in the proceedings concerning an appeal on points of law had prior involvement in the case as a presiding judge of the Higher Court, the ECtHR held that "the impartiality of the 'tribunal' was open to doubt, not only in the eyes of the applicant but also objectively."[580]

[574] See, e.g., *Le Compte, Van Leuven and De Meyere v Belgium*, no. 6878/75; 7238/75 (1981), ¶ 58; and *Micallef v Malta*, no. 17056/06 (2009), ¶ 94.
[575] *Buscemi v Italy*, no. 29569/95 (1999), ¶ 68.
[576] European Court of Human Rights: *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)* (2013), at 30.
[577] *Ibid*.
[578] *Meznaric v Croatia*, no. 71615/01 (2005), ¶¶ 34-36.
[579] *Micallef v Malta*, no. 17056/06 (2009), ¶ 102.
[580] *Perus v Slovenia*, no. 35016/05 (2012), ¶ 38.

Also, the ECtHR has held that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over "whether reasons exist to permit a variation from the wording of the legislation or rules at issue."[581] This is quite relevant in the context of internal members serving on MDBs' appeals bodies or the first-tier decision-makers, who are typically employees of the relevant MDB. None of these individuals should be involved in the drafting of the relevant organisation's Sanctions Procedures in order to ensure that the Sanctions Procedures are free from their influence and interests.

Ultimately, it must be decided in each individual case whether the relationship in question is of such a nature and degree as to suggest a lack of impartiality on the part of the tribunal.[582]

(iv) Public judgment / reasoning of judicial decisions

The ECtHR has held that reasons provided by the court in its decision must be such as to enable parties to make effective use of any existing right of appeal.[583] Although Article 6(1) requires courts to give reasons for their decisions, it does not require that such decisions provide a detailed answer to every argument.[584]

The degree to which the duty to give reasons applies may vary according to the nature of the decision and can only be determined based on the circumstances of the case: it is thus necessary to consider, among other things, the variety of the submissions that a party may bring before the court and the differences among statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments in different states.[585]

Article 6(1) does not require a court of appeals to provide detailed reasoning when it merely applies a specific legal provision to dismiss an appeal on points of law as having

[581] See *McGonnell v The United Kingdom*, no. 28488/95 (2000), ¶ 55.
[582] *Micallef v Malta*, no. 17056/06 (2009), ¶ 97.
[583] See, e.g., *Hirvisaari v Finland*, no. 49684/99 (2001), ¶ 30.
[584] See, e.g., *Van de Hurk v The Netherlands*, no. 16034/90 (1994), ¶ 61.
[585] See, e.g., *Jokela v Finland*, no. 28856/95 (2002), ¶ 72; see also *Ruiz Torija v Spain*, no. 18390/91 (1994)/

no prospects of success, without any further explanation.[586] Moreover, in dismissing an appeal, a court of appeals may simply uphold the reasons for the lower court's decision.[587] Nevertheless, the ECtHR has also held that:

> "the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings."[588]

Further, judgments failing to mention very important arguments,[589] making a clear error regarding established facts,[590] or deciding a case for a legal reason that is not good reason in law, have been found to have violated Article 6(1).[591]

(v) Fair trial

The ECtHR has held that the right to a fair trial "is one of the fundamental principles of any democratic society, within the meaning of the Convention."[592] Moreover, the principle of "equality of arms" is inherent in the broader concept of a fair trial.[593] This concept implies that each party must be afforded a reasonable opportunity to present its case – including its evidence – under conditions that do not place it at a substantial disadvantage vis-à-vis the other party.[594] Although this principle, as well as the adversarial principle, applies equally to both parties in the process, usually equality of arms means that the defendant must not be deprived in their fundamental procedural rights in relation to the prosecutor.[595] This principle was found to have been breached in a number of cases, because the ECtHR found that the defendant had been placed at a disadvantage vis-à-vis the prosecutor. For example, in *Menchinskaya v Russia*, the prosecutor intervened in support of the arguments of the applicant's opponent, noting that,

---

[586] See, e.g., *Gorou v Greece (no. 2)*, no. 12686/03 (2009), ¶ 41.
[587] See, e.g., *Garcia Ruiz v Spain*, no. 30544/96 (1999), ¶ 26.
[588] *Helle v Finland*, no. 20772/92 (1997), ¶ 60.
[589] See, e.g., *Benderskiy v Ukraine*, no. 22750/02 (2007), ¶ 46.
[590] See, e.g., *Kalkanov v Bulgaria*, no. 19612/02 (2008), ¶ 26.
[591] See, e.g., *De Moor v Belgium*, no. 16997/90 (1994), ¶ 55.
[592] *Pretto and Others v Italy*, no. 7984/77 (1983), ¶ 21.
[593] European Court of Human Rights: *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)* (2013), at 42.
[594] *Dombo Beheer B.V. v the Netherlands*, no. 14448/88 (1993), ¶ 33.
[595] Marin Mrcela: *Adversarial Principle, the Equality of Arms and Confrontational Rights – European Court of Human Rights Recent Jurisprudence*, EU and Comparative Law Issues and Challenges (2018), at 17.

given that "only the prosecutor, but not the parties, had submitted his arguments orally before the . . . Court, [and] the Court concludes that the prosecutor's intervention in the appeal proceedings on the applicant's claim undermined the appearances of a fair trial and the principle of equality of arms"[596]

Nonetheless, small procedural omissions do not seem to be tantamount to the violation of the "equality of arms" tenet. Thus, for example, in *Ankerl v Switzerland*, the ECtHR found compatible with Article 6(1) a difference of treatment in respect of the hearing of the parties' witnesses, where one party's witness gave evidence under oath, whereas the other party's witness did not. The Court noted that this had not, in practice, influenced the outcome of the proceedings.[597] In *Wierzbicki v Poland*, the ECtHR articulated general principles of the "equality of arms" by stating that:

> "Article 6 of the Convention does not explicitly guarantee the right to have witnesses called or other evidence admitted by a court in civil proceedings. Nevertheless, any restriction imposed on the right of a party to civil proceedings to call witnesses and to adduce other evidence in support of his case must be consistent with the requirements of a fair trial within the meaning of paragraph 1 of that Article, including the principle of equality of arms. As regards litigation involving opposing private interests, equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent"[598]

Applying these principles to the facts of the case, in *Olujic v Croatia*, the ECtHR found that "the national authorities' refusal to examine any of the defence witnesses led to a limitation of the applicant's ability to present his case in a manner incompatible with the guarantees of a fair trial enshrined in Article 6."[599] Similarly, in *Hentrich v France*, the ECtHR held that the applicant did not get a reasonable opportunity to present his case under conditions that would not place him at a substantial disadvantage vis-à-vis his opponent in administrative proceedings: on the one hand, the tribunals of fact allowed the defendant (the revenue authority) to confine the reason given for its decision in a way that was too short and general to enable the applicant to mount a reasoned challenge; and, on the other hand, the tribunals of fact declined to allow the applicant to establish a reasoned challenge to the authority's assessment.[600]

---

[596] *Menchinskaya v Russia*, no. 42454/02 (2009), ¶ 39.
[597] *Ankerl v Switzerland*, no. 61/1995/567/653 (1996), ¶ 38.
[598] *Wierzbicki v Poland*, no. 24541/94 (2002), ¶ 39.
[599] *Olujic v Croatia*, no. 22330/05 (2009), ¶ 85.
[600] *Hentrich v France*, no. 13616/88 (1994), ¶ 56.

Further, in *Dagtekin v Turkey*, the ECtHR found violation of Article 6(1), because the defendants were not given access to an important document, which led to the annulment of their lease contracts. The government argued that such denial of access was justified on the security grounds, to which the ECtHR contended that "national authorities can[not] be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved."[601]

In conclusion, the ECHR jurisprudence offers several principles of fundamental due process rights, which could prove useful for MDBs:

First, in principle, parties have a right to a hearing unless there exists an exceptional circumstance that justifies dispensing with a hearing. Such circumstances depend on the nature of the issues to be decided (e.g., questions of law, as opposed to questions of fact, no contested facts, technical nature of disputes, which are better addressed in writing than by means of an oral argument, etc.). Moreover, where courts refuse to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the parties' ability to present arguments in support of their case.

Further, parties have the right to have their case heard by an independent and impartial tribunal. The following criteria are considered in determining whether a body can be considered "independent": (1) the manner of appointment of the members, (2) the duration of their term of office, (3) the existence of guarantees against outside pressures, and (4) whether the body presents an appearance of independence. As for the impartiality of the tribunal, the examination of both subjective and objective criteria is required. Subjective criteria examine whether the judge holds any personal prejudice or bias in a given case, whereas objective criteria examine whether the tribunal itself and, among other aspects, its composition, offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

Additionally, courts have to provide sufficient reasoning for their decision to enable parties to make effective use of any right to appeal. Such decisions need not provide a detailed answer to every argument, however.

[601] *Dagtekin v Turkey*, no. 70516/01 (2007), ¶¶ 33-34.

Finally, the principle of "equality of arms" is inherent in the broader concept of a fair trail, and implies that each party must be afforded a reasonable opportunity to present its case – including evidence – under conditions that do not place it at a substantial disadvantage vis-à-vis the other party.

E. MDBs' administrative tribunal jurisprudence

Yet another useful source for MDBs' sanctions regimes may be the jurisprudence developed by MDBs in disputes with their staff members. The jurisprudence concerning MDBs' disputes with their staff members is abundant and points to a number of principles that can be compared to disputes with the parties found to have engaged in sanctionable practices. Namely, under the dispute resolution process between MDBs and their staff, a staff member who has been disciplined for misconduct may bring an action before the relevant MDB's administrative tribunal or an analogous body challenging the legality of the decision to impose disciplinary sanctions. Such challenge could be based on the argument that the decision was unlawful and should be invalidated because it was based on a process, including the underlying investigation of misconduct, that did not afford adequate procedural protection to the accused. Thus, the WB administrative tribunal ("**WBAT**") has long held that, although WB "conducts administrative investigations which are not adjudicatory in nature. . . certain minimum guarantees must be observed, including that the accused staff member is informed of the allegation against him, given a fair opportunity to defend himself, to rebut accusations and to give his version of the pertinent events as to facts, arguments and conclusions."[602] Moreover, the WB's sanctions process has been informed by the WBAT's efforts to distil "national law principles from legal systems with which the Tribunal judges are familiar, both civil law and common law." [603]

While MDBs' sanctions regimes can and should borrow some of the key tenets of fairness in dispute resolution procedures from international organisations' administrative tribunals, which have decided a significantly larger number of cases than the appeals

[602] See, e.g., *Rendall-Speranza v IFC*, WBAT Decision No. 197 (1998), ¶¶ 57-63; and *"D" v IFC*, WBAT Decision No. 304 (2003), ¶ 55; see also *de Merode v The World Bank*, WBAT Decision No. 1 (1981), ¶ 28.
[603] Pascale Helene Dubois and Aileen Elizabeth Nowlan: *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 Yale Journal of International Law 15 (2010), at 21.

bodies have, it is important to keep in mind that the principles of employment relations between international civil servants and international organisations are fundamentally different from those between international organisations and third parties, as in the case of sanctions proceedings. Below is a description of some of the key due process tenets that emerge from the administrative tribunals' decisions and that could be relevant to the MDBs' sanctions regimes.

(i) Discovery rights

In many national court proceedings, claimants have quite extensive discovery rights in disputes against employers, and can seek a range of relevant documents, including even those that would not be admissible in court, as long as they "are reasonably calculated to lead to the discovery of admissible evidence."[604] Parties may also depose witnesses and take their testimony under oath.[605] For example, in the US, it is the parties that are expected to work out their own discovery disputes, and discovery requests and their responses are not filed with the court or agency. If a party faces a non-responsive counterpart, or seeks protection from some request that the party considers improper, he/she may seek court intervention and ask the judge to compel discovery or issue a protective order.[606]

By contrast, discovery in the proceedings before MDBs' administrative tribunals usually takes place through a request made to the tribunal itself, and it is then up to the tribunal to decide whether or not to honour such request.[607] In that context, it has been suggested that MDBs' administrative tribunals tend to be far more sympathetic to MDBs when considering whether a document request is "unduly burdensome" than would a US court in a similar situation.[608]

[604] See, e.g., the US Federal Rules of Civil Procedure, Rule 26(b)(1); and the UK Civil Procedure Rules, Part 31.
[605] US Federal Rules of Civil Procedure, Rule 30.
[606] Marie Chopra: *Discovery in Administrative Tribunal Cases*, in in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 188.
[607] See, e.g., Rules of the World Bank Administrative Tribunal, Rule 73, Rules of the IMF Administrative Tribunal, Rules VII(2)(h) and XVII.
[608] Marie Chopra: *Discovery in Administrative Tribunal Cases*, in in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 189.

Still, although respondents have no power to force MDBs' investigators to produce information, investigators are required to produce both exculpatory and mitigating evidence, and administrative tribunals have, in the past, faulted internal investigators for not giving "proper weight to the exculpatory testimony."[609] Further, the WBAT has emphasised that, as neutral fact-finders, the investigators' duty is "to find facts and not to interpret the rules in a manner that would justify charging applicants with misconduct."[610]

In addition, if the document requested to be produced is deemed to be important enough, the party refusing to produce it runs the risk of having judgment delivered against it. Such judgment was rendered in a recent UN Dispute Tribunal case, *Bertucci v Secretary-General of the United Nations*, in which the Tribunal explained its default judgment against the UN, which refused to produce evidence:

> "The applicable principle is not only clear but rests upon sound notions of procedural justice: the respondent cannot put an applicant to proof when material that is or may reasonably be thought to be a part of that proof is withheld from disclosure by the respondent despite an order for it to be produced. This would enable the respondent to profit from its own illegal actions in breach of its contractual obligation towards the applicant and its instrumental obligations to the Tribunal."[611]

(ii) Oral hearings and witnesses

Because MDBs do not have judicial powers of subpoenaing witnesses, grieving employees cannot oblige a person to appear as a witness. However, administrative tribunals generally have discretion to allow oral hearing of both the parties and their witnesses and experts. Thus, for example, the EBRD Administrative Tribunal Rules state that:

> "The Tribunal may put any question to the witnesses and the experts. Should a party wish to ask any witness or expert (other than its own) any questions, it should provide the Tribunal and the other party with a list of such questions in advance of the relevant hearing. These may only be asked by the chair serving on the Appeal in the form that he deems most suitable. A party who believes that the answers provided invite further questions, may propose to the Tribunal that such further questions be put by the chair serving on the Appeal to the person providing the answer."[612]

[609] *BB v IBRD*, WBAT Decision No. 426 (2009), ¶ 111.
[610] *Ibid.*, ¶¶ 119.
[611] *Bertucci v Secretary-General of the United Nations*, Judgment No. UNDT/2010/80 (2010), ¶¶ 34 and 35.
[612] EBRD Administrative Tribunal Rules, Rule 7.02.

Other administrative tribunals have analogous provisions and therefore retain control over questions posed to witnesses.[613] Some Tribunals, however, allow parties to cross-examine witnesses,[614] which arguably provides greater due process rights to the respondent than the examination by the Tribunal.

(iii) Publication of decisions

Most administrative tribunals publish their decisions,[615] which has resulted in the compilation of a rich database of cases, most of which are searchable by key terms. Arguably, the fact that these decisions are published and fully reasoned has contributed to the Tribunals' professionalisation and perception of transparency. If the Tribunal 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.[616] Finally, parties may request anonymity, which the Tribunal will grant where good cause has been shown for protecting the privacy of an individual.[617]

(iv) Composition of administrative tribunals

(a) WBAT

Created in 1980, the WBAT has served as a model for the administrative tribunals at other international organisations – namely, the IMF, ADB, AfDB and EBRD.[618] Article 1 of the WBAT Statute expressly states that the WBAT is a judicial body which functions independently of the WB's management and that the independence of the Tribunal will be guaranteed and respected by the WB at all times.[619] In addition to this fundamental

[613] See, e.g., UN Administrative Tribunal Rules, Chapter III, Article 10(3) and IMF Administrative Tribunal Rules of Procedure, Rule XIII.
[614] See, e.g., IMF Administrative Tribunal Rules of Procedure, Rule XIII, and WBAT Rules, Rule 18.
[615] See, e.g., WBAT Rules, Rule 31.
[616] See Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012).
[617] See, e.g., IMF Administrative Tribunal Rules of Procedure, Rule XXII.
[618] C.F. Amerasinghe: *Reflections on the International Judicial Systems of International Organizations*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 38.
[619] World Bank Administrative Tribunal Statute, Article I(2).

principle, there are two other features of the WBAT that are particularly important for safeguarding its independence:

(1) First, the Statute emphasises high qualifications required of judges and requires them to be "persons of high moral character [that] must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence."[620]

Further, the Statute states that the WB's current or former staff members are not eligible for appointment and that judges may not be employed by WB after their service on the Tribunal.[621] Arguably, these provisions of the Statute have depoliticised the appointment of the WBAT judges. Admittedly, the judges are appointed by the WB's Executive Directors (a body representing all of the WB's member countries), upon the recommendation of the WB's President, who consults with both the Executive Directors and the Staff Association before compiling a list of proposed candidates.[622] This approach towards the selection criteria and appointment of judges has been followed by a number of other tribunals, including the IMF Administrative Tribunal,[623] the UN Dispute Tribunal[624] and the UN Appeals Tribunal.[625]

Finally, the WBAT judges are appointed for a five-year term, renewable once.

(2) Second, the WBAT Statute recognises the independence of the WBAT Secretariat, expressly stating that the Secretary is responsible in the performance of duties solely to the Tribunal.[626] While this arrangement has been lauded as insulating the Secretariat and the Tribunal from any undue influence that might otherwise have been applied by WB, it is difficult to imagine how the Secretary, who is a WB employee, can be completely insulated from the politics of the organisation which

[620] *Ibid*., Article IV(1).
[621] *Ibid*.
[622] C.F. Amerasinghe: *Reflections on the International Judicial Systems of International Organizations*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 39.
[623] See Article VII of the IMF Administrative Tribunal Statute.
[624] See Article 4 of the UN Dispute Tribunal Statute.
[625] See Article 3 of the UN Appeals Tribunal Statute.
[626] World Bank Administrative Tribunal Statute, Article VI(2).

"hosts" his/her office and decides on the Secretariat's budget and the Secretary's salary.

(b) UN Appeals Tribunal

The UN Appeals Tribunal (the "**UNAT**") is an appellate court established by the UN General Assembly to review appeals against judgments rendered by the UN Dispute Tribunal. Similarly to the WBAT Statute, the UNAT Statute also seeks to create a nomination process that instils independence, accountability and professionalism. To that end, the UNAT judges are appointed by the General Assembly on the recommendation of the Internal Justice Council[627], which is in turn composed of five members: one UN staff representative, one management representative, two external jurists nominated by staff and management respectively , and a third external jurist chosen by a consensus of other members to be the Chairperson. [628] The UNAT Statute further prescribes strict qualifications for judicial appointment: the candidate must possess at least 15 years of judicial experience.[629]

The UNAT judges are appointed for one non-renewable term of seven years and may only be removed by the General Assembly for misconduct or incapacity.[630] This approach of longer and non-renewable terms has been lauded as "enhancing structural independence to a significant extent."[631] Further, in order to remove any perception of bias based on consideration of future employment, the UNAT Statute renders judges ineligible for any UN appointment other than a judicial post for five years after the expiration of their term of office.[632]

[627] UNAT Statute, Article 3(2).
[628] See the Internal Justice Council website: http://www.un.org/en/oaj/unjs/internal.shtml.
[629] UNAT Statute, Article 3(3)(b).
[630] *Ibid*., Article 3(4).
[631] See, e.g., Rishi Gulati: *An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?*, Max Planck Yearbook of United Nations Law, Volume 21 (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200559, at 232.
[632] UNAT Statute, Article 3(6).

(c) IMF Administrative Tribunal

The IMF Administrative Tribunal is an appellate court established by the IMF for the resolution of employment disputes arising between the IMF and its staff members. It is composed of five members, appointed by the IMF's Managing Director, after consultation with the Staff Association and with the approval of the Executive Board.[633] The appointment term is four years, which can be renewed twice. This is somewhat surprising, given the increasing recognition that relatively lengthy tenures with limited to no possibilities for renewal are key to judicial independence. For example, the Institut de Droit International suggests that "[i]n order to strengthen the independence of judges, it would be desirable that they should be appointed for long terms of office, ranging from nine to twelve years. Such terms of office should not be renewable."[634]

The Tribunal members may not have any prior or present employment relationship with the IMF and must possess the qualifications required for the appointment of high judicial office or be jurisconsults of recognised competence.[635] The members of the Tribunal must be completely independent in the exercise of their duties, may not receive any instructions or be subject to any constraint. They are not eligible for staff employment with the IMF following the end of their service with the Tribunal.[636]

In conclusion, the MDBs' administrative tribunal jurisprudence offers several principles, which could prove useful for MDBs's sanctions proceedings:

First, with respect to discovery rights, if a document requested to be produced is deemed to be important enough, the party refusing to produce it runs the risk of having judgment delivered against it. Further, parties are allowed to inform the tribunal of the names and identity of any witnesses whom they wish to be heard, and some tribunals allow cross-examination of such witnesses. Moreover, most tribunals publish reasoned decisions.

[633] IMF Administrative Tribunal Statute, Article VII.
[634] Institut de Droit International: *Resolution on the Position of the International Judges*, note 5, Article 2(1).
[635] IMF Administrative Tribunal Statute, Article VII.
[636] *Ibid*., Article IX.

As for the composition of tribunals, they are composed of non-staff members, who meet very high professional criteria. The length of members' appointment varies from non-renewable seven-year terms to four-year terms renewable twice.

F. Conclusion

The preceding sections have put forward four different sources of best practice standards for MDBs' sanctions regimes, none of which is perfect. Specifically, as the preceding sections have demonstrated, both Global Administrative Law and customary law and legal principles are too high-level and therefore not particularly useful for determining appropriate due process standards for MDBs' sanctions proceedings. Instead, the relevant standards could be identified through case law of the ECtHR and, to some degree (particularly with respect to the composition of tribunals), of MDBs' administrative tribunals. Cases by the ECtHR or the relevant administrative tribunal could be used to fill the gaps in sanctions proceedings by appropriate reliance on analogies. In particular, the ECtHR case law deals with issues from different kinds of legal systems in an integrated way,[637] while MDBs' administrative tribunals, by their administrative set-up, are the closest analogue of MDBs' appeals bodies.

In addition, other sources could also prove useful and be examined by analogy to MDBs' sanctions procedures, including FAR and the principles of procedural propriety articulated in judicial review cases described in section 1. Moreover, in view of the differences in national laws and notions of justice from which MDBs would have to choose in developing their sanctions processes if they tried to base them on customary law and the fact that such procedural issues as admissibility and assessment of evidence are indeed primarily matters for regulation by national law and national courts, rather than the likes of the ECHR,[638] international arbitration rules could provide guidance for filling procedural gaps in MDBs' sanctions procedures – for example, the arbitration rules like the IBA Rules, the UNCITRAL Rules, the SCC Rules, the LCIA Rules, etc.

Of course, such approach of comparing procedural rules of other systems would have inherent practical limitations, and the comparative reasoning may fail for many

[637] Martins Paparinskis: The International Minimum Standard and Fair and Equitable Treatment, Oxford University Press (2013), at 178.
[638] See, e.g., *García Ruiz v. Spain* no. 30544/96 (1999), ¶ 28.

reasons, such as the incomplete transposition of the original reasoning that led to these particular rules.[639] After all, these rules are a product of historical and social development of the relevant system and a direct transplant of a rule or body of law may not have the same measure of success as it did in its home jurisdiction.[640] What is important, then, is to understand that these sources are in no way determinative in and of themselves or to be applied *verbatim.*[641] Instead, one should identify the similarities and differences and address the key question of comparative analysis in international law: To what extent is it appropriate to employ these considerations for the analysis of sanctions proceedings? If this perspective is not properly identified, then the comparative argument may well distort the original logic.[642]

Moreover, none of these sources prescribes specific detailed procedures applicable across the endless variety of cases: one set length of the hearing day, one set number of disclosure requests and other similar issues that one encounters in practice. The laws and rules certainly cannot capture what due process requires in any individual case. But, they can signal qualitative differences between the two categories of routine process and due process.[643]

The next Chapter attempts to apply these sources to MDBs' sanctions regimes with the aim of proposing best practices for these regimes.

[639] Martins Paparinskis: The International Minimum Standard and Fair and Equitable Treatment, Oxford University Press (2013), at 180.
[640] Otto Kahn-Freund: *On Uses and Misuses of Comparative Law*, The Modern Law Review, Volume 37, No. 1 (1974), at 6.
[641] See, e.g., Günter Frankberg: *Critical Comparisons: Re-thinking Comparative Law*, 26 Harvard International Law Journal, 411 (1985) and John Reitz: *How to Do Comparative Law*, 46 American Journal of Comparative Law 617 (1998).
[642] See, e.g., Otto Kahn-Freund: *On Uses and Misuses of Comparative Law*, The Modern Law Review, Volume 37, No. 1 (1974).
[643] Lucy Reed: *Ab(use) of due process: sword vs shield*, Arbitration International (2017), at 369.

CHAPTER 3: DUE PROCESS STANDARDS AND TREATMENT OF CORPORATE GROUPS UNDER MDBs' SANCTIONS REGIMES

Introduction

The previous two Chapters have highlighted some of the key differences between MDBs' sanctions regimes and have proposed different sources of best practice standards for these regimes, most notably the case law of the ECtHR and MDBs' administrative tribunals, as well as FAR and principles of procedural propriety articulated in the US and UK judicial review cases. Applying these standards to MDBs' sanctions regimes, this Chapter proposes enhancements to MDBs' sanctions regimes in the areas of discovery rights, publication of decisions, referral to national authorities, optimal composition of Sanctions Boards,[644] range of sanctions and settlements. The analysis of procedural matters, such as the optimal discovery rights, experts' reports, witnesses, assessment of evidence and oral hearings, introduces the possibility of looking at international arbitrations rules for filling very specific, procedural gaps in MDBs' sanctions procedures. The proposals for improvements to MDBs' sanctioning guidelines and settlement regimes are based on the analysis of the US and UK sanctioning guidelines and settlement regimes, respectively. The first part of the Chapter concludes by providing a table-form summary of proposals for the enhancement of MDBs' sanctions regimes.

The second part of this Chapter analyses the treatment of corporate groups, particularly the application of sanctions on a sanctioned party's employer, subsidiary, parent company or successor, and proposes further guidelines based on US and the UK jurisprudence.

1. Key due process principles to be followed in sanctions proceedings

A. Introduction

As noted in Chapter 1, sanctions regimes of all five MDBs contain many of the fundamental principles of due process rights, including giving notice of allegations and of final decisions, an opportunity for the respondent to defend itself through a two-step decision-making process. While many similarities exist between the five systems, however, differences remain on numerous procedural issues which are relevant to

[644] In this Chapter, "Sanctions Board" refers to an appeals body in MDBs' sanctions proceedings.

respondents' due process rights. In particular, the MDBs differ in the composition of their appellate bodies, which may affect respondents' right to a decision being rendered by an independent and impartial tribunal. They also follow different practices with respect to discovery rights, in particular the use of hearings and witnesses in the discovery process, the range of sanctions that can be imposed, and the issuance of reasoned decisions and their publication. Finally, MDBs also take different approaches towards referral of cases to national authorities and on the availability of settlements. The sections that follow analyse and propose best practices for each of these areas on the basis of the principles identified in the preceding two Chapters.

Moreover, while great strides have been made towards harmonisation of sanctions regimes among MDBs, starting from the Cross-Debarment Agreement to the Sanctioning Guidelines and the Harmonised Principles on Treatment of Corporate Groups, the harmonisation process is still far from complete. Commentators have recommended higher level of cooperation and exchange of information among the MDBs' investigative arms, mutual enforcement by other actors, such as national governments and other development agencies, and even creation of a joint Sanctions Board.[645] In that context, best practices proposed in this Chapter would also contribute to greater harmonisation of MDBs' sanctions regimes.

Notably, however, while harmonisation in core respects is essential for cross-debarment and due process, MDBs should retain discretion to adapt to regional needs and their own institutional priorities, given each institution's specific mandate and operational context. A certain degree of variation is inevitable among the MDBs as it is among national courts and arbitral institutions.

B. Discovery rights

(i) Permissive approach and production of documents

Consistent with the administrative nature of proceedings, MDBs' sanctions procedures provide for an extremely permissive approach to evidentiary issues, leaving it

[645] Lorenzo Nesti: *The 2010 "Agreement on Mutual Enforcement of Debarment Decisions" and Its Impact for the Fight Against Fraud and Corruption in Public Procurement*, Journal of Public Procurement, Volume 14, Issue 1, 62-95 (2014), at 76.

to the decision-maker to determine the relevance and materiality of the presented evidence.[646]

Consequently, both the investigators and the respondent may present any kind of evidence, and where "best evidence" is not available, parties are permitted to present whatever circumstantial evidence they can present to support an allegation or factual assertion. At the same time, however, it is entirely up to the decision-makers[647] to evaluate and weigh the evidence, so they may freely decide that circumstantial evidence proffered by the party is insufficient to support the relevant allegation or assertion.

Yet, the flexible and vague evidentiary rules pose the danger of leaving gaps, which can cause problems if parties have conflicting views on how the case should proceed. This is especially the case when parties come from different legal backgrounds and cultures. The IBA Rules could potentially serve as a reference for filling these gaps.

