



Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law

Pascale Hé lène Dubois[†] & Aileen Elizabeth Nowlan^{††}

I. INTRODUCTION

Last year the World Bank distributed \$58.8 billion in loans and grants around the world.¹ The World Bank's Articles of Agreement require it to ensure that its funds are used for their intended purposes, since fraud and corruption bleed away resources from poverty reduction efforts.² By a conservative estimate, over \$1 trillion in bribes are paid around the world each year.³ The G-20, meeting in 2010 in Toronto, identified corruption as one of two issues that merited

† Sanctions Evaluation and Suspension Officer, World Bank; Adjunct Professor, Georgetown University Law Center. I would like to thank Anne-Marie Leroy, Senior Vice President and General Counsel to the World Bank Group, as well as my colleagues Jamieson Smith and Elizabeth Buehler, all of whom were kind enough to read drafts of this Essay and provide helpful comments and encouragement. Special thanks to Frank Fariello, Lead Counsel in the World Bank's Legal Vice Presidency for his detailed review, insightful comments, and feedback. Thank you as well to Tasha Manoranjan, Julia Spiegel, Claire Pavlovic, and the other editors for their patience while going through the publication steps. Most importantly, many thanks to Aileen Nowlan, the co-author of this Essay, whose keen intelligence, quick wit, and excellent work product were appreciated by all at the World Bank. The findings, interpretations, and conclusions expressed herein are those of the authors and do not necessarily reflect the view of the World Bank Group, its Board of Directors, or the governments they represent.

†† Yale Law School, J.D. expected 2012. Ms. Nowlan worked at the World Bank in the summer of 2010.

1. Press Release No. 2010/002/EXC, World Bank, World Bank Group Support to Crisis-Hit Countries at Record High (July 1, 2009), <http://go.worldbank.org/O4729N4MC0>. The World Bank Group consists of five institutions. The "World Bank" or "Bank" consists of two of these institutions: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).
2. Articles of Agreement of the International Bank for Reconstruction and Development, art. III, § 5(b), Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 [hereinafter World Bank Articles of Agreement].
3. *The Costs of Corruption*, WORLD BANK (Apr. 8, 2004), <http://go.worldbank.org/LJA29GHA80>.

ongoing attention between G-20 summits.⁴ The World Bank in its own operations aims to keep pace with anti-corruption developments around the world, such as the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention and stepped-up fraud and corruption prosecutions in member countries.⁵ Thus, in order to meet its goal of a world free of poverty and in order to steward its funds, the World Bank has created, reformed, and enforced anti-corruption procedures for more than ten years. To date, the World Bank has publicly sanctioned over four hundred firms and individuals.⁶ These sanctions include banning them from bidding on any World Bank-financed project indefinitely or for a period of time, non-debarment contingent on improved practices, sending a letter of reprimand, or issuing an order of restitution.⁷

In the course of its anti-corruption work the World Bank faces a number of legal challenges that are unique to international institutions. One challenge is that the sanctions process relies in part on precedent from World Bank case law, which is quite thin due to the newness of the proceedings.⁸ A second challenge is that as the World Bank sanctions procedures have evolved over time, they have come to represent a synthesis of elements from four different legal disciplines that have been imported, adjusted, and combined from national systems: contract law, criminal law, tort law, and adjudicative procedures similar to those in the administrative agencies of many countries.

This Essay argues that, given the diversity of national legal systems and notions of justice from which the World Bank would have to choose in developing its sanctioning process, a more productive approach may be to prioritize improvements based on recent scholarship on Global Administrative Law (GAL).⁹ A GAL-based approach would not end the need to synthesize national law, but it would allow the Bank to develop substantive norms, independent of whether they are in line with particular national systems. The principles of GAL, such as transparency, reasoned decisionmaking, and participation, can build added legitimacy for an institution that devotes itself to the reduction of human suffering. The outputs of a GAL-based approach to