Notably, some of the IBA Rules provisions are at odds with the underlying principles of MDBs' sanctions procedures: For example, the IBA Rules allow each party to submit a request to produce documents to the arbitral tribunal and the other parties.[648] Similarly, the IBA Rules also permit parties to ask an arbitral tribunal "to take whatever steps are legally available to obtain the requested documents, or seek leave from the arbitral tribunal to take such steps itself", as long as the arbitral tribunal determines that such documents would be "relevant to the case and material to its outcome."[649] Likewise, the SCC Rules allow parties to request the Arbitral Tribunal to order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome.[650] MDBs' sanctions procedures, on the other hand, rely on each party producing its own evidence to support its case, and require investigators to produce the evidence in support of their investigations, including all exculpatory and mitigating evidence. Namely, MDBs' investigators do not possess the traditional powers of investigators in a national police agency – including, at least after court approval, the power to compel testimony and

[646] See, e.g., WB Sanctions Procedures, §7.01.
[647] In this Chapter, "decision-maker" refers to the first-tier decision-maker or the Sanctions Board in MDBs' sanctions proceedings, depending on the stage of the proceedings.
[648] IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 3(3).
[649] *Ibid*., Article 3(9).
[650] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 31(3).

the production of documentary evidence.[651] Even their ability to access the records of a respondent company depends on the MDB having included such clause (often referred to as the "third party audit right") in the initial contract, which naturally limits the MDBs' ability to gather sufficient evidence of sanctionable practices. Alternatively, MDBs could seek information from law enforcement authorities in order to obtain information, but the authorities' willingness and ability to provide assistance to the MDBs will depend on that jurisdiction's legal framework and the authority's willingness to cooperate. Yet, even with these limitations on MDBs' ability to gather evidence and despite the fact that investigators are required to produce both exculpatory and mitigating evidence (which, as discussed in Chapter 2, is in line with the practices of MDBs' administrative tribunals[652] and the ECtHR[653]), respondents have no power to force MDBs' investigators to produce information. Discovery is thus one area where sanctions procedures do not come close to the rights that respondents would have if they were able to appeal to the courts of a national judicial system.[654]

As a possible solution to the discovery conundrum, MDBs' sanctions procedures could specify that respondents have the right to request documents from investigators and that investigators are expected to respond to those requests. Only if the investigators claim that the discovery requested is irrelevant, privileged, or unduly burdensome, would the decision-maker be brought in to decide. In most cases, the presumption would be that the requesting party is making legitimate requests and the burden would be on the investigators to persuade the decision-maker otherwise.[655] Further, in line with the current version of the WB's Sanctions Procedures, investigators should have the right to redact particular parts of evidence by removing references to staff members and other third parties in case where the identity of such parties is either not relevant or not germane to the case.[656] The respondent may, however, challenge a redaction, in which case the decision-maker would review the unredacted version of such evidence to determine

[651] Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011), at 252.
[652] See, e.g., *N v IBRD*, WBAT Decision No. 362 (2007), ¶ 35; *BB v IBRD*, WBAT Decision No. 426 (2009), ¶¶ 111 and 119; and *M v IBRD*, WBAT Decision No. 369 (2007), ¶ 71.
[653] See, e.g., *Dagtekin v Turkey*, no. 70516/01 (2007).
[654] See, e.g., Rule 26(b)(1) of the US Federal Rules of Civil Procedure and Part 31 of the UK Civil Procedure Rules.
[655] See, e.g., Marie Chopra: *Discovery in Administrative Tribunal Cases*, in in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), in the context of discovery rights in the MDBs' administrative tribunal proceedings.
[656] World Bank Sanctions Procedures, § 5.04(d).

whether the redacted information is necessary to enable the respondent to mount a meaningful response to the allegations against it.[657]

(ii) Experts' reports and assessment of evidence

There are several other procedural provisions in various international arbitration rules that could prove useful for MDBs' sanctions regimes, given that the jurisprudence of MDBs' administrative tribunals and the ECtHR is sparse in this area: For example, MDBs' sanctions procedures are silent on the use of expert reports, and would benefit from the IBA Rules provisions on the content of expert reports, which say that the expert report must describe, among other things, "the methods, evidence and information used in arriving at the conclusions."[658] The IBA Rules further require disclosure with respect to any and all relationships the expert may have with the parties, their legal advisors and the arbitral tribunal,[659] as well as a statement of the expert's independence (for example, in the sense that the expert has no financial interest in the outcome or otherwise has relationships that would prevent him/her from providing his/her opinion).[660] The UNCITRAL Rules go even further and allow parties to inform the Tribunal if they have any objections to the expert's qualifications, impartiality or independence, and the Tribunal may decide whether or not to accept such objection.[661]

Similarly, the SCC Rules, the LCIA Rules and the UNCITRAL Rules require the Arbitration Tribunal to send a copy of the expert's report to the parties and to give them an opportunity to submit written comments on the report and examine any expert appointed by the Arbitral Tribunal at a hearing.[662]

Further, just like MDBs' sanctions procedures, the IBA Rules, the SCC Rules, the LCIA Rules and the UNCITRAL Rules all contain the general principle that the arbitral

[657] *Ibid*. See also analogous provisions in EBRD's Enforcement Policy and Procedures, §§ 4.7 and 7.4.
[658] IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 5(2)(e).
[659] *Ibid*., Article 5(2)(a).
[660] *Ibid*., Article 5(2)(c), and 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee: *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2 B.L.I., at 16-36 (2010).
[661] UNCITRAL Arbitration Rules, Article 29(2).
[662] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 34; UNCITRAL Arbitration Rules (2013), Article 29(4) and (5); and LCIA Arbitration Rules (2014), Article 21.4.

tribunal shall determine the admissibility, relevance, materiality and weight of evidence.[663] The IBA Rules go further and lay out how an arbitral tribunal will determine what evidence it will consider and how evidence will be assessed: Thus, for example, the IBA Rules allow the arbitral tribunal, at the request of a party or on its own motion, to exclude from evidence any document, statement, oral testimony for, among others, the following reasons: (i) legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable; [664] (ii) grounds of commercial or technical confidentiality that the arbitral tribunal determines to be compelling;[665] (iii) grounds of special political or institutional sensitivity that the arbitral tribunal determines to be compelling;[666] or (iv) considerations of procedural economy, proportionality, fairness or equality of the parties that the arbitral tribunal determines to be compelling.[667]

In order to provide some predictability to the proceedings, the IBA Rules further lay out a number of different considerations for the tribunal to take into account when deciding on privilege-related issues (e.g., the need to protect the confidentiality of a piece created for the purpose of providing or obtaining legal advice or for the purpose of settlement negotiations, the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules, etc.).[668] While the exceptions described in (i)-(iii) above are understandable in that some documents may be subject to such commercial and technical confidentiality concerns that they should not be required to be introduced into evidence, these kinds of exclusions could be used to delay the process: "procedural economy" in (iv) is far from a clearly defined concept, which means that parties cannot be sure if there indeed exist grounds to object to a request to produce for economic reason, and different tribunals are bound to interpret this provision in different ways.

Moreover, although the IBA Rules provide tribunals with express authority to take into account the lack of good faith at the cost stage of the proceedings,[669] it seems unlikely

[663] 2010 IBA Rules of Evidence, Article 9(1); UNCITRAL Arbitration Rules (2013), Article 27(4); LCIA Arbitration Rules (2014), Article 22.1(vi); and Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 31(1).
[664] 2010 IBA Rules of Evidence, Article 9(2)(b).
[665] *Ibid*., Article 9(2)(e).
[666] *Ibid*., Article 9(2)(f).
[667] *Ibid*., Article 9(2)(g).
[668] *Ibid*., Article 9(3).
[669] *Ibid*., Article 9(7).

that tribunals would condemn on bad-faith grounds an objection to the document production because of procedural economy. Consequently, parties may be encouraged to submit objections on economic grounds without fearing breaching the duty to act in good faith (except for the most blatant attempts to stall the process). Still, the threshold for excluding evidence on these grounds appears quite high, given that the arbitral tribunal must find the concerns to be "compelling" and, furthermore, under Article 9(4) may make certain arrangements (such as entering into a confidentiality agreement or order) in order to permit evidence to be considered subject to suitable confidentiality protection.[670] All of these principles could also be used by MDBs in filling the gaps in the application of their rules of evidence.

(iii) Witnesses and oral hearings

As noted in Chapter 1, WB is the only MDB that allows live witness testimony during sanctions proceedings. Witnesses may be called and questioned only by the Sanctions Board, and no cross-examination is allowed.[671] Further, as noted in Chapter 2, MDBs' administrative tribunal rules are more flexible, and typically give tribunals discretion to allow oral hearing of both the parties and their witnesses and experts, with some even allowing cross-examinations. The IBA Rules also allow each party to request the presence of a witness whose appearance it requests,[672] and grant the Arbitral Tribunal the power to limit or exclude a question, answer, or the appearance of a witness if it considers the question or presence of the witness irrelevant or immaterial.[673] If a witness whose testimony is requested by a party refuses to cooperate, that party may ask the arbitral tribunal to take whatever steps are available to obtain that testimony, or seek leave from the arbitral tribunal to take such steps itself.[674]

Notably, however, under most arbitration rules, either the arbitral tribunal or a party with the approval of the arbitral tribunal may ask state courts to compel the witness

[670] 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee: *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2 B.L.I., at 16-36 (2010).
[671] WB Sanctions Procedures, § 6.03(b)(iv).
[672] IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 8(1).
[673] *Ibid*., Article 8(2).
[674] *Ibid*., Article 3(9).

to appear or to examine the witness itself.[675] This is in stark contrast to the powers of Sanctions Boards, which cannot avail themselves of courts' witness subpoena powers. Consequently, parties in sanctions proceedings cannot request Sanctions Boards to compel witnesses to appear. Inevitably, the decision of whether or not to allow live witness testimony and cross-examination will turn to the balancing act of whether, in the opinion of the Sanctions Board, this is necessary to ensure a fair hearing of the respondent's case. Similarly, as discussed in the context of judicial review standards in Chapter 2, if the Sanctions Board thought that a request to call a witness were in bad faith (e.g., in order to obstruct or subvert proceedings by calling larger numbers of witnesses), it should not be required to call witnesses.[676]

Still, following the example of MDBs' administrative tribunals, which as described in Chapter 2, allow each party to inform the tribunal of the names and description of any witnesses and experts whom the party wishes to be heard, as a starting point, parties in sanctions proceedings should be allowed to provide the Sanctions Board with the names of witnesses whom they wish to appear before the Board, bearing in mind that the Board does not have judicial powers of subpoenaing witnesses. Just as in the case of administrative tribunals, if a witness is not able to appear before the Board, the Board may decide that the witness will reply in writing to the questions of the parties.[677]

Sanctions Boards could also take guidance from the LCIA Rules, which try to accommodate for the non-cooperation of a witness by stating that "[i]f the Arbitral Tribunal orders [the] party to secure the attendance of [the] witness and the witness refuses or fails to attend the hearing without good cause, the arbitral tribunal may place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances."[678]

---

[675] See 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee: *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2 B.L.I., at 16-36 (2010); see also Section 43(1) of the 1996 Arbitration Act.

[676] Helen Fenwick and Gavin Phillipson: Text, Cases and Materials on Public Law and Human Rights, 3rd edition, Routledge (2011), at 809.

[677] See IMF Rules of Procedure, Rule XIII; Rules of the Administrative Tribunal of the International Labour Organization, Article 12.

[678] LCIA Arbitration Rules (2014), Article 20.4.

Finally, while cross-examination of witnesses certainly increases parties' due process rights, whether or not Sanctions Boards want to follow suit in this respect will depend on the extent to which they want to "judicialise" their proceedings, at the expense of efficiency and accessibility to those without legal representation. Sanctions Boards may also consider limiting the maximum number of witnesses that each party may offer on each disputed fact.[679]

With respect to oral hearings, given that Article 8.1 of the IBA Rules requires each party to inform the arbitral tribunal and the other parties of the witnesses whose appearance at the hearing it requests, the assumption is that an oral hearing is the default. Similarly, the SCC Rules, the LCIA Rules and the UNCITRAL Rules each allow parties to request a hearing.[680] As described in Chapter 1, MDBs' practices vary in this respect: all MDBs, except for ADB, allow Sanctions Boards to request a hearing; moreover, AfDB and WB also allow hearings at both parties' request, and ADB and EBRD only at respondents' request.

Looking at the practice of MDBs' administrative tribunals, it is evident that some courts, such as the UN Dispute Tribunal, AfDB's and IADB's Administrative Tribunals have oral hearings as a matter of routine, while many others, such as the WBAT and the Administrative Tribunals of the ADB and the IMF rarely have them.[681] As noted in Chapters 1 and 2, judicial review of FAR and other administrative decisions in the US, judicial review of administrative decision in the UK and the ECtHR case law all suggest that oral hearings are not always necessary. In fact, there are no grounds for concluding that mandatory oral hearings result in fairer and better judgments, while they certainly have financial implications for both parties.[682] The operative reason for not calling for oral hearings when a court has discretion to do so is if the court concludes that it has sufficient evidence based on the written proceedings to decide the case fairly. By analogy, the Sanctions Boards should retain a discretion to have or not have oral hearings based on their determination of whether they have insufficient evidence on the basis of the written

[679] See, e.g., Rules of Procedure of the Inter-American Development Bank Administrative Tribunal, Article 20(2)(B).
[680] UNCITRAL Arbitration Rules (2010), Article 17(3); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 32(1); and LCIA Arbitration Rules (2014), Article 19.1.
[681] C.F. Amerasinghe: *Reflections on the International Judicial Systems of International Organizations*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 51.
[682] *Ibid*., at 52.

proceedings to decide a case fairly. In particular, as articulated by the ECtHR's reasoning described in Chapter 2 above, the hearing may be necessary when the Sanctions Board would like to obtain clarification on certain points, which it is unable to do through written submissions or where circumstances require the Sanctions Board to get a personal impression of the respondents in order to give the respondents the right to explain their situation.

C. Publication of decisions

In general, the MDBs have responded to increasing calls for accountability and transparency in their operations by shifting from a presumption of confidentiality to a presumption in favor of access to information. The following table provides an overview of the various MDBs' approaches to the publication of sanctions information:[683]

MDB	Publication of names of debarred parties?	Publication of settlements?	Publication decisions of 1st tier decision-maker?	Publication of decisions of Sanctions Boards?
AfDB	Always	Announces the fact of settlement with limited details.	Summaries only	Summaries only
ADB	No, unless (i) a repeat offence, (ii) respondent cannot be served notice or does not respond, or (iii) exceptional circumstances such as "very serious integrity violations."	N/A	Summaries only	Summaries only
EBRD	Always	No	No	Fully reasoned decisions to be published (no appeals received yet).
IADB	Always	No	Summaries only	Summaries only

[683] See AfDB Sanctions Procedures, ¶¶ 11.7, 14.1 and 15.4; ADB Integrity Principles and Guidelines, ¶¶ 93, 94, 110-113; ADB Anticorruption and Integrity, Case Summaries, available at: https://www.adb.org/site/integrity/case-summaries; EBRD Enforcement Policy and Procedures, §§ 10.3 and 13; IADB Sanctions Procedures, ¶8.6; IADB: Sanctions Officer Case Synopses, available at: https://www.iadb.org/en/sanctions-officer; IADB: Sanctions Committee Case Synopses, available at: https://www.iadb.org/en/sanctions-committee; and WB Sanctions Procedures, §10.01).

WB	Always	Usually announces the fact of settlement with limited details.	Summary determinations published for uncontested sanctions.	Fully reasoned decisions published.

As shown above, nearly all MDBs publish the names of currently debarred respondents on the debarment lists maintained on their public websites. The main exception to this approach is the ADB's use of two separate debarment lists: one public and one private. First-time offenders are included only on ADB's private debarment list, which is available to a limited audience of MDB staff and member governments. Only the published ADB debarments are eligible for mutual enforcement under the Cross-Debarment Agreement.[684]

While MDBs generally publicise who has been debarred, as noted in the above table, only some publish more detailed information to explain why they are debarred. The publication of fully reasoned decisions serves multiple purposes: If a decision-maker 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. Similarly, the strength or weakness of the cases brought by the investigators will come to light. Consequently, publication would also provide a powerful incentive for all stakeholders in the sanctions process to maximise the quality of their work.[685]

Other benchmark regimes also suggest that publication of reasoned decisions would be desirable. Specifically, as noted in Chapter 2, Article 6(1) of the ECHR requires courts to give reasons for their decisions, although it does not require that such decisions provide a detailed answer to every argument, and the degree to which the duty to give reasons applies may vary according to the nature of the decision and can only be determined based on the circumstances of the case.[686]

[684] Agreement for Mutual Enforcement of Debarment Decisions, ¶4(b).
[685] Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012), at 24-25.
[686] See, e.g., *Hirvisaari v Finland*, no. 16034/90 (1994), in which the ECtHR held that "Article 6 para. 1 (art. 6-1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument", ¶ 61. The same principle was reiterated in *Perez v France*, no. 47287/99 (2004), ¶ 81.

Similarly, as noted in Chapter 2, most administrative tribunals publish their decisions,[687] which has resulted in the compilation of a rich database of cases, most of which are searchable by key terms. Further, as noted in Chapter 2, in the context of a judicial review of an administrative decision, in *R v Ministry of Defence ex parte Murray*,[688] a UK court articulated the principles governing the right to be given reasons for the final decision, noting that, while there is no general duty to give reasons, this may be required if necessary to achieve justice, in which case the reasons need be no more than a concise statement of the way in which the decision-maker arrived at its decision. The court in this case also summarised a number of arguments for and against providing reasons, which could also apply to the MDB decision-making bodies' determination of whether to provide reasons for their decisions in sanctions cases: In particular, the most persuasive argument in favour of providing reasons is that this would demonstrate that the issues have been conscientiously addressed and how the result has been reached. Moreover, in view of the increasing trend towards openness and given that sanctions processes have moved closer to a judicial model, issuance of reasoned decisions enhances credibility of the decision-making process and contributes to the development of a more accessible body of jurisprudence.

In addition, the requirement to provide reasoned decisions for administrative action, including responses to arguments raised by interested parties is often a crucial factor in rendering meaningful any accountability mechanism. For example, as described in Chapter 2, in *Siedler v Western European Union*, in finding that the Western European Union's internal procedures fell short of adequate due process requirements under Article 6(1) of the ECHR, the Belgian Court of Appeals cited the fact that the organisation's administrative tribunal did not publish its decisions.[689] Such quest for greater transparency is prevalent in many other areas, including in investment treaty arbitration, where the seeming lack of transparency surrounding arbitrations is perceived by some to be an egregious failing, given that many known cases are challenging a broad spectrum of significant public policy measures in relation to environmental protection and regulation of essential public services. This has led some nations to require that future investment

[687] See, e.g., WBAT Rules, Rule 31.
[688] [1998] COD 134.
[689] *Siedler v Western European Union*, Appeal Judgment, JT 2004, 617, ILDC 53 (BE 2003), ¶ 43.

rules should expressly provide for full transparency both in the launching of claims and in their resolution.[690]

For all its advantages, publication of reasoned decisions is not free of risks, however. For example, there is a risk that the Sanctions Board might rely on defamatory material, which then is placed in the record. While Sanctions Boards can be expected to avoid making assertions not justified by the evidence, the accuracy of the Sanctions Boards' determinations is greatly dependent on the quality of the evidence presented to them.[691] This highlights the significance of the quality of the evidence and of a careful evaluation of the evidence.[692] In this context, comfort can be derived from the fact that evidence gathered by the Investigations Unit is vetted by the first-tier decision maker, and the opportunity is given the opportunity to contest the evidence. Moreover, additional safeguards can be put in place by allowing Sanctions Boards to redact their decisions in order to preserve a party's anonymity and/or protect its reputation.[693] EBRD's procedures offer a good example by stating that the Sanctions Board "may, in its discretion, publish its . . . [d]ecision in such a way so as to preserve the essential anonymity of any person or entity whose reputation might be adversely affected by such publication."

Finally, if Sanctions Board decisions are published, then by the same logic, the first-tier decision maker's decisions in contested cases should also be published once the deadline for appeal has passed without the appeal having been lodged. The first-tier decision-maker should put in place the same safeguards as the Sanctions Board with respect to the redaction of decisions.

In the context of settlements, it might be useful for the MDBs to establish clear guidelines on the publication of settlements. This would not only ensure greater consistency, but also address concerns about unequal treatment for different types of respondents.[694]

---

[690] See Luke Eric Peterson and Kevin R. Gray: *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development research paper (2003), at 34.
[691] Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012), at 24-25.
[692] *Ibid*.
[693] See, e.g., Section 10.3(v) of EBRD's Enforcement Policy and Procedures.
[694] African Development Bank, Independent Development Evaluation: *Comparative Review of Sanctions Practices across Multilateral Development Banks, Executive Summary* (May 2019).

D. Referral to national authorities

As described in Chapter 1, MDBs' sanctions procedures follow slightly different practices in terms of referrals to national authorities. Specifically, EBRD's procedures say that, if the Chief Compliance Officer (CCO) makes a determination on a *prima facie* basis that criminal or regulatory laws of any country may have been violated by any party, he/she may at any time, recommend to the President of the Bank that the matter be referred to appropriate governmental authorities (including agencies of a Bank's member country). The recommendation must contain the General Counsel's opinion on the legal implications and ramifications on the Bank's privileges and immunities of the referral. The President then makes the decision on the recommended referral.[695]

IADB's procedures allow the Sanctions Commissioner or the Chairperson of the Sanctions Committee to recommend to the President at any time, if they believe that the laws of any country may have been violated by a respondent, that the matter be referred to appropriate governmental authorities.[696]

ADB's procedures state that the Office of Anticorruption and Integrity (OAI) "may consider whether it is appropriate to refer information relating to the complaint to the appropriate national authorities, and the [OAI] will seek the necessary internal authorisation to do so in cases where it finds a referral is warranted."[697] In practice, such authorisation entails speaking or writing to the Bank's President, who decides on the referral of the matter to appropriate authorities. Further, the OAI only refers to, and advise national authorities of, the OAI's findings where there was clearly a violation of local law.[698]

AfDB's and WB's procedures simply state that the Bank may make disclosure to any governmental authorities as deemed necessary.[699] WB has had extensive experience with referrals to national authorities. In the past, the INT would refer the findings of its investigations to the relevant national authorities, if it believed there had been a violation

[695] EBRD's Enforcement Policy and Procedures, §11.1.
[696] IADB's Sanctions Procedures, §14.2.
[697] ADB's Integrity Principles and Guidelines, §45.
[698] Interview with the Head of OAI (December 2016).
[699] AfDB's Sanctions Procedures, §14.1 and World Bank's Sanctions Procedures, §10.02(a).

of national law. Such information would be sent to the relevant authorities at the end of the INT's investigation, and with a *caveat* that the investigation was conducted pursuant to the WB's anti-corruption framework and that the relevant authority could not rely on it in developing its case (with such *caveat* included to assist in protecting the WB's privileges and immunities). National authorities were required to develop their own evidence pursuant to their own laws, regulations and procedures. The recipients found such information of a limited use. As a consequence, the INT moved towards closer cooperation with national authorities including the sharing of information at the earlier stages of its investigation, with the expectation in certain cases that the authorities would equally share their information and thereby assist with the development of the INT's cases, especially if the INT did not have sufficient evidence to prove a sanctionable practice and believed that law enforcement authorities could be instrumental in obtaining it. In each case, such information was provided with an express statement that such disclosure did not constitute a waiver of WB's privileges and immunities.[700]

The benefits of such referrals were illustrated in the following case, which resulted in a wide-ranging investigation involving multiple national authorities and the debarment of nine companies. It started in 2011, when the INT received allegations that a Dutch medical supply company had obtained confidential information about a WB-financed procurement. INT identified a WB consultant as the potential source of the disclosure. After launching its own investigation, INT referred the matter to Dutch authorities, who initiated a parallel investigation. INT's investigation revealed that the consultant had colluded with the company to help it win WB-financed contracts. INT subsequently made additional referrals to the UK and Switzerland. While the Dutch and UK authorities conducted simultaneous searches in the Netherlands and the UK, the Swiss authorities opened a money laundering investigation and froze several Swiss accounts. In order to uncover the full scope of the consultant's corrupt activities, INT launched investigations covering ten WB-financed projects in nine countries. These investigations have, to date, led to the WBG imposing sanctions on nine companies. They ranged from a one-year debarment to a 14-year debarment with conditional release.[701]

[700] Interview with the WB's Suspension and Debarment Officer (December 2016).
[701] *World Bank Group Sanctions System Annual Report FY18*, at 20.

However, in a recent case before a Canadian court, *Kevin Wallace v HMQ*, the WB's immunities were challenged as a result of the INT's referral to the authorities. Specifically, the information provided by the INT was quite pivotal to the prosecution's case and the defence counsel filed a motion seeking to compel WB to produce additional documents. Given that WB believed that such disclosure would jeopardise WB's immunities, it refused to comply with the motion. Namely, WB's investigators often recognise a need to keep certain information they collect confidential for the following reasons: (a) to preserve the integrity of an investigation and prevent interference with the investigation or destruction of evidence, (b) to protect those who assist the investigators in their investigations and who might otherwise face retaliation, and (c) to reassure potential witnesses, complainants and whistle-blowers that they can come forward confident in the knowledge that their identities will be kept confidential. The judge in the case, however, found that, by having shared the information with the prosecution in the first place, WB had implicitly waived its immunity and ordered WB to produce the documents. Part of the reason for such decision was the judge's perception that, in having shared the information with the prosecution only, WB had put the defence in a disadvantageous position.[702] WB appealed this interlocutory decision before the Supreme Court of Canada, which reversed the trial court's decision, finding that the trial judge erred in his finding that the WB had waived this immunity.[703]

In view of the above, MDBs' sanctions procedures should contain explicit authority to refer cases involving possible violation of national laws to the appropriate law enforcement authorities. Given that a referral to national authorities is not a decision to be taken lightly, any such recommendation should require the identification of the information that may be disclosed to such authorities and possibly also the General Counsel's opinion regarding the legal aspects of the recommended referral. Given the graveness of the decision, it seems appropriate for the MDB's President (in consultation with the senior management) to have a final decision as to whether the matter should be so referred.

Further, in view of the trial court's findings in *Kevin Wallace v HMQ*, MDBs should refer matters and share information with national authorities only in cases where

[702] *Kevin Wallace v HMQ*, 2014 ONSC 7449.
[703] *World Bank Group v. Wallace*, 2016 SCC 15.

they are (a) appraised of the subsequent criminal procedures in the relevant country, and (b) fully prepared to share additional information (in the case of follow-on requests for information), cooperate with the relevant authorities in their investigation and have its staff testify, if necessary. Additionally, a case should be referred to national authorities if there exists credible evidence suggesting that a party had violated national laws. The credibility of such evidence should be corroborated by a local counsel, experienced with the relevant country's criminal law system. Finally, MDBs should also take into account that proper measures are put in place in order to ensure the chain of custody of the evidence.

Another issue is whether the respondent should be informed of such referral. In *C v IBRD*, the WBAT considered a situation in which WB had referred an internal disciplinary matter to the domestic law enforcement authorities, but did not inform the staff member of the nature of the precise files and investigative material turned over to the authorities. The WBAT held that, while it was entirely proper to refer the matter for criminal prosecution, "[h]ad the Bank decided not to disclose any part of the investigation file, it might have had an argument that there was no reason to release it to anyone, including the Applicant. But once the Bank decided to refer this file to an outside party for possible prosecution, the Applicant became entitled to examine such documents since they contained specific accusations against him, particularly those that purport to summarize conversations with him."[704] Thus, the WBAT made clear that the organisation should, unless the law enforcement authorities direct otherwise, inform an accused staff member of any information provided by WB to the authorities for purposes of criminal prosecution. The same reasoning could be applied to MDBs' sanctions procedures: it would be incumbent on the relevant MDB to inform the respondent of any materials made available to the authorities, and to provide copies of any such materials that are not already in the respondent's possession. As under the WB rule adopted in response to the ruling in *C v IBRD*, such notification should be provided within 30 days of disclosure, unless the law enforcement authorities request that it be delayed.[705]

E. Composition of Sanctions Boards

[704] *C v IBRD*, WBAT Decision No. 272 (2002), ¶¶19 and 25.
[705] See WB's Misconduct Policy and Procedures, Rule 8.01.06, available at: http://siteresources.worldbank.org/HR/Resources/328634-1420631346603/Staff_Manual.pdf.

(i) Sanctions Board members' independence and impartiality

All MDBs' Sanctions Board members are expected to act impartially in their review of sanctions cases.[706] However, the Boards vary in their formal independence and appointment or removal provisions, as well as reporting policies and practices. These provisions are summarised in the following table:[707]

MDB	Unqualified written provision of independence ?	External members appointed by the Board of Directors?	Internal members appointed by the President?	Clearly defined limits on removal in sanctions framework?	Length of Sanctions Board members' terms
AfDB	Yes	Yes	Yes	No	Three years, renewable once, "depending on performance."
ADB	No	N/A	No (nominated by the Investigations Unit from among ADB's Vice Presidents)	No	N/A (Sanction Appeals Committee is appointed on an *ad hoc* basis)
EBRD	Yes	Yes	Yes	Yes	External members: five years, renewable once. Internal members: renewable five-year term.
IADB	Yes	No (appointed by the President)	Yes	No	External members: up to five years, renewable once. Internal members: up to three years, renewable once
WB	Yes	Yes	N/A	No	Single, non-renewable term of

[706] See AfDB: Code of Conduct for Members of the Sanctions Appeals Board, ¶1; WB: Code of Conduct for Members of the Sanctions Board, ¶1; ADB: Integrity Principles and Guidelines, ¶99; IADB: Sanctions Committee Charter, Article X, ¶7; and EBRD: Enforcement Committee Code of Conduct ¶1.

[707] See AfDB Code of Conduct for Members of the Sanctions Appeals Board, ¶1; AfDB Sanctions Appeals Board Statute, Articles V(4) and XIV; AfDB Sanctions Procedures, §3.3; ADB Integrity Principles and Guidelines, §§96-101; EBRD Enforcement Committee Code of Conduct, ¶2; EBRD Enforcement Committee Terms of Reference, Article III, §§2-4 and Article X, §1; IADB Sanctions Committee Charter, Article III, §§2 and 4; Article IX, §4; WB Code of Conduct for Members of the Sanctions Board; ¶2; and WB Sanctions Board Statute, §§4(i), 4(iii) and 14).

					six years

As evidenced in a limited number of national cases where courts considered the immunity of international organisations in the context of mostly employment disputes, as described in Chapters 1 and 2, the criteria of "independence" and "impartiality" are central when it comes to assessing due process rights in administrative trials.

As described in Chapter 2, in assessing the independence of tribunals, the ECtHR considers the manner of appointment of the decision-making body's members, the duration of the judges' term of office, the existence of guarantees against outside pressure, and whether the tribunal presents an appearance of independence. While no court has established the optimum term of an administrative tribunal member, in practice, courts balance various factors in order to determine whether the relevant decision-making body is effectively "independent" and guarantees a fair trial. In assessing the impartiality of tribunal members, the ECtHR examines whether the member holds any personal prejudice or bias in a given case and whether the tribunal itself and, among other aspects, its composition, offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

The existence of possible pressure from the relevant MDB is particularly acute in MDBs' Sanctions Boards. Namely, even with the majority of Sanctions Board members being non-MDB employees, the system is still vulnerable to real or perceived conflicts of interest, because several members of the Board (albeit the minority) are still the organisation's staffers with managerial and professional positions that may cause conflicts of interest.[708] In addition, MDBs maintain close relationships with several multinational corporations. For example, Corner House reported that staff members of Lahmeyer International, a company that was debarred by the WB for bribery and fraud in relation to its contracts on the WB-financed Lesotho Highlands Water Project, had previously participated in the WB's staff exchange programme, which "allow[ed] them an insider's view of how the Bank works, as well as allowing them to get to know Bank staff

[708] Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011), at 252.

personally…"[709] These relationships may call into question the neutrality of any investigations into these companies.

Another analogy that could be drawn is between the Sanctions Board members and panels of arbitrators in commercial arbitration. In a recent UK case, *Jivraj v Hashwani*, the Supreme Court considered whether arbitrators should be considered employees for purposes of the employment equality regulations, and concluded that they should not. Had the Supreme Court found otherwise (as did the Court of Appeals), the independence of arbitrators and, by analogy, of the Sanctions Board members, could have been compromised. In that context, the Supreme Court's reasoning in *Jivraj v Hashwani* is worth examining: The Court first accepted that it was "common ground . . . that there is a contract between the parties and the arbitrator or arbitrators appointed under a contract and that his or their services are rendered pursuant to that contract."[710] The Court cited a number of provisions of the Arbitration Act 1996 which are inconsistent with a relationship of subordination to the parties, including the fact that an arbitrator can only be removed in exceptional circumstances.[711] Thus, the Court held that the role of an arbitrator "is not naturally described as employment under a contract personally to do work. That is because his role is not naturally described as one of employment at all."[712] The court did, however, recognise that there were several elements in the arbitrator's work that might have suggested an employment relationship: the arbitrator receives fees for his work and renders personal services that he cannot delegate.[713] Importantly, however, the Court held that "he does not perform those services or earn his fees for and under the direction of the parties."[714] Instead, the Court considered the arbitrator as being "in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services. . . His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party."[715]

---

[709] The Corner House, Dams Inc. 2: Lahmeyer International (2003), cited in Jean-Bernard Auby, Emmanuel Breen and Thomas Perroud: Corruption and Conflicts of Interest, Edward Elgar (2014), at 232-3.
[710] *Jivraj v Hashwani* [2011] UKSC 40, ¶ 23.
[711] *Ibid*., ¶ 42.
[712] *Ibid*., ¶ 23.
[713] *Ibid*., ¶ 40.
[714] *Ibid*.
[715] *Ibid*., ¶ 41.

Commentators have suggested that the application of the "anti-subordination principle" calls for the exercise of considerable judgment as to who is "subordinate" and to whom and, that in the future, there might be considerable debate as to what "subordination" involves, such as how far it extends beyond the "control" test, applied by the Supreme Court to also include economic dependency.[716] The European Court of Justice provided useful guidance in *Allonby v Accrington and Rossendale College*, by stating that "there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration."[717]

Applying these principles to the Sanctions Board members, although they are paid by the relevant MDB, external members of MDBs' Sanctions Boards cannot be said to perform services "under the direction" of that MDB. In fact, as reflected in the table in this section E(i) above, Terms of Reference of the Sanctions Board members of each of AfDB, EBRD, IADB and WB incorporate an unqualified written statement of independence, which says that, "in considering cases, each member shall act independently and shall not answer to or take instructions from the Bank's management, members of the Bank's Board of Director, member governments, Respondents or any other entity."[718] Although this standard applies to all members of the Sanctions Board, and not just external members, in practice, it is not difficult to see that an MDB's employee, who serves on the Sanctions Board, might feel greater pressure to rule in favour of the organisation that employs him/her. The same applies to the first-tier decision-maker, who – except in the case of AfDB – is a regular MDB employee, whose performance and compensation are determined by other MDB employees. It is thus difficult to conclude that, despite the wording in their Terms of Reference, employees of MDBs serving in the capacity of decision-makers in the sanctions proceeding will be truly independent.

Moreover, as established in *Clarke v The United Kingdom*, described in Chapter 2, determination of impartiality requires analysing hierarchical or organisational connections between judges and other actors in the proceedings, as well as the indicia of any pressure

[716] See Christopher McCrudden: *Two Views of Subordination: The Personal Scope of Employmnet Discrimination Law in Jivray v Hashwani*, Ind. Law J (2012), 41(1), at 51.
[717] *Allonby v Accrington and Rossendale College* ((2004) C-256/01), at ¶ 67.
[718] EBRD's Enforcement Committee Terms of Reference, Annex A, ¶ 2; IADB's Sanctions Committee Charter, Article IX(4); WB's Code of Conduct for Members of the Sanctions Board, ¶2; and AfDB's Code of Conduct for Members of the Sanctions Appeals Board, ¶ 2.

put on judges to decide cases one way or another in order to determine whether there is anything that objectively justifies doubts as to the impartiality of the tribunal.[719]

Therefore, in order to avoid the scrutiny of the organisational connections between the investigators and Sanctions Board members (which exist in case of internal Sanctions Board members), it would be advisable for the Sanctions Boards to be composed entirely of non-staff members, as is the case with the WB's Sanctions Board members. Further, in order to ensure maximum impartiality and to prevent any appearance of conflict of the Sanctions Board members, the candidates for the Sanctions Board membership should not have previously held or, at the time of appointment, hold any appointment with the relevant MDB, including as a staff member, Board director or a consultant. In addition, MDBs' sanctions procedures should provide a mechanism that allows a challenge to the impartiality of individual Sanctions Board members, as was suggested in *Siedler v Western European Union*.[720] Moreover, as noted in Chapter 2 in the context of the ECtHR's decision in *McGonnell v The United Kingdom*, none of the Sanctions Board members or the first-tier decision-maker should be involved in the drafting of the relevant MDB's Sanctions Procedures in order to ensure that MDBs' sanctions procedures are free from their influence and interests.