-
4. G-20 Toronto Summit Declaration, ¶ 40, June 25-26, 2010, http://www.g20.org/Documents/g20_declaration_en.pdf. The second issue that merited a Working Group between Summits was development more generally. *Id.* ¶ 47.
 5. See, e.g., Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP 711 (2008) (discussing the stepped up enforcement efforts of the U.S. Department of Justice and the Securities Exchange Commission).
 6. The list of currently debarred firms and individuals is available at World Bank Listing of Ineligible Firms, WORLD BANK, <http://www.worldbank.org/sanctions> (follow “Debarred Firms/Individuals” hyperlink) (last visited Oct. 24, 2010).
 7. *Id.*
 8. The World Bank has debarred over four hundred firms and individuals since 2001, but many of the questions it faces are still of first impression. See *The World Bank Sanctions System: Tackling Corruption Through a Two-Tier Administrative Sanctions Process*, WORLD BANK, <http://go.worldbank.org/EB6JXKU4Z0> (last visited Oct. 24, 2010).
 9. See Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006) (providing an extensive overview of the principles and purposes of Global Administrative Law).

sanctions, such as a public record of jurisprudence, should help stakeholders hold the institution accountable for the sanctions system it creates.

Given the current thinness of World Bank precedent and the unorthodox combination of legal disciplines in the sanctions process, national systems can provide a useful point of reference, especially when compared and contrasted with one another in a benchmark survey.¹⁰ However, “[t]he choice among such approaches is a political choice with political implications.”¹¹ When looking to national systems for guidance, the World Bank may be faced with a choice among legal approaches. National law, even combined with notions of natural justice or customary international law, can only provide so much guidance. Although there is a great deal of convergence among national systems, there will inevitably be situations where the Bank is obliged to choose among irreconcilably different approaches to a legal question.

The challenges of the World Bank’s experience have broad relevance, as the articulation and enforcement of rules and regulations increasingly takes place in international organizations.¹² Just as GAL can help the World Bank fill in the blanks without necessitating impossible choices among the national systems of member countries, we expect that looking to the principles of GAL may help other international institutions and member countries design and build up their adjudicative systems.

II. THE WORLD BANK’S SANCTIONS PROCESS

The fraud and corruption sanctions process at the World Bank begins with a legal framework that arises from the Articles of Agreement, the treaty that established the World Bank. These Articles require the World Bank to ensure that its funds are used for their intended purpose.¹³ In accordance with this obligation, the World Bank ensures that either Procurement or Consultant Guidelines are included in any grant or loan agreement between the World Bank and a borrower country, and that the borrower country includes the relevant Guidelines in its request for proposals and contracts that carry out the purpose of the loan or grant.

The definition of what constitutes a sanctionable practice has changed over the years. In 1999, the Procurement and Consultant Guidelines referred only to corruption, fraud, and collusion.¹⁴ In 2004, the Guidelines added coercive

10. The thinness of precedent results from the short history of the system. As of this writing, the World Bank sanctions website still includes an announcement of the start of the work of the Sanctions Board, which occurred in March of 2007. *See Sanctions System at the World Bank*, WORLD BANK, <http://go.worldbank.org/WICZWZY0E0> (last visited Oct. 24, 2010).

11. Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 26 (2009).

12. *See, e.g.*, Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT’L L. 177, 180 (2005) (discussing the expansion of roles and responsibilities of international organizations).

13. World Bank Articles of Agreement, *supra* note 2, art. III, § 5(b).

14. All current and historical Guidelines are available at the World Bank website. *See* World Bank, Guidelines: Selection and Employment of Consultants by World Bank Borrowers, § 1.22 (Oct. 1, 2006), *available at* <http://go.worldbank.org/U9IPSLUDC0> [hereinafter

practices, such as threatening fellow bidders or government officials, to the list of unacceptable behaviors, and in 2006 the Guidelines added obstructive practices, that is, actions that impede an investigation, such as destroying evidence or threatening witnesses.

The steps in the sanctions process are laid out in the World Bank's Sanctions Board Statute and Sanctions Procedures.¹⁵ The process starts when the World Bank learns about possible sanctionable conduct from any of a variety of sources, such as its own staff, the local government, or other bidders. The Integrity Vice Presidency (INT) investigates the allegations by, among other things, interviewing witnesses, gathering documents, and visiting the project site. Under its mandate, INT only investigates firms and individuals. INT sends the evidence, both exculpatory and inculpatory, along with a summary of the allegations, to the respective Evaluation Officer (EO). There are four EOs, one for the International Bank for Reconstruction and Development and International Development Association (who focuses on this work exclusively) and three part-time EOs for the Multilateral Investment Guarantee Agency, International Finance Corporation, and Bank Guarantee Projects (who work part-time on fraud and corruption in addition to their other tasks). The EO assesses the allegations and determines whether the evidence is sufficient to support a finding of sanctionable conduct. At that point, the EO can temporarily suspend an individual or a firm (known as the Respondent). The EO then issues a Notice to the Respondent and recommends a sanction. If the Respondent does not appeal to the Sanctions Board—which happens in over half of the cases—the EO's recommendation becomes the final decision. Otherwise, the Respondent has the opportunity to contest the allegation or the recommended sanction by filing a written Response with the Sanctions Board within 90 days; INT can then offer a Reply within thirty days to counter any evidence in this Response. Although the Sanctions Committee, the precursor to the current EOs and Sanctions Board, was composed entirely or predominantly of World Bank staff, a majority of the members of the current Sanctions Board are external, as is its chair.¹⁶ Either INT

Consultant Guidelines]; World Bank, Guidelines: Procurement Under IBRD Loans and IDA Credits, § 1.14 (May 1, 2010), *available at* <http://go.worldbank.org/1KKD1KNT40> [hereinafter Procurement Guidelines].

15. International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, and Multilateral Insurance Guarantee Agency Sanctions Board Statute, Sept. 15, 2010, *available at* <http://go.worldbank.org/CVUUIS7HZ0> [hereinafter Sanctions Board Statute].

16. The external members are

appointed by the Executive Directors of the International Bank for Reconstruction and Development from a list of candidates drawn up by the President of the Bank after appropriate consultation. The candidates must not have previously held or currently hold any appointment to the staff of the Bank, IFC or MIGA and shall be familiar with procurement matters, law, dispute resolution mechanisms, or operations of development institutions.

Id. art. 5(2). The external members are currently Ms. Marielle Cohen-Branche (France), Judge at the French Court of Cassation; Ms. Cornelia Cova (Switzerland), Judge at the Swiss

or the Respondent can request a hearing before the Sanctions Board, and the Sanction Board's decision is final. As many firms and individuals in the development field receive a significant portion of their revenues from the World Bank, a prohibition on bidding for projects and associated negative publicity can be a serious business setback.

From this brief description of the sanctions process, it is evident that the system provides significant procedural protections for Respondents. These protections include notice, the opportunity to be heard, and a decision by a neutral decisionmaker. Including the Guidelines in requests for proposals and contracts provides firms and individuals with prior notice about the kinds of conduct that could lead to sanctions.¹⁷ Furthermore, when the Guidelines are updated, the definitions are not applied to existing projects and contracts; no one with a contract referring to the 2004 Guidelines would be sanctioned for obstructive practices, for example, since that element was not a part of the 2004 Guidelines. The Respondent has an opportunity to present evidence to refute the basis for the temporary suspension, and may argue to the Sanctions Board in person as to why the firm or individual should not be sanctioned. The Respondent also has access to information supporting the allegations in the Notice, including exculpatory evidence, so that Respondents are able to mount a meaningful defense.¹⁸ The Sanctions Board makes a *de novo* decision based on the written submissions and the hearing. The two-tiered sanctions system, divided between the EOs and the Sanctions Board, gives the Respondent notice of the allegations and two opportunities to respond. It also allows decisionmakers who are independent of the investigators to temporarily suspend and debar Respondents in order to protect the integrity of the World Bank. Notice, an opportunity to respond, and a decision by an independent decisionmaker are considered to be the basics of procedural justice, and the World Bank's sanctions system operates to provide these protections.