Further, for a period of several years after the end of his/her term, the Sanctions Board member should not be able to (i) accept any kind of employment, consultancy or interest with any firm that has been a respondent in the sanctions proceedings in which such member has participated or (ii) accept any employment with the relevant MDB or provide the MDB with any services. This is in line with what a number of Sanctions Board Statutes already provide.[721] A more nuanced question is whether a Sanctions Board member may simultaneously act as a counsel in a case pending before a different Sanctions Board. In the context of MDBs' administrative tribunals, it is believed that the combination of both roles is permissible as long as the advocacy does not concern a controversial question which is frequently raised before tribunals on which the person sits as a judge. In any event, judges can always recuse themselves from a case if they advocated a position as counsel on a legal question raised in the case in a manner which

[719] *Clarke v The United Kingdom*, no. 23695/02 (2005).
[720] *Siedler v Western European Union*, Appeal Judgment, JT 2004, 617, ILDC 53 (BE 2003), ¶ 61.
[721] See, e.g., WB Code of Conduct for Members of the Sanctions Board, §11, and EBRD Enforcement Committee Code of Conduct, §9.

may reasonably appear to affect their independence in the case on which they are deciding.[722] Further guidance could be taken from the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**"), which include the requirements for arbitrators to disclose certain circumstances upon appointment (or as soon as possible thereafter) if they exist. A list of circumstances is included in the Guidelines, is coded by colour (red, orange and green), which provides examples of specific situations that do, or do not, warrant disclosure by, or the disqualification of, an arbitrator.

With respect to the tenure of the Sanctions Board members, short renewable terms tend to decrease independence, while relatively longer non-renewable terms enhance it.[723] There are two ways to limit the perception that a Sanctions Board member may favour the organisation's management: either appointments are made for life or appointments are restricted to one term without possibility for renewal. The former alternative precludes the potential contribution of new members who may bring different experiences and perspectives.[724] On the other hand, the latter alternative has the inconvenience of the short duration of the appointment given the complexity of the proceedings.[725] A compromise solution could be to have the terms of service be as long as five or seven years, which is sufficiently long. This would also be in line with the Statutes of the UN Dispute Tribunal and the UN Appeals Tribunal, which provide that their judges will be appointed for one non-renewable term of seven years.[726] Similarly, an Evaluation Group appointed by the Council of Europe to assess the working of the ECtHR said that a nine-year non-renewable judicial term for the ECtHR judges would "offer a further guarantee of the Court's independence."[727]

In addition, the Sanctions Board Statute could recognise the administrative and budgetary independence of the Sanctions Board, with the Chair of the Sanctions Board

[722] Nassib G. Ziade: *Conflicts of Interest in International Administrative Law*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 390-91.
[723] Rishi Gulati *An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?*, Max Planck Yearbook of United Nations Law, Volume 21 (2018), at 232.
[724] Andres Rigo Sureda: *The Evolution of the Independence of Internal Judicial and Quasi-Judicial Organs of International Organizations: The Case of the World Bank*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 305.
[725] *Ibid*.
[726] Statute of the UN Dispute Tribunal, Article 4(4) and Statute of the UN Appeals Tribunal, Article 3(4).
[727] Evaluation Group: *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* (27 September 2001), ¶ 89.

preparing the budget and submitting it to the Board of Directors of the relevant MDB as part of the proposed administrative budget of the MDB. Moreover, the budget of the Sanctions Board should not be fungible with the budget of other administrative units.

Finally, as noted in *Jivraj v Hashwani*, the power to remove a member of the Sanctions Board is another essential consideration concerning the independence of the Board. As reflected in the table in this section E(i) above, none of the MDBs, except for EBRD, clearly define the grounds for removal of their Sanctions Board members. Moreover, AfDB's Sanctions Board Statute says that the renewal of the member's term depends on the "performance", but does not specify how such performance will be determined or by whom.[728] As described in Chapter 2, in *Luka v Romania*, the ECtHR expressly stated that the independence of judges was questionable when the executive can remove judges without the law prescribing the criteria based on which such removal can be effected. To date, it does not appear that any MDB has sought to remove a sitting Board member on any grounds. In order to ensure the independence of the Board from the relevant MDB, it would be advisable not only to have clearly defined grounds for the removal of members, but also for the matter to be handled exclusively by the Sanctions Board itself. For example, a Sanctions Board member's appointment could be terminated if two-thirds of the Sanctions Board members agree to such removal, after the member in question has been notified of the alleged grounds for the proposed removal and afforded a reasonable opportunity to respond to the allegations. Right now, MDBs allow their governing bodies to remove Sanctions Board members,[729] which is in contrast with the procedures followed by the administrative tribunals. For example, the UNAT member cannot be dismissed by the General Assembly unless the other UNAT members are of the unanimous opinion that he/she is unsuited for further service.[730] The fact that a Sanctions Board member cannot be removed without a decision being taken by other members, without the involvement of the organisation's management, would be paramount to ensuring the Board's independence.

(ii) Appointment of Sanctions Board members

[728] AfDB's Sanctions Appeals Board Statute, Article V, ¶ 4.
[729] See, e.g., World Bank Sanctions Board Statute, Section 14; EBRD Enforcement Committee Terms of Reference, Article X.
[730] UNAT Statute, Article 3(5).

The appointment of Sanctions Board members is another issue to consider, given that such appointments are made by the governing body of the relevant MDB. As such, there exists a risk that the appointment process will become politicised and will raise issues of impropriety. As reflected in the table in section E(i) above, ADB is unusual in having the Investigations Unit nominate members who serve on the Sanctions Board, as well as provide secretariat support and advice directly to the Board. Among the other MDBs, the selection and appointment process is generally handled independently of the Investigations Unit, and staff outside the Investigations Unit provide the necessary secretariat support or advice to the Board. For the majority of MDBs, external members are appointed by the Board of Directors upon the President's nomination, while internal members are appointed by the President. ADB and IADB are exceptions in having external members appointed by the President, rather than the Board of Directors.

As described in Chapter 2, in *Clarke v The United Kingdom*, the ECtHR found that the mere fact that judges were appointed by one of the parties in the proceedings did not automatically amount to a violation of Article 6(1). Rather, one must examine a broader context of the judges' appointment, including whether they were appointed after a competitive procedure, how their salaries were determined and on what grounds they could be removed. Similarly, in the context of MDBs' administrative tribunals, to avoid the risk of impropriety around the appointment process, at the time of the establishment of the UNAT, there was a discussion as to whether the ICJ should appoint the Tribunal's members. This suggestion was ultimately rejected in favour of an appointment by the UN General Assembly.[731] Nevertheless, both WB and UN have created advisory committees to identify suitable candidates for the administrative tribunal membership. Such advisory committees consist not only of the organisation's management, but also of staff representatives (given that these tribunals resolve employee disputes) and external experts.[732] An analogous committee, majority composed of external experts, could be created for the selection of Sanctions Board members. Moreover, strict qualifications for the Sanctions Board appointments should also be mandated in the fields which are relevant for the service on the Board, notably law, compliance, international procurement, auditing or forensic accounting or related fields.

[731] Nassib G. Ziade: *Conflicts of Interest in International Administrative Law*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 387.
[732] *Ibid*., at 388.

Finally, thought has to be given to the appointment and functioning of the Sanctions Board Secretariat, which is the administrative arm of the Sanctions Board. In all MDBs, the Secretary is always a staff member of the MDB, with his/her budget allocated by the organisation's management, but his/her responsibility only to the Board. As is the case with the administrative tribunals, it is difficult to imagine how the Secretary can be completely insulated from the politics of the organisation which "hosts" his/her office and decides on the Secretariat's budget and the Secretary's salary. The alternative would be to have the Secretary appointed from non-employees of the organisation; however, that would not achieve complete independence given that the Secretary's compensation and the Secretariat's budget would still be determined by the organisation. Therefore, this feature appears to be inevitable, just as is the case with judges and Secretariat officials of national courts, who are generally paid by governments, even though the same governments appear as parties before courts. The arrangements that could contribute to the Secretary's independence, however, include the renewal of his/her term being determined and his/her performance being assessed solely by the Sanctions Board and not the organisation which is a party in proceedings handled by the Secretary, and ideally to have the Secretary elected solely by the Board and not by the organisation's management.

In some MDBs (e.g., AfDB, IADB and WB), the Sanctions Board workload is sufficient to justify having a Secretary work on a full-time basis. However, at EBRD the volume of appeal-level work does not reach this level and, as a result, the Secretary works part-time for the Board and part-time in a different position at the organisation. This, of course, is not ideal, but seems inevitable, given that the number of appeals can vary from zero to several a year, and thus does not warrant a regular part-time employee dedicated solely to this function.

F. Range of sanctions and their proportionality to the wrongdoing; baseline sanction

(i) Range of sanctions; mitigating and aggravating factors

Collectively, MDBs have imposed over 3,200 sanctions to date. Among these, about 80% have been debarments of various types: permanent debarments, fixed-term

debarments or debarments with conditional release.[733] MDBs may want to consider a broader range of sanctions that is not so biased towards debarment, and should also provide more detailed guidelines on mitigating and aggravating factors in order to ensure they are consistently applied.

Looking at other benchmark regimes, it is well-established in international administrative law that disciplinary sanctions must be proportionate to the offence for which they are imposed. This principle has been invoked by the WBAT on several occasions to overturn staff termination decisions on the grounds that they were disproportionate to the offence and failed to adequately take into account mitigating circumstances in the particular case. For example, in *Carew v IBRD*, where a staff member assigned to the WB's printing unit was fired for inflating his overtime claims, the WBAT concluded that:

> "disciplinary measure imposed by the Bank is significantly disproportionate to the misconduct . . . Here, the Tribunal notes the long service of the Applicant as a staff member of the Bank for a period of 14 years, his diligent performance in the discharge of duties, and the positive performance reviews and evaluation he received. Moreover, the Tribunal notes as well that the amount of money improperly claimed was modest, and that the Applicant's employment was not one involving higher management responsibilities."[734]

The WBAT thus rescinded the termination decision and ordered reinstatement or the payment of compensatory damages equal to six months' pay in lieu thereof.

As for mitigating and aggravating factors, as noted in Chapter 1, FAR requires agency officials to consider a number of mitigating factors when determining the length of debarment. In the same vein and in furtherance of greater harmonisation of their sanctions practices, all MDBs have adopted The General Principles and Guidelines for Sanctions (the "**Sanctioning Guidelines**"), which represent a set of principles to ensure consistent treatment of individuals and firms in the determination of sanctions. As the name suggests, however, these are non-binding guidelines and leave the decision-makers with broad discretion to weigh mitigating and aggravating factors.

[733] Analysis of MDBs' websites with debarred parties.
[734] *Carew v IBRD*, WBAT Decision No. 142 (1995), ¶ 44.

The tables below indicate how the decision-makers may consider mitigating and aggravating factors when deciding sanctions:[735]

Aggravating circumstances:

Increase in Base Sanction	**Aggravating Circumstances**
1-5 years	Severity • Repeated pattern of sanctionable conduct • Sophisticated means • Central role in the sanctionable conduct • Management's role in sanctionable conduct • Involvement of public official or IFI staff
	Harm Caused • Harm to Public Welfare • Harm to the Project
1-3 years	Interference with Investigation, or obstruction of the investigative process • Intimidation/payment of witness • Refusal to accept notice/failure to respond
Up to 10 years	• Past history of sanction by any Institution • Violation of a sanction or Temporary Suspension

(ii) Mitigating circumstances:

Decrease	**Mitigating Circumstance**
1-2 years or alternatively up to 25%	Minor Role in the sanctionable conduct
1-3 years or alternatively up to 33%	Voluntary corrective Action Taken • Cessation of sanctionable conduct independent to and in advance of investigation • Internal action against responsible party • Institution of corrective measures to prevent the sanctionable conduct • Restitution or financial remedy
1-3 years or alternatively up to 50%	Cooperation with investigation • Assistance and/or ongoing cooperation • Internal investigation • Admission/acceptance of guilt/responsibility • Voluntary restraint

These factors are broadly similar to those in the US Federal Sentencing Guidelines, which provide for several categories of sentence adjustments: victim-related adjustments (e.g., if the offender knew that the victim was unusually vulnerable due to age or physical or

[735] General Principles and Guidelines for Sanctions, ¶¶ 5 and 6, available at: http://lnadbg4.adb.org/oai001p.nsf/0/CE3A1AB934F345F048257ACC002D8448/$FILE/Harmonized%20Sanctioning%20Guidelines.pdf.

mental condition, the offence level is increased by two levels[736]); the offender's role in the offence (e.g., if the offender was a minimal participant in the offence, the offence level is decreased by four levels[737]); and obstruction of justice (e.g., if the offender engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense, the offence level is increased by two levels[738]).

By way of example, the WB has accorded mitigating credit to: a respondent company that demonstrated taking disciplinary measures against those responsible for the wrongdoing,[739] a respondent company that demonstrably provided substantial and timely assistance with INT's investigation,[740] a respondent company that was shown to have taken voluntary corrective actions in the form of compliance policies to address the type of misconduct at issue in the case,[741] and a respondent company which offered compensation for damages to demonstrate its willingness to take responsibility for the acts of its legal predecessor.[742]

Similarly, WB has applied aggravation to: a respondent company, where evidence showed that high-ranking individuals within the company participated in, condoned, or were wilfully ignorant of the misconduct;[743] a respondent company whose misconduct caused WB to declare misprocurement and to cancel a portion of its loan when the misconduct was uncovered;[744]a respondent company with demonstrable repeated instances of fraudulent practices over the course of nearly two years;[745] and a respondent company which impeded WB's exercise of "audit rights" by denying INT access to relevant information concerning the misconduct.[746]

Commentators have suggested that guidelines based on the loss amount associated with the sanctionable practice would produce better outcomes in most instances: For

[736] United States Sentencing Commission: Guidelines Manual, §3A1.1 (Nov. 2016).
[737] *Ibid*., §3B1.2 (Nov. 2016).
[738] *Ibid*., §2D1.1 (Nov. 2016).
[739] See, e.g., Sanctions Board Decision No. 48 (2012), ¶ 44.
[740] See, e.g., Sanctions Board Decision No. 66 (2014), ¶ 42.
[741] See, e.g., Sanctions Board Decision No. 71 (2014), ¶¶ 93-94.
[742] See, e.g., Sanctions Board Decision No. 53 (2012), ¶ 62.
[743] See, e.g., Sanctions Board Decision No. 65 (2014), ¶¶ 70-72.
[744] *Ibid*., ¶ 75.
[745] See, e.g., Sanctions Board Decision No. 56 (2013), ¶ 55.
[746] *Ibid*., ¶ 61.

example, a fraudulent practice which resulted in the diversion of millions of dollars in MDB's funds should result in a more severe sanction than a corrupt practice where a contractor paid a few hundred dollars to a government official, in a manner that did not materially affect the award of the contract.[747] By way of comparison, in the US Federal Sentencing Guidelines, which are used to determine the length of a defendant's sentence, sentences in fraud cases are dependent on the amount of money involved. Thus, for a loss of less than $6,500, there is no change to the baseline sanction; incremental adjustments are made at levels including $15,000, $40,000, $90,000, $150,000, all the way up to more than $550 million.[748]

Naturally, financial criteria will not be applicable in some cases (such as coercion or obstructive practice). However, MDBs should consider a wider range of sanctions that are not so biased towards debarment. In that context, it has also been suggested that MDBs should consider relying more heavily on letters of reprimand and conditional non-debarments, especially in minor cases or where the respondent demonstrates that it has and will continue to take corrective actions to remedy the sanctionable conduct.[749]

Furthermore, because of the powerful deterrent effect of sanctions, their use should not be undermined by inconsistent application of, and low standards for, mitigating and aggravating factors. Thus, mitigating factors should include a definition of self-reporting, which is based on the provision of information that MDBs' investigators could not otherwise have known about. Similarly, "assistance and/or ongoing cooperation" should also be elaborated upon to include, for example, the provision of detailed information about wrongdoing by individuals, unedited first witness accounts, provision of access to witnesses, full evidence of other wrongdoing discovered during investigations.[750] Finally, such terms as "sophisticated means," "voluntary restraint" and "internal action against responsible party" should also be elaborated upon before they are considered as a mitigating factor, in order to ensure they are consistently applied among MDBs.

(ii) Baseline sanction

[747] See Freshfields Bruckhaus Deringer US LLP: *Submission of Freshfields Bruckhaus Deringer LLP in Connection with Review of the World Bank Group Sanctions System*, 31 October 2013.
[748] United States Sentencing Commission: Guidelines Manual (Nov. 2016), §2B1.1.
[749] World Bank 2013 Phase I Sanctions Review Stakeholder Consultation: *Comments of the U.S. Defense Bar*, 31 October 2013, at 10.
[750] *Ibid*., at 43.

The Sanctioning Guidelines provide that the baseline sanction should be a three-year debarment, with or without conditional release.[751] Sanctions Procedures of both AfDB and WB state that their baseline sanction is a debarment with conditional release.[752] This means that debarment with conditional release is the starting point, unless there are conditions that justify issuing another sanction. The reasoning behind debarment with conditional release, rather than a "plain vanilla" debarment, being the baseline sanction is that the former places greater emphasis on rehabilitation, encouraging sanctioned firms to adopt adequate, effective policies and measures that make it less likely that they will engage in such misconduct again.[753] Under the terms of debarment with conditional release, the sanctioned party will be debarred for a minimum period and must demonstrate compliance with one or more remedial or preventative conditions in order to be released from debarment.[754] In most cases, these conditions require an improved compliance programme and remedial measures against the parties found to have engaged in the misconduct, such as reassignment or termination.[755] Sanctioned parties are therefore incentivised to adopt specific conditions to deter misconduct, reduce integrity risks and send a message of compliance within the company and externally.[756]

A significant consideration for institutions that have imposed or anticipate imposing sanctions of debarment with conditional release is that they have in place the function necessary to monitor integrity compliance requirements.[757] WB, for example, established an Integrity Compliance Office (the "**ICO**") in 2010, whose primary function is to have oversight over the satisfaction of debarment conditions.[758] Other MDBs may not have sufficient resources for setting up such function dedicated to regular engagement with the debarred party on identifying areas of improvement and on regular monitoring of compliance with the imposed conditions.

---

[751] General Principles and Guidelines for Sanctions, ¶ 4.
[752] Sanctions Procedures of the African Development Bank, §11.2(b) and World Bank's Sanctioning Guidelines, ¶ II.A.
[753] See Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012), at 15.
[754] World Bank Sanctioning Guidelines, ¶ II.A.
[755] *Ibid.*
[756] *Ibid.*
[757] Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016), at 9.
[758] *Ibid.*

The complex procedures the ICO has established for monitoring compliance illustrate the burden that such monitoring imposes on institutions.[759] The sanctioned party, in turn, would have to engage sufficiently and provide all the relevant information.[760] Needless to say, this is both a time-consuming and costly exercise, which will not be practicable for all MDBs.

Moreover, the effectiveness of debarment with conditional release in encouraging rehabilitation and the establishment (or improvement) of a satisfactory integrity compliance programme is questionable, particularly with respect to small and medium-sized enterprises ("**SMEs**"). Namely, given that the WB's sanctions activity has increased in terms of both the number of cases and public profile, in 2013 WB's Legal Department launched a review of the WB's sanctions system, which is being conducted in two phases. This review raised questions about the implementation costs for debarments with conditional release for both the WB itself and the debarred party, given the time and resources implications.[761] Some of the recommendations that the preliminary Phase I report, which was discussed at the WB's Audit Committee in March 2013, has identified are: revisiting the designation of debarment with conditional release as the "baseline" sanction, in particular in smaller cases involving individuals and SMEs, which have not demonstrated much initiative in adopting effective compliance measures on which their release from debarment is conditioned; considering listing all known sanctioned or suspended affiliates by name on the debarment and suspension lists and considering steps to make the system more accessible to SMEs and individuals who lack the means to engage legal counsel, without incurring undue costs.[762]

Curiously, the review also found a pattern of non-engagement by SMEs in the system, as more than half of respondents, most of them SMEs, are sanctioned "by default" because they do not respond in any way to Notices of Sanctions Proceedings.[763] Moreover,

---

[759] See WB Sanctions Procedures, § 9.03(a).
[760] Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016), at 10..
[761] *Ibid.*.
[762] See *World Bank Initiating Discussion Brief: Review of the World Bank Group Sanctions Regime 2011-2014*, at 11-12 available at: https://consultations.worldbank.org/Data/hub/files/consultation-template/consultation-review-world-bank-group-sanctions-systemopenconsultationtemplate/materials/sanctionsreview_initiatingdiscussionbrief.pdf.
[763] *Ibid*.

when the imposed sanction is a debarment with conditional release, SMEs often do not engage with the ICO, which results in a default indefinite debarment.[764] This suggests that the debarment imposed on smaller organisations that cannot meet the conditions for release is disproportionate to the misconduct and consequently punitive. Thus, if the sanctions regime does not take into account the costs of compliance, entities with deeper pockets that are able to pay these costs will be released from debarment, while entities in different financial positions will not be.[765] This is particularly important in view of the data that shows that the smaller the firm, the more likely it is to be negatively affected by corruption, for a number of reasons, including their limited financial resources, inability to exert a strong influence over public officials, and capital structure.[766]

Arguably, the reason that some SMEs do not engage with the system is because they do not do enough MDB-related work to make it worth time and expense of litigating or adopt various compliance and anti-corruption measures imposed as part of debarment with conditional release. However, it may also be the case that, as MDBs' sanctions regimes have become more sophisticated and provide more robust due process rights, they have also become less accessible to respondents that cannot afford to pay for external legal advice. MDBs' sanctions procedures may prove daunting even for English speakers, as they are drafted in legalese.

Moreover, the adoption of compliance programmes is expensive – it has been estimated that an independent compliance monitor for a multinational corporation may charge well in excess of USD 1 million in fees over a two-year period.[767] For SMEs, even minor issues such as translation of programme materials may pose significant costs.

Further, hearings before Sanctions Boards are typically held at the relevant MDB's headquarters. Travel costs, not to mention the need to obtain a visa, likely represent a significant barrier for SME and individual respondents.[768] While hearings may be held via

[764] *Ibid*.
[765] Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016), at 12.
[766] UNIDO and UNODC: *Fighting Corruption, Corruption Prevention to Foster Small and Medium-Sized Enterprise Development* (2012), at 14.
[767] Frank Fariello and Giovanni Bo: *The World Bank Group Sanctions System and Access to Justice for Small and Medium-Sized Enterprises*, The World Bank Legal Review, Volume 5 (November 2013), at 427.
[768] *Ibid*.

video conference, research suggests that video testimony is less effective than in-person testimony at conveying information essential to credibility determinations. Moreover, technical problems might adversely affect respondents.[769]

In view of these hurdles to SMEs' access to justice under MDBs' sanctions regimes, MDBs should undertake measures to make the system more accessible to SMEs and individuals without legal counsel. For example, the creation of a plain English "know your rights" literature for respondents, and the use of plain English throughout sanctions proceedings would help surmount, at least in part, the language barrier that some respondents face.[770] Further, in addition to making compliance programmes more understandable and affordable to SMEs, MDBs may also consider reducing the use of conditional release in smaller cases involving SMEs in favour of alternative approaches like more severe sanctions for repeated misconduct.[771]

These measures could also be coupled with technical assistance programmes for SMEs, such as training on effective anti-corruption and compliance regimes, and on the legal framework for dealing directly or indirectly with corruption in their respective country; awareness raising about the long-term costs of corruption; and extending credit lines to financial institutions for on-lending to SMEs that have robust ethnics and compliance programmes in place.[772]

Similarly, it has been suggested that MDBs should move beyond the notion of a single baseline sanction altogether and instead use the full panoply of available sanctions in order to more closely tailor the sanction to the wrongdoing.[773] This would be consistent with the US Federal Sentencing Guidelines, which prescribe a different baseline sentence not only for each different type of offence, but also for its severity.[774] For example, the Guidelines provide 43 levels of offence seriousness — the more serious the crime, the higher the offence level. Each type of crime is assigned a base offence level, which is the

[769] See *Developments in the Law – Access to Courts*, 122 Harvard Law Review (2009), at 1192.
[770] Frank Fariello and Giovanni Bo: *The World Bank Group Sanctions System and Access to Justice for Small and Medium-Sized Enterprises*, The World Bank Legal Review, Volume 5 (November 2013), at 432.
[771] *Ibid*., at 433.
[772] *Ibid*.
[773] Transparency International's Submission to the Consultation Process on the World Bank's Sanctions System, 30 October 2013, at 4.
[774] United States Sentencing Commission: Guidelines Manual, §3E1.1 (Nov. 2016).

starting point for determining the seriousness of a particular offence. More serious types of crime have higher base offence levels (for example, a trespass has a base offence level of 4[775], while kidnapping has a base offence level of 32[776]). In addition to base offence levels, each offence type typically carries with it a number of specific factors that can increase or decrease the base offence level and, ultimately, the sentence an offender receives. For example, one of the specific factors for fraud (which has a base offence level of 7) is the amount of loss involved in the offence: if a fraud involved a more than $6,500 loss, there is a 2-level increase to the base offence level. If a fraud involved a more than $40,000 loss, there is a 6-level increase.[777]

Similarly, the UK Sentencing Council has issued sentencing guidelines, which contain a multi-step approach to determining the sentence by "weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out."[778] Thus, for example, in the case of fraud by false representation, the court first classifies the offender's culpability into high culpability (in case the offence involved significant planning, or was conducted over sustained period of time, involved large number of victims, etc.), medium culpability (where, for example, the offender played a significant (but not a leading) role where offending is part of a group activity) or lesser culpability (where the offender was involved through coercion, intimidation or exploitation, was not motivated by personal gain, played a peripheral role in organised fraud, etc.). The court then assesses the harm by the actual, intended or risked monetary loss that may arise from the offence. Next, the court considers the level of harm caused to the victim(s) (e.g., serious detrimental effect on the victim by, for example, causing substantial damage to credit rating, particularly vulnerable victim, etc.). Finally, having determined the category of the offence, the court uses the appropriate starting point to reach a sentence within the category range in the table in the Guidelines.[779]

Admittedly, although these types of guidelines provide predictable sentences and arguably serve as a deterrent to crime, given that offenders know the formula for

[775] *Ibid*., §2B2.3(a) (Nov. 2016).
[776] *Ibid*., §2A4.1(a) (Nov. 2016).
[777] *Ibid*., §2B1.1(a) and (b) (Nov. 2016).
[778] UK Sentencing Council: *Fraud, Bribery and Money Laundering Offences, Definitive Guide* (2014), at 6.
[779] *Ibid.*, at 5-8.

sentencing, sentencing guidelines have not escaped criticism as possibly two-dimensional, mechanical approach to punishment.[780] Another criticism in the US has been the shift in power from the judge to the prosecutor, given that it is not the prosecutor's charging decision that is the most important one in the case, and arguably, prosecutors can manipulate the charges.[781] MDBs' sanctions regimes, however, do not run the risk of such manipulation of charges by the investigators, given the level of scrutiny by the first-tier decision-maker. Nonetheless, too prescriptive sentencing guidelines with narrow sanction ranges could result in a too rigid approach to sentencing and fail to accommodate for important variations among cases.

MDBs' approach to sentencing should therefore probably fall somewhere between the US and the UK sentencing guidelines and MDBs' existing Sentencing Guidelines: start with a more nuanced list of possible baseline sanctions, based on different types of offences and their severity and not biased towards debarment, and then have the decision-makers use their judgment to determine a just sanction, which should be explained in a reasoned decision.

(iii) Restitution

MDBs should develop more formal guidelines for determining the appropriate amount of restitution and should avoid the perception that they themselves are financially benefiting by imposing fines that are paid directly to them. By way of comparison, under FAR, sanctioning officials may impose restitution or fines as stand-alone sanctions, but may also use them as mitigating factors in their debarment determinations. FAR states that, before reaching the debarment decision, the sanctioning official should consider factors including "whether the contractor has paid or has agreed to pay all criminal, civil and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution."[782]

[780] Erik Luna: *Gridland: An Allegorical Critique of Federal Sentencing*, Journal of Criminal Law and Criminology, Volume 96 (2005), at 63.
[781] *Ibid*., at 27.
[782] FAR, § 9.406-1(a)(5).

It is not, however, the sanctioning official who determines whether the sanctioned party will pay restitution. Rather, the US Department of Justice ("**DOJ**") decides whether the contractor will pay restitution and what the amount will be, and DOJ has significant discretion in determining what the amount of restitution will be, especially when it is impossible to specifically quantify what proceeds the contractor has received as a result of the wrongful action.[783] Nonetheless, restitution is typically determined by the amount of benefit conferred on the contracting party.[784]

Unlike under the US sanctions system, the objective of restitution under the MDBs' sanctions regime is not necessarily to restore the *status quo* of the parties harmed by the wrongdoing. Instead, the sanctions regime allows restitution to be used for a deterrent purpose. Similar to the US sanctions system, however, MDBs' sanctions regimes allow the use of restitution based on damages or on compensation grounds. Thus, for example, ADB's Sanctions Procedures allow the imposition of "restitution and other financial remedies."[785] Similarly, IADB's Sanctions Procedures allow the imposition of "fines representing reimbursement of the costs associated with investigations and [sanctions] proceedings." Under the WB's Sanctions Procedures, the respondent may be required to make restitution to any party or take actions to remedy the harm done by its misconduct.[786] Further, the WB's Sanctioning Guidelines state that "[r]estitution, as well as financial and other remedies, may be used in exceptional circumstances, including those involving fraud in contract execution where there is a quantifiable amount to be restored to the client country or project."[787] AfDB's Sanctions Procedures allow for the imposition of "restitution and other financial remedies … where there is a quantifiable amount to be restored to the Bank Group … or directly to the Project or Programme."[788] Finally, EBRD's Sanctions Procedures allow for the imposition of "restitution to another party or the Bank . . . of diverted funds or the amount representing the economic benefit that the Respondent obtained as a result of having committed a Prohibited Practice."[789] These differences in the definition of "restitution" could be the areas for future harmonisation.

---

[783] Roman Majtan: *The Self-Cleaning Dilemma*: *Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291 (2013), at 343-4.
[784] See, e.g., *Acme Process Equip. Co. v United States*, 347 F.2d 509, at 539 (Ct. Cl. 1965).
[785] ADB Integrity Principles and Guidelines, § 86(ii).
[786] World Bank's Sanctions Procedures, § 9.01(e).
[787] World Bank Sanctioning Guidelines, §II.F.
[788] Sanctions Procedures of the African Development Bank, §11.2(b).
[789] EBRD's Enforcement Policy and Procedures, §10.2(vii).

In practice, MDBs have imposed monetary contributions almost exclusively in the context of negotiated settlements. For instance, as described in Chapter 1 above, in 2009, in what remains the largest WB case in terms of monetary settlement, Siemens reached a settlement with WB over bribery allegations, agreeing to make USD 100 million available for anti-corruption projects and to forego bidding on WB projects for two years. Since then (and as described in Chapter 1 above), WB has accepted (a) USD 9.5 million from Alstom, which represented 40% of the value of the contracts Alstom had obtained through corruption; (b) USD 500,000 from Oxford University Press (OUP), which represented the profit that OUP had obtained through corruption; (c) USD 350,000 from Lotti in restitution for the overpayments that Lotti and its joint venture partners fraudulently obtained; (d) 127,147 rupees from J Mitra in restitution of the orders won through fraudulent misrepresentation; and (e) USD 350,000 from Iberdrola, which is equal to the amount that Iberdrola had paid to an agent and failed to disclose this in its bid. Importantly, most of WB's borrowers are sovereigns and they are not the ones found to have engaged in a sanctionable practice. Consequently, WB typically engages in discussions with the relevant borrower/sovereign and agrees on the most appropriate way in which the restitution funds should be applied. In one instance, the settlement involved the in-kind contribution of medical test kits to the affected country's health authorities; in another instance, the restitution funds went towards a fund dedicated to the fight against ebola.[790]

Similarly to WB, AfDB has imposed restitution as part of its sanctions. For instance, as described in Chapter 1, in 2015, AfDB reached a settlement with SNC-Lavalin International Inc. ("SNCLI"), under which AfDB imposed a conditional non-debarment on SNCLI for a period of two years and ten months, while SNCLI is required to make a settlement payment of CAD 1.5 million to flow into support of activities and programmes combating corruption on the African continent. Similarly, in the same year, AfDB reached a settlement with Hitachi, Ltd. ("Hitachi"), under which AfDB imposed a debarment of twelve months with conditional release, while Hitachi had voluntarily agreed

[790] See Leonard McCarthy (the then Vice President of the WB's INT): *Settling for Development with Integrity*, FCPA Blog (June 2016), available at: http://www.fcpablog.com/blog/2016/6/13/leonard-mccarthy-of-the-world-bank-settling-for-development.html.

to make a substantial financial contribution to the AfDB, which will be used to fund worthy anti-corruption causes on the African continent.

The AfDB's collection of substantial fines led to the creation of a stand-alone trust fund in 2016 – the Africa Integrity Fund, whose aim is to enhance the implementation of the legal framework in AfDB's member countries and by encouraging civil society participation in fiduciary, accountability and monitoring systems.[791] The main activities of the Fund include outreach, training, capacity building and technical assistance.[792] The Fund is exclusively financed through the collection of financial penalties derived from settlement agreements entered into between the AfDB and entities that are found to have engaged in sanctionable practices.[793] Recognising the possible risk of perception that the AfDB is using the funds from settlements to boost its own budget, the AfDB has set up safeguards to mitigate reputational risks to the Fund through the Oversight Committee majority controlled by external appointees, and annual public report that the Fund will be required to issue.[794] It remains to be seen whether the Fund is successful in its efforts and what would happen if a sanctionble practice were to take place in relation to the Fund's operations. It would be worrying, however, if fines were to be used increasingly to minimise or avoid debarment periods, which would undermine cross-debarment.

Finally, to date, none of ADB, EBRD or IADB has imposed restitution as part of its sanctions. This is consistent with the fact that restitutions are typically imposed as part of a settlement and EBRD and IADB introduced settlement regimes only recently (in 2015), whereas ADB does not have the settlement regime in place.

In the situations where an MDB is directly damaged by the sanctonable practice (because, for example, the borrower misrepresented the ownership of assets that were to be pledged to the MDB under the loan agreement – a scenario which can be contrasted to the one where the MDB's borrower is the damaged party because, for example, a bidder misrepresented its qualifications in the tender run by the borrower), the relevant MDB

[791] African Development Bank, Integrity and Anti-Corruption Department: Proposal for the Establishment of the Africa Integrity Fund (October 2016), available at: https://www.tralac.org/images/docs/11305/proposal-for-the-establishment-of-the-africa-integrity-fund-afdb-october-2016.pdf, at 5.
[792] *Ibid.*
[793] *Ibid*., at 4.
[794] *Ibid*., at ix.

should have the right to seek reimbursement of its own funds, as well as any economic benefit, that the respondent may have obtained through the commission of a sanctionable practice. This sanction is then intended to be used primarily in the context of settlements, conditional non-debarments and debarments with conditional release, rather than as a stand-alone enforcement action, given that MDBs do not have the authority to enforce such enforcement action. Any such reimbursement of project-related funds would need to be demonstrably commensurate with the benefit that a respondent, found to have engaged in a sanctionable practice, may have unfairly derived from an MDB's project. The funds should always be used primarily towards repayment of any outstanding liability of the respondent towards the MDB and should not be used as a means by which a respondent could negotiate its way out of a warranted sanction.

In any event, MDBs should develop more formal guidelines for determining the appropriate amount of reimbursement/restitution. For example, in cases of fraud, where the actual amount is quantifiable, the restitution could be the amount that was overpaid as a result of fraud, as this is the amount lost by the project as a result of fraud. In cases of corruption, collusion or coercion, the restitution could be based on the profit made or anticipated to be made by the respondent, the rationale being that but for the corruption/collusion/coercion, the respondent would not have been awarded the contract and derived any profit therefrom. The profit could be calculated by reference to the average profit margin in the relevant industry determined by an independent valuer, unless the respondent can provide evidence of the actual profit it had made and the relevant MDB determines that such amount represents a fair calculation of all benefits to the respondent resulting from the contract at issue.

Finally, MDBs should avoid any perception that they are financially benefitting from wrongdoing that occurred in relation to their own projects. While keeping funds derived from financial penalties strictly separate from MDBs' administrative budgets is a step in the right direction,[795] the use of funds by the relevant MDB to develop certain programmes raises numerous practical issues, which MDBs should consider beforehand, including how to ensure that the unit which negotiated the fines does not have any role in

[795] *Interview with Anna Bossman, Director of IACD, on Settlement Agreements*, African Development Bank (May 28, 2014), available at: https://www.afdb.org/en/news-and-events/interview-with-anna-bossman-director-of-iacd-on-settlement-agreements-13242/.

the management structure overseeing the use of funds, how to segregate and handle the funds prudently without creating a new and costly bureaucracy to manage it, and how to handle the consequences of sanctionable practices occurring in the administration of these funds themselves.

G. Settlements

Settlements are appearing more frequently on the sanctions landscape, which suggests they have become less of an exceptional recourse to resolve sanctions proceedings.[796] While the settlement processes of these four MDBs are broadly similar, there are some differences, as described in the table below:

Type of action	WB	AfDB	EBRD	IADB
Timeframe within which settlements are allowed	Settlement agreement must be *submitted* before a decision by the Sanctions Board	Settlement agreement must be *submitted* before a decision by the Appeals Board	Settlement must be *concluded* before a decision by the first-tier decision-maker	Settlement must be *concluded* at any time before or after an investigation, but not after the receipt of the Statement of Charges by the first-tier decision-maker
Stay of proceedings during settlement negotiations	The respondent and the investigators may jointly apply to stay proceedings; decision made by the first-tier decision-maker	The respondent and the investigators may jointly apply to stay proceedings; decision made by either the first-tier decision-maker or the Appeals Board (depending on the stage of proceedings)	The respondent and the investigators may jointly apply to stay proceedings; decision made by the first-tier decision-maker	Silent
Parties responsible for the review of settlement agreements	First-tier decision-maker and General Counsel	Relevant decision-maker and General Counsel	First-tier decision-maker and General Counsel	Silent

[796] Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016), at 20.

With respect to the timeframe within which settlements should be allowed, there is not necessarily the single right approach, and one could argue that settlements should be allowed at any stage in the sanctions proceedings. On the other hand, however, it could also be argued that parties should not wait until the last minute and should be incentivised to negotiate a settlement early in the process. Otherwise, if settlement negotiations commence at the stage when the case has progressed to the appeals level, the first-tier decision-maker's time would be a waste of resources.

At the same time, settlements must be handled with discretion and transparency. For this reason, settlements should be subject to a number of procedural and substantive safeguards to ensure fairness, transparency and credibility, including established criteria for entering into settlements and a number of procedural "checks and balances" to ensure fundamental fairness and equal treatment. This is why each settlement agreement should be cleared by the Head of the Investigations Unit, and the first-tier decision-maker, with the MDB's General Counsel having to verify that the terms of the settlement agreement do not manifestly violate relevant MDB's policies.

Another issue worth considering is whether the admission of culpability should be a prerequisite for settlement. A comparison could be drawn with deferred prosecution agreements ("**DPAs**"). In the US, the DOJ has not issued standards or policies to suggest that self-disclosure will result in a more lenient treatment for the FCPA violations. In many situations, companies therefore weigh the likelihood of getting caught, the cost of cooperating with the government, and the potential for a criminal fine when deciding whether or not to self-disclose, not just the likelihood that DOJ may bestow a more lenient sentence.[797] In fact, DOJ has rewarded companies that provide significant cooperation after an FCPA violation is discovered, even if the company did not self-disclose. For example, Bridgestone Corporation received a penalty 37.34% below the base fine, despite not self-disclosing, because its cooperation was "extraordinary, including conducting an extensive worldwide internal investigation, voluntarily making Japanese and other employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information for the United States."[798]

[797] See Sarah Marberg: *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 Vanderbilt Journal of Transnational Law (2012), at 577.
[798] *Ibid*., at 584 and *United States v Bridgestone Corp*., No. 4:110cr-00651 (S.D. Tex, Oct 2011), at 17).

In the UK, the SFO initially said that, generally, companies would be offered a DPA only when they self-report.[799] More recently, however, the SFO appears to be taking a more relaxed approach to the use of DPAs and has offered DPAs even in the absence of self-reporting. For instance, in 2017, the SFO entered into a widely publicised DPA with Rolls-Royce despite the fact that the company did not self-report its violations. Still, the judge noted that "the company could not have done more to expose its own misconduct, limited neither by time, jurisdiction or area of business."[800] Arguably, the company is likely to have felt the need to cooperate to such a degree because it did not self-report in the first place. Rather, the SFO first became aware of the issues as a result of a whistleblower's internet blog. Nonetheless, the company was praised for its "extraordinary cooperation" with the SFO, which involved providing many of the 30 million documents given to the SFO voluntarily and without censoring for legal privilege.[801]

Following the Rolls-Royce settlement, the SFO's Joint Head of Bribery and Corruption explained that the key factor in determining whether to offer a DPA or prosecute is "the stance the company takes once it becomes aware of the issue", which includes such factors as: (i) the point at which the company came and talked to the SFO; (ii) the work the company has already taken to investigate the matter; (iii) the approach the company is intending to take in order to provide the SFO with access to the factual elements of that work; (iv) how the company has handled data identification, collection, preservation, continuity and provision to the SFO; and (v) to what extent the company is willing to respond to the SFO's interests in work that remains to be done in the investigation – for example, sequencing interviews with the SFO, drawing relevant material to the SFO's attention even if the SFO has not asked for it, and allowing the SFO to do its job fairly, without seeking to exert pressure through the media, the politicians or other means.[802]

---

[799] See, e.g., Speech by Ben Morgan, Joint Head of Bribery and Corruption at the SFO at the Global Anti-Corruption and Compliance in Mining Conference (20 May 2015), available at: https://www.sfo.gov.uk/2015/05/20/compliance-and-cooperation/.
[800] See Serious Fraud Office: Deferred Prosecution Agreement with Rolls Royce, Judgment (2017), ¶38, available at: https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
[801] *Ibid*., ¶19.
[802] *Ibid*.

While MDBs could follow a similarly flexible approach, they should avoid the appearance of giving companies a "slap on the wrist" through settlements, and could therefore consider using settlements only where the respondent:

- has self-reported and cooperated (where self-reporting should be based on the provision of information that MDBs' investigators could not otherwise have known about; and standards of cooperation should include, among other things, the provision of detailed information about wrongdoing by individuals, unedited first witness accounts, provision of access to witnesses, and full evidence of any other wrongdoing discovered in the course of investigating a specific offence);
- has admitted guilt; and
- has agreed on concrete measures of the strengthening and monitoring of compliance procedures, to be verified by MDBs' monitors and with public reporting on how the respondent has done so.[803]

By contrast, settlements should not be used where wrongdoing is egregious and has resulted in significant harm, or where a company has previously received a corruption-related enforcement or regulatory action against it. Otherwise, settlements will be perceived as another "cost of doing business", where corporate recidivists repeatedly agree to pay fines, while continuing with improper behaviour.[804]

As noted in Chapter 1 above, however, AfDB and WB have recently announced several high-value settlements, which raise questions about how settlement payments have been calculated in these cases and how much of those payments was restorative and how much was punitive, and whether settlement arrangements favour those with deep pockets. Questions have also been raised about the reputational risks that may attach to settlements, particularly given that, as described in Chapter 1, recent AfDB's settlements are conspicuously under the one-year threshold that would have triggered cross-debarment. Therefore, MDBs should be aware of the perception that large companies are able to buy

[803] OECD: *Public Consultation on Liability of Legal Persons:* Submission by Corruption Watch, United Kingdom (November 2016), at 44.
[804] *Ibid*.

their way out of lengthy debarment periods.[805] Consequently, MDBs should consider introducing greater transparency of settlements, especially with respect to any payments that the respondent is required to make as part of the settlement agreement, and even more so given that, when treated confidential, without publicity of their use or terms, settlements also limit the general deterrent and educational value of sanctions.[806] Nonetheless, as argued in section C above, publication of settlement agreements may not be the best option, given that many respondents see the lack of publicity as a significant advantage to settlements. Rather, MDBs should develop further guidelines on the basic tenets for the disclosure of settlements.

Moreover, MDBs should consider greater coordination, where the same respondent seeks to settle with more than one MDB on related matters. Such respondent's behaviour could undermine the core concept of cross-debarment, and could be mitigated through a global negotiated resolution, or at least the coordination of separate MDB agreements.[807]

H. Conclusion

MDBs' sanctions proceedings are not criminal, civil or human rights proceedings. Indeed, they are inherently administrative proceedings, aimed at safeguarding the MDBs' funds. Nonetheless, they do not operate in a vacuum, nor are they exempt from scrutiny, as has become increasingly apparent with the ever-growing emphasis on the due process requirements. As discussed in Chapter 2, international organisations' immunities have been consistently challenged before courts, with some courts waiving immunity on the ground of lack of internal administrative mechanisms for addressing (employment) grievances.[808] International organisations therefore have to continuously adjust and develop better and more robust mechanisms that will keep them moving in a direction that maintains their legitimacy. Due process of law is, however, one of those key notions that

[805] Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016), at 26.
[806] African Development Bank, Independent Development Evaluation: *Comparative Review of Sanctions Practices across Multilateral Development Banks*, Executive Summary (2019).
[807] *Ibid*.
[808] See, e.g., *Siedler v Western European Union*, Appeal Judgment, JT 2004, 617, ILDC 53 (BE 2003).

have not been (and probably cannot be) strictly defined and whose scope tends to evolve and move in order to better reflect the balances of power within society.[809]

The preceding sections have proposed enhancements to MDBs' sanctions regimes based on the principles identified in Chapter 2 and drew inspiration from various international arbitration rules. More specifically, with respect to evidentiary standards of sanctions regimes, the rather vague evidentiary rules of MDBs' sanctions regimes inevitably leave gaps, which can cause problems if parties have conflicting views on how these gaps should be filled. To that end, MDBs' sanctions regimes would benefit from specifying that respondents have the right to request documents from investigators and that investigators are expected to respond to those requests. Only if the investigators claimed that the discovery requested is irrelevant, privileged or unduly burdensome, would the relevant decision-maker be brought in to decide. Investigators should also have the right to redact parts of evidence, which the respondent should be able to challenge.

MDBs would also benefit from more detailed rules on the use of experts' reports, taking guidance from the IBA Rules by, for example, requiring the expert to disclose the methods, evidence and information used in arriving at the conclusions; and to disclose any relationship the expert may have with the parties. The regimes should also take guidance from the IBA Rules by describing how the Sanctions Board will determine what evidence it will consider, how evidence will be assessed and how it will decide on privilege-related issues.

Taking further guidance from not only the IBA Rules, but also the LCIA Rules, the UNCITRAL Rules and the SCC Rules, as well as the ECtHR's and the administrative tribunals' case law, MDBs' sanctions regimes could allow Sanctions Boards to decide whether or not to have oral hearings based on whether they have insufficient evidence on the basis of the written proceedings to decide a case fairly. Additionally, each party could be allowed to propose any witnesses or experts it wishes to call, and the Sanctions Board itself should also be allowed to call witnesses and experts. Sanctions Boards may,

[809] Santiago Onate Laborde: *The Relation between Due Process in International and National Human Rights Instruments and International Adjudication Mechanisms*, in The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012), at 378.

however, consider limiting the maximum number of witnesses and experts that each party may offer on each disputed fact.

In addition, the requirement to provide reasoned decisions for administrative action, including responses to arguments raised by interested parties, has been established as a crucial factor in rendering meaningful any accountability mechanism[810], and MDBs' sanctions regimes should be no exception to this. Such publication would also provide a powerful incentive for all stakeholders in the sanctions process to maximise the quality of their work, and could also enhance the deterrent value of sanctions by revealing the circumstances underlying the sanctioning of respondents.[811] Importantly, however, safeguards should be put in place to allow Sanctions Boards to redact their decisions in order to preserve a party's anonymity and/or protect its reputation.

As regards referrals to national authorities, MDBs' sanctions procedures should contain explicit authority to refer to the appropriate national enforcement authorities the cases involving possible violation of national laws. Any such recommendation should require the identification of the information that may be disclosed to such authorities and possibly also the relevant MDB's General Counsel's opinion regarding the legal aspects of the recommended referral. Moreover, given the graveness of this decision in view of the *Kevin Wallace* case, MDBs should refer matters and share information with national authorities only in cases where they are appraised of the subsequent criminal procedures in the relevant country, and fully prepared to share additional information, cooperate with the authorities and have its staff testify, if necessary.

With respect to the optimal composition of Sanctions Boards, in order to avoid any perception of partiality, it would be advisable for Sanctions Boards to be composed entirely of non-staff members and for the candidates for the Sanctions Board membership not to have previously have held or, at the time of appointment, hold any appointment with the relevant MDB, including as a staff member, Board director or a consultant. MDBs' sanctions procedures should also provide a mechanism that allows a challenge to the impartiality of individual Sanctions Board members.

[810] By each of the GAL, the ECtHR and the MDBs' administrative tribunal jurisprudence.
[811] Anne-Marie Leroy and Frank Fariello: *The World Bank Group Sanctions Process and Its Recent Reforms* (2012), at 24-25.

As discussed in the preceding sections, taking guidance from the UN Dispute and Appeals Tribunals, Sanctions Board members should have fixed, non-renewable terms of five-seven years. Moreover, the Sanctions Board Statute should recognise budgetary independence of the Sanctions Board. The right to appoint Sanctions Board members should be granted to a majority external selection committee, and the right to remove a Sanctions Board member should be vested with the Board itself, rather than the MDBs' management.

The preceding sections have also proposed measures for greater harmonisation of MDBs' sanctions regimes in the areas of sanctioning guidelines and settlements. Specifically, MDBs should consider a broader range of sanctions that are not biased towards debarment, let alone debarment with conditional release, which – because of the associated costs and resources – favours more sophisticated and wealthier companies. One evident area of concern is how few respondents subject to debarment with conditional release seek to meet the conditions required to regain eligibility. The low rate of compliance raises questions as to the general effectiveness of conditional sanctions as a tool intended to change behaviour; the fairness of essentially indefinite debarments for many respondents; and the risk of anticompetitive effects from a continually expanding pool of debarred contractors and consultants.[812] Consequently, moving away from the notion of a single baseline sanction altogether may be desirable, as well as the introduction of measures that would make the system more accessible to SMEs and individuals without legal representation. Taking guidance from national sanctioning guidelines, particularly the US Federal Sentencing Guidelines and the UK Sentencing Council Guidelines, MDBs should consider having a different baseline sanction based on the type of offence and its severity.

Moreover, MDBs should consider harmonising the definition of "restitution" and developing clear guidelines for determining the appropriate amount of reimbursement and restitution, and should avoid the perception that they themselves are financially benefitting

[812] African Development Bank, Independent Development Evaluation: *Comparative Review of Sanctions Practices across Multilateral Development Banks*, Executive Summary (2019).

from wrongdoing that occurred in relation to their own projects by having the restitution amount paid directly to them.

Finally, MDBs should develop robust guidelines for the availability of settlements, which should not be used when wrongdoing is egregious and has resulted in significant harm, nor as a way for MDBs to extract maximum restitution in exchange for a more lenient sanction. Rather, settlements should be available only when the respondent has self-reported and cooperated (where MDBs' should consider providing guidance on what constitutes "self-reporting" and "cooperation"), has admitted guilt, and has agreed on concrete measures of the strengthening and monitoring of compliance procedures, to be verified by MDBs' monitors.

The below table summarises proposals for the enhancement of MDBs' sanctions regimes:

Issue	Recommendation
Respondents' discovery rights	MDBs' sanctions procedures should specify that respondents have the right to request documents from investigators and that investigators are expected to respond to those requests. Only if the investigators claim that the discovery requested is irrelevant, privileged, or unduly burdensome, would the relevant decision-maker be brought in to decide. Investigators should have the right to redact parts of evidence, but the respondent may challenge a redaction before the decision-maker.
Experts' reports	MDBs' sanctions procedures should provide guidance on the content of expert reports – for example, by stating that the report must describe the methods, evidence and information used in arriving at the conclusions, and disclose any relationship the expert has with the parties, their legal advisors and the relevant decision-maker. MDBs could also consider allowing parties to object to the expert's qualifications, impartiality or independence. Finally, MDBs' sanctions procedures should require the decision-maker to send a copy of the expert report to the parties and give them an opportunity to submit written comments on the report.
Assessment of evidence	MDBs should consider introducing guidance on the exclusion of evidence, similar to that in the IBA Rules.
Oral hearing	Parties should be allowed to request a hearing, while the Sanctions Board should retain discretion of whether to have a hearing. Such decision should

	be based on the Sanctions Board's determination of whether it has sufficient evidence on the basis of the written proceedings to decide a case fairly.
Witnesses	Sanctions Boards should have discretion to decide whether to allow live witness testimony and cross-examination, depending on whether, in the Sanctions Board's opinion, this is necessary to ensure a fair hearing of the respondent's case. As a starting point, however, parties in the proceedings should be allowed to provide the Board with the names of witnesses whom they wish to appear before the Board, bearing in mind that the Board does not have judicial powers of subpoenaing witnesses. Sanctions Boards may want to limit the maximum number of witnesses that each party may offer on each disputed fact. If the Sanctions Board thought that a request to call witnesses were in bad faith (e.g., in order to obstruct or subvert proceedings), it should not be required to call witnesses.
Publication of decisions	MDBs should publish reasoned decisions of both the Sanctions Board and the first-tier decision-maker in contested cases (once the deadline for appeal has passed without the appeal having been lodged). Safeguards should be put in place by allowing the decision-makers to redact their decisions in order to preserve a party's anonymity and/or protect its reputation.
Referral to national authorities	MDBs' sanctions procedures should contain explicit authority to refer cases involving possible violation of national laws to the appropriate law enforcement authorities. The credibility of the relevant evidence suggesting that a party had violated national laws should be corroborated by a local counsel. Further, the recommendation to refer should require the identification of information that may be disclosed and the General Counsel's opinion regarding the legal aspects of the recommended referral. The MDB's President (in consultation with the senior management) should have a final say on whether the matter should be so referred. MDBs should refer matters and share information with national authorities only in cases where they are appraised of the subsequent criminal procedures in the relevant country, and fully prepared to share additional information, cooperate with the authorities in their investigation and have their staff testify, if necessary. Finally, MDBs should inform the respondent of any materials made available to the authorities and provide copies of such materials that are not already in the respondent's possession.

Independence and impartiality of Sanctions Board members	Sanctions Boards should be composed entirely of non-staff members. In order to ensure maximum impartiality and prevent any appearance of conflict, the candidates for the Sanctions Board membership should not have previously held or, at the time of appointment, hold any appointment with the relevant MDB, including as a staff member, Board director or a consultant. MDBs' sanctions procedures should also provide a mechanism that allows a challenge to the impartiality of individual Sanctions Board members. In addition, none of the Sanctions Board members (or the first-tier decision-maker, for that matter) should be involved in the drafting of the relevant MDB's Sanctions Procedures in order to ensure that MDBs' sanctions procedures are free from their influence and interests. For a period of several years after the end of his/her term, the Sanctions Board member should not be able to (i) accept any kind of employment, consultancy or interest with any firm that has been a respondent in the sanctions proceedings in which such member has participated, or (ii) accept any employment with the relevant MDB or provide the MDB with any services. Sanctions Board members may serve as a counsel in a case pending before a different Sanctions Board, unless such case concerns a controversial question which is frequently raised before Boards on which the person sits as a member. Further guidance could be taken from the IBA Guidelines. Sanctions Board members should be appointed for a non-renewable term of between five and seven years. The Sanctions Board Statute should recognise the administrative and budgetary independence of the Sanctions Board, and the budget of the Sanctions Board should not be fungible with the budget of other administrative units. MDBs should prescribe clear grounds for the removal of Sanctions Board members. Such removal should be handled exclusively by the Sanctions

	Board itself, rather than the governing body of the relevant MDB.
Appointment of Sanctions Board members	MDBs should consider establishing an advisory committee composed of external experts for the selection of Sanctions Board members. Moreover, strict qualifications for the Sanctions Board appointments should be mandated in the fields which are relevant for the service on the Board, such as law, compliance, international procurement, auditing, forensic accounting or related fields.
Appointment and independence of the Sanctions Board Secretary	MDBs should consider having the Secretary elected, and the renewal of his/her term determined, solely by the Board and not the MDB's management.
Range of sanctions; mitigating and aggravating factors	MDBs should consider a wider range of sanctions that is not so biased towards debarment, in particular letters of reprimand and conditional non-debarments in minor cases or where the respondent demonstrates that it has and will continue to take corrective actions to remedy the sanctionable conduct. Moreover, a significant factor in MDBs' Sanctions Guidelines should be the loss amount associated with the sanctionable practice. Further guidance is also needed on such terms as "sophisticated means," "internal action against responsible party" and "assistance and/or ongoing cooperation" in order to ensure they are consistently applied among MDBs.
Baseline sanction	MDBs should move beyond the notion of a single baseline sanction and instead use a range of available sanctions, based on different types of offences and their severity, taking guidance from the likes of the US Federal Sentencing Guidelines and the UK Sentencing Council Guidelines.
Restitution	MDBs should consider harmonising the definition of 'reimbursement/ restitution'. Further, MDBs should develop guidelines for determining the appropriate amount of reimbursement/restitution. MDBs should also avoid any perception that they are financially benefitting from wrongdoing that occurred in relation to their own projects, and – before imposing sanctions that require payment of fines directly to MDBs – should resolve such practical issues as how they will ensure that the unit which

	negotiated the fines does not have any role in the management structure overseeing the use of funds, how they will segregate and handle the funds prudently without creating a new and costly bureaucracy to manage it, and how they will handle the consequences of sanctionable practices occurring in the administration of these funds themselves.
Encouraging involvement of SMEs and individuals without legal counsel	MDBs should undertake measures to make the system more accessible to SMEs and individuals without legal counsel. Such measures should include, for example, the creation of a plain English "know your rights" literature for respondents, and the use of plain English throughout sanctions proceedings. Further, MDBs may consider reducing the use of conditional release in smaller cases involving SMEs in favour of alternative approaches like more severe sanctions for repeat offences. Other complementary measures could include technical assistance programmes for SMEs, involving training on effective anti-corruption and compliance regimes, awareness-raising about the long-term costs of corruption, etc.
Settlements	MDBs should avoid the appearance of giving companies a "slap on the wrist" through settlements, and should therefore consider using settlements only where the respondent: - has self-reported and cooperated (where self-reporting should be based on the provision of information that MDBs' investigators could not otherwise have known about; and standards of cooperation should include, among other things, the provision of detailed information about wrongdoing by individuals, unedited first witness accounts, provision of access to witnesses, and full evidence of any other wrongdoing discovered in the course of investigating a specific offence); - has admitted guilt; and - has agreed on concrete measures of the strengthening and monitoring of compliance procedures, to be verified by MDBs' monitors and with public reporting on how the respondent has done so. By contrast, settlements should not be used where wrongdoing is egregious

	and has resulted in significant harm, or where a company has previously received a corruption-related enforcement or regulatory action against it. Finally, in order to balance increasing calls for transparency, on the one hand, and the fact that many respondents see the lack of publicity as a significant advantage to settlements, on the other hand, MDBs should develop guidelines that set out the basic terms for the disclosure of settlements – for example, whether a press release will be issued in each case, how the underlying misconduct or agreed sanction may be summarised, and whether the respondent should publicly accept culpability or responsibility.

2. Treatment of corporate groups

A. Introduction

All MDBs' sanctions procedures provide that affiliates of respondents may also be sanctioned, and that sanctions may be applied to successors and assigns of sanctioned parties. Nevertheless, a number of challenging issues surround the need to prevent the circumvention of sanctions through the use of affiliates or changes in corporate forms, on the one hand, while on the other hand ensuring that sanctions are commensurate with the degree of responsibility, especially where a sanctioned party has numerous affiliates in different business sectors around the globe. In order to provide guidance on these matters, in September 2012, the MDBs adopted Harmonised Principles on Treatment of Corporate Groups (the "**Principles**"), which set out general principles for the application of sanctions to affiliates and successors and assigns.[813]

While the Principles provide a useful starting point, they would benefit from further guidance in order to facilitate clearer standards for the MDBs. For example, the Principles recommend that sanctions should be applied to the sanctioned party's parent company if that company was involved in the sanctionable practice. Such involvement may include wilful blindness and failure to supervise. However, without sufficient guidance on this issue, the "failure to supervise" standard may allow a company to successfully argue that it had properly supervised its employees, but that its employees acted "rogue" in committing a sanctionable practice. Similarly, without more detailed standards to address successor liability, companies could evade sanctions by dissolving and taking on another legal form.

This Chapter makes recommendations for further guidance under the Principles, based on the analysis of the US and the UK laws. The choice of the US and the UK as benchmark jurisdictions was guided by two factors: (i) first, the fact that MDBs' sanctions regimes are based on the US Federal Acquisition Regulation[814] and thus founded on common law principles, and (ii) second, the fact that three out of the five MDBs are

[813] MDB Harmonized Principles on Treatment of Corporate Groups (10 September 2012), available at: http://lnadbg4.adb.org/oai001p.nsf/0/A7912C61C52A85AD48257ACC002DB7EE/$FILE/MDB%20Harmonized%20Principles%20on%20Treatment%20of%20Corporate%20Groups.pdf.

[814] The US Federal Acquisition Regulation served as the basis for the World Bank Group's Sanctions Procedures, which in turn served as the basis for the sanctions procedures of the other four MDBs.

headquartered in these two jurisdictions. After an overview of the Principles in section B, the subsequent sections analyse four main areas of corporate liability: (i) liability of a company for its employees' wrongdoings, (ii) liability of a parent company for its subsidiaries' wrongdoings, (iii) liability of a subsidiary for its parent company's wrongdoings and (iv) successor liability. Each section concludes the analysis by making recommendations for further enhancements of, and clarifications under, the Principles.

B. Overview of the Principles

The Principles recognise that sanctions should be applied to entities within corporate groups, based on the facts of the relevant case and not a rigidly automatic approach. Nevertheless, the Principles state a rebuttable presumption that sanctions should be applied to all entities controlled by the respondent, unless the respondent demonstrates that the entities are free of responsibility for the misconduct, application to the entities would be disproportional and is not reasonably necessary to prevent evasion.[815] In practice, however, very few respondents focus on the possibility that their subsidiaries may be captured by the sanction and hence fail to rebut this presumption in their response to the allegations of sanctionable practices, which then by default results in the sanctions typically extending to affiliates controlled by the sanctioned parties.

The Principles additionally recommend that sanctions should be applied to entities controlling the respondent and to entities under common control, if the relevant entity was involved in the sanctioned misconduct.[816] Such involvement may include wilful blindness and failure to supervise.[817] The WB Sanctions Board's stance has been to impose a sanction based on a finding of either (i) culpability for direct involvement (e.g., through instructions or orders, approval or guidance, or inferred authorisation in cases of close supervision),[818] or (ii) responsibility for another party's actions (e.g., where there is a duty to supervise combined with deliberate non-intervention).[819] Needless to say, it is challenging as a practical matter to establish that a parent company had a duty to supervise the subsidiary found to have engaged in a sanctionable practice. In addition, critics have

[815] *Ibid*., at A.3.
[816] *Ibid*., at A.4.
[817] *Ibid*.
[818] See, e.g., World Bank Sanctions Board Decision No. 65 (2014), ¶59, and Sanctions Board Decision No. 49 (2012), ¶¶19-31 (applying a sanction to an affiliate under common control with the respondent where the affiliate was found to have been directly involved in the misconduct).
[819] See, e.g., World Bank Sanctions Board Decision No. 65 (2014), ¶59.

suggested that concepts such as wilful blindness and failure to supervise should be applied sparingly and, instead, the MDBs' sanctions determinations should respect the doctrine of corporate separateness, which is observed in civil and common law systems worldwide.[820]

Furthermore, the Principles recommend that the sanction should be applied to the successor or assign of a sanctioned party, unless the successor or assign demonstrates that such application would be unreasonable.[821] In that context, the WB's general principles and presumptions in regard to sanctions and corporate groups include the presumption that sanctions should be applied to successors and assigns, and the principle that sanctions should be applied flexibly to avoid evasion.[822] Moreover, the Principles also state that "the business operations of the originally sanctioned entity should continue to be sanctioned."[823] It is unclear how a sanction can apply to "business operations", given that business operations of an entity are not legal entities themselves.