Federal Penal Court; Ms. Patricia Diaz Dennis (United States), Senior Vice President and Assistant General Counsel, AT&T; Dr. Fathi Kemicha (Tunisia), Chairman of the Sanctions Board, Attorney, International Arbitrator, Member of the United Nations International Law Commission, former Secretary General of the Constitutional Court of the Kingdom of Bahrain; Mr. Babar Ali (Pakistan), entrepreneur and former Minister of Finance, Economic Affairs and Planning of Pakistan; Mr. Rodrigo B. Oreamuno (Costa Rica), former Vice President of Costa Rica; Mr. Bernard Hanotiau (Belgium), member of the International Arbitration Commission, the Institute of the International Chamber of Commerce in Paris, and the arbitration commission of the International Law Association; and Mr. Anne van't Veer (Netherlands), former Secretary-General of the Berne Union of credit and investment insurers. *Sanctions Board Members*, WORLD BANK, <http://go.worldbank.org/ZL06WOFFD0> (last visited Oct. 28, 2010).

17. Many of the protections, including notice, were outlined in the "Thornburgh Report" and are incorporated into the Sanctions Procedures. See DICK THORNBURGH, RONALD L. GAINER & CUYLER H. WALKER, REPORT CONCERNING THE DEBARMENT PROCESSES OF THE WORLD BANK, 30, 42, 46 (Aug. 14, 2002), <http://siteresources.worldbank.org/PROCUREMENT/Resources/thornburghreport.pdf>.
18. *Id.* at 45 (cautioning against "'prosecution by ambush' by holding back certain evidence until the reply, and effectively depriving the respondent of the chance to rebut such evidence").

III. CHALLENGES WITH THE WORLD BANK'S SANCTIONS PROCEEDINGS

The procedural protections articulated above are the result of the World Bank learning from earlier experience and codifying new practices.¹⁹ Unfortunately, however, the challenges articulated in the Introduction largely still remain. First, even as the procedural protections have improved significantly, the challenge of clarifying the substantive law remains. The Legal Department and the Sanctions Board must still answer questions such as what it means to give a bribe indirectly.²⁰ Although the World Bank has the ability to make authoritative interpretations of its founding Articles of Agreement, the goal of internal adjudication is not so much to interpret the Articles of Agreement as to formulate consistent legal principles.²¹ In the context of employment law adjudication in the World Bank Administrative Tribunal,²² “actions of Bank managers and supervisors . . . are restrained by legal principles going beyond the self-promulgated rules and regulations of the Bank. These general principles . . . the Tribunal identifies, formulates and applies as is needed and appropriate on a case-by-case basis”²³ The Tribunal’s experience is instructive, and the World Bank’s sanctions process has been informed by the Tribunal’s efforts to distill

national law principles from legal systems with which the Tribunal judges are familiar, both civil law and common law. Also central to [the Tribunal’s] jurisprudence are rules of national administrative law by which judicial bodies control the actions of government agencies; perhaps the most important of those rules is that the decision-maker has considerable discretion in taking decisions

19. See Andrés Rigo Sureda, *Process Integrity and Institutional Independence in International Organizations: the Inspection Panel and the Sanctions Committee of the World Bank*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 192 (Laurence Boisson de Chazournes et al. eds., 2002) (discussing the movement from ad hoc arrangements to permanent mechanisms in the World Bank).

20. The Legal Department also consults with a working group, which includes colleagues from the Operations Policy and Country Services Department, the General Services Department, the Integrity Vice Presidency, the Partial Risk Guarantee Program, the Office of Evaluation and Suspension, as well as the International Finance Corporation and the Multilateral Investment Guarantee Agency. See, e.g., LEGAL VICE PRESIDENCY OF THE WORLD BANK, STRENGTHENING THE ROLE OF LAW TO RESPOND TO THE NEEDS AND CHALLENGES OF THE BANK IN A CHANGING WORLD: THE ROAD AHEAD FOR THE LEGAL VICE PRESIDENCY 17 (2010), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/04/22/000333037_20100422020851/Rendered/PDF/541070WPOStren10Box345636B01PUBLIC1.pdf (highlighting other questions the Legal Department and Sanctions Board may ask, such as those relating to the treatment of corporate groups).