Additionally, the Principles recommend that, if a *prima facie* case has been made that an individual who is subject to a sanction has been employed or engaged by an entity, then the MDBs may apply the sanction to the employing or engaging entity, if the individual was engaged to evade a sanction.[824] Clearly, this principle is intended to prevent sanctioned individuals from evading a sanction by working on a project on which their company is working with an MDB.[825] For example, the WB Sanctions Board has typically held that an employer could be found liable for the acts of its employees under the doctrine of *respondeat superior*, considering in particular whether the employees acted within the course and scope of their employment, and were motivated, at least in part, by the intent of serving their employer.[826] Where a respondent entity has denied responsibility for the acts of its employees based on a rogue employee defence, the Sanctions Board has assessed any evidence presented regarding the scope and adequacy of the respondent entity's controls and supervision at the time of the misconduct.[827]

820

821 See Freshfields Brockhaus Deringer US LLP: Submission of Freshfields Brockhaus Deringer LLP in connection with Review of the World Bank Group Sanctions System (October 2013), at 13.

822 See The World Bank Group's Sanctions Regime: Information Note (November 2011), at 21.

823 *Ibid*.

824 *Ibid*., at C.2.b.

825 *Ibid*.

826 See, e.g., World Bank Sanctions Board Decision No. 94 (16 June 2017), ¶ 35.

827 World Bank Sanctions Board Decision No. 83 (30 September 2015), ¶ 69.

Lastly, with respect to cross-debarments, the Principles state that only such sanctioned entities within a corporate group that are identified by name by the sanctioning institution are subject to cross-debarment pursuant to the Cross-Debarment Agreement.[828] This approach is understandable, because if the debarment applied to the respondent "and all of its affiliates" or "all of the affiliates controlled by the respondent", without identifying such affiliates by name, it would be impossible to know which companies are captured by the cross-debarment without undertaking a thorough analysis of the organisational structure of a company attempting to work on an MDB-financed project. This would be impractical in view of the hundreds of debarred companies on the list. On the other hand, if the debarment were to apply only to the specifically named affiliates, this would generate the risk that a debarred party may simply create a new affiliate with a name different from any of the names on the list and consequently avoid debarment. EBRD's Sanctions Procedures attempt to deal with such risk by placing the onus of detecting circumvention attempts on the Investigations Unit by stating that if, after the issuance of the first-tier decision-maker's decision or the final decision by the Sanctions Board, the Investigations Unit determines *prima facie* that an entity that is seeking to get funding (directly or indirectly) from an EBRD-financed project (the "**New Entity**") is a successor or assignee of sanctioned entity, including through the acquisition of or merger with that entity, the Investigations Unit may apply to the first-tier decision-maker to have the original sanction applied to the New Entity.[829]

C. Liability of a company for its employees' wrongdoings

The basic feature of separate corporate personality is that the corporation is a legal entity distinct from its shareholders. The main advantage that a company has is that it is capable of having rights and being subject to duties which are not identical as those enjoyed or borne by its shareholders. It has distinct personality from any individual person, and thus longevity beyond that of its members. Nonetheless, there are instances when the law makes companies vicariously liable for their employees' wrongdoings. After all, one could argue that, given that a company has no mind of its own, in order to evaluate the company's acts, it is necessary to refer to the acts of its employees, directors, officers or agents (as applicable). This section analyses the liability of a company for its

[828] *Ibid*., at D.1.
[829] EBRD's Enforcement Policy and Procedures, §11.2(i).

employees' wrongdoing under the US and UK law, and makes suggestions for enhancements of the Principles.

(i) US law

In the US, under the doctrine of *respondeat superior*, a company may be held criminally liable for the illegal acts of its directors, officers, employees and agents. To hold a company liable for these actions, the government must establish that the company agent's actions (1) were within the scope of his duties and (ii) were intended, at least in part, to benefit the company.[830]

An employee is considered to be acting within the scope of his/her duties if he/she has actual or apparent authority to engage in the act in question.[831] Moreover, an employee is acting with apparent authority if a third party reasonably believes that he/she has the authority to perform the act in question.[832]

As to the second element, as established in *Automated Medical Laboratories*, the company does not necessarily need to profit from its agent's actions for it to be held liable. In that context, the US Court of Appeals for the 4th Circuit stated:

> "Benefit is not a 'touchstone of criminal corporate liability; benefit at best is an evidential, not an operative fact.' Thus, whether the agent's actions ultimately [accrued] to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation."[833]

Companies can be held liable for crimes committed by low-level employees,[834] contrary to corporate directives,[835] or notwithstanding the company's adoption of an

[830] Offices of the United States Attorneys: Principles of Federal Prosecution of Business Organizations, §9-28.010.
[831] See, e.g., *A.I. Credit Corp v Legion Ins. Co.*, 265 F.3d 630 (7th Cir. 2001), at 637 and *Zurich Capital Mkts. v Coglianese*, 332 F. Supp. 2d 1087 (N.D. Ill. 2004), at 1108.
[832] See, e.g., *United States v Bi-Co Pavers, Inc.*, 741 F.2d 730 (5th Cir. 1984), at 737.
[833] *United States v Automated Medical Laboratories Inc*. 770 F. 2d 399, at 407 (4th Cir. 1985).
[834] See, e.g., *United States v. Dye Constr. Co*., 510 F.2d 78 (10th Cir. 1975); *Tex.-Okla. Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1975); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958); *United States v. George F. Fish, Inc*., 154 F.2d 798 (2d Cir. 1946).

effective compliance programme, although – as further described below – a company that had an effective compliance programme, self-reported and cooperated is eligible for a reduced fine.[836] In addition, under the wilful blindness doctrine, a company can be held criminally liable for deliberately disregarding the criminal activity at hand.[837] Therefore, if a company should have known of a wrongdoing, it should not recklessly fail to address it.

Notably, in the recent years, the emphasis has been on seeking accountability from the individuals who perpetrated the wrongdoing. In that context, in September 2015, Sally Yates, the then Deputy Attorney General of the DOJ, issued the Memorandum on Individual Accountability for Corporate Wrongdoers (the "**Yates Memo**") which signals that the DOJ would proceed more aggressively in targeting individuals involved in corporate wrongdoing, emphasising that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." This is because "such accountability . . . deters future illegal activity, it incentivizes change in corporate behaviour, it ensures that proper parties are held responsible for their actions, and it promotes the public's confidence in the justice system."[838]

The Yates Memo was likely issued in response to widespread criticism that, following the 2008 financial crisis, the DOJ pursued enforcement actions against financial institutions without a successful prosecution of any senior officers employed by those organisations.[839] The Memo has raised concerns that lower-level personnel may feel pressured to provide government investigators with what they want as opposed to facts that might be less helpful to investigators, and that higher-level officials will be less cooperative due to fears of potential individual liability.[840] In response to this criticism, in November 2018, the Deputy Attorney General, Rod Rosenstein, announced that, in contrast to the requirements in the Yates Memo, a corporation now need not identify every

---

[835] See, e.g., *United States v. Twentieth Century Fox Film Corp*., 882 F.2d 656 (2d Cir. 1989); *United States v. Hilton Hotels Corp*., 467 F.2d 1000 (9th Cir. 1972), cert. denied 409 U.S. 1125 (1973); *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009).
[836] US Sentencing Commission, Sentencing of Organizations, §8C2.5.
[837] See, e.g., *United States v Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987), at 856.
[838] Memorandum from Sally Quillian Yates: *Individual Accountability for Corporate Wrongdoing* (9 September 2015).
[839] Gideon Mark: *The Yates Memo*, University of California Davis Law Review, Volume 51 (2018), at 1591.
[840] Alan Gutterman: *Yates Memo Signals Heightened Focus of DOJ on Executives and Other Personnel of Corporate Wrongdoers*, Thompson Reuters Legal Solutions (February 2016).

individual who might face civil liability in order to receive maximum cooperation credit in civil cases, but rather only those individuals who were "substantially involved in" or "responsible for" the alleged misconduct.[841] However, DOJ will not award any credit to a corporation that "conceals involvement in the misconduct by members of senior management or the board of directors" or that "otherwise demonstrates a lack of good faith in its representations regarding the nature or scope of the misconduct."[842]

Moreover, the US Sentencing Commission has published the Organizational Guidelines, under which a potential fine range can be mitigated by up to 95% if an organisation demonstrates that it has put in place an effective compliance and ethics programme. This mitigating credit under the Guidelines is contingent upon prompt reporting to the authorities and the non-involvement of high level personnel in the actual offence conduct.[843]

Importantly for MDBs' sanctions procedures, under the FCPA, a company is vicariously liable when its directors, officers, employees or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company.[844] As there is no requirement for the culpable employee to be of a certain seniority, it is relatively easy for the prosecution to discharge its burden of proof regarding the company's liability.[845] For criminal liability to apply to a company, there must be corporate "knowledge" – either through individual corporate employees or through the doctrine of "collective knowledge", which imputes to a company the sum knowledge of all or some of its employees by aggregating individual employee's knowledge for the purpose of creating the necessary guilty intent for the corporation.[846] Thus, a company may be liable even if there is no single employee entirely at fault and intent may be accumulated

[841] DOJ: *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act*, 29 November 2018, available at: https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.
[842] *Ibid*.
[843] US Sentencing Commission: Organizational Guidelines, §8B2.1, setting forth various factors that typify an effective compliance and ethics programme.
[844] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, at 27.
[845] *Ibid*.
[846] See Robert C. Blume et al.: *Potential FCPA Liability for Third-Party Conduct*, Practical Law (2017).

across the company.[847] Finally, the prosecution of an individual is not a prerequisite for corporate criminal liability.[848]

The only two affirmative defences under the FCPA are that: (1) the payment was lawful under the written laws of the foreign country (the "local law" defence), and (2) the money was spent as part of demonstrating a product or performing a contractual obligation (the "reasonable and *bona fide* business expenditure" defence). Because these are affirmative defences, the defendant bears the burden of proving them.[849]

(ii) UK law

Emphasising the separate legal personality doctrine, in a landmark UK corporate law case, *Salomon v A Salomon & Co Ltd*, Lord Macnaghten stated that:

> "The company is at law a different person altogether from the subscribers…. and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act."[850]

Pursuant to the Legal Guidance on Corporate Prosecutions issued by the UK Crown Prosecution Service (the "**CPS Guidance**"), in the absence of legislation which expressly creates criminal liability for companies, corporate liability may be established by either: (1) vicarious liability for the acts of a company's employees/agents, or (2) non-vicarious liability arising from the so-called "directing mind" principle, which determines whether the offender was a directing mind and will of the company.[851]

Vicarious liability will typically arise from offences of strict liability, which do not require intention, recklessness or even negligence as to one or more elements in the *actus reus*. In this case, it is likely that any corporate prosecution will be linked to the prosecution of a controlling officer and/or other employees.[852]

---

[847] American Criminal Law Review: *Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 359 (2009), at 369.
[848] Homer Moyer: *Joint DOJ-SEC Guidance on FCPA Clarifies and Confirms Agency Enforcement Attitudes and Policies*, Miller & Chevalier alert (20 November 2012).
[849] *Ibid.*, at 23.
[850] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1.
[851] Corporate Prosecutions: Legal Guidance: The Crown Prosecution Service, available at: http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/, ¶ 10.
[852] *Ibid.*, ¶ 16.

In addition to strict liability offences, companies can also be liable for offences requiring *mens rea*, whereby "the acts and state of mind" of those who represent the will and directing mind will be imputed to the company.[853] As a starting point, the CPS Guidance instructs prosecutors that, in seeking to identify the "directing mind" of a company, they should consider the constitution of the company in question (by reviewing the company's foundation documents, as well as actions of directors or the company in general meetings) and consider any reference in the company's statutes to offences committed by company's officers.[854]

The "directing mind" test has been criticised as too narrow to deter corporate crime and as encouraging companies to decentralise responsibilities to *avoid* liability, making it difficult to identify a senior individual who is in charge of a particular operation.[855] For example, in the 2012 LIBOR-fixing scandal, an individual LIBOR-fixer employed by UBS (Hayes) was held liable in a criminal court in England, but UBS itself could not be prosecuted in the UK, because the SFO did not have sufficient admissible evidence that a person who was identified as a directing mind was party to Hayes' conduct and therefore could not conclude that there was a realistic prospect of conviction.[856] Moreover, it has been suggested that this test may encourage bad corporate culture and practices, such as manipulation of meeting minutes which fail to record the identity of those present, in order to conceal the presence of board members; and complex organisational structures designed to insulate the board from evidence of wrongdoing.[857]

The one exception to the applicability of the "directing mind" doctrine particularly relevant to MDBs' sanctions regime is section 7 of the UK Bribery Act 2010, which introduces wider liability in the context of bribery, without requiring the identification of the "directing mind", for failure by a company to prevent bribery by persons associated with it to obtain or retain business or to obtain or retain an advantage in the conduct of business for that commercial organisation, which is very similar to the strict liability under the FCPA. Thus, while a company itself will not be held liable for a bribery offence, it

[853] *Ibid.*, ¶ 17.
[854] *Ibid*., ¶ 20.
[855] See Ministry of Justice: *Corporate Liability for Economic Crime, Call for evidence* (13 January 2017), at 13.
[856] *Ibid.*, at 14.
[857] *Ibid*.

will be guilty of a separate offence of failing to prevent bribery. This is different from the FCPA, where a company can be held vicariously liable for acts of its employees and agents. Further, under the Bribery Act, the company will have a full defence if it can demonstrate that it had adequate procedures in place to prevent persons associated with it from bribing, which is also different from the FCPA approach that does not offer this type of defence and offers only mitigation of sentence for remediation. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account particular facts and circumstances of the case. The onus remains on the company to prove that it had adequate procedures in place to prevent bribery.[858]

The government has indicated that the following six core principles demonstrate the existence of adequate procedures: (1) risk assessment, (2) proportionality of risk-based prevention procedures, (3) top level commitment, (4) due diligence in respect of persons who perform services for or on behalf of the organisation, (5) communication throughout the organisation (including training) and (6) monitoring and review.[859]

The principle of holding a company liable for its employees' offences was illustrated in the first conviction of a company under the Bribery Act, which occurred in February 2016, when a construction and professional services company, Sweett Group PLC pled guilty to a charge of failing to prevent bribery by its subsidiary's employees in the Middle East. In sentencing, the judge described the offence as a system failure patently committed over a period of time.[860] Interestingly, some have criticised the fact that no individuals have been charged in relation to corporate wrongdoings in the *Sweett* and other similar cases.[861] As described in section (i) above, it was exactly this type of criticism for leaving senior executives untouched that led to the increased emphasis on individual accountability by the DOJ.

---

[858] UK Ministry of Justice Guidance on the UK Bribery Act 2010, available at: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, at 6.
[859] *Ibid*., at 21-31.
[860] SFO press release: *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction* (19 February 2016).
[861] OECD: *Public Consultation on Liability of Legal Persons: Submission by Corruption Watch, United Kingdom* (November 2016), at 40.

More recently, the Criminal Finances Act 2017 came into force and, similar to the Bribery Act, introduced an offence of the failure to prevent facilitation of tax evasion. If a person "associated with" the relevant company commits the offence, the company will be vicariously liable.[862] Just like the Bribery Act, the Criminal Finances Act provides for a defence where, at the time of the offence, the company had in force "reasonable prevention procedures."[863] Thus, it would appear that the government is moving away from the "directing mind" doctrine and imposing strict liability on companies accused of facilitating tax evasion, unless they can demonstrate that they had adequate prevention procedures in place.

Notably, the broad principles of corporate liability in general and the vast literature associated with it are not the focus of this work.[864]

(iii) Application of the foregoing principles to MDBs' sanctions procedures

While the Principles' general stance towards the sanctioning of companies that employ sanctioned respondents is in line with the ethos of the FCPA and the UK Bribery Act, MDBs' sanctions regimes would benefit from greater clarity in this area. In particular, without further clarification, the "failure to supervise" could incentivise companies to argue that they had properly supervised their employees, but that the employees acted "rogue" in committing a sanctionable practice.

To that end, two distinct bases of liability emerge as an option for MDBs' sanctions regimes: (i) the vicarious liability under the FCPA and (ii) the strict liability under the UK Bribery Act. As is generally the case with all options, each of the two has its advantages and disadvantages. Specifically, under the vicarious liability doctrine, a

[862] Criminal Finances Act 2017, §§44-46.
[863] *Ibid*., §§45 and 46.
[864] See, e.g., Alan Dignam: Hicks and Goo's Cases and Materials on Company Law, 7th edition, Oxford University Press (2011); Derek French, Stephen Mayson and Christopher Ryan: Company Law, 27th edition, Oxford University Press (2010); Sarah Worthington: Sealy & Worthington's Text, Cases, and Materials in Company Law, 11th edition, Oxford University Press (2016); Chris Taylor: Company Law, 5th edition, Pearson Education (2018); Laura Stockin: *Piercing the corporate veil: reconciling R v. Sale, Prest v. Petrodel Resources Ltd and VTB Capital Plc v Nutritek International Corp*, The Company Lawyer, Case Comment (2014); Rian Matthews: *Clarification of the doctrine of Piercing the Corporate Veil*, Journal of International Banking Law and Regulation (2013); and Brenda Hannigan*: Wedded to Salomon: evasion, concealment, and confusion on piercing the veil of the one-man company*, Irish Jurist (2013).

company would be liable for a sanctionable practice of its culpable employee if he/she acted within the scope of his/her employment and with the intent to benefit the company.

One of the main problems with vicarious liability is that an individual who commits wrongful acts could simultaneously be held individually responsible for them. Arguably, this can give the appearance of scapegoating, particularly if it is the company's culture (which is set by the management) that condones or even encourages corrupt practices.[865] This was recently evidenced in the context of the 2012 LIBOR scandal, which arose out of the banking culture that prioritises profit ad rewards employees who achieve profits through risky behaviour, as a result of which only individual traders were prosecuted, rather than the senior management. The risk of relying solely on impersonal corporate liability is that corporate sanctions are ineffective in eliciting a sufficient corporate response to non-compliance by simply replacing management without addressing the underlying problem. Therefore, in addition to imposing a sanction on a company for a sanctionable practice committed by its employees, a vicarious liability regime should also emphasise the strong behavioural influence of corporate management and adequate procedures to prevent misconduct.[866]

By contrast, the regime that holds companies strictly liable for sanctionable practices committed by employees undermines the companies' ability to deter corporate misconduct, because it would hold companies liable for sanctionable practices committed by their employees within the scope of employment, regardless of the efforts and resources mobilised by the company.[867] For example, a company that has detected misconduct could report it and cooperate with the authorities; however, by doing so, the company should expect to be convicted for its employees' wrongdoing.[868]

In order to avoid companies being caught on the horns of such dilemma, the UK Bribery Act gives companies a full defence if they can demonstrate that they had adequate procedures in place to prevent their employees' misconduct, thus practically turning the strict liability standard into a negligence standard. This approach, however, is also

[865] OECD Public Consultation on Liability of Legal Persons: Submission by U4 Anti-Corruption Resource Centre (November 2016), at 11.
[866] *Ibid.*
[867] OECD: *Public Consultation on Liability of Legal Persons: Compilation of Responses*: *Submission by Jennifer Arlen* (November 2016), at 7.
[868] *Ibid.*

problematic because what constitutes "adequate procedures" will depend on the unique risks and challenges of each organisation, and, despite the UK government's broad-brush guidelines on the indicia of adequate procedures, law enforcement authorities, let alone MDBs, are not necessarily best placed to determine whether a company's procedures adequately address the risks presented. In addition, the company is best placed to argue why its systems work despite the violation that occurred, while in fact, the occurrence of a violation should serve as an indicator that the company's procedures could be improved.[869] Moreover, offering companies complete exoneration from liability if they have put "adequate procedures" in place may also incentivise companies to focus on adopting measures that are easily demonstrable to the authorities, such as elaborate policies and formal trainings, rather than focusing on adopting the most effective measures, such as the creation of the culture of integrity from the top.[870]

Additionally, it has been suggested that compliance programmes are not sufficient in and of themselves, and that companies need to do such additional measures as: (i) reforming compensation/promotion/retention policies to ensure that they encourage productivity without also encouraging misconduct, (ii) self-reporting all detected misconduct, and (iii) fully cooperating by investigating the wrongdoing and turning over all materials to the enforcement authorities. Otherwise, arguably, regimes that exonerate companies from liability if they have an effective compliance programme do not provide companies with needed incentives to self-report, fully cooperate or take other actions to deter crime (such as compensation and promotion policy reform).[871]

In light of the above, it might be better for the existence of effective procedures to be considered as a mitigating factor in assessing the appropriate sanction that should be imposed, rather than a full defence, as under the UK Bribery Act. Thus, a desirable MDBs' system for holding companies liable for sanctionable practices committed by their employees should deter companies from engaging in sanctionable practices while motivating them to effectively exercise control over their employees. This could be achieved by a hybrid system that would start off with strict liability (i.e., holding

[869] See OECD: *Public Consultation on Liability of Legal Persons: Compilation of Responses*: *Submission Chiawen Kiew and Melissa Khemani* (November 2016), at 78.
[870] See OECD: *Public Consultation on Liability of Legal Persons: Compilation of Responses: Submission by Sharon Oded* (November 2016), at 90.
[871] OECD: *Public Consultation on Liability of Legal Persons: Compilation of Responses*: *Submission by Jennifer Arlen* (November 2016), at 9.

companies strictly liable for sanctionable practices committed by their employees in the scope of employment, even if the company did all it reasonably could to prevent the wrongdoing), while rewarding companies – through the use of mitigating factors – for measurable actions to prevent the occurrence of sanctionble practices, as well as for voluntarily self-reporting and cooperating with the investigation. Only where a company could show that there was no failure to supervise and that appropriate measures were taken as soon as the wrongdoing was discovered, could this lead to further mitigating factors and possibly even provide grounds for exculpation. Such measures would also need to be accompanied by self-reporting and cooperation with the investigation; otherwise, if companies were protected from liability on the grounds of having an effective compliance programme, this would not create incentives for companies to self-report and fully cooperate.

MDBs could also provide some guidance on how to determine whether a company's compliance system was adequately designed and implemented. A good example is the FCPA Resource Guide (the "**FCPA Resource Guide**") by the DOJ and the Securities Exchange Commission (the "**SEC**"), which describes the ten "hallmarks of effective compliance program", which include: (i) commitment from senior management and a clearly articulated policy against corruption; (ii) clear, concise and accessible code of conduct and compliance policies and procedures; (iii) proper authority, autonomy from management and adequate resources by the responsible manager; (iv) risk-based approach, with greater focus on high-risk areas than on low-risk markets; (v) local language training, with web-based or in-person delivery, tailored to particular jobs and situations with relevant hypotheticals; (vi) incentives and disciplinary measures, where staff are rewarded for ethics and compliance leadership and disciplinary measures for misconduct; (vii) due diligence of agents, consultants and distributors, which entails: (a) understanding the parties' qualifications and associations, (b) understanding the business rationale for including them in the transaction, and (c) undertaking ongoing monitoring; (viii) reporting mechanism that allow for confidentiality and protect against retaliation; (ix) regular review and improvements of the compliance programme; and (x) in the context of mergers and acquisitions, a robust FCPA due diligence of the target company and prompt

integration of the acquired company into the acquiring company's internal controls, including its compliance programme.[872]

D. Liability of a parent for its subsidiaries' wrongdoings

The typical corporate group includes one or more parent companies that hold a majority or controlling equity interest in one or more subsidiaries, which together function as a single economic enterprise, often with a common public identity.[873] Regardless of how the boundaries of the corporate group are defined, each subsidiary within the corporate group enjoys separate legal personality from its shareholder parent. More often than not, however, the decision to form a subsidiary, as opposed to an internal division within a company, is driven by tax, regulatory or managerial factors.[874] A corporate group's organisational structure is therefore not an accurate indicator of the group's economic organisation or actual decision-making authority within the group. In an equity-based corporate group, one or more parent entities generally exercise control of subsidiaries through voting control, which often, but not always, corresponds to the parent entity's financial stake.[875] The parent(s) also exercise(s) direct or indirect control of subsidiary management through operational integration, overlapping directors and officers, or contractual means.[876] A significant equity stake in a higher-tier subsidiary may be enough to convey effective control over lower-tier subsidiaries, which may be wholly owned or partially owned by the parent.[877]

The following sections analyse the liability of a parent company for its subsidiaries' wrongdoing under the US and UK law, and make suggestions for enhancements of the Principles.

(i) US law

[872] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, at 57-68.
[873] Philip L. Blumberg: *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 Connecticut Law Review, 605, at 606 (2005).
[874] Virgina Harper Ho: *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 Columbia Journal of Transnational Law 113, at 133 (2013-2014).
[875] *Ibid.*, at 134.
[876] *Ibid.*
[877] *Ibid.*

(a) General approach

With respect to piercing the corporate veil from subsidiary to parent, it has been suggested that the "traditional 'piercing' jurisprudence rests on a demonstration of three fundamental elements: (1) the subsidiary's lack of independent existence; (2) the fraudulent, inequitable, or wrongful use of the corporate form; and (3) a causal relationship to the claimant's loss. Unless each of these three elements has been shown, courts have traditionally held "piercing" unavailable."[878]

The first element contemplates a lack of real-world existence of the subsidiary resulting from an exercise by the parent of such a high degree of control over the affairs of the subsidiary that it is reduced to a "mere agency" of the parent, comparable to a division.[879] The second element is a use by the parent of the subsidiary for an improper purpose that amounts to an abuse of the privilege of carrying on business as a corporation.[880] The final factor requires a claimant to show a causal connection between the defendant's wrongful act and the injury sustained by the claimant.

Unfortunately, it does not seem that the tests used by courts to determine the existence of these elements are entirely clear. Namely, the application of these tests often consists largely of lists that courts recite, which has resulted in a number of overlapping lists of factors that are passed off as tests.[881] For example, in *Victoria Elevator C. v Meridian Grain Co*, the court listed the following factors: (1) insufficient capitalisation for purposes of corporate undertaking, (2) failure to observe corporate formalities, (3) non-payment of dividends, (4) insolvency of debtor corporation at time of transaction in question, (5) siphoning of funds by dominant shareholder, (6) non-functioning of other officers and directors, (7) absence of corporate records, and (8) existence of corporation as merely a façade for individual dealings.[882]

---

[878] John H. Matheson: *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, North Carolina Law Review, Volume 87 (2009), at 1099, citing Phillip L. Blumberg: The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations (1983), at 612.
[879] See Phillip I. Blumberg et al.: Blumberg on Corporate Groups (Aspen Publishers, 2d ed. Supp. 2013-2), § 10.03[B], at 8.
[880] See *Oddenino & Gaule v. United Fin. Group*, 1999 U.S. App. LEXIS 29506, 9th Cir. (November 1999), at 3.
[881] *Ibid*.
[882] *Victoria Elevator Co. v Meridian Grain Co*., 283 N.W.2d 509 (1979).

Scholars have suggested that "[t]his is one of the most unsatisfactory areas of the law. With hundreds of irreconcilable decisions and shifting rationales, it functions in an almost inscrutable manner behind conclusory metaphors such as 'mere instrumentality', 'sham', 'adjunct', 'agent', 'alter ego', 'puppet' or dozens of similarly murky terms."[883] Specifically, courts have held a parent company liable for the actions of a subsidiary pursuant to the regulatory policies of the Federal Water Pollution Prevention and Control Act,[884] the Robinson-Patman Act (the anti-price discrimination law),[885] the Federal Trade Commission Act,[886] and the Commodity Exchange Act,[887] among others. However, they have not used a single test; rather, federal regulatory policies have resulted in a broad range of tests used, with courts often citing public interest concerns as key in their determination of whether a parent company should be found liable for the acts of its subsidiaries. Thus, for example, in *P.F. Collier & Son Corp. v F.T.C.*, which concerned the Federal Trade Commission Act, the court held:

> "Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute."[888]

The court found the following factors relevant in finding the parent's liability: the parent not only wholly-owned the relevant subsidiaries, but also (i) interchanged personnel with its subsidiaries and maintained common or overlapping officers and directors; (ii) operated through its subsidiaries, which were often created and dissolved for purposes unrelated to the business carried on by the corporate complex; and (iii) approved the use by its subsidiaries of the parent's name and goodwill in order to develop favourable public associations between the parent and its subsidiaries.

---

[883] Phillip I. Blumberg: *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 Hastings Int'l & Comp. L. Rev. 297 (2001), at 307.
[884] See, e.g., *United States v Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973).
[885] See, e.g., *Reines Distribs., Inc. v. Admiral Corp.*, 256 F. Supp. 581 (S.D.N.Y. 1966).
[886] See, e.g., *P.F. Collier & Son Corp. v F.T.C.*, 427 F.2d 261 (6th Cir. 1970).
[887] See, e.g., *Corn Prods Refining Co. v Benson*, 232 F.2d 554 (2nd Cir. 1956).
[888] *P.F. Collier & Son Corp. v F.T.C.*, 427 F.2d 261, at 267 (6th Cir. 1970).

(b) Criminal liability, including FCPA

The problem of establishing the criminal liability of a parent company for criminal acts of its subsidiary is that many economic crimes require a mental element (such as an intention to commit an offence or *mens rea*). Nonetheless, federal law permits prosecution of the parent if it exercises sufficient control over the subsidiary under the same *respondeat superior* doctrine described in section C(i) above. Thus, just as a corporation may be responsible for the criminal acts of its employees when they act for the corporation, so is subsidiary sometimes treated as the legal agent of the parent.[889]

Specifically, under the agency theory of liability, a parent may be liable for the acts of its subsidiary because the subsidiary's employees are considered either agents or sub-agents of the parent.[890] A subsidiary's employee may become the parent's agent if the parent has taken some demonstrable step that effectively authorises that employee to act as the parent's agent for the type of activity in which the illegal conduct occurred. Alternatively, under the vicarious liability doctrine, a subsidiary could be viewed as the parent's agent when the illegal conduct occurred.[891]

Under the mere instrumentality or unity of business theory of liability, a parent may be held liable for its subsidiary's misconduct when the parent uses the subsidiary to violate the law and does not treat the subsidiary as a separate entity.[892] Courts consider several factors in determining whether to impute the actions of a subsidiary to its parent, including whether: the parent and subsidiary have common officers and directors; the parent and subsidiary have consolidated financial statements; the subsidiary is grossly undercapitalised; the parent finances the subsidiary; the subsidiary receives only the parent's business; the parent uses the subsidiary's property as its own; the daily operations of the parent and subsidiary are not separate (for example, both companies are located in

[889] See, e.g., *United States v Bestfoods*, 524 U.S. 51, 62-65 (1998) (federal).
[890] See Conspiracy to commit offense or to defraud United States, 18 U.S. Code § 371.
[891] Carola A. Poindexter: *Criminal and Civil Liability for Corporations, Officers and Directors*, Practical Law, Thompson Reuters (2016).
[892] See *NLBR v Deena Artware, Inc*., 361 U.S. 398 (1960), at 402-03 and *United States v Jon-T Chems, Inc*., 768 F.2d 686 (5th Cir. 1985), cited in Carola A. Poindexter: *Criminal and Civil Liability for Corporations, Officers and Directors*, Practical Law, Thompson Reuters (2016).

the same building and use the same equipment); and the parent and subsidiary fail to observe corporate formalities, such as required shareholder meetings.[893]

However – and this is particularly relevant in the context of MDBs' sanctions regimes – authorities have been quick to hold parent companies liable for their subsidiaries' violations of the FCPA. In that context, in the FCPA Resource Guide provides the following guidance:

> "There are two ways in which a parent company may be liable for bribes paid by its subsidiary. First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example, when it directed its subsidiary's misconduct or otherwise directly participated in the bribe scheme.
>
> Second, a parent may be liable for its subsidiary's conduct under traditional agency principles. The fundamental characteristic of agency is control. Accordingly, DOJ and SEC evaluate the **parent's control**—including the parent's **knowledge and direction** of the subsidiary's actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent.
>
> Although the formal relationship between the parent and subsidiary is important in this analysis, so are the practical realities of how the parent and subsidiary actually interact. If an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent. Moreover, under traditional principles of *respondeat superior*, a company is liable for the acts of its agents, including its employees undertaken within the scope of their employment and intended, at least in part, to benefit the company. Thus, if an **agency relationship** exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary's employees."[894] *(emphasis added)*

Case law suggests that the standard is rather low for the SEC to determine that a parent company controlled a subsidiary for purposes of finding that the parent company should be liable for its subsidiary's FCPA violation. For example, in 2014, the SEC found Alcoa Inc. liable for corrupt practices of its subsidiaries under agency principles. In determining that Alcoa's subsidiaries were agents of the parent company, the SEC considered the following factors: First, Alcoa appointed the majority of seats on a Strategic Council that provided "direction and counsel" to the subsidiaries. Second, Alcoa and a subsidiary transferred personnel between them. Third, Alcoa set the business and financial goals for the subsidiaries and coordinated their legal, audit, and compliance functions. Fourth, the subsidiaries' employees managing the business with the company

[893] Carola A. Poindexter: *Criminal and Civil Liability for Corporations, Officers and Directors*, Practical Law, Thompson Reuters (2016).
[894] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, at 27-28.

involved in the corrupt scheme (Alba) reported functionally to Alcoa officials. Fifth, Alba was a significant Alcoa customer. Sixth, members of Alcoa senior management met with Alba officials and a consultant involved in the scheme to discuss matters related to the Alba relationship. Seventh, Alcoa officials were aware that the consultant was the subsidiaries' agent and that the terms of related contracts were reviewed and approved by senior Alcoa managers.[895]

The first five factors relate to the parent company's influence over the subsidiaries generally and not in connection with the alleged wrongdoing. The sixth and seventh factors are described quite neutrally, and there does not seem to be any indicia of Alcoa's management taking inappropriate actions with respect to the consultant in question. If these factors suffice to establish parent liability under the FCPA, many subsidiaries are likely to be considered parent company's "agents."[896]

Similarly, in February, 2016, the SEC found SciClone Pharmaceuticals, Inc., a California-based company liable for its Chinese subsidiary's FCPA violation. In finding that SciClone controlled its subsidiary, the SEC noted that:

> "SciClone directs the relevant operations of SPIL and its subsidiaries and oversees SPIL's operations through various means including through the appointment of directors and officers of SPIL, review and approval of its annual budget, business and financial goals, and oversight of its legal, audit, and compliance functions. SciClone also reviews and approves annual marketing and promotion budgets of SPIL and its subsidiaries. During relevant periods, some SciClone officers also served as officers and/or directors of SPIL, travelled frequently to China to participate in the management of SPIL."[897]

These factors also appear quite neutral and do not entail any pleading by the parent company in the subsidiaries' FCPA violations.

Finally, in November 2016, the SEC found JPMorgan liable for the FCPA violation of its Chinse subsidiary JPMorgan APAC, which was found to have won business from clients and corruptly influenced government officials in the Asia-Pacific

[895] SEC Cease-and-Desist Order in the matter of Alcoa Inc. (9 January 2014), available at: https://www.sec.gov/litigation/admin/2014/34-71261.pdf, at 10.
[896] See Wiley Rein: *Parent FCPA Violations Based on Subsidiary Misconduct*, ABA's Corporate Counsel Committee eNewsletter (April 2014).
[897] SEC Administrative Proceeding File No. 3-17101, *In the Matter of SciClone Pharmaceuticals, Inc*. (4 February 2016).

region by giving jobs and internships to their relatives and friends.[898] Even though the SEC recognised that "JPMorgan APAC employees failed to follow the firm's internal accounting controls, … and took steps to hide the magnitude and purpose of the Client Referral Program from others within the firm, and devised a way to avoid having certain Referral Hires in APAC counted within JPMorgan APAC's internal year-end headcount calculations", it still found JPMorgan liable because it "failed to devise and maintain a system of internal accounting controls around its hiring practices sufficient to provide reasonable assurances that its employees were not bribing foreign officials in contravention of company policy."[899] Thus, it would appear that inadequate proceedings for the prevention of the FCPA activities will result in the parent company's liability, without the SEC necessarily finding the parent company's knowledge of the subsidiary's actions.

(c) Proposals for reforms of the US system

It has been suggested that the test for finding the existence of an enterprise should have at its basis an enquiry of economic control, focusing on the integration of parent and subsidiary companies to pursue one economic purpose.[900] In that context, the relevant enquiries might include whether: (1) the subsidiary exists in order to further the economic goals of the parent, (2) the corporate group presents itself to the public as a unified enterprise through, for example, common logos, policies and guiding principles, (3) the two companies are functionally part of the same business and, most importantly, (4) the subsidiary was created or is utilised to advance business goals of the parent company, in order to essentially externalise the parent company's risk.[901] Each of these questions is aimed at determining the functional economic integration of the two companies.

Still, the problem with trying to determine the functional economic integration of the two companies and elements of the parent company's control over subsidiary is that, the further down the chain we are, the more difficult it becomes to establish the elements of control, which points to the deficiencies of the control/agency theory.

[898] SEC Press Release: *JPMorgan Chase Paying $264 Million to Settle FCPA Charges* (17 November 2016).
[899] SEC Administrative Proceeding File No. No. 3-17684, *In the Matter of JPMorgan Chase & Co*. (17 November 2016).
[900] Meredith Dearborn: *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, California Law Review, Volume 97, Issue 1 (February 2009), at 252.
[901] *Ibid*., at 252-53.

Basing her findings on several international corporate liability regimes, Dearborn thus advocates that the company should bear the burden in disproving the existence of an enterprise, without the claimant having to prove the economic structure of the corporate group.[902] Therefore, once the claimant demonstrates to the court that it was harmed by an activity of the corporate group and that the parent and subsidiary were both members of that group, the company should have to prove that it is not part of an economic enterprise. The main reason for this shifting of the burden of proof is that the parent company has better access to information about the internal structure of the group than the claimant.[903] While this seems logical, merely looking at the corporate structure without considering other factors, such as, for example, control and operational arrangements, is quite a simplistic approach, which has been criticised by the UK courts, as described in continuation.

(ii) UK law

(a) General approach

The fundamental principle in the UK is that "each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities."[904] However, courts have developed certain exceptions for finding a parent company liable for its subsidiaries' actions. Thus, in a landmark corporate law case, *Adams v Cape Industries plc*, in which an English company was sued for the actions of one of its subsidiaries in South Africa, the court set forth three main grounds for veil piercing: (1) a single economic unit, when a group of companies should be treated as a single economic entity; (2) special circumstances that point to subsidiaries being a mere façade to the true group dynamics; and (3) agency.[905]

In this particular case, the court rejected all three grounds. More specifically, with respect to a single economic entity, the court established that corporate veil should not be

[902] *Ibid*., at 253.
[903] *Ibid.*
[904] L.S. Sealy: Cases and Material in Company Law, Butterworths, 7th edition (2001), at 71.
[905] *Adams v Cape Industries plc* [1990] Ch 433. See also *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 and *Woolfson Regional Council v Strahclyde Regional Council* [1978] UKHL 5.

pierced just because a group of companies operated as a single economic unit. The court pointed out that:

> "the court is [not] entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."[906]

Further, the court accepted that the veil could be lifted if the subsidiary was a mere façade concealing the true facts, but did not find that this applied to the company at hand. Similarly, the court did not find any evidence of the agency relationship, given that the subsidiaries were independent and with no general power to bind the parent, and held that such an agency relationship can be established only where there was an express agency agreement between the companies.

Despite this apparent tendency of UK courts to strictly follow the separate legal personality and limited liability doctrine laid down in *Salomon*, as described in continuation, the more recent cases, particularly in connection with personal injury, criminal liability and the UK Bribery Act violations, suggest a greater tendency to hold parent companies liable for their subsidiaries' illegal actions.

(b) Tort liability

Establishing liability of a parent company for its subsidiaries' actions is particularly acute in tort cases, where tort victims are unable to predict in advance the likelihood or nature of the loss or injury they suffer, and so are unable to protect themselves by means of insurance or alleviate the harm they have suffered in any other way.[907] If tort victims were unable to claim against the parent company, parent companies could simply limit tort liabilities to certain companies in the group and thereby insulate the rest of the group from actual and potential liabilities.

[906] *Adams v Cape Industries plc* [1990] Ch 433.
[907] Phillip Lipton: *The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective*, 40 Monash University Law Review, 452 (2014), at 481.

In *HRH Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria*, this case proceedings were brought Royal Dutch Shell plc ("**RDS**"), the ultimate holding company of the Shell Group, and its subsidiary, Shell Petroleum Development Company of Nigeria Ltd ("**SPDC**"). The claimants were seeking damages arising as a result of ongoing pollution and environmental damage caused by oil spills. The court considered several precedents on this issue and said that the starting point was the *Caparo Industries Plc v Dickman* case and its "three ingredients": foreseeability, proximity and reasonableness.[908] The court further noted that in the landmark case, *Chandler v Cape plc*, the Court of Appeal had stated that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances included situations where:

(1) the businesses of the parent and subsidiary were in a relevant respect the same;
(2) the parent had, or ought to have had, superior knowledge on some relevant aspect of health and safety in the particular industry
(3) the subsidiary's system of work was unsafe as the parent company knew, or ought to have known; and
(4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[909]

Thus, the imposition of a duty of care in such cases will require a claimant to demonstrate more than general manifestation of a group identity.

On the facts of the case, the court found that none of the factors from the *Chandler* case were present in the relations between RDC and SPDC, because RDC was an investment holding company, with only a very superficial view of the business of this indirectly-held and highly-autonomous subsidiary.[910] The court also found that the subsidiary's knowledge was more specialist than the parent's and the subsidiary was not relying on the parent for any expertise.[911]

[908] *HRH Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* 2017 EWHC 89 (TCC), ¶ 72.
[909] *Ibid*., ¶ 76.
[910] *Ibid*., ¶ 116.
[911] *Ibid*., ¶ 106.

Most recently, in *VTB Capital plc v Nutritek International Corp*, the Court of Appeal echoed the principle relating to piercing the corporate veil that had been set out in the judgment of *Faiza Ben Hashem v Shayit* by finding that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing.[912] Similarly, in *Prest v Petrodel Resources Limited and Others*, the court held that piercing of the corporate veil is appropriate only if the corporate structure had been used in order to avoid or conceal an obligation owed to a third party.[913]

(c) Criminal liability, including UK Bribery Act

As in the US, the problem of establishing the criminal liability of a parent company for criminal acts of its subsidiary is that many economic crimes require a mental element (such as an intention to commit an offence or *mens rea*), and there is an inherent difficulty in establishing corporate criminal liability for such offences to attribute a human state of mind, such as intention, to a company."[914]

In recent years, two important pieces of legislation have sought to overcome the historical difficulty of establishing corporate criminal liability by creating specific corporate offences: (1) corporate manslaughter (Corporate Manslaughter and Corporate Homicide Act 2007 ("**CMCHA**")) and (2) failure to prevent bribery (Bribery Act 2010), the latter being particularly relevant for MDBs' sanctions regimes.[915]

Under the CMCHA, an organisation is guilty of an offence if the way in which its activities are managed or organised (i) causes a person's death and (ii) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.[916] Section 8 of the CMCHA allows the jury to consider the attitudes, policies, systems or accepted practices that were likely to have encouraged the breach or produced a tolerance of it.

[912] *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, ¶¶ 123-128.
[913] *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34.
[914] Jonathan Grimes, Rebecca Niblock and Lorna Madden: *Corporate criminal liability in the UK: the introduction of deferred prosecution agreements, proposals for further change, and the consequences for officers and senior managers*, Practical Law, Multijurisdictional Guide 2013/14, Corporate Crime, Fraud and Investigations.
[915] *Ibid.*
[916] CMCHA § 1(1).

As described in section B(ii) above, under section 7 of the UK Bribery Act, a company is liable for the offence of failing to prevent bribery. Similar to the FCPA, section 7 of the Bribery Act says that a company is guilty of an offence if a person *associated with it* bribes another person intending to obtain or retain business for the organisation. The Ministry of Justice's Guidance on the Bribery Act clarifies the scope of parent company's liability for its subsidiaries' violations as follows:

> "Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa."[917]

Clearly, the mere fact of a parent and subsidiary relationship will not automatically result in the finding that the subsidiary is performing services for and on behalf of the parent. Rather, it will be necessary to demonstrate that the subsidiary acted with the intention of obtaining an advantage for the parent. This is a higher standard than that applied by the SEC, as described above. The SFO managed to demonstrate this in its first conviction under section 7, when in 2016 it convicted Sweett Group PLC (a UK-based company) for the offence of failing to prevent its subsidiary from paying bribes on its behalf in the Middle East. Sweett was unable to rely on the defence of having adequate procedures in place to prevent bribery.[918]

Section 7 liability is not limited to a parent company. As illustrated by the SFO first deferred prosecution agreement with Standard Bank PLC, it can also extend to other companies within the corporate group. In that case, Standard Bank's Tanzanian sister

[917] Ministry of Justice: UK Bribery Act Guidance, ¶ 45.
[918] SFO press release: *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction* (19 February 2016).

company, Stanbic Bank Tanzania was charged with bribing a local partner in Tanzania to induce members of the government to favour Stanbic's private placement proposal. However, given that both sister companies stood to benefit from the transaction (with the fee split 50/50), and were acting jointly (with different but complementary roles), the employees and the Tanzanian company were regarded as associated persons of the UK company and their bribery act regarded as benefitting both companies.[919]

In conclusion, where corporate groups are involved, *Salomon* remains the starting point in UK courts. However, courts have been more willing to lift the veil recently, especially where personal injury or criminal liability is involved. This seems fair, as otherwise shareholders would enjoy double protection: through the doctrine of corporate personality established under *Salomon* and the high threshold of the "directing mind" test.

(iii) Application of the foregoing principles to MDBs' sanctions procedures

As described in section A above, the Principles recommend that sanctions be applied to a respondent's parent company if the parent company was involved in the sanctioned misconduct, including as a result of wilful blindness and failure to supervise. Both concepts are problematic and require further guidance: Wilful blindness itself is quite a fluid concept and, as described above, jurisdictions vary in the information that may be considered to infer the parent's guilt.[920] As with the "failure to supervise" employees, described in section B above, the "failure to supervise" a subsidiary could easily incentivise companies to argue that they had properly supervised their subsidiaries, but that the employees of the relevant subsidiary acted "rogue" in committing a sanctionable practice. Thus, it would be important to distinguish between the parent's culpability based on the actual knowledge and deliberate participation in the wrongdoing, on the one hand, and organisational responsibility, on the other hand, which may arise from a failure to supervise or to maintain adequate controls or ethical culture within the corporate group, such that the wrongdoing is made possible. The former should result in a sanction, although knowledge will obviously thin out the longer the chain of entities between the parent company and the ultimate subsidiary becomes. Each analysis of the relationship between the parent and the subsidiary will be fact-specific and MDBs could take guidance

[919] See *SFO v Standard Bank*, Royal Courts of Justice, PLC Case No: U20150854 (30 November 2015).
[920] See Fletcher N. Baldwin Jr. and Daniel Ryan Koslosky: *Mission Creep in National Security Law*, 114 W. Va. L. Rev. 669 (2012), at 689.

from the FCPA Resource Guide and the US case law regarding the factors considered in determining the level of the parent's control. The greater such control, the easier it will be to establish that a subsidiary's misconduct was intended to benefit the parent company, if one is also to apply the above-described UK Ministry of Justice's Guidance.

On the other hand, mere responsibility should not normally lead to debarment, but instead to conditional non-debarment. Under this sanction, the parent company would not be debarred, but would have to comply with certain conditions and report on its compliance to the MDB for a period of time. This way, an MDB could require that companies develop and implement effective anti-corruption compliance systems as a condition of non-debarment, which would allow the MDB to help a company reform its controls, and at the same time avoid imposing a sanction that may have draconian consequences for the company, the market, the project, and the community at large.[921] As described in section C(iii) above, the FCPA Resource Guide lists some useful factors to determine the adequacy of a company's compliance programme.

E. Liability of a subsidiary for its parent's wrongdoings

(i) US and EU sanctions regimes

As noted above, the Principles state a rebuttable presumption that sanctions should be applied to all entities controlled by the respondent, unless the respondent demonstrates that the entities are free of responsibility for the misconduct, application to the entities would be disproportional and is not reasonably necessary to prevent evasion. Interestingly, MDBs seem to follow slightly different guidelines on what constitutes "control." For example, ADB's Integrity Principles and Guidelines say that, in determining interest or control, the investigators will consider, among other things, "the degree of association, proximity of the sanctioned party and the similarity of business activities or operations with the sanctioned party."[922] EBRD's Enforcement Policy and Procedures say that the indicia of "control" include, but are not limited to, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of another entity,

[921] See, e.g., OECD: *Public Consultation on Liability of Legal Persons: Compilation of Responses*: *Submission Chiawen Kiew and Melissa Khemani* (November 2016), at 78.
[922] ADB's Integrity Principles and Guidelines (2015), footnote 26.

whether through the ownership of voting shares, by contract or otherwise."[923] Finally, the WB's Information Note says that the indicia of "control" include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organised following the imposition of a sanction that has the same or similar management, ownership, or principal employees as the person that was suspended or debarred.[924]

When considering further guidance on imposing a sanction on the respondent's subsidiaries, it is worth analysing the US and UK economic sanctions. In that context, the US Treasury Department's Office of Foreign Assets Control ("**OFAC**") applies the "50% rule", pursuant to which any company that is owned 50% or more by a blocked person or entity, is blocked even if the company itself is not on the OFAC list of sanctioned parties.[925]

Further, OFAC aggregates the ownership interests of sanctioned parties when determining whether the 50% rule applies. For example, if a Blocked Person X owns 25% of Entity A and a Blocked Person Y also owns 25% of Entity A, then Entity A is blocked, because it is owned 50% or more in the aggregate by blocked persons. Aggregation applies even if Person X and Person Y are blocked under different sanctions programmes.[926] In addition, the application of the 50% rule to indirect ownership interests will result in a cascade-down effect. For example, if Blocked Person X owns 50% of Entity A, and Entity A owns 50% of Entity B, both Entity A and Entity B are automatically blocked.[927]

Notably, however, the US sanctions apply only through ownership, and not through control, of entities, as is the case with the EU sanctions and MDBs' sanctions.[928] Similarly, the US Bank Holding Company Act provides for a rebuttable presumption of

[923] EBRD's Enforcement Policy and Procedures (2017), § II(2).
[924] The World Bank Group's Sanctions Regime: Information Note, available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/The_World_Bank_Group_Sanctions_Regime.pdf, at 21.
[925] US Department of the Treasury: Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked (13 August 2014).
[926] See US Department of the Treasury: *OFAC FAQs: General Questions*; see also Willkie, Farr & Gallagher LP: *New OFAC Guidance on 50% Rule Expands U.S. Sanctions Against Russia* (15 August 2014).
[927] *Ibid.*
[928] US Department of the Treasury: *OFAC FAQs: General Questions*, Question 398.

control if a parent or holding company holds 25% of the voting shares of another company, controls the election of the company's directors, or retains the ability to control the management or policies of the company.[929] Likewise, the Savings and Loan Holding Company Amendments Act provides for a rebuttable presumption of control if the parent or controlling company holds 25% of the subsidiary's voting shares.[930] This approach is curious, given that FAR, on the other hand, applies to "affiliates", which as described in Chapter 1 above, are determined through control, and control is a question of fact. FAR says that the indicia of "control" include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organised following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contract or that was debarred, suspended, or proposed for debarment.[931]

By contrast, the EU Regulation 833/2014, as amended by Regulation 960/2014 ("**Regulation 960**") mandates that EU persons are prohibited from transacting with an entity that is 50% or more owned by a sanctioned party (which is the same as the OFAC rule), or "controlled" by such party (which is in addition to the OFAC rule). The indicia of control are:

(a) having the right or exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory body of a company;

(b) having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a company who have held office during the present and previous financial year;

(c) controlling alone, pursuant to an agreement with other shareholders in or members of a legal person or entity, a majority of shareholders' or members' voting rights in that legal person or entity;

[929] 12 U.S.C. § 1841(a)(2).
[930] 12 U.S. Code § 1467a(a)(2).
[931] FAR, Section 9.403.

(d) having the right to exercise a dominant influence over a legal person or entity, pursuant to an agreement entered into with that legal person or entity, or to a provision in its memorandum or articles of association, where the law governing that legal person or entity permits its being subject to such agreement or provision;

(e) having the power to exercise the right to exercise a dominant influence referred to in point (d), without being the holder of that right;

(f) having the right to use all or part of the assets of a legal person or entity;

(g) managing the business of a legal person or entity on a unified basis, while publishing consolidated accounts; and

(h) sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them.

If any of these criteria are satisfied, it is considered that the legal person or entity is controlled by another person or entity, unless the contrary can be established on a case-by-case basis.[932]

(ii) Application of the foregoing principles to MDBs' sanctions procedures

Despite the OFAC approach, there are numerous benefits to having "control" defined by actual control and not only a threshold share ownership. Namely, a small, organised group of shareholders, whose combined ownership of shares exceeds 50% of the total number of shares is able to control a company by acting in concert. Also, when share ownership is widely diffused among a large number of shareholders, control may be secured by owning 20% or less of the total shares. Consequently, Regulation 960, together with its indicia of control seems to offer a more nuanced approach to determining true control of a subsidiary.

[932] Council of the European Union: *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy - new elements*, 9068/1 (2013).

Finally, with respect to the practical difficulties around the identification of subsidiaries covered by a sanction imposed on a respondent "and all of the entities controlled by it", there are two possible solutions:

(i) First, the creation of a comprehensive database of each of the entities that is sanctioned together with the exact names of all entities controlled by it, similar to the databases maintained by the OFAC and the European Commission. In order to be meaningful, such database would have to be updated regularly in order to capture newly created subsidiaries, which would of course require additional resources.

(ii) Second, whenever a company applies for a project financed by the relevant MDB (be it as a borrower, a contractor, sub-contractor, or in any other capacity in which it stands to benefit from such project), it should be asked to represent in the financing agreements that it is not a subsidiary of any of the entities sanctioned by that MDB. Obviously, this type of self-certification is not as robust as the actual checking of the database, but is less costly and provides a contractual remedy that could include clawback of funding or restitution.

F. Successor liability

Companies acquire a number of liabilities when they merge with or acquire another company, including those arising from contracts, torts, regulations and statutes. Successor liability is an integral component of corporate law and, among other things, prevents companies from avoiding liability by reorganising. What is often challenging, however, is determining whether the type of transaction through which one company acquired part or all of another company's shares or assets renders the acquired company a "successor." Typically, an acquiring company will acquire a target company by one of the three transaction structures: a share purchase, a merger or an asset purchase.[933] Very broadly speaking, in a share-purchase structure, the acquiring company purchases all, or at least a controlling interest in, the target company's voting shares directly from the target's shareholders, which means that the target company will become the acquiring company's subsidiary, with the acquiring company effectively acquiring the target's assets and

[933] John Matheson: *Successor Liability*, Minnesota Law Review, 96(2) (2011), at 374.

liabilities.[934] In a merger, two companies combine to produce a single entity, with the surviving company becoming legally responsible for all liabilities of the constituent organisations.[935] The successor liability analysis, however, becomes more complicated in the asset purchase structure, where the acquiring entity can selectively choose which assets and which, if any, liabilities it wants to acquire and where, consequently, it is more difficult to establish whether the acquiring entity should be considered the target's "successor."

MDBs' sanctions framework does not provide a definition of "successor", and this was at the core of a recent WB Sanctions Board case, in which the Sanctions Board had to determine whether WB had committed an abuse of discretion in determining (in its previous decision) that the appellant entity was a successor to a sanctioned entity. The Sanctions Board found that WB did, in fact, commit an abuse of discretion in making that determination.[936]

In reaching this conclusion, the Sanctions Board sought guidance from the WB's Legal Department on the definition of "successor", which advised that the WB's approach to successorship was based on a concept of economic successorship – specifically, whether the entity in question continues to carry out business operations of the sanctioned entity.[937] To that end, the Sanctions Board considered the following factors: common business lines and business address, ownership and managerial connections, corporate relationship, assignment of legal and financial rights, and public understanding (which included consulting the government of the appellant's domicile on their views as to whether the appellant is indeed the sanctioned company's successor).[938]

Clearly, MDBs would benefit from further guidance on successor liability. The sections that follow consider successor liability rules in the US and the UK, and make recommendations for further guidance under the Principles in order to provide greater clarity

[934] *Ibid*., at 376.
[935] *Ibid*., at 377-79.
[936] WB Sanctions Board Decision No. 101 (December 2017).
[937] *Ibid*., at 4.
[938] *Ibid*., at 4-7.

(i) US law

The FCPA Resource Guide says that "[a]s a general legal matter, when a company merges or acquires another company, the successor company assumes the predecessor company's liabilities."[939] Successor liability does not, however, create liability where none existed before: if, for example, an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.[940]

Despite this rule, however, an acquirer may try to avoid seller's liabilities by structuring the acquisition as an asset purchase. Under both New York law and traditional common law, a company that purchases the assets of another company is generally not liable for the seller's liabilities. The policy rationale for this rule is quite straightforward: First, it appeals to fundamental notions of fairness, according to which "[n]o person should be bound by contractual obligations that they have not voluntarily assumed."[941] Second, it increases certainty in the market-place and recognises the importance of the free alienability of property; an alternative broad rule of successor liability would have a "chilling effect on potential purchasers who might acquire the assets of a foreclosed business and find themselves liable for debts they never intended to assume."[942] However, there are four exceptions, and a buyer of a company's assets will be liable as its successor if: (1) it expressly or impliedly assumed the predecessor's tort liability, (2) the transaction is entered into fraudulently to escape such obligation, (3) there was a consolidation or merger of seller and purchaser, or (4) the purchasing company was a mere continuation of the selling company.[943]

The first and second exceptions are straightforward: When an asset purchase agreement provides that the acquirer will assume certain liabilities, the acquirer will be responsible for them. Similarly, when a company fraudulently transfers its assets to avoid its liabilities, courts will ignore the transaction and hold the successor responsible for the

[939] U.S. Department of Justice and the U.S. Securities and Exchange Commission: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), at 28.
[940] *Ibid*.
[941] John Matheson: *Successor Liability*, Minnesota Law Review, 96(2) (2011), at 381.
[942] *Glentel, Inc. v Wireless Ventures, LLC* 362 F. Supp. 2d 992 (N.D. Ind. 2005), at 1003.
[943] See, e.g., *Excel Energy, Inc. v. Cannelton Sales Co*., 337 Fed. App. 480 (6th Cir. 2009), at 16.

company's liabilities.[944] The "de facto merger" and the "mere continuation" exceptions are closely related. The formulations vary slightly by jurisdiction – for example, Delaware requires a transfer of all of the transferor's assets and an assumption of all of its liabilities, in exchange for a payment made in the shares of the transferee directly.[945] Broadly speaking, however, these formulations typically involve elements or factors similar to the following: (1) continuity of shareholders and ownership, management, personnel, physical location and business operations; (2) whether sufficient consideration was given, particularly whether shares were given in exchange; (3) whether the predecessor ceased business operations and was dissolved shortly after the new company was formed; (4) whether the successor company paid any outstanding debts on behalf of the previous company in order to continue business without interruption; (5) the acquirer's intent or purpose when the new company was formed; and (6) whether the successor held itself out to the public as a continuation of the previous company.[946] These factors embody a policy that companies should not be able to avoid liability by simply changing their form or name, and critically, both require continuity of ownership between the seller and the purchaser.[947]

In addition to the four traditional exceptions, some US courts have recognised other exceptions, such as a "continuity of enterprise" exception, which makes liability easier to achieve than the "mere continuation" exception, because it considers whether there was a continuation of the seller's *business operations* (rather than a continuation of ownership).[948]

Commentators have suggested that the "patchwork system of successor liability" has left asset purchasers guessing at judicial outcomes due to inconsistent and conflicting rules.[949] One of the proposed solutions is for a sale of substantially all of the assets to impose automatic liability on the acquiring company for the full extent of the seller's liabilities.[950] That way, the acquiring company would avoid potential liability under piece-

[944] Taylor Philips: *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, William & Mary Business Law Review, Volume 6, Issue 1 (2016), at 103.
[945] *Ibid*., at 104.
[946] *Ibid*.
[947] *Ibid*.
[948] See, e.g., *Turner v Bituminous Casualty Co*., 244 N.W. 2nd 873 (1976), at 878 and *Savage Arms, Inc. v Western Auto Supply Co.*, 18 P.3d 49 (2001), at 55-58.
[949] John Matheson: *Successor Liability*, Minnesota Law Review, 96(2) (2011), at 399.
[950] *Ibid*., at 415.

meal theories of successor liability and would have certainty over which liabilities will stay and which will attach.[951] Notably, there does not exist a clear standard on when a "substantially all" threshold has been met. For example, in *Katz v. Bregman*, the Delaware Chancery Court held that a sale of assets that constituted 51% of the company's total assets and generated about 45% of the net sales constituted the sale of substantially all assets.[952] By contrast, in *Hollinger Inc. v. Hollinger International Inc.*, the same court concluded that a sale of less than 60% did not meet the "substantially all" threshold, if the remaining assets were "quantitatively vital economic assets."[953]

While there is no clear arithmetic test for determining how much is "substantially all", the "substantially all" threshold should be determined on a case-by-case basis, by assessing, first, whether the asset in question constitutes most of the company's assets and, even if the asset represents a small percentage of the company's total assets, whether the sale will affect the company's ability to carry out its corporate purpose.

(ii) UK law

As in the US, in the UK, share acquisitions result in all assets and liabilities of the target company remaining with the target. Unlike in the US, however, in the UK an asset purchase can effectively insulate the acquirer from liabilities it does not expressly assume, except with respect to employees. Therefore, case law on successor liability in the UK asset acquisition context is sparse.[954]

Moreover, the SFO does not publish the equivalent of the DOJ/SEC FCPA Resource Guide, and there is no formal guidance from the SFO or the Ministry of Justice on successor liability. Nevertheless, the UK Bribery Act offence for failing to prevent bribery subjects a company to strict liability where an "associated person" commits a bribery offense,[955] where "associated person" means a person who performs services for or on behalf of the company.[956] Consequently, an acquiring company that does not

[951] *Ibid*.
[952] *Katz v. Bregman*, 431 A.2d 1274 (Del.Ch.1981).
[953] *Hollinger Inc. v Hollinger International Inc.*, 858 A.2d 342 (Del. Ch. 2004).
[954] See Levy, Jeremy Kutner, Frank Miller and Michael Scargill: *Private Mergers and Acquisitions in the UK (England and Wales): Overview*, Thompson Reuters Practical Law (November 2017).
[955] UK Bribery Act 2010, Section 7.
[956] *Ibid*., Section 8.

implement an adequate compliance programme may find itself responsible for continuing misconduct of the target company even where it was unaware of its occurrence.

(iii) Application of the foregoing principles to MDBs' sanctions procedures

From the above analysis, it appears clear that in share acquisitions, the successor assumes all liabilities of the target company. Similarly, in the case of asset acquisitions, it would seem natural for the acquirer to be responsible for any liabilities it may have voluntarily assumed, as well as in the case where a company fraudulently transfers its assets. It is less clear, however, whether MDBs should adopt the "de facto merger" and the mere continuation exceptions by analysing such factors as common business lines and business address, ownership and managerial connections and corporate relationship, as the WB Sanctions Board did.[957] As described above, this is based on a "patchwork system of successor liability" of US courts, all of which seem to apply different criteria in their determinations. Consequently, such analysis runs the risk of inconsistent and conflicting outcomes.

Instead, MDBs could adopt a more uniform approach with a sale of substantially all of the assets resulting in automatic liability on the acquiring company for the full extent of the seller's liabilities. That way, the acquiring company would avoid potential liability under piece-meal theories of successor liability and would have some certainty over which liabilities will stay and which will attach. The "substantially all" threshold would need to be determined on a case-by-case basis, by assessing, first, whether the asset in question constitutes most of the company's assets and, even if the asset represents a small percentage of the company's total assets, whether the sale will affect the company's ability to carry out its corporate purpose.

G. Conclusion

The preceding sections have analysed the treatment of corporate groups by examining analogous provisions in the US and the UK legislation, including the EU sanctions, and have proposed improvements to the Principles. Specifically, MDBs' sanctions regimes would benefit from greater clarity regarding a company's liability for

[957] WB Sanctions Board Decision No. 101 (December 2017).

sanctionable practices committed by its employees. Such liability should start off with strict liability, while rewarding companies – through the use of mitigating factors – for measurable actions to prevent the occurrence of sanctionable practices, as well as for voluntarily self-reporting and cooperating with the investigation. Only where a company could show that there was no failure to supervise and that appropriate measures were taken as soon as the wrongdoing was discovered, could this lead to further mitigating factors and possibly even provide grounds for exculpation. Such measures would also need to be accompanied by self-reporting and cooperation with the investigation. Moreover, MDBs would also benefit from further guidance on how to determine whether a company's compliance system was adequately designed and implemented, and the FCPA Resource Guide could provide useful guidance in that respect.

Further, as regards a company's liability for sanctionable practices committed by its subsidiaries, MDBs' sanctions regimes should go beyond the current "wilful blindness" and "failure to supervise" principles, which are quite vague, and instead should distinguish between the parent's culpability based on the actual knowledge and deliberate participation in the wrongdoing, on the one hand, and organisational responsibility, on the other hand, which may arise from a failure to supervise or maintain adequate controls or ethical culture within the corporate group. Unlike actual knowledge and deliberate participation, mere responsibility should not normally lead to debarment, but instead to conditional non-debarment, where the parent company would be required to develop and implement effective anti-corruption compliance systems as a condition of non-debarment. Just as in the case of its liability for the misconduct of its employees, a parent company should also be rewarded – through the use of mitigating factors – for measurable actions to prevent the occurrence of sanctionable practices.