21. Rigo Sureda, *supra* note 19, at 166.

22. The Administrative Tribunal hears staff grievances about non-observance of employment rules and regulations, and is composed of “seven judges, chosen from around the world—from different legal systems and different social and cultural traditions.” Robert A. Gorman, *The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank*, 25 COMP. LAB. L. & POL’Y J. 423, 426 (2004).

23. *Id.* at 429-430.

but that it may not abuse that discretion, act arbitrarily or unreasonably, or utilize unfair procedures²⁴

The Legal Vice Presidency, in seeking to articulate substantive principles to guide the sanctions regime, looks to the Sanctions Procedures and Sanctions Board Statute, the “legislative history” of the sanctions regime, the jurisprudence of the Sanctions Board, and any coherent principles that can be ascertained from national law, general principles of law, and notions of natural justice. Even so, the short history of the Sanctions Board jurisprudence and the diversity in national laws indicate that debates over substantive law are far from settled.

Another unique legal challenge in the World Bank’s sanctions proceedings stems from the fact that, although the sanctions process is an administrative adjudication, it incorporates aspects of at least three other legal disciplines: criminal, tort, and contract law. For example, the 2006 Guidelines specify that fraudulent conduct must involve knowledge or recklessness.²⁵ This means that the World Bank must prove a mental state, just as a criminal prosecutor would, but without the subpoena powers that a national prosecutor would be able to use.

The sanctions proceedings also draw from tort law. The debates at the World Bank echo those that legislators face when deciding whether strict liability, negligence, or recklessness standards should govern tortious conduct. In other procurement systems, such as that of the U.S. government, procurement officers can simply make a business decision about whether a supplier who is presently responsible but has a history of problematic conduct offers sufficient unique value to outweigh its history.²⁶ At the World Bank, there is a continuous healthy debate among policymakers about how much to expect from suppliers and consultants, and what the loss of their resources might mean for the World Bank’s development goals. As in tort law, an important concern is the appropriate standard of care for the Bank’s suppliers and consultants. This of course must be weighed against the implications for the effectiveness of the bidders in the World Bank-financed marketplace.

Finally, given that the Procurement and Consultant Guidelines are included in the contract between the World Bank and the borrower country, and that the borrower country must include the relevant Guidelines in its request for proposals and associated contracts, it may seem strange that criminal intent, tort law standards of care, or procedural protections have anything to do with sanctions. If a contractual obligation is breached, why can’t the World Bank simply sanction firms and individuals as it sees fit? The answer is that the unexplained debarment of firms and individuals would be anathema both to the World Bank’s development mission and to its associated work to improve transparency and reasoned decisionmaking in governance worldwide. Nevertheless, contract principles remain relevant to the sanctions process.

24. *Id.* at 431.

25. Consultant Guidelines, *supra* note 14, § 1.22(a)(ii); Procurement Guidelines, *supra* note 14, § 1.14(a)(ii).

26. KATE M. MANUEL, CONG. RESEARCH SERV., DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 8 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34753.pdf>.

Given the challenges posed by the sanctions system's thin precedent and unusual combination of legal disciplines, national law and customary international law provide one option for identifying substantive standards in state consent or state practice.²⁷ The World Bank's mandate to ensure proper use of resources provides the flexible space to design a sanctions system that draws from whatever seems most appropriate in national and international law, but it should not worry us if the sanctions process does not look like domestic administrative law: "the fact that some of the old techniques may not be transferred (or wholly transferred) from the domestic sphere to the international should not concern us, as long as an appropriate level of control remains."²⁸ The next Part will argue that the emerging field of Global Administrative Law is the most appropriate yardstick by which to determine whether the sanctions process provides a level of control sufficient to prevent an abuse of its discretion.

IV. EMERGING FIELD OF GLOBAL ADMINISTRATIVE LAW

The flexibility of the World Bank in designing its sanctions process means that the search to articulate guidelines based on national legal systems is limited only by the World Bank's own choices. The current system, however, already reflects a combination of elements from contract, tort, and criminal law disciplines; it would require a significant overhaul to create a sanctions process that resembles any one national system. In addition, the application of national law principles to the World Bank's transnational space has required considerable adaptation already. Moreover, where there is considerable divergence among national norms on a given issue, the choice of one norm over another may raise political or reputational risks for the institution.