Additionally, as regards a company's liability for sanctionable practices committed by its parent company, MDBs' regime should be premised on the definition of "control", based on the actual control and not only a threshold share ownership, which typifies the rather simplistic OFAC approach. Such actual control can be ascertained by considering the indicia from the Regulation 960 – from the parent company's right to appoint or remove a majority of the management or supervisory board members to having the right to exercise a dominant influence over the subsidiary pursuant to an agreement, rather than the mere shareholding percentage.

Moreover, as regards successor liability, the Principles' presumption that sanctions should be applied to successors and assigns should be supplemented with guidelines for determining whether a company is a sanctioned party's successor or assign. Such guidelines should stipulate that a share acquisition should result in the assumption of liabilities by the acquirer, while an asset acquisition should result in the assumption of liabilities by the acquirer with respect to the liabilities it voluntarily assumed, where the asset transfer was fraudulent or where the acquirer purchased substantially all assets of the target. The "substantially all" threshold should be determined on a case-by-case basis, by assessing, first, whether the asset in question constitutes most of the company's assets and, even if the asset represents a small percentage of the company's total assets, whether the sale will affect the company's ability to carry out its corporate purpose.

Finally, sanctioning discrete business operations of the originally sanctioned entity is probably most meaningful in the context of settlement negotiations, where the respondent is fully cooperating with the investigators and may be expected to comply with the terms of the settlement agreement. For example, if a company's construction unit were to engage in a sanctionable practice, an MDB could negotiate a settlement with the company, such that the construction unit is debarred, but other company units in unrelated areas may still be eligible to benefit from the MDB-financed contracts. Inevitably, this type of arrangement would seem appropriate under exceptional circumstances – for instance, if a respondent company proved that the relevant unit acted against the company's policies.

CONCLUSION AND WAY FORWARD

This thesis has provided a thorough analysis of MDBs' sanctions regimes, starting with their origins, which are premised on MDBs' duty to secure the confidence of donor governments that the proceeds of MDBs' financings are used solely for the purposes for which they were granted. Bearing in mind that the underlying objective of these regimes has been to develop an internal mechanism of law enforcement that targets sanctionable practices committed by those involved in the supply side of MDB-funded contracts, this thesis has first examined and compared their characteristics and differences across the five MDBs. Against this background, this thesis has explored MDBs' immunity from judicial review, which leaves little or no redress against MDBs' decisions in courts, and thus raises questions about appropriate safeguards that should characterise MDBs' sanctions regimes in order to ensure that the aggrieved parties are provided with adequate protections against any potentially unreasonable and arbitrary decisions on the part of MDBs.

In order to prove the underlying hypothesis that this thesis set out to prove – that MDBs' sanctions regimes should be characterised by robust due process rights and would benefit from substantial improvements in a number of areas, including respondents' discovery rights, oral hearings and witnesses, publication of decisions, referrals to national authorities, the use of negotiated settlements, and the composition, appointment and independence of the Sanctions Board members, as well as the treatment of corporate groups – the thesis first determined the systems that should serve as the benchmarks for MDBs' sanctions regimes. In that context, the thesis has proposed possible sources of best practice standards for MDBs' sanctions regimes, ranging from the US and UK judicial review standards, customary law and general principles, Global Administrative Law, the ECtHR case law, MDBs' administrative tribunals' jurisprudence and various international arbitration rules. Extrapolating from, and drawing comparisons with, these regimes, the thesis has provided a number of suggestions for potential enhancements of MDBs' sanctions regimes.

Specifically, based on the examination of benchmark regimes, the thesis suggests that MDBs' sanctions procedures should be strengthened with more robust rules on respondents' discovery rights, assessment of evidence and treatment of experts' reports. Moreover, MDBs' sanctions procedures should allow Sanctions Boards to decide on whether to have a hearing, based on their determination of whether it has sufficient

evidence on the basis of the written proceedings to decide a case fairly. The same principle should guide the Sanctions Boards' decisions on whether to allow live witness testimony and cross-examination, depending on whether this is necessary to ensure a fair hearing of the respondent's case. Further, MDBs should publish reasoned decisions of both the Sanctions Boards and the first-tier decision-makers in contested cases, as this will increase transparency and provide a powerful incentive for all stakeholders in the sanctions process to maximise the quality of their work.

The thesis further recommends that, in line with best practices among MDBs' administrative tribunals, Sanctions Boards should be composed entirely of non-staff members in order to avoid any perception of Sanctions Board members' partiality. Similarly, and also in line with best practices among MDBs' administrative tribunals, as well as ICJ and ECtHR, the Sanctions Board members' tenure should not be renewable, as this would create the perception of the members' partiality towards the relevant MDB, which holds the power over the term renewal.

Further, the thesis has also analysed the range of sanctions imposed by MDBs and recommends a more nuanced approach with more than one baseline sanction to more closely tailor the sanction to the wrongdoing, taking guidance from the US and UK Sentencing Guidelines. Moreover, MDBs should consider harmonising the definition of "restitution" and developing clear guidelines for determining the appropriate amount of reimbursement and restitution in order to avoid the perception that they themselves are financially benefitting from wrongdoing that occurred in relation to their own projects by having the arbitrarily determined restitution amount paid directly to them.

In addition, the thesis has also analysed the MDBs' settlement regime and recommended the development of robust guidelines on the availability of settlements, which should not be used when wrongdoing is egregious and has resulted in significant harm, nor as a way for MDBs to extract maximum restitution (which is often imposed as part of a settlement) in exchange for a more lenient sanction.

Finally, the thesis has provided recommendations for the treatment of corporate groups under MDBs' sanctions regimes, based on the analysis of the US and UK laws. The recommendations focus on four main areas of corporate liability: (i) liability of a

company for its employees' wrongdoings, (ii) liability of a parent company for its subsidiaries' wrongdoings, (iii) liability of a subsidiary for its parent company's wrongdoings and (iv) successor liability.

It is important to remember that MDBs lack competence to sanction member countries and government officials at any level. In fact, government officials are expressly exempt from most MDBs' Sanctions Procedures. Specifically, the WB's Anti-Corruption Guidelines, which are the WB's "umbrella" document on anti-corruption, expressly exempt "officials and employees of the national government or of any of its political or administrative subdivisions, and government owned enterprises."[958] WB rationalises this policy by "the cooperative structure of the Bank, respect for the sovereignty of its Member[s] and the fact that alternative means are available to address these cases, in particular the Borrower's obligation 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."[959]

Similarly, AfDB's and IADB's Sanctions Procedures expressly exempt "governmental entities",[960] while ADB's Integrity Principles and Guidelines stipulate that "[i]f investigative findings indicate that an official of a government committed or was engaged in an integrity violation, OAI will report its findings to Management. OAI will work with Management and operational departments to assess ways that ADB may respond pursuant to the Anticorruption Policy and other ADB rules, policies and procedures."[961]

Arguably, if MDBs were to criticise countries' anti-corruption measures too loudly, this may jeopardise their collaboration with the relevant governments, which may in turn have repercussions for various development programmes. This policy of exemption for government officials is also grounded in respect for the sovereign status of MDBs'

[958] WB's Anti-Corruption Guidelines, available at: http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/AnticorruptionGuidelinesOct2006RevisedJan2011.pdf, footnote 16.
[959] The World Bank Group's Sanctions regime: Information Note, at 19.
[960] IADB's Sanctions Procedures, §15.5 and AfDB's Sanctions Procedures, §17.8.
[961] ADB's Integrity Principles and Guidelines, §67.

member states.[962] Rather, MDBs resort to "soft measures" by encouraging the introduction of integrity-promoting laws and institutions, and seek to enlarge the space for civil society watchdogs.[963] Additionally, as described in Chapter 3, MDBs sometimes refer matters to national authorities that have jurisdiction over the government officials that may be implicated in a corruption scheme investigated by the relevant MDB. While sanctioning of officials through domestic authorities would yield the wanted result, it is subject to the relevant authorities' willingness to act in the requisite way, and this is often not the case. Moreover, if an MDB were to pressure its member countries to prosecute corrupt government officials, this may be at odds with the underlying principle of MDBs' respect for member countries' sovereignty. Still, if the government representatives are beyond the reach of MDBs' sanctions regimes, these regimes can hardly be seen as efficient means of reducing corruption in government-controlled spending.[964]

MDBs' distrust of national court systems is also evident from MDBs' non-reliance on any government's or court's judgment and, consequently, excluding from procurement only those companies that have been found guilty by its own investigators. In practice, this means that a company found guilty of corruption in a national court, and not debarred by an MDB, could be eligible to participate in tenders for the MDB's contracts. The only exception to this practice is EBRD, which enforces "final judgment[s] of a judicial process in a member country of [EBRD]" if such judgment has "relevance and seriousness to [EBRD]."[965]

There is no easy solution to this issue. Relying on national courts would open MDBs to possible discrimination between judgments of different courts, given that due process standards greatly vary among countries. If MDBs were to officially trust the courts in certain countries and not in others, it could easily compromise its own attempts to maintain good dialogue with governments whose courts it considered untrustworthy. On the other hand, however, by refusing to trust any domestic courts altogether, MDBs'

[962] See *Legal Vice Presidency of the World Bank: Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases*, No. 2010/1 (2010), available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1377105390925/AdvisoryOpinion.pdf, at 32.
[963] Tina Soreide, Linda Groning and Rasmus Wandall: *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, Chicago Journal of International Law, Volume 16, No. 2 (2016), at 530.
[964] *Ibid*., at 545.
[965] EBRD's Enforcement Policy and Procedures, §§ 3.3 and 11.59 (*Third Party Findings*).

sanctions regimes uphold a public belief that domestic institutions lack the capacity to enforce the laws of their countries, which may in fact push both private parties and public officials towards alternative and informal strategies to solve their issues, often through bribery or corruption. This undermines development and is precisely what the sanctions regime is supposed to work against.[966]

One approach to resolve this problem may be to use the contract award process as the catalyst for review. If debarment actions by national authorities were available to contracting officials as they considered an award to a contractor in an MDB-funded project, the contracting official should be required to take that information into account when considering the qualifications of the contractor. Those debarment actions could be memorialised in central, online databases, much as there is a central resource on the US federal debarments under FAR (as described in Chapter 1). As databases proliferate, they could be linked electronically, relatively simply, or their review could be made a mandatory part of contract award procedures. Because debarment actions are relatively straightforward and public acts, they would offer clearer points of reference, without forcing disclosure of sensitive, underlying investigative information.[967] The databases could, however, still give contact information for those officials that led an investigation or debarment action, so that they could be contacted for background information, if appropriate. In addition, an affected contractor could respond to the prior debarment, perhaps by describing the remedial measures taken to resolve the problems that resulted in the debarment.[968] This flexible approach, which would not result in automatic cross-debarments based on another country's blacklist, but put contracting officials on notice and give them discretion in addressing such blacklist, would also allow contracting officials to focus their efforts on those firms that posed the most material risks.

Another problem with MDBs' focus on suppliers is that, arguably, sanctions regimes distort market competition: they result in eliminating potential contractors, thus reducing contractors and that sanctions regimes should take into account these competing objectives by adding, for example, restitution as a punitive measure to its framework,

[966] Tina Soreide, Linda Groning and Rasmus Wandall: *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, Chicago Journal of International Law, Volume 16, No. 2 (2016), at 547.
[967] Christopher R. Yukins: *Cross-Debarment: A Stakeholder Analysis*, The Geo. Wash. Int'l L. Rev., Volume 45 (2013), at 228-29
[968] *Ibid*.

which could potentially replace debarment altogether.[969] For example, the debarred supplier may deliver unique products or services of high quality, or may be an important employer in the local community.[970] Some scholars have therefore suggested that the WB's recent use of settlement agreements which incorporate restitution is precisely the right approach to balancing deterrence with the need to promote competition.[971] Arguably, excluding a competitor leads to reduced competition, and this in turn may result in higher prices or lower quality – quite the opposite of what procurement rules are supposed to deliver.[972] In addition, the greater the number of excluded suppliers, the fewer the number of remaining firms, and the easier it is for them to facilitate cartel collaboration, which in turn implies huge benefits for those firms that are still involved in corruption.[973]

Thus, in addition to focusing solely on suppliers, MDBs could also strengthen their efforts towards improvements of anti-corruption regimes in the countries where they operate. For example, they could strengthen their technical assistance support focused on training, awareness-raising and policy dialogue with local agencies responsible for enforcing anti-corruption legislation. Moreover, MDBs could also condition development assistance support on countries' fulfilment of certain governance and anti-corruption criteria, including the capacity and willingness of a country to prosecute demand-side corruption. Another precondition to lending could be the strengthening of a country's anti-corruption agencies' enforcement capabilities. Further, MDBs' investigation officers, some of whom already collaborate with national law enforcement institutions, could further encourage these institutions to investigate and prosecute actors involved in the offence, who are outside the reach of MDBs' investigation, including government representatives.[974] The collaboration could be extended by, for example, having MDBs' investigators serve as advisers to the prosecution and remain in the country as the case

[969] Roman Majtan: *The Self-Cleaning Dilemma*: *Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291 (2013), at 339.
[970] See, e.g., Erling Johan Hjelmeng and Tina Soreide: *Debarment in Public Procurement: Rationales and Realization*, University of Oslo Faculty of Law Legal Studies, Research Paper Series No. 2014-32, at 6.
[971] *Ibid*., at 341.
[972] Emmanuelle Auriol and Tina Soreide: *An Economic Analysis of Debarment*, 15 May 2016, at 3.
[973] See Tina Soreide: *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, ResearchGate publication (May 2015), at 12 and 14.
[974] Tina Soreide: *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, Chicago Journal of International Law, Volume 16, No. 2 (2016), at 548.

moves through the domestic criminal justice system.[975] Naturally, this would require additional resources for MDBs' Investigations Units.

Further, government officials should be subject to sanction when they act in their individual, rather than official, capacity. For instance, a government official that controls a firm that bids for an MDB-financed contract should be liable to sanction for any sanctionable practice that he/she engages in as a head of the bidding firm.[976] There is already precedent for this type of distinction in MDBs' practices: state-owned enterprises are liable to sanctions when they operate autonomously and participate in bidding for MDB-financed contracts, while they are not liable to sanction if they are essentially arms of government acting within their own country.[977] Moreover, this is in line with the European Commission's and the US and French court jurisprudence, which have held that acts performed by officials for their own benefit and in their own interest cannot be considered as acts performed in an official capacity, although they may appear to have been performed officially.[978]

In addition, just as MDBs collaborate on cross-debarments, they could also collaborate on "cross-referrals", whereby loans would not be offered unless a given case is brought through the domestic criminal justice system.[979] If this becomes too difficult to maintain, given urgent development needs, MDBs could place restrictions on the government's flexibility and control over spending – the less reliable the government, the more external control placed on its spending.[980]

As noted in Chapter 1, tackling corruption requires considering the institutional framework of a country, and tackling institutional framework requires a complex process of understanding political institutions and the distribution of political power, as well as the nature of economic institutions. In that context, sanctions regimes are only part of MDBs'

[975] *Ibid*.
[976] See *Legal Vice Presidency of the World Bank: Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases*, No. 2010/1 (2010), available at: http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/3601045-1377105390925/AdvisoryOpinion.pdf, at 33.
[977] See, e.g., WB Procurement Guidelines, ¶ 1.08(c), Consultant Guidelines, ¶ 1.11(b), and IBRD/IDA Anti-Corruption Guidelines, ¶ 11(a), footnote 14.
[978] International Law Commission: *Report on the work of the sixty-eighth session*, UN Doc. A/71/10, Chapter IX (2016), at 358, citing *Teodoro Nguema Obiang Mangue and Others*, Court of Appeals of Paris, Pole 7, Second Investigating Chamber, judgments of 13 June 2013 and 16 April 2015.
[979] *Ibid*., at 549.
[980] *Ibid*.

efforts in the global fight against fraud and corruption, and MDBs' should pursue a more proactive, prevention-focused approach that looks beyond individual sanctions cases to better identify areas of systemic vulnerability and red flags, and find longer-term solutions to address recurring types of misconduct.[981] Some MDBs are already taking such proactive steps by assisting countries in fighting fraud and corruption through programmes running parallel to the sanctions regimes. For instance, the WB has been working with countries on numerous projects with governance components, in areas such as public financial management, corporate financial reporting, and open government – all intended to help member countries build more effective and accountable institutions.[982] Similarly, IADB has supported anti-corruption efforts in different ways such as its program for Strengthening of Prevention and Combat of Corruption in Public Management in Brazil;[983] and a report on Transparency in the Extractive Industries in Latin America and the Caribbean,[984] covering a wide range of challenges and opportunities along the chain of production of extractive industries (oil, gas and minerals), from the issuance of licenses to revenue management. With its focus on private sector, EBRD has been helping its private-sector clients devise anti-corruption and compliance action plans, aimed at improving the clients' compliance policies and procedures.[985]

Moreover, in some cases, MDBs also provide financial and technical assistance to countries as they develop anti-corruption regimes of their own. For instance, with the WB's assistance, the Senegalese government has created a new anti-corruption office and is working to enforce a new law that requires public officials to declare their assets.[986] Similarly, in 2014, EBRD launched an Anti-Corruption Initiative with the government of Ukraine to ensure greater accountability and transparency and a more

[981] African Development Bank, Independent Development Evaluation: *Comparative Review of Sanctions Practices across Multilateral Development Banks*, Executive Summary (2019).
[982] See World Bank Governance, available at: http://www.worldbank.org/en/topic/governance (last visited 6 November 2015).
[983] *IADB US$18 Million Loan to Help Prevent and Combat Corruption in Brazil's Public Administration* (11 March 2014), IADB News, available at: http://www.iadb.org/en/news/news-releases/2013-03-11/prevent-and-combat-corruption-in-brazil,10363.html.
[984] *Transparent Governance in an Age of Abundance: Experiences from the Extractive Industries in Latin America and the Caribbean* (October 2014), IADB Report, available at: https://publications.iadb.org/handle/11319/6681.
[985] EBRD Anti-Corruption and Integrity Report 2017, at 19.
[986] *Steering Senegal Towards Greater Transparency in Governance and Public Finance Management* (9 December 2014), World Bank News, available at: http://www.worldbank.org/en/news/feature/2014/12/09/steering-senegal-towards-greater-transparency-in-governance-and-public-finance-management.

effective rule of law within the Ukrainian economy.[987] As part of this initiative, Ukraine established an independent business ombudsman institution to help address the problem of unfair treatment of businesses.[988] The preventative power of MDB-supported government initiatives like these, combined with the protection and deterrence of sanctions regimes, may provide valuable support to countries worldwide in their fight against fraud and corruption.[989]

Concluding with the main theme of this thesis – MDB's sanctions regimes – the following should be noted. Amidst the growing recognition that combating the negative effects of corruption requires a global and concerted effort at both the national and international levels, the MDBs have an opportunity to play a useful role, both as promoters and examples of international best practices. In considering the future of MDBs' sanctions systems, it is important to remember that these systems are inherently administrative, aimed at protecting MDBs' funds, which are coupled with MDBs' limited powers compared to national enforcement authorities. Nonetheless, given the far-reaching consequences of MDBs' sanctions, particularly in view of the Cross-Debarment Agreement, which can amount to the deprivation of property, this thesis asserts that MDBs should continue their efforts to further harmonise their practices on due process grounds.

In addition to deeper harmonisation among MDBs, there is also the prospect of broader harmonisation beyond the current five signatories of the Cross-Debarment Agreement. The Agreement already has a mechanism for other international organisations to join, although none has done so to date.[990] That said, some national and even private organisations and institutions, including the Millennium Challenge Corporation[991] and the Nordic Development Fund use the WB's debarment list.[992]

---

[987] *Ukraine and EBRD Launch Initiative to Combat Corruption* (12 May 2014), EBRD News, available at: http://www.ebrd.com/news/2014/ukraine-and-ebrd-launch-initiative-to-combat-corruption.html.
[988] *Ibid.*
[989] John Coogan et al.: *Transparency, accountability and due process in multilateral development banks' sanctions regimes*, The Company Lawyer, Issue 7 (2016).
[990] Frank Fariello and Conrad Daly: *Coordinating the Fight against Corruption among MDBs*: *The Past, Present, and Future of Sanctions*, The Geo. Wash. Int'l L. Rev., Volume 45 (2013), at 268.
[991] See Millennium Challenge Corporation: Program Procurement Guidelines, ¶ P1.A.1.7, available at: https://www.mcc.gov/resources/doc/program-procurement-guidelines.
[992] See News Release: *World Bank and the Nordic Development Fund to Expand Cooperation in Protecting Development Resources* (19 September 2012), available at: http://siteresources.worldbank.org/INTDOII/Resources/MoU_NDF_09_19_2012.pdf.

Moreover, considering the goals of general deterrence and development effectiveness, MDBs may benefit from conducting more in-depth analysis of sanctions cases aimed at identifying systemic vulnerabilities and recurring types of misconduct, as well as evaluating the actual impact of the imposed sanctions.[993] For example, the data could track sanctions per country, industry sector and company size, proportion of companies to individuals among respondents, as well as the volume of, and types of allegations in, sanctions cases received per each MDB, duration of sanctions proceedings, and – perhaps most importantly for assessing the impact of conditional sanctions as a tool intended to change behaviour – respondent engagement on conditionalities required to regain eligibility. If done properly, such data could present a treasure trove of trends and data points about MDBs' sanctions tendencies. Tracking the information year-over-year would also present informative insights into the nature and quality of sanctions cases at different MDBs, and illuminate (in)consistencies in the application of sanctions standards across institutions. Moreover, trend lines gathered through such sharing of case statistics across MDBs could also contribute in a substantive way to the overall fight against corruption worldwide. It is hoped that the research in this thesis will assist the MDBs in the future development of these processes.

[993] African Development Bank, *Independent Development Evaluation: Comparative Review of Sanctions Practices across Multilateral Development Banks, Executive Summary* (2019).

BIBLIOGRAPHY

Laws, rules, regulations, treaties, policies and guidelines

1. Agreement Establishing the African Development Bank
2. Agreement Establishing the Asian Development Bank
3. Agreement Establishing the European Bank for Reconstruction and Development
4. Agreement Establishing the Inter-American Development Bank
5. Agreement for Mutual Enforcement of Debarment Decisions
6. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
7. Articles of Agreement of the International Bank for Reconstruction and Development
8. Asian Development Bank Integrity Principles and Guidelines
9. Code of Conduct for Members of the African Development Bank Sanctions Appeals Board
10. Code of Conduct for Members of the World Bank Sanctions Board
11. Convention on the Privileges and Immunities of the United Nations
12. Council of the European Union: *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy - new elements*, 9068/1 (2013)
13. Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (12 October 2017)
14. EU Regulation 833/2014, as amended by Regulation 960/2014
15. European Bank for Reconstruction and Development Enforcement Policy and Procedures
16. European Bank for Reconstruction and Development Procurement Policies and Rules
17. European Bank for Reconstruction and Development Enforcement Committee Terms of Reference
18. European Convention on Human Rights
19. General Policy of her Majesty's Government on Privileges and Immunities of International Organizations
20. General Principles and Guidelines for Sanctions
21. Inter-American Development Bank Sanctions Procedures
22. Inter-American Development Bank Sanctions Committee Charter
23. International Bar Association Guidelines on Conflicts of Interest in International Arbitration
24. International Bar Association Rules on the Taking of Evidence in International Arbitration
25. International Covenant on Civil and Political Rights
26. London Court of International Arbitration Rules
27. Millennium Challenge Corporation: Program Procurement Guidelines
28. Multilateral Development Banks' General Principles and Guidelines for Sanctions
29. Multilateral Development Banks' Harmonized Principles on Treatment of Corporate Groups
30. Offices of the United States Attorneys: Principles of Federal Prosecution of Business Organizations
31. Rules of the Administrative Tribunal of the International Labour Organization
32. Rules of the European Bank for Reconstruction and Development Administrative Tribunal
33. Rules of Procedure of the Inter-American Development Bank Administrative Tribunal

34. Rules of Procedure of the International Monetary Fund Administrative Tribunal
35. Rules of the United Nations Administrative Tribunal
36. Rules of the World Bank Administrative Tribunal
37. Sanctions Procedures of the African Development Bank
38. Statute of the International Monetary Fund Administrative Tribunal
39. Statute of the United Nations Appeals Tribunal
40. Statute of the United Nations Dispute Tribunal
41. Statute of the World Bank Administrative Tribunal
42. UNCITRAL Arbitration Rules
43. United Kingdom Arbitration Act 1996
44. United Kingdom Bribery Act 2010
45. United Kingdom Civil Procedure Rules
46. United Kingdom Corporate Manslaughter and Corporate Homicide Act 2007
47. United Kingdom Crown Prosecution Service: Corporate Prosecutions: Legal Guidance
48. United Kingdom Ministry of Justice: *Guidance on the UK Bribery Act 2010*
49. United Kingdom Sentencing Council: *Fraud, Bribery and Money Laundering Offences, Definitive Guide* (2014)
50. United States Administrative Procedure Act
51. United States Department of the Treasury: *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked* (13 August 2014)
52. United States Federal Acquisition Regulation
53. United States Federal Rules of Civil Procedure
54. United States Foreign Corrupt Practices Act
55. United States Foreign Sovereign Immunities Act
56. United States International Organizations Immunities Act
57. United States Sentencing Commission: Organizational Guidelines
58. Uniform Framework for Preventing and Combating Fraud and Corruption
59. Universal Declaration of Human Rights
60. World Bank: *Anti-corruption Guidelines and Sanctions Reform*
61. World Bank: *Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants*
62. World Bank: *Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants*
63. World Bank Consultant Guidelines
64. World Bank Misconduct Policy and Procedures
65. World Bank Sanctions Proceedings and Settlements in Bank Financed Projects

Books

1. Paul Alston: Non-State Actors and Human Rights, Oxford University Press (2005)
2. Jean-Bernard Auby et al.: Corruption and Conflicts of Interest, Edward Elgar (2014)
3. Phillip I. Blumberg et al.: Blumberg on Corporate Groups (Aspen Publishers, 2d ed. Supp. 2013-2)
4. Steven J. Cann: Administrative Law, Sage Publications, Inc. (2006)
5. Luigi Condorelli: Customary International Law: The Yesterday, Today, and Tomorrow of General International Law, Oxford University Press (2012)

6. Anthony D'Amato: The Concept of Custom in International Law, Cornell University Press (1971)
7. Alan Dignam: Hicks and Goo's Cases and Materials on Company Law, 7th edition, Oxford University Press (2011)
8. Olufemi Elias: The Development and Effectiveness of International Administrative Law, Nijhoff Publishers (2012)
9. Mark Elliott and Robert Thomas: Public Law, Oxford University Press (2011)
10. Helen Fenwick and Gavin Phillipson: Text, Cases and Materials on Public Law and Human Rights, 3rd edition, Routledge (2011)
11. Derek French, Stephen Mayson and Christopher Ryan: Company Law, 27th edition, Oxford University Press (2010)
12. Peter Leyland and Gordon Anthony: Administrative Law, 7th Edition, Oxford University Press (2013)
13. Ralph C. Nash, Jr. et al.: Formation of Government Contracts, Wolters Kluwer, 4th edition (2011)
14. Martins Paparinskis: International Minimum Standard and Fair and Equitable Treatment, Oxford University Press (2013)
15. Arme Peters et al.: Les acteurs à l'ère du constitutionnalisme global / Actors in the age of global constitutionalism, 2014 (Coll. de l'UMR de droit comparé de Paris, vol. 35)
16. August Reinisch (ed.): The Privileges and Immunities of International Organizations in Domestic Courts, Oxford University Press (2013)
17. Shabtai Rosenne: The Perplexities of Modern International Law, Nijhoff Publishers (2004)
18. Henry Schermers and Niels Blokker: International Institutional Law: Unity Within Diversity, Springer, 3rd edition (1995)
19. L.S. Sealy: Cases and Material in Company Law, Butterworths, 7th edition (2001)
20. Michael Slater and Julie Mason: Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson 2007)
21. Chris Taylor: Company Law, 5th edition, Pearson Education (2018)
22. Sarah Worthington: Sealy & Worthington's Text, Cases, and Materials in Company Law, 11th edition, Oxford University Press (2016)

Articles (arranged alphabetically based on the first author's surname)

1. George Abed and Hamid Davoodi: *Corruption, Structural Reforms, and Economic Performance in the Transition Economies*, IMF Working Paper 00/132 (2000)
2. Daron Acemoglu and James Robinson: *The Role of Institutions in Growth and Development*, Commission on Growth and Development, Working Paper No. 10 (2008)
3. George B. Adams III: *Plain Reading, Subtle Meaning: Rethinking the IOIA and the Immunity of International Organizations*, 81 Fordham L. Rev. 241 (2012)
4. Toke Aidt: *Corruption, institutions, and economic development*, Oxford Review of Economic Policy, Volume 24, Number 2 (2009)
5. Selcuk Akcay: *Corruption and Human Development*, Cato Journal, Volume 26, No.1 (Winter 2006)
6. Mahnoush Arsanjani: *Claims against International Organisations: Quis Custodiet Ipsos Custodes?*, Yale Journal of World Public Order 7 (1980)
7. Emmanuelle Auriol and Tina Soreide: *An Economic Analysis of Debarment*, Toulouse School of Economics Working Paper (15 May 2016)

8. Fletcher N. Baldwin Jr. and Daniel Ryan Koslosky: *Mission Creep in National Security Law*,
114 W. Va. L. Rev. 669 (2012)
9. William M. Berenson: *Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS*, The World Bank Legal Review, Volume 3 (2012)
10. Keith Blackburn, Niloy Bose and M. Emranul Haque: *The Incidence and Persistence of Corruption in Economic Development*, Journal of Economic Dynamics & Control, Vol. 30 (2005)
11. Niels Blokker and Nico Schrijver: *Afterwords*, International Organizations Law Review, Volume 10, Issue 2 (June 2014)
12. Robert C. Blume et al.: *Potential FCPA Liability for Third-Party Conduct*, Practical Law (2017)
13. Philip L. Blumberg: *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 Connecticut Law Review, 605 (2005)
14. Phillip I. Blumberg: *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 Hastings Int'l & Comp. L. Rev. 297 (2001)
15. Beatrice I. Bonafe: *Italian Courts and the Immunity of International Organizations*, International Organizations Law Review 10 (2013)
16. Christopher K. Carlberg: *A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards*, Boston College International & Comparative Law Review, Volume 26, Number 1 (2003)
17. John Coogan et al.: *Combatting Fraud and Corruption in International Development, Journal of Financial Crime*, Volume 22, Issue 2 (2015)
18. John Coogan et al.: *Transparency, accountability and due process in multilateral development banks' sanctions regimes*, The Company Lawyer, Issue 7 (2016)
19. Laura J. Cooper: *Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised Is a Question of Law?*, 64 Minnesota Law Review 1107 (1980)
20. Meredith Dearborn: *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, California Law Review, Volume 97, Issue 1 (February 2009)
21. Stephen Dearden: *Corruption and Economic Development*, European Development Policy Study Group Discussion Paper No. 19 (October 2000)
22. Pascale Helene Dubois: *Domestic and International Administrative Tools to Combat Fraud and Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, The University of Chicago Legal Forum, Volume 2012 (2012)
23. Pascale Helene Dubois and Aileen Elizabeth Nowlan: *Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law*, 36 Yale Journal of International Law 15 (2010)
24. Wouter Ebben and Albert de Vaal: *Institutions and the relation between corruption and economic growth*, Radboud University Nijmegen (January 2009)
25. Edward Eberle: *The Method and Role of Comparative Law*, Washington University Global Studies Law Review, Volume 8, Issue 3 (2009)
26. Issac Ehrlich and Francis T. Lui: *Bureaucratic Corruption and Endogenous Economic Growth*, Journal of Political Economy, Vol. 107, No. 6 (1999)
27. Frank Fariello and Giovanni Bo: *The World Bank Group Sanctions System and Access to Justice for Small and Medium-Sized Enterprises*, The World Bank Legal Review, Volume 5 (November 2013)