The emerging field of Global Administrative Law (GAL) provides the Bank with a strategy to enforce substantive norms while avoiding these pitfalls. By focusing on the principles that GAL scholars emphasize, such as transparency and reasoned decisionmaking, the World Bank can build confidence in the legitimacy and strength of the sanctions system and elicit all the information needed to effectively sanction firms and individuals without exclusive reliance on norms identifiable from national systems for legitimacy.

The field of GAL has emerged in the past decade in response to the fact that, in areas ranging from anti-doping²⁹ to agricultural development,³⁰ international rule-making and enforcement have moved further and further away from a strict delegation or transfer of sovereign power and into adjudication in

27. See, e.g., Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1091 (2008) (discussing how resorting to national law systems is not a new phenomenon for international organizations).

28. Jacob Katz Cogan, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT'L L. 1013, 1020 (2009).

29. See Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 INT'L ORG. L. REV. 421 (2009) (discussing rule-making in anti-doping efforts).

30. See Rutsel Silvestre J. Martha, *Mandate Issues in the Activities of the International Fund for Agricultural Development*, 6 INT'L ORG. L.R. 447 (2009) (discussing rule-making in agricultural development).

international bodies. Although it is still a new field, GAL offers one solution to the challenge that “[w]here the norm-generation or norm-acceptance is only shakily related to the will of states, a relevant factor for outsiders in deciding what weight to give to the norm may be the ways in which it was produced.”³¹ First and foremost, GAL explains that legitimacy is a function of procedural guarantees of transparency and structured decisionmaking.³² GAL scholars emphasize the importance of notice-and-comment rights and the right to a hearing in adjudicative proceedings.³³ In addition, rationality (giving reasons and producing a factual record) and legality (constraining actors to act within articulated rules) further enhance “the accountability of global administrative bodies.”³⁴ “[T]ransparency guards against two problems that are of particular concern internationally: capture and conflicts of interest,”³⁵ and reason-giving ensures consideration of principles of proportionality and human rights.

How would the principles of GAL help the World Bank to overcome the challenges of generating substantive norms and combining legal disciplines? The legitimacy of the sanctions process can be drawn not only from norms and legal disciplines that are familiar from national systems, but also from the design principles of transparency and structured decisionmaking. GAL predicts that these design principles will generate adherence to and confidence in the sanctions adjudicative proceedings.

First, for any organization, “[a] fair procedure plays an important role in building social consensus. Process control or voice encourage people’s cooperation . . . and lead to legitimacy.”³⁶ At the same time that the World Bank is working with countries to improve their governance practices,

people begin to demand that those institutions themselves respect the rights of the governed by adapting techniques from national administrative law. All of these institutions . . . find themselves under pressure, including by our government, to adopt mechanisms to encourage transparency, accountability, greater access for NGOs and legal responsibility. . . . The international community is encouraging these organizations to become more legalized even as these organizations attempt to legalize others.³⁷

31. Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT’L ORG. L. REV. 319, 354 (2009).

32. See Esty, *supra* note 9, at 1511.

33. See Sabino Cassese, *A Global Due Process of Law?* 6 (Sept. 13, 2006) (unpublished paper presented at New York University, Hauser Colloquium on Globalization and its Discontents), available at www.iilj.org/courses/documents/Cassese.AGlobalDueProcess.pdf.

34. See Kingsbury, *supra* note 11, at 25; Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

35. Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT’L L. 883, 946 (2009).

36. Cassese, *supra* note 33, at 6.

37. José E. Alvarez, Speech, *The Internationalization of U.S. Law*, 47 COLUM. J. TRANSNAT’L L. 537, 551 (2009).

Second, procedural protections, such as the right to present a defense when accused, are considered by some to be human rights.³⁸ For example, national courts in a number of European countries have decided whether to extend immunity to international organizations in part on the basis of a “human rights impact assessment,” requiring that the international organization provide an adequate means for hearing legal claims in order to receive immunity.³⁹ Practices such as these indicate the importance of conforming with basic human rights principles in establishing the legitimacy of international organizations.

GAL does not answer all of the challenges posed above, and national law will remain a source of wisdom for the World Bank in developing substantive legal norms. However, the principles of GAL, especially transparency and reasoned decisionmaking, may help the World Bank develop a sanctions system that need not resemble any particular national system in terms of substantive norms or the function of legal disciplines. As a practical matter, GAL principles do this by calling for the creation of outputs, such as a public record of jurisprudence, that open the system to reasoned criticism, and therefore hold the institution accountable for the legal policies and procedures it espouses.

V. GLOBAL ADMINISTRATIVE LAW IN THE SANCTIONS PROCESS AT THE WORLD BANK

Fortunately, it should not be difficult for the World Bank to incorporate the principles of GAL in the sanctions system, as some elements are already present. To start, the World Bank provides notice of the allegations against the firm or individual, as well as two opportunities to respond in writing and one opportunity in a hearing. The sanctions procedures and governing statute are publicly available, and, subject to approval by the Bank’s Executive Directors, the World Bank plans to publish the decisions of the Sanctions Board and the Evaluation Officers. The written decisions of the Evaluation Officers and the Sanctions Board support the goals of rationality and legality as they build a track record of reasoned decisionmaking and encourage all actors to act in accordance with articulated rules. From a structural point of view, by making the investigators, Evaluation Officers, and Sanctions Board independent of each other, the World Bank can temporarily suspend or debar firms and individuals with more confidence that the evidence supports the allegations of fraud and corruption. The sanctions process expects insights from national law to emerge through the reasoned deliberation of Sanctions Board members (who are judges from all over the world) in the context of each case. Existing features of the sanctions system and reforms like the publication of decisions put the World Bank at the forefront of the development of basic due process at the international level,

38. See Cassese, *supra* note 33, at 62 (discussing the right to present a defense in the European Convention on Human Rights).

39. August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT’L L. 285, 295-96 (2008). The emphasis on examining the existence of a reasonable forum to hear a claim, rather than the law the forum will apply, is another indication of the importance of the GAL principles.

making the institution, perhaps unwittingly, an early leader in the application of GAL.

Moreover, the World Bank is already enjoying some of the advantages of the GAL approach. Five multilateral development banks have recently announced a cross-debarment arrangement; if a firm or individual is debarred by the World Bank, it will also be debarred from the four others.⁴⁰ Just as European courts respected international organizations' adjudicatory processes in the context of extending immunity, trustworthy sanctions procedures form the basis for cross-debarment, which will significantly increase the costs of sanctionable conduct and therefore the deterrent effect of the sanctions system.

VI. CONCLUSION

In a sanctions system possessing sparse jurisprudence and an unorthodox combination of elements from criminal, tort, contract, and administrative law, there has been a tendency at the World Bank to turn to national law, general legal principles, and natural justice. The effort to articulate substantive norms and procedures for the World Bank's sanctions process, however, is not finished. National law norms will remain an important point of reference for the World Bank sanctions system, even as norms and procedures end up reflecting the needs of the World Bank and bearing little resemblance to their country of provenance. But at an institution that counts most countries of the world as its members, the way to fulfill its development mandate while stewarding funds is to take the flexible space the World Bank has been given and accept that the sanctions system will evolve. Although drawn from national law, the World Bank's substantive norms may not look similar to any one national law; therefore, the principles of GAL, especially transparency and reasoned decisionmaking, form an additional basis for the legitimacy of the sanctions system. The procedural protections emphasized in GAL should increase confidence in the adjudicatory process, allow collaboration with similar enforcement functions in multilateral institutions and member countries, and elicit the evidence needed to impose sanctions for fraud and corruption.

40. *Cross-Debarment Accord Steps Up Fight Against Corruption*, WORLD BANK (Apr. 9, 2010), <http://go.worldbank.org/B699B73Q00>. The other multilateral development banks participating in the cross-debarment accord are the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank Group. *Id.*