28. Frank Fariello and Conrad Daly: Coordinating the Fight against Corruption among MDBs: *The Past, Present, and Future of Sanctions*, The Geo. Wash. Int'l L. Rev., Volume 45 (2013)
29. Raymond Fisman and Jakob Svensson: *Are Corruption and Taxation Really Harmful to Growth?*, The World Bank Development Research Group Macroeconomics and Growth (November 2000)
30. Emmanuel Gaillard and Isabelle Pingel-Lenuzza: *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass*, International & Comparative Law Quarterly, Volume 51, Part 1 (2002)
31. Jonathan Grimes et al.: *Corporate criminal liability in the UK: the introduction of deferred prosecution agreements, proposals for further change, and the consequences for officers and senior managers*, Practical Law, Multijurisdictional Guide 2013/14, Corporate Crime, Fraud and Investigations
32. Rishi Gulati: *An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?*, Max Planck Yearbook of United Nations Law, Volume 21 (2018)
33. Alan Gutterman: *Yates Memo Signals Heightened Focus of DOJ on Executives and Other Personnel of Corporate Wrongdoers*, Thompson Reuters Legal Solutions (February 2016)
34. Moshin Habib and Leon Zurawicki: *Country-Level Investments and the Effect of Corruption: Some Empirical Evidence*, International Business Review (2001)
35. Brenda Hannigan*: Wedded to Salomon: evasion, concealment, and confusion on piercing the veil of the one-man company*, Irish Jurist (2013)
36. Carol Harlow: *Global Administrative Law: The Quest for Principles and Values*, The European Journal of International Law Volume 17, No. 1 (2006)
37. Steven Herz: *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity,* 31 Suffolk Transnat'l L. Rev. (2008)
38. Virgina Harper Ho: *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 Columbia Journal of Transnational Law 113 (2013-2014)
39. Courtney Hostetler: *Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects*, 14 Yale Hum. Rts. & Dev. L.J. 231 (2011)
40. Jeff Huther and Anwar Shah: *Anti-corruption Policies and Programs: A Framework for Evaluation, World Bank Policy Research Working Paper*, No. 2501 (2000)
41. Ernest M Jones: *Some Current Trends in Legal Research*, Legal Research and Methodology, Indian Law Institute (2006)
42. Günter Frankenberg: *Critical Comparisons*: *Re-thinking Comparative Law*, 26 Harvard International Law Journal, 411 (1985)
43. Otto Kahn-Freund: *On Uses and Misuses of Comparative Law*, The Modern Law Review, Volume 37, No. 1 (1974)
44. Daniel Kaufman and Shang-Jin Wei: *Does "Grease Money" Speed up the Wheels of Commerce?*, World Bank (1999)
45. Benedict Kingsbury et al.: *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005)
46. Yaraslau Kryvoi: *The Law Appliced by International Administrative Tribunals: From Autonomy to Hierarchy*, The Geo. Wash. Int'l L. Rev., Volume 47 (2015)
47. Adam K. Lasky and Oles Morrison: *The Rise of the Corporate Death Penalty: Understanding Suspensions and Debarments*, Navigant (2012)
48. Nathaniel Leff: *Economic Development through Bureaucratic Corruption*, American Behavioral Scientist 82 (2)(1964)

49. Carlos Leite and Jens Weidmann: *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth*, IMF Working Paper 99/85 (1999)
50. Anne-Marie Leroy and Frank Fariello Jr.: *The World Bank Group Sanctions Process and Its Recent Reforms*, The World Bank (2012)
51. Laurence Levy et al.: *Private Mergers and Acquisitions in the UK (England and Wales): Overview*, Thompson Reuters Practical Law (November 2017)
52. Abigail H. Lipman: *Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 359 (2009)
53. Phillip Lipton: *The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective*, 40 Monash University Law Review, 452 (2014)
54. Erik Luna: *Gridland: An Allegorical Critique of Federal Sentencing*, Journal of Criminal Law and Criminology, Volume 96 (2005)
55. Roman Majtan: *The Self-Cleaning Dilemma*: *Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291 (2013)
56. Desmond Manderson and Richard Mohr: *From Oxymoron to Intersection: An Epidemiology of Legal Research*, Law Text Culture, Volume 6, No. 1 (2002)
57. Sarah Marberg: *Promises of Leniency: Whether Companies Should Self-Disclose Violations of the Foreign Corrupt Practices Act*, 45 Vanderbilt Journal of Transnational Law (2012)
58. Gideon Mark: *The Yates Memo*, University of California Davis Law Review, Volume 51 (2018)
59. John H. Matheson: *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, North Carolina Law Review, Volume 87 (2009)
60. John Matheson: *Successor Liability*, Minnesota Law Review, 96(2) (2011)
61. Rian Matthews: *Clarification of the doctrine of Piercing the Corporate Veil*, Journal of International Banking Law and Regulation (2013)
62. Christopher McCrudden: *Two Views of Subordination: The Personal Scope of Employmnet Discrimination Law in Jivray v Hashwani*, Ind. Law J (2012)
63. Fabio Mendez and and Facudo Sepulvedo: *Corruption, Growth and Political Regimes: Cross Country Evidence*, European Journal of Political Economy, Vol. 22 (2005)
64. Pak Hung Mo: *Corruption and Economic Growth*, Journal of Comparative Economics, Vol. 29 (2001)
65. Homer Moyer: *Joint DOJ-SEC Guidance on FCPA Clarifies and Confirms Agency Enforcement Attitudes and Policies*, Miller & Chevalier alert (20 November 2012)
66. Marin Mrcela: *Adversarial Principle, the Equality of Arms and Confrontational Rights – European Court of Human Rights Recent Jurisprudence*, EU and Comparative Law Issues and Challenges (2018)
67. A. Sam Muller: *International Organisations and their Host-states: Aspects of their Legal Relationship*, Kluwer Law International (1995)
68. Lorenzo Nesti: *The 2010 "Agreement on Mutual Enforcement of Debarment Decisions" and Its Impact for the Fight Against Fraud and Corruption in Public Procurement*, Journal of Public Procurement, Volume 14, Issue 1, 62-95 (2014)
69. No.5 Barristers Chambers: *Piercing the Corporate Veil 2010* (January 2011)
70. Esin Örücü: *Developing Comparative Law*, in Esin Örücü and David Nelken: Comparative Law: A Handbook, Hart Publishing (2007)
71. Matthew Parish: *An Essay on the Accountability of International Organizations*, International Organizations Law Review 7 (2010)

72. Jason Parkin: *Adaptable Due Process*, 160 University of Pennsylvania Law Review 1309 (2012).
73. Niels Petersen: *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, American University International Law Review, Volume 23, Issue 2 (2007)
74. Luke Eric Peterson and Kevin R. Gray: *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development research paper (2003)
75. Taylor Philips: *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, William & Mary Business Law Review, Volume 6, Issue 1 (2016)
76. Carola A. Poindexter: *Criminal and Civil Liability for Corporations, Officers and Directors*, Practical Law, Thompson Reuters (2016)
77. Hans-Joachim Priess: *Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks*, The Geo. Wash. Int'l L. Rev., Volume 45 (2013)
78. Frederick Rawski: *To Waive or Not to Waive: Immunity and Accountability in UN Peacekeeping Operations*, 18 Conn. J. Int'l L. 103 (2002)
79. Lucy Reed: *Ab(use) of due process: sword vs shield*, Arbitration International (2017)
80. August Reinsch: *Immunity of International Organisations and Alternative Remedies against the United Nations*, Seminar on State Immunity, Vienna University (2006)
81. August Reinisch: *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, Chinese Journal of International Law (2008), Volume 7, No. 2
82. August Reinisch: *To What Extent Can and Should National Courts 'Fill the Accountability Gap?'*, International Organizations Law Review 10 (2013)
83. August Reinsch and Ulf Andreas Weber: *In the Shadow of Waite and Kennedy*, International Organizations Law Review 1 (2004)
84. John Reitz: *How to Do Comparative Law*, 46 American Journal of Comparative Law 617 (1998)
85. Susan Rose-Ackerman: *The Role of the World Bank in Controlling Corruption*, 29 Law & Pol'y Int'l Bus. 94 (1997)
86. Sarah B. Rogers: *The World Bank Voluntary Disclosure Program (VDP): A Distributive Justice Critique*, 46 Colum. J. Transnat'l L. 709 (2007-2008)
87. Rohan Schaap and Cecile Divino: *The AMEDD Five Years On: Trends in Enforcement Actions and Challenges Facing the Enforcement Landscape*, Harvard International Law Journal Online, Volume 57 (January 2016)
88. Steven A. Shaw: *Suspension and Debarment in a Nutshell*, United States Department of the Air Force (2011)
89. Bruno Simma and Philip Alston: *The Source of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austl. Y.B. Int'l L. (1988)
90. Alice Sindzingre and Christian Milelli: *The Uncertain Relationship between Corruption and Growth in Developing Countries: Threshold Effects and State Effectiveness*, Working Paper 2010-10, Universite de Paris Ouest Nanterre La Defense (2010)
91. Tina Soreide et al.: *An Efficient Anticorruption Sanctions Regime? The Case of the World Bank*, Chicago Journal of International Law, Volume 16, No. 2 (2016)
92. Laura Stockin: *Piercing the corporate veil: reconciling R v. Sale, Prest v. Petrodel Resources Ltd and VTB Capital Plc v Nutritek International Corp*, The Company Lawyer, Case Comment (2014)

93. Eisuke Suzuki and Suresh Nanwani: *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 Mich. J. of Int. L. (2006)
94. Vito Tanzi and Hamid Davoodi: *Corruption, Public Investment and Growth*, IMF Working Paper 97/139 (1997)
95. Jessica Tillipman: *Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, Thompson Reuters, No. 11-9 (August 2011)
96. Dick Thornburgh et al.: *Report Concerning the Debarment Processes of the World Bank* (14 August 2002)
97. Rajeshwar Tripathi: *Concept of Global Administrative Law, an Overview*, India Quarterly (2011)
98. Mehmet Ugur and Nandini Dasgupta: *Evidence on the economic growth impacts of corruption in low-income countries and beyond* (2011)
99. Mark Van Hoecke: *Methodology of Comparative Legal Research*, in Law and Method, Ghent University (2015)
100. Vernon Valentine Palmer: *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, The American Journal of Comparative Law, Volume 53, No. 1 (2005)
101. Joseph D. West et al.: *Suspension and Debarment*, Briefing Papers, Second Series (2006)
102. Chanaka Wickremasinghe: *The Immunity of International Organizations in the United Kingdom*, International Organizations Law Review 10 (2013)
103. James Wolfensohn: People and Development (speech delivered at the Annual Meeting of the World Bank and International Monetary Fund, Washington DC, 1 October 1996)
104. Ruqaiijah Yearby: *A Right to No Meaningful Review under the Due Process Clause: The Aftermath of Judicial Deference to the Federal Administrative Agencies*, 16 Health Matrix 723 (2006)
105. Christopher R. Yukins: *Cross-Debarment: A Stakeholder Analysis*, The Geo. Wash. Int'l L. Rev., Vol. 45 (2013)

Press releases

1. European Bank for Reconstruction and Development News: *Ukraine and EBRD Launch Initiative to Combat Corruption* (12 May 2014)
2. *IADB US$18 Million Loan to Help Prevent and Combat Corruption in Brazil's Public Administration* (11 March 2014)
3. Inter-American Development Bank: *Transparent Governance in an Age of Abundance: Experiences from the Extractive Industries in Latin America and the Caribbean* (October 2014)
4. Press Release: *Integrity in Development Projects: AfDB and SNC-Lavalin settle corruption allegations* (October 2015)
5. Press Release: *Integrity in Development: AfDB and Hitachi, Ltd. conclude settlement agreement* (December 2015)
6. Press Release: *World Bank Launches Voluntary Disclosure Program* (2006)
7. Press Release: *World Bank Announces Settlement with Iberdrola Ingeniería y Construcción, S.A.U. ("Iberinco") and Iberdrola S.A.* (June 2015)

8. Press Release: *World Bank Announces New Settlement with Gezhouba Group Co. Ltd* (May 2015)
9. Press Release: *World Bank Group Announces Settlement with GKW Consult GmbH* (January 2015)
10. Press Release: *World Bank Group Announces Settlement with Sinclair Knight Merz Management Pty Ltd, Sinclair Knight Merz Holdings Ltd and Sinclair Knight Merz Pty* (July 2013)
11. Press Release: *World Bank Sanctions Oxford University Press for Corrupt Practices Impacting Education Projects in East Africa* (July 2012)
12. Press Release: *Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates* (February 2012)
13. Press Release: *World Bank and the Nordic Development Fund to Expand Cooperation in Protecting Development Resources* (19 September 2012)
14. Press Release: *Enforcing Accountability: Italian Company Lotti to pay US$350,000 in restitution to Indonesia after acknowledging fraudulent misconduct in a World Bank-financed project* (December 2010)
15. United Kingdom Serious Fraud Office Press Release: *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction* (19 February 2016)
16. United States Securities and Exchange Commission Press Release: *JPMorgan Chase Paying $264 Million to Settle FCPA Charges* (17 November 2016)
17. World Bank*: Steering Senegal Towards Greater Transparency in Governance and Public Finance Management* (9 December 2014)

Reports and studies

1. African Development Bank, Independent Development Evaluation: *Comparative Review of Sanctions Practices across Multilateral Development Banks, Executive Summary* (2019)
2. Asian Development Bank: *Integrity Principles and Guidelines* (2015)
3. Asian Development Bank: *Office of Anticorruption and Integrity Annual Report 2009*
4. European Bank for Reconstruction and Development: Anti-Corruption and Integrity Report 2017
5. Evaluation Group: *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* (27 September 2001)
6. Bardo Fassbender: *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs (2006)
7. Erling Johan Hjelmeng and Tina Soreide: *Debarment in Public Procurement: Rationales and Realization*, University of Oslo Faculty of Law Legal Studies, Research Paper Series No. 2014-32
8. Inter-American Development Bank: *Strengthening the Systematic Framework Against Corruption for the Inter-American Development Bank* (2001)
9. Inter-American Development Bank: *Office of Institutional Integrity and Sanctions System Report of Activities* (2014)
10. International Council on Human Rights Policy: *Corruption and Human Rights: Making the Connection* (2009)
11. International Law Commission: *Report on the work of the seventieth session*, UN Doc. A/73/10 (2018)

12. International Law Commission: *Report on the work of the sixty-eighth session*, UN Doc. A/71/10 (2016)
13. OECD: Consequences of Corruption at the Sector Level and Implications for Growth and Economic Development (2015)
14. OECD: *Issues Paper on Corruption and Economic Growth* (2013)
15. Report Concerning the Anti-Corruption Framework of The Inter-American Development Bank (2008)
16. Review of the World Bank Group Sanctions Regime 2011 – 2014
17. UNIDO and UNODC: *Fighting Corruption, Corruption Prevention to Foster Small and Medium-Sized Enterprise Development* (2012)
18. United Nations High Commissioner for Human Rights: *Best practices to counter the negative impact of corruption on the enjoyment of all human rights* (2016)
19. United Nations Office for Drug Control and Crime Prevention: *Prevention: An Effective Tool to Reduce Corruption*, Vienna (December 1999)
20. World Bank: *Development and Human Rights*: *The Role of the World Bank*, Washington: World Bank Group (1998)
21. World Bank: *Helping Countries Combat Corruption: Progress at the World Bank since 1997* (2000)
22. World Bank: *Initiating Discussion Brief, Review of the World Bank Group Sanctions Regime 2011-14, Phase I Review: Stock-Taking*
23. World Bank: Sanctions Board Law Digest (December 2011)
24. World Bank: *Sanctions Reform*: *Expansion of Sanctions Regime Beyond Procurement and Sanctioning of Obstructive Practices*, Information Note for Borrowers (2006)
25. World Bank: *VDP Guidelines for Participants*
26. World Bank: *What they are saying about the VDP*
27. World Bank: *World Bank Group' Settlements: How Negotiated Resolution Agreements Fit within the World Bank Group's Sanctions System*
28. World Bank Group Sanctions System Annual Report FY18

Cases

1. *Acme Process Equip. Co. v United States*, 347 F.2d 509, at 539 (Ct. Cl. 1965)
2. *Agrokompleks v Ukraine*, ECHR no. 23465/03 (2012)
3. *A.I. Credit Corp v Legion Ins. Co.*, 265 F.3d 630 (7th Cir. 2001)
4. *Allonby v Accrington and Rossendale College*, C-256/01 (2004)
5. *Andersson v Sweden*, ECHR no. 17202/04 (2010)
6. *Ankerl v Switzerland*, ECHR no. 61/1995/567/653 (1996)
7. Asian Development Bank Case No. 09-060-1004 (27 April 2010)
8. *Atkinson v Inter-American Development Bank*, 156 F.3d 1335 (1998)
9. *Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1995)
10. *Banque africaine de développement v M.A. Degboe*, Cour de Cassation (25 January 200), Bull. civ. V, No. 04-41.012 (Fr.)
11. *BB v IBRD*, World Bank Administrative Tribunal Decision No. 426 (2009)
12. *Beaumartin v France*, ECHR no. 15287/89 (1994)
13. *Beer and Regan v Germany*, European Court of Human Rights (18 February 1999)
14. *Benderskiy v Ukraine*, ECHR no. 22750/02 (2007)

15. *Bertucci v Secretary-General of the United Nations*, Judgment No. UNDT/2010/80 (2010)
16. *Board of Regents v Roth* 408 U.S. 564 (1972)
17. *BRO Tech Corp. v European Bank for Reconstruction and Development*, 200 WL 1751094 (E.D. Pa) (2000)
18. *Broadbent v Organization of American States* 628 F.2d 28 (DC Cir 1980)
19. *Budha Ismail Jam, et al. v International Finance Corporation*, No. 17–1011, 586 US (2019)
20. *Buscemi v Italy*, ECHR no. 29569/95 (1999)
21. *Bushell v Secretary of State for the Environment* [1981] AC 75
22. *C v IBRD*, World Bank Administrative Tribunal Decision No. 272 (2002)
23. *Carew v IBRD*, World Bank Administrative Tribunal Decision No. 142 (1995)
24. *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155
25. *Chirico v ICAMAS, Corte di Cassazione*, Judgment No. 4968/1989 (1991)
26. *Citizens to Preserve Overton Park v Volpe*, 401 U.S. 402 (1971)
27. *Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310
28. *Clarke v The United Kingdom*, ECHR no. 23695/02 (2005)
29. *Corn Prods Refining Co. v Benson*, 232 F.2d 554 (2nd Cir. 1956)
30. *"D" v IFC*, World Bank Administrative Tribunal Decision No. 304 (2003)
31. *Dagtekin v Turkey*, ECHR no. 70516/01 (2007)
32. *de Merode v The World Bank*, World Bank Administrative Tribunal Decision No. 1 (1981)
33. *De Moor v Belgium*, ECHR no. 16997/90 (1994)
34. *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852
35. *Dombo Beheer B.V. v the Netherlands*, ECHR no. 14448/88 (1993)
36. *Döry v Sweden*, ECHR no. 28394/95 (2002)
37. *Drago v IPGRI*, Corte di Cassazione, Judgment No. 3718/2007 (2007)
38. *Electro-Methods, Inc. v United States*, 728 F.2d 1471 (Fed. Cir. 1984)
39. *Entico Corp Ltd v United Nations Educational Scientific & Cultural Organisation (UNESCO)*
[2008] APP.L.R. 03/18
40. *Eurotrends v. Banque Asiatique de Développement*, Tribunal De Grande Instance de Paris (April 2015), File No. 13/07942
41. *Excel Energy, Inc. v. Cannelton Sales Co*., 337 Fed. App. 480 (6th Cir. 2009)
42. *Fischer v Austria*, ECHR no. 16922/90 (1995)
43. *Fisher v. RTC*, 59 F.3d 1344 (D.C. Cir. 1995)
44. *Flux v Moldova (no. 2)*, ECHR no. 31001/03 (2007)
45. *Fredin v Sweden*, ECHR no. 12033/86 (1991)
46. *Garcia Ruiz v Spain*, ECHR no. 30544/96 (1999)
47. *Giovanni Porru v FAO*, the Rome Court of 1st Instance (1969)
48. *Glentel, Inc. v Wireless Ventures, LLC* 362 F. Supp. 2d 992 (N.D. Ind. 2005)
49. *Goldberg v Kelly* 397 U.S. 254 (1970)
50. *Gonzales v. Freeman*, 334, F.2d 570 (D.C. Cir. 1964)
51. *Gorou v Greece (no. 2)*, ECHR no. 12686/03 (2009)
52. *Heckler v. Chaney*, 470 U.S. 821 (1985)
53. *Helle v Finland*, ECHR no. 20772/92 (1997)
54. *Hentrich v France*, ECHR no. 13616/88 (1994)

55. *Hirvisaari v Finland*, ECHR no. 49684/99 (2001)
56. *Hollinger Inc. v Hollinger International Inc.*, 858 A.2d 342 (Del. Ch. 2004)
57. *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972)
58. *HRH Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* 2017 EWHC 89 (TCC)
59. *Illemassene v OECD*, Cour de Cassation, application number: 09-41030 (30 November 2010)
60. *IMCO, Inc. v United States*, 33 Fed. Cl. 312 (1995)
61. *In re Bruce*, Judgment 2096, ILO Administrative Tribunal (2002)
62. *In re Rubio*, Judgment 1644, ILO Administrative Tribunal (1997)
63. *Jacobsson v Sweden* (No. 2), ECHR no. 16970/60 (1990)
64. *Jivraj v Hashwani* [2011] UKSC 40
65. *Jokela v Finland*, ECHR no. 28856/95 (2002)
66. *Kalkanov v Bulgaria*, ECHR no. 19612/02 (2008)
67. *Katz v. Bregman*, 431 A.2d 1274 (Del.Ch.1981)
68. *Kevin Wallace v HMQ*, 2014 ONSC 7449
69. *Kleyn and Others v the Netherlands*, ECHR nos. 39343/98, 39651/98, 43147/98 and 46664/99 (2003)
70. *Langborger v Sweden*, ECHR no. 11179/84 (1989)
71. *Le Compte, Van Leuven and De Meyere v Belgium*, no. 6878/75; 7238/75 (1981)
72. *Lincoln v Vigil*, 508 U.S. 183 (1993)
73. *Lion Raisins v United States*, 51 Fed. Cl. 238 (2001)
74. *Luka v Romania*, ECHR no. 34197/02 (2009)
75. *Lundevall v Sweden*, ECHR no. 38629/97 (2002)
76. *M v IBRD*, World Bank Administrative Tribunal Decision No. 369 (2007)
77. *Malhous v Czech Republic*, ECHR no. 33071/96 (2001)
78. *Mathews v Eldridge*, 424 U.S. 319 (1976)
79. *McGonnell v The United Kingdom*, ECHR no. 28488/95 (2000)
80. *Menchinskaya v Russia*, ECHR no. 42454/02 (2009)
81. *Mendaro v World Bank*, 717 F.2d 610 (D.C. Cir, 1983)
82. *Meznaric v Croatia*, ECHR no. 71615/01 (2005)
83. *Micallef v Malta*, ECHR no. 17056/06 (2009)
84. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v U.S.A.*), International Court of Justice (1986)
85. *Miller v DeBuono* 90 N.Y.2d 783 (1997)
86. *Miller v Sweden*, ECHR no. 55853/00 (2005)
87. *Mukoro v European Bank for Reconstruction and Development* [1994] UKEAT 813_92_2303
88. *N v IBRD*, World Bank Administrative Tribunal Decision No. 362 (2007)
89. *North Sea Continental Shelf cases*, International Court of Justice (20 February 1969)
90. *Oddenino & Gaule v. United Fin. Group*, 1999 U.S. App. LEXIS 29506, 9th Cir. (November 1999)
91. *Oerlemans v Netherlands* (1993), ECHR 12565/86
92. *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 632 F.2d 953 (D.C. Cir. 1980)
93. *Olujic v Croatia*, ECHR no. 22330/05 (2009)
94. *OSS Nokalva, Inc. v European Space Agency*, 617 F.3d 756 (3d Cir. 2010)
95. *Osseiran v International Finance Corporation*, 552 F.3d 835 (D.C. Cir. 2009)

96. *Parlov-Tkalčić v. Croatia*, ECHR no. 24810/06 (2009)
97. *Perez v Germany*, App. No. 15521/08, European Court of Human Rights (2015)
98. *Perry v. Sindermann* 408 U.S. 593 (1972)
99. *Perus v Slovenia*, ECHR no. 35016/05 (2012)
100. *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 167 (D.C. Cir. 1983)
101. *P.F. Collier & Son Corp. v F.T.C.*, 427 F.2d 261 (6th Cir. 1970)
102. *Pistelli v European University Institute*, Judgment No. 20995/2005 (2006)
103. *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34
104. *Pretto and Others v Italy*, ECHR no. 7984/77 (1983)
105. *R (on the application of Smith) v Parole Board* [2005] 1 WLR 350
106. *R (on the application of Weaver v London & Quadrant Housing Trust)* [2009] EWCA Civ 587
107. *R v Barnsley Metropolitan Borough Council ex parte Hook* [1976] 1 WLR 1052
108. *R (Beer (Trading as Hammer Trout Farm)) v Hampshire Farmer's Markets Ltd* [2004] 1 WLR 223
109. *R v City Panel on Takeovers and Mergers ex parte Datafin plc* [1987] 2 WLR 699
110. *R v Higher Education Funding Council ex p Institute of Dental Surgery* [1994] 1 WLR 242
111. *R v Ministry of Defence ex parte Murray* [1998] COD 134
112. *R v Secretary of State for the Home Department ex parte Doody and Others* [1994]
113. *R v Secretary of State for the Home Dept ex parte Tarrant* [1984] 2 WLR 613
114. *R v Servite Houses and Wandsworth LBC ex parte Goldsmith and Chatting* [2001] 33 HLR 35
115. *Reines Distribs., Inc. v. Admiral Corp.*, 256 F. Supp. 581 (S.D.N.Y. 1966)
116. *Rendall-Speranza v IFC*, World Bank Administrative Tribunal Decision No. 197 (1998)
117. *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958)
118. *Robinson v Cheney*, 876 F.2d 152 (D.C. Cir. 1989)
119. *Roemer v. Hoffman*, 419 F. Supp. 130 (DDC 1976)
120. *Ruiz Torija v Spain*, ECHR no. 18390/91 (1994)
121. Rulings of the Court of Justice of the European Union concerning OLAF
122. *Sacilor-Loramines v France*, ECHR no. 65411/01 (2006)
123. *Salomon v A Salomon & Co Ltd* [1896] UKHL 1
124. *Savage Arms, Inc. v Western Auto Supply Co.*, 18 P.3d 49 (2001)
125. *Schuler-Zgraggen v Switzerland*, ECHR no. 14518/89 (1993)
126. *Scuola europea di Varese v Philippe*, Corte di Cassazione, Judgment No. 376/1990 (1991)
127. Serious Fraud Office: Deferred Prosecution Agreement with Rolls Royce, Judgment (2017)
128. *SFO v Standard Bank*, Royal Courts of Justice, PLC Case No: U20150854 (30 November 2015)
129. *Siedler v Western European Union*, Appeal Judgment, JT 2004, 617, ILDC 53 (BE 2003)
130. *Sramek v Austria*, ECHR no. 8790/79 (1984)
131. *Stichting Mothers of Srebrenica et al. v The Netherlands*, Application No. 65542/12, European Court of Human Rights (2013)
132. *Tex.-Okla. Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1975)

133. *Transco Sec., Inc. of Ohio v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981)
134. *Turner v Bituminous Casualty Co*., 244 N.W. 2nd 873 (1976)
135. *UNESCO v Boulois*, Cour d'Appel Paris (19 June 1998)
136. *United States v Automated Medical Laboratories Inc*. 770 F. 2d 399 (4th Cir. 1985)
137. *United States v Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987)
138. *United States v Bestfoods*, 524 U.S. 51, 62-65 (1998) (federal)
139. *United States v Bi-Co Pavers, Inc.*, 741 F.2d 730 (5th Cir. 1984)
140. *United States v Bizzell*, 921 F.2d 263 (10th Cir. 1990)
141. *United States v Dye Constr. Co*., 510 F.2d 78 (10th Cir. 1975)
142. *United States v George F. Fish, Inc*., 154 F.2d 798 (2d Cir. 1946)
143. *United States v Hatfield*, 108 F.3d 67 (4th Cir. 1997)
144. *United States v Hilton Hotels Corp*., 467 F.2d 1000 (9th Cir. 1972), cert. denied 409 U.S. 1125 (1973)
145. *United States v Ionia Mgmt. S.A*., 555 F.3d 303 (2d Cir. 2009)
146. *United States v Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973)
147. *United States v Twentieth Century Fox Film Corp*., 882 F.2d 656 (2d Cir. 1989)
148. United States Securities and Exchange Commission Cease-and-Desist Order in the matter of Alcoa Inc. (9 January 2014)
149. United States Securities and Exchange Commission Administrative Proceeding File No. 3-17101, *In the Matter of SciClone Pharmaceuticals, Inc*. (4 February 2016)
150. SEC Administrative Proceeding File No. No. 3-17684, *In the Matter of JPMorgan Chase & Co*. (17 November 2016)
151. *Valová, Slezák and Slezák v. Slovakia*, ECHR no. 44925/98 (2004)
152. *Van de Hurk v The Netherlands*, ECHR no. 16034/90 (1994)
153. *Varela Assalino v Portugal*, ECHR no. 643369/01 (2002)
154. *Victoria Elevator Co. v Meridian Grain Co*., 283 N.W.2d 509 (1979)
155. *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337
156. *Waite and Kennedy v Germany*, European Court of Human Rights (18 February 1999)
157. *Western European Union v Siedler*, Cour de Cassation, N° S.04.0129.F (2009)
158. *Wierzbicki v Poland*, ECHR no. 24541/94 (2002)
159. *Woolfson Regional Council v Strahclyde Regional Council* [1978] UKHL 5
160. *World Bank Group v. Wallace*, 2016 SCC 15
161. World Bank Sanctions Board Decision No. 48 (30 May 2012)
162. World Bank Sanctions Board Decision No. 49 (30 May 2012)
163. World Bank Sanctions Board Decision No. 50 (30 May 2012)
164. World Bank Sanctions Board Decision No. 51 (30 May 2012)
165. World Bank Sanctions Board Decision No. 53 (4 September 2012)
166. World Bank Sanctions Board Decision No. 56 (10 June 2013)
167. World Bank Sanctions Board Decision No. 60 (9 September 2013)
168. World Bank Sanctions Board Decision No. 65 (2 May 2014)
169. World Bank Sanctions Board Decision No. 66 (19 May 2014)
170. World Bank Sanctions Board Decision No. 71 (9 July 2014)
171. World Bank Sanctions Board Decision No. 94 (16 June 2017)
172. World Bank Sanctions Board Decision No. 101 (8 December 2017)
173. World Bank Sanctions Board Decision No. 104 (19 December 2017)
174. *World Bank Group v Wallace*, 2016 SCC 15
175. *Zurich Capital Mkts. v Coglianese*, 332 F. Supp. 2d 1087 (N.D. Ill. 2004)

Other

1. 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee: *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2 B.L.I. (2010)
2. Administrative Tribunal of the International Monetary Fund: *Statute of the Administrative Tribunal: Commentary of the Statute* (2000)
3. Council of Australian Law Deans: *Statement on the Nature of Legal Research* (2005)
4. Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission: *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012)
5. European Court of Human Rights: *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb)* (2013)
6. Freshfields Bruckhaus Deringer US LLP: *Submission of Freshfields Bruckhaus Deringer LLP in Connection with Review of the World Bank Group Sanctions System* (31 October 2013)
7. *Georges v United Nations*, No. 15-455 (2d Cir. 2016), Brief of the European Law Scholars
8. Institut de Droit International: *Resolution on the Position of the International Judges*
9. International Court of Justice: Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 73 (1980)
10. Legal Vice Presidency of the World Bank*: Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases*, No. 2010/1 (2010)
11. Augusto Lopez-Carlos (Director of Global Indicators Group at the World Bank Group): *Six Strategies to Fight Corruption*, posted on the World Bank Development Blog on 14 May 2014
12. Leonard McCarthy: *Settling for Development with Integrity*, FCPA Blog (June 2016)
13. Memorandum from Sally Quillian Yates: *Individual Accountability for Corporate Wrongdoing* (9 September 2015)
14. New York State Department of Civil Service: *Manual for Administrative Law Judges and Hearing Officers* (2002)
15. OECD Public Consultation on Liability of Legal Persons, Compilation of Responses (November 2016)
16. OLAF: *What We Do; Legal Background;* and *European Public Prosecutor's Office*
17. Proposal for the Implementation of a Sanctions Process within the African Development Bank (2012)
18. Transparency International's Submission to the Consultation Process on the World Bank's Sanctions System (30 October 2013)
19. Uniform Commercial Law in the Twenty-First Century, Proceedings of the Congress of the United Nations Commission on International Trade Law (18-22 May, 1992)
20. United Kingdom Ministry of Justice: *Corporate Liability for Economic Crime, Call for evidence* (13 January 2017)
21. United States Department of Justice: *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (29 November 2018)
22. United States Department of the Treasury: *OFAC FAQs: General Questions*

23. United States Sentencing Commission: Guidelines Manual
24. Wickremasinghe, Chanaka: *The jurisdictional immunities of international organisations and their officials*, PhD thesis, London School of Economics and Political Science (2003).
25. World Bank 2013 Phase I Sanctions Review Stakeholder Consultation: *Comments of the U.S. Defense Bar*, 31 October 2013
26. World Bank: *The World Bank Group's Sanctions Regime: Information Note*